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# Articles

## PROMISING THE CONSTITUTION

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**ABSTRACT**—The Constitution requires that all legislators, judges, and executive officers swear or affirm their fidelity to it. The resulting practice, often called “the oath,” has had a pervasive role in constitutional law, giving rise to an underappreciated tradition of promissory constitutionalism. For example, the Supreme Court has cited the oath as a reason to invalidate statutes, or sustain them; to respect state courts, or override them; and to follow precedents, or overrule them. Meanwhile, commentators contend that the oath demands particular interpretive methods, such as originalism, or particular distributions of interpretive authority, such as departmentalism.

This Article provides a new framework for understanding the oath, its moral content, and its implications for legal practice. Because it engenders a promise, the oath gives rise to personal moral obligations. Further, the content of each oath, like the content of everyday promises, is linked to its meaning at the time it is made. The oath accordingly provides a normative basis for officials to adhere to interpretive methods and substantive principles that are contemporaneously associated with “the Constitution.” So understood, the oath provides a solution to the “dead hand” problem and explains how the people can legitimately bind their elected representatives: with each vote cast, the people today choose to be governed by oath-bound officials tomorrow. Constitutional duty thus flows from a rolling series of promises undertaken by individual officials at different times. As old officials give way to new ones, the overall constitutional order gradually evolves, with each official bound to a distinctive promise from the recent past. This process of gradual change is normally invisible because the oath also incorporates publicly recognized rules for legal change, or “change rules,” such as the Article V amendment process. As a result, the timing of an official’s oath becomes morally relevant only when a legal change has not complied with previously recognized change rules, such as in the case of a revolution. Finally, because promises, even constitutional promises, should sometimes be broken, the oath can illuminate the bounds of constitutional duty, including the role of stare decisis, and shed light on instances when the Constitution itself should be set aside.

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*The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .<sup>†</sup>*

#### INTRODUCTION

By law, all U.S. legislators, judges, and executive officers, both state and federal, must take what is often simply called “the oath.”<sup>1</sup> That is, they must swear or affirm that they will support the Constitution. Because of this requirement, the U.S. government is now and has always been shot through with constitutionally required assertions of constitutional fidelity. Presidents and other prominent officials have invoked their oaths to

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<sup>†</sup> U.S. CONST. art. VI, cl. 3 (Oath Clause); *see also* U.S. CONST. art. II, § 1, cl. 8 (presidential oath); *infra* note 235 (noting other constitutional oaths). This Article uses “officer” and “official” to refer to persons who take the oath pursuant to Article VI.

<sup>1</sup> Pursuant to the Article VI Oath Clause, *see supra* note <sup>†</sup>, various statutes establish the terms of oaths for various kinds of officer. *E.g.*, 4 U.S.C. § 101 (state officers: “I . . . do solemnly swear that I will support the Constitution of the United States.”); 5 U.S.C. § 3331 (federal officers: “I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”); 28 U.S.C. § 453 (federal judges: “I . . . do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as . . . under the Constitution and laws of the United States. So help me God.”); *cf.* 8 U.S.C. § 1448(a) (naturalization oath). This Article sets aside related oaths by civil servants, lawyers, and naturalized citizens, as well as the distinctive features of office-specific oaths. It may be of moral import, for instance, that the judicial oath refers to economic justice—a topic for a later work.

legitimize decisive policy choices.<sup>2</sup> And the oath is a frequent subject of judicial and scholarly reflection. For example, the Supreme Court has expressly assumed, as an empirical matter, that the oath has psychological force and so tends to be followed.<sup>3</sup>

Yet the oath's legal and practical import remains uncertain. In cases, speeches, and articles, the oath has been invoked as support for almost every imaginable proposition, as well as its opposite. In the Supreme Court alone, the oath has variously been cited as a reason to invalidate statutes, or sustain them;<sup>4</sup> for federal courts to respect their state court counterparts, or override them;<sup>5</sup> and to follow precedent, or ignore it.<sup>6</sup> Indeed, the oath has been put to so many conflicting and opportunistic uses that it can seem like little more than rhetorical ornamentation for decisions actually made on other grounds. This state of affairs might even be inevitable, given that the "terse" oath or affirmation of support "identifies no 'central tenets' of constitutional faith" and so could mean anything—or nothing—at all.<sup>7</sup>

The oath deserves to be taken more seriously. Constitutional duty cries out for justification,<sup>8</sup> and nobody feels the need for that justification more

<sup>2</sup> See, e.g., *infra* Section II.B.1 (discussing President Jackson's veto message); Section III.B (discussing Lincoln's message to Congress); cf. MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT'S CONSTITUTIONAL OATH: ITS MEANING AND IMPORTANCE IN THE HISTORY OF OATHS 169–84 (1999) (discussing various instances in which presidents invoked the oath); Robert F. Blomquist, *The Presidential Oath, the American National Interest and a Call for Presiprudence*, 73 UMKC L. REV. 1, 8–22 (2004) (collecting statements from presidents including Washington, Van Buren, Harrison, and Taft).

<sup>3</sup> *Illinois v. Krull*, 480 U.S. 340, 352 n.8 (1987) (declining to exclude evidence for Fourth Amendment violations in reasonable reliance on legislation). *Krull* began its analysis by explaining that, "Before assuming office, state legislators are required to take an oath to support the Federal Constitution." *Id.* at 351. The Court then went on to emphasize that "we are given no basis for believing that legislators are inclined to subvert their oaths." *Id.* Later, in evaluating the benefits of the suppression remedy, the Court "doubt[ed] whether a legislator possessed with . . . disregard for his oath to support the Constitution[] would be significantly deterred by the possibility [of] the exclusionary rule." *Id.* at 352 n.8. The Court indicated it would remain open to "future empirical evidence" bearing on that "assumption." *Id.*; see also *id.* at 366 (O'Connor, J., dissenting) ("I heartily agree with the Court that legislators ordinarily do take seriously their oaths to uphold the Constitution . . .").

<sup>4</sup> See *infra* Section II.B.1 (discussing the separation of interpretive powers).

<sup>5</sup> See *infra* Section II.B.2 (discussing interpretive federalism).

<sup>6</sup> See *infra* Section II.A (discussing the oath's ability to mandate adherence to text and history over precedent); *infra* Part III (discussing oath-breaking, including in connection with the doctrine of stare decisis).

<sup>7</sup> Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387, 390 (2003); see also SANFORD LEVINSON, CONSTITUTIONAL FAITH 36 (1988) ("[R]ecourse to 'the Constitution' as a source of guidance within our own polity simply begs the question of what counts as 'the Constitution' . . ."); Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1, 24 n.70 (2003) ("That [Founding Era] oaths created an obligation to conform to a duty more substantially defined by a judges' office is evident from the often limited content of the oaths.").

<sup>8</sup> See Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 642 (2014) (noting that "one of the two most difficult questions in legal philosophy" is: "how can we be obligated to comply with the law when compliance conflicts with the

strongly than officials who are “bound”<sup>9</sup> by oath to the Constitution, even when they do not want to be.<sup>10</sup> Because no document can establish its own authoritativeness, any attempt to explain officials’ constitutional obligations must come from outside the Constitution.<sup>11</sup> Put another way, officials need a theory of constitutional duty that can translate the demands of “the Constitution” or, equivalently, “this Constitution”<sup>12</sup> into personal moral obligations.

The oath supplies an obvious candidate: unlike benevolent dictators or lobbyists with de facto influence over government, officials have *promised* the public that they will uphold the law.<sup>13</sup> This essentially philosophical claim may seem an odd subject for legal scholarship—but that sense of oddity is itself peculiar. Officials throughout U.S. history, including such figures as Chief Justice John Marshall and President Abraham Lincoln, have looked to the oath to ground and focus their sense of constitutional duty.<sup>14</sup>

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deliverances of our first-order practical reasoning”); Frederick Schauer, *Ambivalence About the Law*, 49 ARIZ. L. REV. 11, 16 (2007) (“[I]t is hardly clear, except as opportunistic political rhetoric, that we really expect our political leaders to follow the law when following the law conflicts with simply doing the right thing.”); see also Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1314 (2013) (“To say that the Constitution means *X* does not entail that actors making decisions in the real world should act on the basis of *X* . . .”). Consistent with legal positivism, I assume throughout that law and morality can diverge.

<sup>9</sup> See U.S. CONST. art. VI, cl. 3.

<sup>10</sup> Recent high-profile examples are legion. *E.g.*, President Barack Obama, Remarks by the President to the National Council of La Raza (July 25, 2011), <https://www.whitehouse.gov/the-press-office/2011/07/25/remarks-president-national-council-la-raza> [<https://perma.cc/3GBH-DTLK>] (“Now, I swore an oath to uphold the laws on the books, but that doesn’t mean I don’t know very well the real pain and heartbreak that deportations cause.”); Bill Bowden, *Scalia: Statutes’ Merit Not My Call*, ARK. DEMOCRAT-GAZETTE, Apr. 17, 2015, at 5B (quoting Justice Antonin Scalia as saying: “If it indeed is a bad statute, I am honor bound by oath to produce a bad result.”); Steve Hendrix, *Tim Kaine’s Moral Convictions and Political Ambitions*, WASH. POST (Oct. 18, 2012), [http://www.washingtonpost.com/local/tim-kaines-moral-convictions-and-political-ambitions/2012/10/18/38d473ba-0996-11e2-858a-5311df86ab04\\_story.html](http://www.washingtonpost.com/local/tim-kaines-moral-convictions-and-political-ambitions/2012/10/18/38d473ba-0996-11e2-858a-5311df86ab04_story.html) [<http://perma.cc/KX5Q-9U4G>] (quoting Governor Tim Kaine as saying: “I have a moral position against the death penalty. . . . But I took an oath of office to uphold it. Following an oath of office is also a moral obligation.”); Adam Liptak, *Justices Hear Second Round of Arguments on Case Hinging on Phrase’s Meaning*, N.Y. TIMES (Apr. 20, 2015), <http://nyti.ms/1P7Ev94> [<http://perma.cc/KN29-YX6J>] (quoting a sentencing judge as saying: “I think 180 months is too heavy of a sentence in this case. But I take an oath to follow the law as I see it, and I’ve made my decision in that regard.”). As these examples suggest, recourse to the oath remains a publicly accepted form of moral reasoning.

<sup>11</sup> See *infra* notes 20–21 (collecting sources).

<sup>12</sup> See *infra* note 88.

<sup>13</sup> See *infra* text accompanying notes 22–23, 35–37.

<sup>14</sup> See *supra* notes 2, 10; *infra* Section II.B (Marshall), Section III.B (Lincoln); see also Philip Hamburger, *A Tale of Two Paradigms: Judicial Review and Judicial Duty*, 78 GEO. WASH. L. REV. 1162, 1172 (2010) (showing that, from “England in the Middle Ages” through “the early [American] Republic,” “[w]hen judges explained what they were doing, they spoke of their office or duty, and of the oaths by which they bound themselves to their office”); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 17, 106, 150, 612–13 (2008).

Viewing constitutional obligation through the lens of the oath has significant implications. Constitutional theory has generally focused on the content of the Constitution and so has restricted its gaze to moments of public importance. For instance, originalists have made us accustomed to locating the Constitution's demands in the history of long-dead Founders, whereas living and popular constitutionalists have directed our attention toward the here and now.<sup>15</sup> But these approaches overlook the personal dimension of constitutional practice. For each official, the critical moment of constitutional obligation is the moment of taking the oath and thereby promising to adhere to a certain role defined by certain powers and duties. And the content of the official's oath, like the content of any promise, depends in large part on the contemporaneous meaning of its terms. So instead of starting with either historical or present-day understandings of the Constitution, theorists should focus first on the meaning of "the Constitution" at the time of each official's oath. This temporal reorientation bears on the nature, content, and limits of constitutional obligation.

First, tracing the source of constitutional duty to the oath helps theorize both the stability and the dynamism of actual legal practice. In supporting oath-bound officials, the public gives actual, ongoing consent to rule under the Constitution. Thus, constitutional practice should be neither fixed, as originalists contend, nor fluid, as living constitutionalist maintain. Instead, constitutional practice is and should be sticky, in that it arises from a rolling series of promises undertaken by individual officials at different times. As old officials give way to new ones, the overall constitutional order evolves, with each official bound to a distinctive promise from the recent past.

Second, grounding constitutional obligation in the oath clarifies the content of constitutional duty. In general, officials have a promissory obligation to adhere to the public meaning of "the Constitution" that existed at the time they took their oaths.<sup>16</sup> For example, modern officials

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<sup>15</sup> Compare Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7 (2015) (noting that certain "originalist theories agree that the communicative content of the constitutional text was fixed at the time each provision was framed and ratified"), with William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986) ("But the ultimate question must be: What do the words of the text mean in our time?"), and Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003) (noting that what popular constitutionalists "seem to share is a notion that—at least in specified circumstances—judicial review should mirror popular views about constitutional meaning").

<sup>16</sup> Even the oath's best commentators do not make this critical move. See, e.g., Abner S. Greene, *What Is Constitutional Obligation?*, 93 B.U. L. REV. 1239, 1245 (2013) (arguing officers are not obligated to "constrain their decisionmaking... by any particular interpretation" of "abstract provisions"); Paul Horwitz, *Honor's Constitutional Moment: The Oath and Presidential Transitions*,

are bound to the current consensus understanding that the Constitution prohibits racial segregation. The oath also encompasses “change rules,” or publicly recognized rules for constitutional change, such as the Article V rules for amendments.<sup>17</sup> Thus, the timing of any given official’s oath is generally relevant to that official’s constitutional duty only when a legal change has *not* complied with previously recognized change rules—such as in the event of revolution. Further, the link between public understandings and the oath’s content demonstrates that many claims about the oath are overdrawn.

Finally, grounding constitutional duty in the oath points toward situations when that duty runs out. Participants in legal culture typically take it for granted that the Constitution is a powerful source of reasons for action, and scholars have accordingly focused on the Constitution’s content, rather than on the reasons for adhering to it. As a result, too little attention has been paid to the moral limits of constitutional fidelity. Yet officials do and should feel those limits. For example, an individual official’s promissory obligation to “the Constitution” can expire in the event that the law undergoes an unauthorized change *after* the official takes the oath. This moral possibility sheds light on revolutionary constitutional change, as well as on important Supreme Court decisions made in the wake of such change.

By way of disclaimer, the argument below focuses on the affirmative moral force of the oath and its limits, without attempting to negate all other potential sources of moral obligation to adhere to law. Yet focused study of the oath remains critically important. Besides offering a rejoinder to those who are skeptical that officials have a general moral duty to follow law at all,<sup>18</sup> the oath provides a powerful moral reason that must at the very least be considered in tandem with rival moral considerations. Indeed, anyone who cares about officials’ moral responsibilities must reckon with the oath.

The case for promissory constitutionalism proceeds in three Parts. Part I explains why the oath has personal moral significance and argues that it ameliorates the “dead hand” problem.<sup>19</sup> Part II explores the oath’s content, including its implications for interpretive methodologies, substantive commitments, and constitutional change. Finally, Part III explores the

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103 NW. U. L. REV. 1067, 1076 (2009) (asking “whether [each president] will honor the promise that he made . . . to preserve the Constitution *as he understands it*”).

<sup>17</sup> On change rules, see *infra* text accompanying notes 73, 130–31.

<sup>18</sup> See, e.g., LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 8–9 (2012); see also *supra* note 8.

<sup>19</sup> See *infra* Section I.B.

limits of officials' promissory obligation, particularly in connection with the law of precedent and revolutionary change.

### I. PROMISE-MAKING, OR WHY THE CONSTITUTION HAS NORMATIVE FORCE

The oath's first and most foundational role is to supply a personal moral reason for adhering to "the Constitution," whatever it might be.

#### A. *Between Document and Duty*

No document can establish its own authority through declaration alone.<sup>20</sup> In that sense, the creation of constitutional authority must happen off the page. It is something that the reader of the document must decide for herself, after undertaking her own nonconstitutional decisionmaking process. The reader might be an originalist with a robust historical theory, a consequentialist who believes that adhering to the Constitution produces happiness over time, or a patriot who feels grateful for having enjoyed the blessings of constitutional liberty. In every case, the Constitution's normative force must stem from the reader's own values, as well as from the reader's understanding of how those values interact with the Constitution. "The Constitution" is necessarily distinct from the source of allegiance to it.<sup>21</sup>

The Article VI Oath Clause could easily be regarded as just another constitutional provision, with no special power to confer normative force on the remainder of the document. Words on a page, after all, are still just words on a page, even if they are commands written in the second person. If presented in a certain context, the Clause could be understood as an ironic act of faux sincerity never meant to be taken seriously. One might even imagine an alter-American culture that regarded the Oath Clause as nothing more than a quaint and inoperative relic. For all these reasons, the Oath Clause—like the rest of the Constitution—must implicitly ask to receive the reader's allegiance. The Clause cannot generate a sense of allegiance on its own.

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<sup>20</sup> LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 6 (2008) ("[T]he fact that a text proclaims its own supremacy, while displaying confidence on the part of its authors and ratifiers, can't in itself establish that text as legitimate, much less as 'supreme.'"); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998) ("No document is authoritative because it says so.").

<sup>21</sup> See TRIBE, *supra* note 20, at 7 (arguing that if the Constitution "is to count as the fundamental and supreme law of the land, then it must be some thing *outside*" its text "that makes it so"); Andrzej Rapaczynski, *The Ninth Amendment and the Unwritten Constitution: The Problems of Constitutional Interpretation*, 64 CHI.-KENT L. REV. 177, 177 (1988) (arguing that "no textual provision *by itself* seriously constrains how it is going to be interpreted").



Yet there is something special about the Oath Clause: it calls for a promise.<sup>22</sup> To say “I swear to support the Constitution” is to make a personal moral commitment to adhere to a shared understanding of something—let us reserve for the moment just what this something is—called “the Constitution.” Judge Frank Easterbrook has made this point particularly forcefully:

Our constitutional order does not depend on hypothetical contracts. There are actual contracts. Like other judges, I took an oath to support and enforce both the laws and the Constitution. That is to say, I made a promise—a contract. In exchange for receiving power and lifetime tenure I agreed to limit the extent of my discretion.<sup>23</sup>

The oath’s moral force is a function of language and social practices. An official who takes the oath thereby promises the American people that she will follow the Constitution. This speech act is understood both by the official and the public because it piggybacks on the publicly shared understanding of “the Constitution,” as well as on the nonconstitutional practice of promise-making.<sup>24</sup> In this sense, the Oath Clause reaches up and out of the page in order to invite its reader to adopt a particular moral relationship with “the Constitution.” If that invitation is accepted, then the

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<sup>22</sup> See, e.g., KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* 279 (1987) (“[O]fficials, by taking oaths or voluntarily undertaking known responsibilities, are bound by a promissory obligation to perform duties attaching to their offices.”); Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 *NOTRE DAME L. REV.* 553, 579 n.125 (1992) (“[J]udges commonly promise to obey the law as a condition of assuming judicial office.”); Frederick Schauer, *The Questions of Authority*, 81 *GEO. L.J.* 95, 101 (1992) [hereinafter *Questions*] (“What makes an oath different from any other official statement is that we consider the oath a species of a promise.”). As noted below, not all oaths create promises. See *infra* notes 37–38.

<sup>23</sup> Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1122 (1998). As Judge Easterbrook went on to observe, the oath “was an important part of Chief Justice Marshall’s account of judicial review in *Marbury v. Madison* and matters greatly to conscientious public officials.” *Id.*; see also *infra* Section II.B.1. Or consider Justice Story, a famous antislavery jurist who, after being criticized for issuing a controversial decision promoting slavers’ rights, invoked the oath as his defense: “That Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure.” Letter from Joseph Story to Ezekiel Bacon (Nov. 19, 1842), in *LIFE AND LETTERS OF JOSEPH STORY* 431 (William W. Story ed., Boston, Charles C. Little & James Brown 1851); see also JOSEPH STORY, *A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 252 (New York, Harper & Bros. 1872) [hereinafter *A FAMILIAR EXPOSITION*] (That officers are “bound, by some solemn obligation . . . to support the Constitution . . . results from the plain right of society, to require some guarantee from every officer, that he will be conscientious in the discharge of his duty”).

<sup>24</sup> Some readers may view the oath or the act of assuming office as source of a voluntary obligation other than a promise to the public, such as a vow, resolution, or promise *to oneself*. Even then, however, the main text’s key claims would still seem to follow, provided that officers do assume a voluntary obligation that is democratically endorsed and defined by fidelity to “the Constitution.” Cf. *infra* note 25 (collecting sources suggesting that an oath does carry with it a moral element). On self-promises, see, e.g., JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 125–28 (2001); R.S. Downie, *Three Accounts of Promising*, 35 *PHIL. Q.* 259, 266 (1985).

otherwise inert Constitution comes alive with moral consequence.<sup>25</sup> The oath functions as a bridge between the document and the duty to obey it, imbuing the Constitution with moral force.<sup>26</sup>

To be clear, the formal act of taking the oath is just the most visible piece of a much larger set of social practices that create promissory obligations to the Constitution. No ceremony or incantation is necessary for an official's promissory obligation to arise. It is quite possible to imagine a world without a formal oath but where the public still expected that officials would adhere to "the Constitution" and where officials still gave the public assurances to that effect.<sup>27</sup> In that world, the public might understand that officials communicate their promissory obligations simply by assuming office. In the absence of a formal oath, the promissory significance of assuming office might be maintained exclusively through informal practices, like public education or officials' statements to media. Those informal methods of instilling promissory obligation operate in the real world as well, but they do so in tandem with a formal oath that affords officials an efficient and familiar means of achieving the same moral objective—that is, of assuring the public through personal commitment. The formal oath also fosters and entrenches the informal practices and public expectations that can help create officials' promissory obligations. As a result, the public can assume that officials promise adherence to the Constitution, even when their formal oaths are unpublicized or postponed for emergencies.<sup>28</sup> For these reasons, "the oath" is best understood to encompass both formal and informal sources of officials' promissory obligations.

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<sup>25</sup> See JOSEPH RAZ, *THE AUTHORITY OF LAW* 239 (2d ed. 2009) ("[A]n oath may impose a moral obligation to obey (e.g. when voluntarily undertaken prior to assuming an office of state which one is under no compulsion or great pressure to assume)."); STEPHEN MICHAEL SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* 108 (2009) ("[L]aws creating a legal office don't in themselves create a moral claim on the official; the laws create legal obligations. Yet the laws can require a moral undertaking as a condition of entering the office, which is the function of the oath."); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1800 (2005) ("Because governmental officials take an oath to support the Constitution, they put themselves under at least a presumptive moral duty to obey the law . . .").

<sup>26</sup> The oath thus fosters the internal point of view, by confirming that each officer acknowledges a moral duty to law. See *infra* note 47.

<sup>27</sup> Aristotle reported that for certain ancient kings "the form of the oath was the stretching out of their sceptre." ARISTOTLE, *POLITICS* bk. III, ch. 14, at 97 (Benjamin Jowett trans., 1885) (c. 350 B.C.E.).

<sup>28</sup> See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 229 (Oxford, Clarendon Press 1765) (While the coronation is an "express contract," "doubtless the duty of protection is impliedly as much incumbent on the sovereign before coronation as after."); JAMES ENDELL TYLER, *OATHS; THEIR ORIGIN, NATURE, AND HISTORY* 68 (London, John W. Parker, West Strand 1834) ("[E]very man has already promised to do his duty by the very act of accepting an office.").

In asserting that the oath creates personal moral obligations, there is no need to resolve a host of more difficult questions concerning promises, such as precisely how or why promissory obligations arise. This agnosticism is possible because officials undertake a morally significant duty under many, and perhaps even all, plausible views of promissory obligation. An official who takes the oath has made a voluntary and intentional expression of commitment, and at least a large part of the public knows about and desires that commitment.<sup>29</sup> In addition, the oath is part of a conditional exchange, as officeholders may assume their posts only if they commit to constitutionalism.<sup>30</sup> And official defiance of the oath would violate the public's trust, reliance, and expectations.<sup>31</sup> Finally, the oath equilibrates the power imbalance between officials and the public and so serves a paradigmatic promissory function.<sup>32</sup> Those who govern should have the moral power to bind themselves to law, and theorists have proposed sophisticated accounts in support of that intuition.<sup>33</sup> So while

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<sup>29</sup> For example, T.M. Scanlon argues that promissory obligation stems from the intentional provision of "assurance" to a party seeking it. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 304 (1998). On the import of "uptake" by the promisee, see JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 299–301 (1990).

<sup>30</sup> See *supra* note 25; see also JOHN RAWLS, A THEORY OF JUSTICE 305 (rev. ed. 1999) ("[P]romising is an act done with the public intention of deliberately incurring an obligation the existence of which in the circumstances will further one's ends."). Rawls offers a separate, nonpromissory account of officials' legal duties. See *id.* at 301–08.

<sup>31</sup> See, e.g., RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 304 (2011) (rooting promises in "a more general responsibility[] not to harm other people by first encouraging them to expect that we will act in a certain way and then not acting in that way"). Some thinkers argue that promises do not create obligations so much as provide evidence that an independent obligation exists, such as by acknowledging that the promisor has received a benefit or prompted reliance. See P.S. ATIYAH, PROMISES, MORALS, AND LAW 192 (1981). But see Joseph Raz, *Promises in Morality and Law*, 95 HARV. L. REV. 916 (1982) (reviewing Atiyah's *Promises, Morals, and Law*). Even on that view, however, the oath would have practical moral significance because it prompts the conferral of the benefit of holding office and justifies the public's reliance on the official's law-abidingness.

<sup>32</sup> Seana Shiffrin's account of promising views intimate relationships as the paradigmatic occasion for promising, so as to show that promises play a critical role in establishing moral equality between persons with unequal power. Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 485 (2008). This reasoning applies to the oath, which also involves "the solicitation of trust through a representation that certain opportunities to exploit the imbalance or vulnerability [between persons], to leave someone vulnerable or to allow the hazards of vulnerability to unfold will be forsworn." *Id.* at 519; see also Easterbrook, *supra* note 23, at 1122 ("Would you surrender power to [judges] who can be neither removed from office nor disciplined, unless that power was constrained?").

<sup>33</sup> See Joseph Raz, *Is There a Reason to Keep a Promise?* 13 (King's Coll. Legal Studies Research Paper, No. 2014-5, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2162656](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2162656) [<http://perma.cc/7E4R-QTDS>] ("[W]e have the power to promise because it is valuable to be able to undertake obligations, of certain kinds and in certain conditions, and that value is sufficient to establish in us the normative power to do so."). Of special relevance are accounts of how commitments enhance freedom by expanding an agent's or people's range of choice, such as by allowing for otherwise unacceptably risky action. See JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY,

officials and the public may be unsure or indifferent as to the ultimate source of promissory obligation, the existence of those obligations is the subject of an overlapping consensus.<sup>34</sup> In the United States, there are those who readily declare themselves to be democrats, capitalists, anarchists, socialists, Marxists, and most everything else—but few would proudly call themselves promise-breakers.

Far from being a new development, oaths of office have long been deemed “promissory oaths.”<sup>35</sup> For example, the promissory oath of English monarchs was once called the “*promissio regis*.”<sup>36</sup> Perhaps the oath’s social role has evolved, in that most Founders likely understood the oath as being directed toward a divinity.<sup>37</sup> Today, by contrast, many view the oath’s

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PRECOMMITMENT, AND CONSTRAINTS 88–117 (2000); STEPHEN HOLMES, PASSIONS AND CONSTRAINT 134–55 (1995).

<sup>34</sup> As one commentator recently put it: “We can all agree that we should keep our promises. But why?” Erin Taylor, *A New Conventionalist Theory of Promising*, 91 AUSTRALASIAN J. PHIL. 667, 667 (2013).

<sup>35</sup> While the oath creates a promise, oaths and promises are distinct concepts. In general, oaths are solemn declarations, whereas promises are commitments of future action. Promissory oaths combine these concepts by solemnly asserting a promise. Other oaths, by contrast, can be testimonial in that they solemnly assert past events. See *Ex parte Garland*, 71 U.S. 333, 376–77 (1866) (identifying the “promissory” part of an oath); TYLER, *supra* note 28, at 297–302 (discussing “promissory” oaths of office); Jacob Rush, *The Nature of an Oath Stated and Explained*, in CHARGES AND EXTRACTS OF CHARGES, ON MORAL AND RELIGIOUS SUBJECTS; DELIVERED AT SUNDRY TIMES, BY THE HONORABLE JACOB RUSH 32–33 (New York, Forman for Davis 1803) (distinguishing a testimonial oath from a “promissory oath”); 10 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND WITH FORMS AND PRECEDENTS 104–05 (2d ed. 1908) (discussing the history of promissory oaths); see also *Oath*, OED.COM, <http://www.oed.com/view/Entry/129495?rskey=RW0Mnc&result=1&isAdvanced=false#id> [<http://perma.cc/EA33-WKYA>] (first definition for “oath, *n.*”: “A solemn or formal declaration invoking God (or a god, or other object of reverence) as witness to the truth of a statement, or to the binding nature of a promise or undertaking; an act of making such a declaration. Also: the statement or promise made in such a declaration, or the words of such a statement.” (emphasis added)); cf. J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 157–59 (2d ed. 1975) (drawing a similar distinction in writing that swearing and promising are “commissives” when they commit one to a future act, but “expositives” when they report one’s past act); *infra* note 37.

<sup>36</sup> See Mary Clayton, *The Old English Promissio Regis*, 37 ANGLO-SAXON ENG. 91, 106–07 (2008); see also T.E. BRIDGETT, THE ENGLISH CORONATION OATH 2–7 (1896) (documenting historical characterizations of the English coronation oath as a “promise”); BLACKSTONE, *supra* note 28, at 227 (citing Bracton and Fortescue in arguing “that ‘the King of England must rule his people according to the decrees of the laws thereof: insomuch that he is bound by an oath at his coronation to the observance and keeping of his own laws’”); Coronation Oath Act 1688, 1 W. & M. c. 6 (Eng.) (“Will You solemnly Promise and Swear to Govern the People of this Kingdome of England and the Dominions thereto belonging according to the Statutes in Parlyament Agreed on and the Laws and Customs of the same? The King and Queene shall say, I solemnly Promise soe to doe.”).

<sup>37</sup> For instance, Francis Hutcheson, a Scottish philosopher widely read in Colonial America, argued that an oath “is ‘a religious act in which for confirmation of something doubtful, we invoke God as witness and avenger, if we swerve from truth.’” FRANCIS HUTCHESON, A SHORT INTRODUCTION TO MORAL PHILOSOPHY 170 (5th ed. 1788). Oaths thus reinforced promises and other statements by creating conditional self-curses. Hutcheson believed that “an oath and a promise . . . may often be expressed by one and the same grammatical sentence.” *Id.* at 172; see also 3 ST. THOMAS AQUINAS, SUMMA THEOLOGICA pt. II–II, q. 89, art. 5, at 1576 (Fathers of the English Dominican Province trans., Cosimo Classics 2007) (1912) (“[I]n an oath reverence for the name of God is taken in confirmation of

religious aspect as ceremonial or outmoded,<sup>38</sup> in part because the oath can be enforced through earthly sanctions.<sup>39</sup> But the Constitution has always allowed officials to be “bound” by “affirmation” rather than an oath to God,<sup>40</sup> and the option to affirm demonstrates the Founders’ belief that promises are no small thing even for those who don’t explicitly risk damnation.<sup>41</sup> That belief remains correct. While there are many plausible reasons for officials to adhere to law, none is more intuitive, universal, and culturally entrenched than the oath. In tethering the Constitution to the practice of promising, the Founders identified a source of moral duty that would stand the test of time.

In addition, the oath’s promissory obligation should frequently affect practical decisions.<sup>42</sup> First, the oath is an unusually significant promise. In addition to being undertaken in a solemn context,<sup>43</sup> the oath runs to millions of people who have collectively relied upon it in installing the oath-bound official. Underscoring this point, officials obtain the ability to use their

a promise.”); Eric G. Anderson, *Three Degrees of Promising*, 2003 BYU L. REV. 829, 839 (“Oaths often reinforce the making of a promise.”); JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 276, at 170 (1842) (“A President, who shall dare to violate the obligations of his solemn oath or affirmation of office, may escape human censure . . . [b]ut he will be compelled to learn, that there is a watchful Providence, that cannot be deceived . . .”); Helen Silving, *The Oath: I*, 68 YALE L.J. 1329, 1330 (1959) (arguing that, in ancient times, “[t]he oath was a self-course, uttered in conditional form, operating irrevocably upon occurrence of the condition”).

<sup>38</sup> Cf. Wesley J. Campbell, *Testimonial Exclusions and Religious Freedom in Early America*, LAW & HIST. REV. (forthcoming) (arguing that “the explicitly theological premise of oath-taking eroded across the United States in the early nineteenth century”).

<sup>39</sup> See, e.g., U.S. CONST. amend. XIV, § 3 (barring from government oath-bound persons who had nonetheless joined a rebellion); ARTICLES OF IMPEACHMENT EXHIBITED BY THE HOUSE OF REPRESENTATIVES AGAINST ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, H.R. MISC. DOC. NO. 91 (2d Sess. 1868) (listing impeachment charges against President Johnson and noting his failure to fulfill his official oath); cf. 49 CONG. REC. 1266 (1913) (statement of John W. Davis); John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 54–55 (1970) (discussing the categories of activity that are impeachable).

<sup>40</sup> See U.S. CONST. art. II; *id.* art. VI. The Framers allowed affirmances—which, like oaths, are solemn declarations—in part to accommodate those who opposed divine oaths on religious grounds. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1475 (1990) (The Framers “allowed any person, whether ‘conscientiously scrupulous’ or not, to promise by affirmation instead of oath”); James E. Pfander, *So Help Me God: Religion and Presidential Oath-Taking*, 16 CONST. COMMENT. 549, 549–50, 549 n.2 (1999) (discussing historical role of Quakers and deists and referring to the Article II oath as “the presidential promise”); see also U.S. CONST. art. VI, cl. 3 (“[B]ut no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”). Notably, the Fourteenth Amendment mentions only oaths, not affirmations. U.S. CONST. amend. XIV, § 3.

<sup>41</sup> For example, Justice Story emphasized that “[o]aths have a solemn obligation upon the minds of all reflecting men, and especially”—but not exclusively—“upon those, who feel a deep sense of accountability to a Supreme being.” STORY, A FAMILIAR EXPOSITION, *supra* note 23, at 252.

<sup>42</sup> For related discussion of the oath’s ability to act as an “exclusionary reason,” in Joseph Raz’s sense of that phrase, see the discussion *infra* note 193.

<sup>43</sup> See Myron Gochnauer, *Swearing, Telling the Truth, and Moral Obligation*, 9 QUEEN’S L.J. 199, 203–04 (1983) (linking the strength of a promissory obligation to its solemnity).

authority unlawfully *only because of* their oaths. By analogy, it is one thing to promise that you will not speed for pleasure and quite another, more significant, thing to make that promise to get someone to hand over his car keys. Second, the oath often points in a relatively specific direction, whereas other first-order moral factors are comparatively indeterminate. For instance, an official might have great difficulty ascertaining the morality of the latest revision to the tax code—but in light of the oath, the official would still have a moral reason to abide by that revision. In this and other situations, the law itself is clear, yet the underlying morality of the law's dictates is difficult or even practically impossible to assess. For that reason alone, oath-bound officials will often have a moral reason to act lawfully. Finally, the oath provides a shared point of moral attraction for many different officials who may otherwise have divergent views of morality. Imagine that one official believes that most taxes are immorally high whereas another thinks they are immorally low. The officials' shared promissory duty to the law will mitigate their divergent views of the law's morality and so cause the officials' moral duties to converge.<sup>44</sup>

As a promissory obligation, the oath is distinct from two other forms of moral duty bearing on legal obligation. First, the oath stems from an act of communication (with the American public) and so is interpersonal in a way that many claims of individual conscience are not.<sup>45</sup> As discussed in Part II below, the oath relies on public meanings that bound the content of promissory obligation. Second, the oath is distinct from whatever moral obligations may stem from simply being a member of the political community of the United States.<sup>46</sup> An official who has assumed the oath has done so in order to undertake a position of trust and so, on balance, has a greater moral duty to the Constitution than the average citizen.<sup>47</sup> These distinctive features of the oath play some role in the argument that follows.

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<sup>44</sup> See DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 89 (2009) (positing that federal judges have “different personalities, backgrounds, experiences, ideologies, and moral intuitions” and that “[t]he only commonality is their mutual faith in the rule of law and their sworn oath to uphold it”); Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think (2008)*, 108 MICH. L. REV. 859, 874 (2010) (book review) (“All judges, pragmatists and legalists alike, take the oath seriously, which necessarily limits their capacity to impose their reaction to a set of facts on the parties.”).

<sup>45</sup> See SHEPPARD, *supra* note 25, at 107 (“The oath is not, then, only to God, or only to oneself, or to one’s own moral code; it is taken and so made to other individuals.”).

<sup>46</sup> Section 3 of the Fourteenth Amendment is predicated on this view, as it imposed special burdens on oath-breaking traitors. See *infra* note 171; see also Richard M. Re & Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 YALE L.J. 1584, 1616–24 (2012) (discussing Section 3’s legislative history).

<sup>47</sup> In this respect, the oath is especially tightly linked to positivist theories of law, which often assess the law in part based on its acceptance by “officials.” See, e.g., H.L.A. HART, THE CONCEPT OF LAW 116–17 (2d ed. 1994); Greene, *supra* note 16, at 1242 (“[V]ia the oath or taking and performing

### B. Duty Alongside Democracy

The oath suggests a way of relieving the obvious tension between constitutionalism and democracy. This tension arises under two familiar headings: the “countermajoritarian difficulty” and the dead hand problem.<sup>48</sup> In short, scholars have repeatedly asked whether and how such an old and lifeless document as the Constitution can possibly have normative priority over more recently arising moral demands, such as democratically enacted laws.<sup>49</sup> The oath supplies a key part of the answer. Officials take the oath under conditions that permit the creation of moral obligation. No hand—either dead or alive—forces individuals to run for office, take the oath, or lead others to think that they will take “the Constitution” seriously. And because officials in the United States take the oath with democratic approval, action in compliance with the oath is itself imbued with democratic legitimacy.

These points stem from an important objection: while oaths may often create promissory obligations, an official’s decision to take the oath might be viewed as morally defective because it is undemocratic.<sup>50</sup> After all, the

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their jobs or some combination, officials accept—in a Hartian sense—the Constitution’s rules, which include duties and powers with limits on both.”). Again, this Article assumes that law and morality can diverge.

<sup>48</sup> See Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 117 (2003) (arguing that “constitutional legitimacy has not been conferred by either the individual or the collective consent of ‘We the People’”); McConnell, *supra* note 20, at 1127 (“The first question any advocate of constitutionalism must answer is why Americans of today should be bound by the decisions of people some 212 years ago.”); see also, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 11 (1980) (arguing that “[t]he amendments most frequently in issue in court . . . represent the voice of people who have been dead for a century or two”).

<sup>49</sup> In defending constitutionalism, Michael McConnell has suggested that “[i]t is in the nature of people to make promises, and of groups of people to make promises that may apply not only to current members, but to future members as well (provided they avail themselves of the group’s membership benefits).” McConnell, *supra* note 20, at 1131. McConnell gives the example of a corporation entering long-term contracts. *Id.* But a corporation or an estate cannot conscript into itself new members. The state arguably does just that. McConnell also notes that new members “avail themselves of the group’s membership benefits,” *id.*, but most people have no choice but to accept those benefits.

<sup>50</sup> Cf. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 173 (1986) (recognizing that promises cannot generally render immoral actions permissible); Fallon, *supra* note 25, at 1801 (“[I]f the Constitution is only minimally morally legitimate, and thus unjust in part or otherwise tolerant of legal injustices, there may be exceptional cases in which officials’ pledges to uphold the law do not necessarily determine the moral legitimacy of their doing so.”).

Some thinkers argue more broadly that the oath generally cannot create moral reasons to enforce law. See Larry Alexander, *Was Dworkin an Originalist?* 15 n.31 (San Diego Legal Studies Research Paper No. 15-185, 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2576416](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2576416) [<http://perma.cc/4N3C-N3YX>] (discussing promises “to perform acts that are not morally infirm and that come within the ambit of our moral freedom” and contending that, despite their “oaths to enforce law,” officials “have no moral freedom to enforce laws when [all-things-considered-but-law] reasons militate against doing so”); see also David Lyons, *Justification and Judicial Responsibility*, 72 CALIF. L. REV. 178, 192 (1984) (noting that “there are limits on when promises can be considered binding” and that “[j]udicial decisions have a significant impact on important interests of those who come before the

consent of judges, presidents, and other members of the governing class cannot guarantee the democratic consent of the People. And an undemocratic regime does not become any more democratic simply because its rulers swear allegiance to the political order they oversee.<sup>51</sup> The oath might therefore be analogized to any number of other immoral oaths, such as promises to commit violent crimes. So the mere fact that officials happen to have taken the oath cannot dispel the countermajoritarian difficulty or the dead hand problem. The oath's moral force may also depend on whether an official's decision to take the oath is morally defective, and therefore void, at its inception.

The solution to this problem is to situate the oath within the overall democratic structure of the United States. Thanks largely to the oath and the practices it generates, the people understand that officials, both elected and appointed, will assume a duty to abide by the Constitution.<sup>52</sup> Further, this widespread expectation is celebrated rather than opposed.<sup>53</sup> Americans are fully capable of organizing themselves in opposition to what they perceive to be an immoral regime<sup>54</sup>—yet there is presently no significant resistance to the oath.<sup>55</sup> Indeed, voters routinely insist on officials who not

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courts, as well as other persons"). But a promise can create a reason to act in a way that it is morally permissible even if adverse to the interests of others. For example, one might promise not to patronize a business, even if doing so is financially detrimental to third parties. *See also infra* note 193 (discussing exclusionary reasons). Officials have viewed deportation, imprisonment, and capital punishment partly as products of promissory obligation, presumably because they view those acts as morally permissible. *See supra* note 10.

<sup>51</sup> *E.g.*, A. John Simmons, *Tacit Consent and Political Obligation*, 5 PHIL. & PUB. AFF. 274, 285 (1976) ("[W]e might hold that consent to the authority of a tyrannical government does not bind one, just as a promise to act immorally does not bind one.").

<sup>52</sup> *Cf.* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 644 (2008) (suggesting that "[o]ne might even regard" the oath, the "Charters of Freedom exhibit" at the National Archives, and similar "ongoing practices as a kind of mass official consent").

<sup>53</sup> Polls consistently reflect supermajoritarian support for the Constitution. *E.g.*, *57% Say Constitution Should Be Left Alone*, RASMUSSEN REP. (June 27, 2012), [http://www.rasmussenreports.com/public\\_content/politics/general\\_politics/june\\_2012/57\\_say\\_constituti\\_on\\_should\\_be\\_left\\_alone](http://www.rasmussenreports.com/public_content/politics/general_politics/june_2012/57_say_constituti_on_should_be_left_alone) [<http://perma.cc/H9TL-V6AM>] (indicating that most thought the Constitution should not change at all and only three percent believe it should undergo "major changes," plus or minus three points).

<sup>54</sup> *Cf.* THE ECONOMIST INTELLIGENCE UNIT, *DEMOCRACY INDEX 2013: DEMOCRACY IN LIMBO* 3 tbl.2 (2014), [http://www.eiu.com/public/topical\\_report.aspx?campaignid=Democracy0814](http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0814) [<http://perma.cc/8W7H-4WYB>] (categorizing the United States as a "full democracy"). The point is not that the United States is perfectly or ideally democratic, but rather that it is sufficiently democratic for its laws to have substantial democratic legitimacy.

<sup>55</sup> Confirming as much, Louis Michael Seidman, who is among the leading scholarly critics of the Constitution, is unaware of "a single mainstream public figure who has voiced even the mildest skepticism about constitutional obligation." SEIDMAN, *supra* note 18, at 139; *see also id.* ("No doubt, as things stand now, there is minimal support for constitutional skepticism.").



only take the oath, but take it seriously.<sup>56</sup> And popular and sophisticated critics alike invoke the oath in public debate.<sup>57</sup> Public support for the oath may seem trivial, akin to the lack of public opposition to the Star Spangled Banner or the Pledge of Allegiance, but that perception simply reflects the overwhelming popular support for the Constitution at our moment in history.

While many commentators have suggested that the Constitution's legitimacy stems in large part from its present popular acceptance, few have emphasized that this acceptance is substantially mediated by the oath.<sup>58</sup> In electing oath-bound officials, the people are choosing—today—to be governed by words from the past.<sup>59</sup> And once an official takes the oath under conditions that allow for morally valid promising, she becomes morally “bound” to a constitutional course of conduct. This means, for example, that an oath-bound official has a promissory obligation to enforce duly enacted statutes, even when (as in the case of midnight appropriation riders) those statutes lack democratic or other inherent moral virtues. So understood, the public's choice to install each oath-bound official is like Ulysses tying himself a little tighter to the mast.<sup>60</sup> Far from being the product of a distant past, every officeholder's constitutional obligation is traceable to recent democratic choices.

The relationship between the oath and elections has gone underappreciated because the Constitution's defenders usually have little

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<sup>56</sup> See Samaha, *supra* note 52, at 644 (noting that, in taking the oath “and [in] other public ways, officials advertise their willingness to adhere to the federal constitutional text and warn others about departures”).

<sup>57</sup> See, e.g., Bruce Ackerman, *Obama's Betrayal of the Constitution*, N.Y. TIMES (Sept. 11, 2014), <http://www.nytimes.com/2014/09/12/opinion/obamas-betrayal-of-the-constitution.html> [perma.cc/679Q-5VQ8] (accusing President Obama of “betraying the Constitution he swore to uphold”).

<sup>58</sup> For example, Akhil Amar has observed that “[u]nderpinning the Constitution's self-proclaimed supremacy is the basic social fact that Americans generally accept the document's pretensions.” AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 205 (2012). Amar then observed that “[o]rdinary citizens view the Constitution as authoritative, and power-wielding officials everywhere take solemn oaths to support the Constitution, as commanded by the document itself.” *Id.*

<sup>59</sup> See Easterbrook, *supra* note 23, at 1122 (“The constraint [on officials] is the promise to abide by the rules in place—yesterday's rules, to be sure, but rules.”).

<sup>60</sup> Jed Rubenfeld has accurately observed that “[i]t is actually a problem of considerable intricacy to explain how a commitment made at time one could in fact create new reasons to act at time two.” Jed Rubenfeld, *The Paradigm-Case Method*, 115 YALE L.J. 1977, 1991 (2006). But as Rubenfeld also noted: “The problem is easy to solve if we have in mind cases in which the person making the commitment at time one deploys some external mechanism—tying himself to the mast, giving to someone else the keys to his liquor cabinet, entering into a contract—that alters the feasibility, costs, or benefits of his time-two options.” *Id.*; see also RUBENFELD, *supra* note 24, at 115–28. Promissory constitutionalism works through a combination of two commitment mechanisms: the public binds itself to the “external mechanism” of officers, who are in turn bound by oath to the Constitution.

reason to emphasize either the possibility of objecting to the oath or the tentativeness of the constitutional order. But constitutional skeptics have made these points before. Take William Lloyd Garrison's antebellum argument against popular complicity in slavery:

Every voter virtually inscribes upon his ballot *the Constitution of the United States*—he votes for a candidate whom he empowers and expects to take the oath of allegiance to that Constitution, in all fidelity, and without any mental reservation whatever—and, consequently, he is to be held answerable for all that is embodied in that instrument . . . for he agrees to sustain it as it is, in spite of his objections, until it be amended by a constitutional process, and so consents to wrong-doing for the time-being, rather than to lose his vote.<sup>61</sup>

In this passage, Garrison used the oath to implicate voters in the Constitution's apparent alliance with slavery. For Garrison, voting entailed consent to the oath and, therefore, to the constitutional order. The only way to avoid consenting to slavery was to refuse to vote at all. Earlier, Frederick Douglass had endorsed a similar position when he succinctly noted, "I cannot bring myself to vote under, or swear to support" the Constitution.<sup>62</sup> Garrison and Douglass were right to view the franchise as a means of endorsing the constitutional order, but their political goals—framed in the context of the moral evil of slavery—led them to cast the franchise's role in unduly absolutist terms.

In fact, there are many ways to express constitutional skepticism, and most are not nearly as radical or demanding as abstaining from the franchise. For example, members of the public can speak out against the Constitution, campaign for candidates who downplay the duty of constitutional fidelity, or vote for officials who openly regard the oath as ironic, quaint, vapid, or optional. Over time, these efforts—like similar efforts for gay rights, environmentalism, and other once-unpopular

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<sup>61</sup> *Voting—Government—Slavery and War*, THE LIBERATOR, Aug. 1, 1856, at 122 (William Lloyd Garrison ed.). Or consider this similar antebellum passage:

All executive, legislative, and judicial officers, both of the several States and of the General Government, before entering on the performance of their official duties, are bound to take an oath or affirmation, "to support the Constitution of the United States." This is what every office-holder expressly *promises in so many words*. It is a contract between him and *the whole nation*. The voter, who, by voting, sends his fellow citizen into office as his representative, knowing beforehand that the taking of this oath is the first duty his agent will have to perform, does by his vote, request and authorize him to take it. He therefore, by voting, impliedly engages to support the Constitution.

*Can Abolitionists Vote or Take Office Under the United States Constitution?*, in 13 THE ANTI-SLAVERY EXAMINER 2–3 (Am. Anti-Slavery Soc'y 1845).

<sup>62</sup> Frederick Douglass, Letter to C.H. Chase, THE NORTH STAR, Feb. 9, 1849, at 3. Abolitionists were sometimes publicly criticized for rejecting constitutional oaths. *E.g.*, Letter to the Editor, *Should Define His Position*, N.Y. TIMES, Aug. 9, 1862, at 4 (criticizing Wendell Phillips for not swearing fealty to the Constitution so long as it countenanced slavery and comparing him with secessionists). As noted in the main text, this discussion assumes that a promise to commit a moral evil is a nullity.

causes—can gradually bring about widespread legal and social change. In fact, there are already figures, including noted legal scholars, who openly deplore the Constitution and seek to replace it with alternative bases for constitutional reasoning.<sup>63</sup> Unsurprisingly, these constitutional skeptics also follow Garrison and Douglass in expressly opposing the oath.<sup>64</sup> Those dissident voices self-consciously operate outside the bounds of legal practice and aim at destabilizing that practice by undercutting its claim to legitimacy. Given the Constitution’s actual popularity, however, these dissidents do not undermine the oath’s moral force, but rather strengthen it. They fulfill an important social function by reminding the people that they and their representatives could think and act differently when it comes to constitutional fidelity. Without these skeptics, the public’s ongoing support for the oath (and the Constitution) would be more obscure.

Importantly, there is no morally significant duress at any stage of this process.<sup>65</sup> Voters choose to support Constitution-loving candidates, and prospective officials likewise choose to exhibit constitutional piety. People in the United States are not coerced into political participation, including voting or running for office. And, again, it is always possible to fulfill formal demands like the oath while simultaneously deprecating those very demands. This moral freedom is partly due to the limited ambit of the Oath Clause: whereas many pre- and post-founding oaths sought to bind private citizens,<sup>66</sup> the Article II oath applies only to the President; and the Article VI oath applies not to all or even most Americans, but only to certain public officials.<sup>67</sup> It is therefore entirely possible for a U.S. citizen never to

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<sup>63</sup> E.g., Louis Michael Seidman, *Let’s Give Up on the Constitution*, N.Y. TIMES, Dec. 31, 2012, at A19.

<sup>64</sup> E.g., Louis Michael Seidman, *Political and Constitutional Obligation*, 93 B.U. L. REV. 1257, 1275 (2013) (“If, as I contend, we should not be bound by the Constitution then, prospectively at least, government officials should not be required to take the oath that the Constitution mandates.”).

<sup>65</sup> Whether and when duress vitiates a promise is a subject of dispute. See SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* ch. 2 (2014) (arguing that some promises can be binding despite duress). Here as elsewhere, however, the main text strives to appeal to as many theories of promising as possible.

<sup>66</sup> See Gudridge, *supra* note 7, at 389–90 (explaining that English oaths of allegiance were often “a way of testing for anti-establishment dissent, thus inhibiting it” and that “[t]he most important English oaths purported to test the general population, or at least parts of it” (citing, among other sources, DAVID MARTIN JONES, *CONSCIENCE AND ALLEGIANCE IN SEVENTEENTH CENTURY ENGLAND: THE POLITICAL SIGNIFICANCE OF OATHS AND ENGAGEMENTS* 14–62 (1999), and GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 214–15 (1991)); cf. Gerhard Casper, President Emeritus, Stanford Univ., *Forswearing Allegiance*, The Maurice and Muriel Fulton Lecture Series at the University of Chicago Law School (May 1, 2008) (discussing renunciation of allegiance for naturalization); Léonid Sirota, *True Allegiance: The Citizenship Oath and the Charter*, 33 NAT’L J. CONST. L. 137, 153–54 (2014) (criticizing the Canadian citizenship oath as an incursion on conscience).

<sup>67</sup> See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 30 (1999) (noting that “native-born citizens do not typically have to take an oath to uphold the Constitution, as public officials and naturalized citizens do”).

take the oath at all, much less take it seriously. But, despite the opportunity to do otherwise, the U.S. electorate consistently votes for persons who by all appearances take the oath very seriously indeed. While only officials must take the constitutional oath, virtually every voter who casts a ballot chooses that the oath be taken. This is more than tacit or implied consent.<sup>68</sup> It is personal, active, and ongoing consent to be governed under “the Constitution,” whatever that might ultimately entail.

In light of the oath, the moral duties relevant to constitutional law lie between the historicism of originalism and the presentism of living or popular constitutionalism. Because each official’s oath occurs at a discrete point in time, the government assumes constitutional obligations on an ongoing, rolling basis. As each new official takes the oath, another temporary component of the government becomes bound to abide by a slightly adjusted public meaning of “the Constitution.” This process unfolds gradually as various officials take the oath at different points in history. On this view, constitutional duty does not stem from the meaning, intentions, or understandings that exist at the time that a constitutional provision is proposed or adopted. But neither does constitutional duty directly stem from the meanings or practices of the present, full stop. Instead, the oath first locates constitutional duty in the moment of the oath, which will necessarily be a time earlier than the present. Some historical periods are oath-intensive, such as when a new president is elected and much of the executive branch turns over. For example, President Franklin D. Roosevelt appointed five justices in a roughly three-year period.<sup>69</sup> Those appointments guaranteed that the Court would have a New Deal understanding of the Constitution. That transformation was a spurt of change within a longer, gradual process.<sup>70</sup> To continue and complicate the Ulysses metaphor, a series of oaths over time allows the people to shift position against the mast, loosening the strictures in some areas and tightening them in others.

The Ulysses metaphor also helps clarify how a constitutional duty created in the past can override popular opinion in the present. If the oath

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<sup>68</sup> Cf. Fallon, *supra* note 25, at 1797 n.30 (noting that modern theorists generally reject “tacit consent” as a basis for political obligation); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 189–90 (2008) (discussing potential legitimizing role of “implied consent” for the constitutional order as it is).

<sup>69</sup> See *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> [<http://perma.cc/47X5-ZES6>] (listing appointments of Supreme Court Justices).

<sup>70</sup> The oath’s constitutional gradualism relates to a large literature on constitutional change. *E.g.*, Adam M. Samaha, *Originalism’s Expiration Date*, 30 CARDOZO L. REV. 1295 (2008) (exploring whether fidelity to original constitutional meanings should wane); Primus, *supra* note 68 (similar); *infra* text accompanying notes 74, 84–87, 228.

creates a promise to the public, then the public must be able to waive that promissory obligation—much as any promisee can forgive a breach. One might argue that waiver occurs through normal legislation.<sup>71</sup> Yet waiver must take an appropriate form to be effective. If a doctor solemnly agreed to perform a lifesaving surgery without anesthesia, the fact that the patient momentarily cried out would not constitute a morally relevant waiver. This conclusion is even clearer when morally acceptable conditions for waiver are contained within the promise itself. When Ulysses asked to be tied to the mast, he specified that his crew should not untie him until after they had passed the Sirens. Similarly, the people have specified certain conditions for waiver within the oath: as discussed elsewhere,<sup>72</sup> the oath incorporates change rules, or publicly recognized processes of constitutional change, including Article V amendments. So when the people attempt to overcome constitutional barriers through normal legislation and other actions that *are not* publicly recognized methods of constitutional change, they are like Siren-struck Ulysses demanding to be released. To untie the ropes at that moment—or to abide an unconstitutional law—would not honor a waiver. Rather, it would break a promise.<sup>73</sup>

On the oath-based model described above, constitutional duty, as experienced by the government as a whole, is simultaneously dynamic, stable, and sticky. It is dynamic because it is capable of keeping pace with evolving views of what “the Constitution” means. It is stable because oaths to the Constitution have overlapping meaning and so discourage radical shifts in constitutional practice. And it is sticky because each official’s promissory obligation is fixed at the time of the oath, even if the meaning of “the Constitution” continues to change. Constitutional duty can have all these traits because new officials commit to their present-day understanding of the past. The government as a whole thus keeps up with changing meanings of “the Constitution,” but only after a delay. And officials with the longest tenures—namely, federal judges with lifetime

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<sup>71</sup> Alternatively, waiver would be effective if every promisee consented, with the stringency of the relevant promissory obligation declining as more promisees consented. Given the number of promisees making up the public, however, that approach would generally preclude either complete waiver or greatly reducing the stringency of officials’ oaths.

<sup>72</sup> See *infra* text accompanying note 131; *infra* Section III.C (discussing the morality of amendments and the possibility of ignoring them).

<sup>73</sup> The main text assumes that publicly accepted change rules—including, but perhaps not limited to, Article V, see *infra* text accompanying note 131—establish morally acceptable conditions for waiver. Cf. Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165 (2014) (discussing Article V’s justifiability). If that assumption were incorrect, perhaps because accepted change mechanisms are too undemocratic, then officers would have moral freedom to identify other means of public waiver. Cf. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 458–59 (1994) (contending that “a simple majority of the American electorate” could amend the Constitution “in a way not explicitly set out in Article V”).

appointments—lag furthest behind. In effect, the oath translates changing popular constitutional understandings into lasting obligations applicable to individual officials, thereby balancing constitutionalism’s sometimes-divergent commitments to legal stability and democratic change.<sup>74</sup>

In sum, most people in the United States understand and desire that candidates for public office will assume a duty to support the Constitution. Anticonstitutional figures have the option of mobilizing in support of candidates who would either refuse to take the oath or refuse to take it seriously. In fact, however, actual candidates uniformly celebrate the Constitution, and hypothetical candidates who opposed the Constitution would receive very few votes, if any. The possibility of anticonstitutional politics may seem quixotic, given the Constitution’s current popularity. But anticonstitutional politics is realistic. Indeed, it’s been done before.<sup>75</sup> So the present-day absence of anticonstitutionalism is not a sign that actual public consent is defunct. Instead, it is a sign that actual public consent is overwhelmingly present.

## II. PROMISE-KEEPING, OR THE CONTENT OF CONSTITUTIONAL OBLIGATION

In providing a normative basis for constitutional obligation, the oath also helps establish that obligation’s content.

### A. *What the Oath Means*

Promises generally create obligations defined by their meaning.<sup>76</sup> This intuitive claim requires some elaboration. First, a promise’s *meaning* can incorporate facts and have implications that are unknown at the time of the promise. That possibility explains how someone can promise to abide by the rules of bridge, even if she cannot state a single rule of the game at the time that the promise is made.<sup>77</sup> Likewise, an oath can be made to the

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<sup>74</sup> This conclusion has special import for popular or democratic constitutionalism, or any other approach that links constitutional meaning with democratic change. See, e.g., Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 194 (2008) (“[P]ractices of democratic constitutionalism enable mobilized citizens to contest and shape popular beliefs about the Constitution’s original meaning and so confer upon courts the authority to enforce the nation’s foundational commitments in new ways.”). See generally Friedman, *supra* note 15, at 2599–600 (“[U]nder almost any normative theory of judicial review, the trick is striking a balance between too little and too much judicial responsiveness to public opinion.”).

<sup>75</sup> See *supra* text accompanying notes 55, 61–62.

<sup>76</sup> See, e.g., DAVID HUME, A TREATISE OF HUMAN NATURE 352 (Batoche Books 1999) (1739) (explaining that an “expression makes on most occasions the whole of the promise”).

<sup>77</sup> A promise can be both created and fulfilled without either party *ever* learning the promise’s incorporated content. For instance, someone might promise to abide by the speed limit and then drive so

Constitution, even if neither the official nor the public has ever read the document.<sup>78</sup> Second, the meaning that defines each promise is *contemporaneous* with the promise itself. For instance, if the nation of Great Britain dissolved and people started using the term “Great Britain” exclusively to refer to a popular chain of fish-and-chips shops, then officials who had previously sworn oaths to the nation would not suddenly owe loyalty to the food chain. Contemporaneous meanings—not earlier or later meanings—define promissory obligation. Third, the morally relevant meaning is the promise’s communicated or public meaning.<sup>79</sup> Plainly, people cannot evade promissory obligations by communicating one thing while secretly thinking another.<sup>80</sup> Private meanings do not establish the content of promissory obligations, for such meanings are unrelated to promises’ communicative nature. The critical meaning for any promise is instead the shared meaning communicated between promisor and promisee. Because the oath is a promise to the public, the relevant shared meaning is the public meaning. The content of each official’s oath thus turns on an empirical question: what was the public meaning of the Constitution at the time of the oath?

Of course, the oath does not fully specify constitutional duty.<sup>81</sup> Aspects of the Constitution’s contemporaneous public meaning may be unsettled, obscure, or ambiguous,<sup>82</sup> and uncertainty about a promise’s

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slowly as to abide by any realistically possible speed limit, whatever it might be. Likewise, officials might plausibly seek to avoid constitutional shoals, without ever knowing quite what they are.

<sup>78</sup> Cf. Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2263 (2014) (“Government officers don’t all share an actual knowledge of the law, but rather a broad consensus—like that held by ordinary citizens—about where they should look or whom they should ask.”).

<sup>79</sup> See, e.g., Taylor, *supra* note 34, at 672 (“[T]he actual internal mental states of participants (if these are different than their outward indicators) are inaccessible to typical participants in a convention. Conventionally-mediated requirements, including promises, will therefore not depend on them.” (emphasis omitted)); see also Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1619–27 (2009) (linking promissory obligation with “objective intent”).

<sup>80</sup> Because public meanings control, it is morally unnecessary for officials to disclaim any “mental reservation,” as required by many statutory oaths, but not the Article II presidential oath. See SHIFFRIN, *supra* note 65, at 150 n.59.

<sup>81</sup> The fact that the oath is a source of only limited guidance may be necessary to its persuasiveness as a source of constitutional duty. See Samaha, *supra* note 52, at 611 (“[T]here might be a negative correlation between a constitutional authority theory’s persuasiveness and its practical implications for interpretation.”).

<sup>82</sup> See, e.g., Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL’Y 907, 915 (2008); cf. CHARLES FRIED, *CONTRACT AS PROMISE* 88 (2d ed. 2015) (“Promises, like every human expression, are made against an unexpressed background of shared purposes, experiences, and even a shared theory of the world.”); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 225 n.80 (1980) (arguing that “the oath must be understood in the context of two centuries of constitutional decisionmaking”). Notably, the difficulty of ascertaining past meanings is far less pressing in connection with promissory constitutionalism, as compared with other theories of constitutionalism, such as originalism. The oath’s meaning is set at a relatively recent point

meaning or application can yield underdetermined obligations. An official may therefore face a range of permissible options even after exhausting the meaning of the oath. By analogy, a promise to deliver a healthy snack might allow for either cauliflower or carrots—but rule out cookies. In that sense, the Constitution’s unambiguous or minimum meaning sets the boundaries of officials’ promissory obligations.<sup>83</sup> And when the oath allows multiple actions, nonpromissory reasons may be decisive. Even when promissory obligations are underdetermined, however, the official’s reasoning process must itself accord with the oath’s contemporaneous minimum public meaning. The oath thus engenders a subsidiary obligation to reason through underdetermined cases in a way that is sincere, diligent, and consistent with the oath’s methodological and substantive implications.

*1. Promised Methods.*—Promissory constitutionalism suggests that issues of methodology largely turn on the empirical question of how the public understands “the Constitution.” For example, the Constitution might be understood to incorporate an “unwritten Constitution,”<sup>84</sup> an “invisible Constitution,”<sup>85</sup> or a “constitution outside the Constitution.”<sup>86</sup> Alternatively, the public meaning of “the Constitution” might afford the historical document ultimate legal authority.<sup>87</sup> Or the Constitution’s meaning might be ambiguous as between these options (and others besides). Instead of grappling with those possibilities, the argument here focuses on a surer and more modest claim: under what might be called the “documentarian premise,” the oath’s references to “the Constitution” or “this Constitution”<sup>88</sup> are publicly understood to refer at least in part to the

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in time, and every oath necessarily occurs when the relevant oath-taking official is a living member of the U.S. legal community.

<sup>83</sup> The oath would yield divergent obligations if officers conveyed special meanings to distinctive audiences. Cf. Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 727 (2006) (arguing that “[p]ropositions about U.S. constitutional law and, derivatively, U.S. law more generally are true or false relative to the practices of a stipulated group”). At an extreme, the result would be a fractured constitutional order, perhaps akin to the antebellum United States. More generally, a disputed public understanding might carry increasing moral force as it becomes more widespread among the public (that is, the promisees).

<sup>84</sup> E.g., AMAR, *supra* note 58; CHRISTOPHER G. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW* (1890).

<sup>85</sup> TRIBE, *supra* note 20.

<sup>86</sup> Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

<sup>87</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349 (2015) (arguing that “inclusive originalism” is the publicly accepted law of the United States).

<sup>88</sup> The Article VI phrase “this Constitution” can refer to an evolving concept—much like the Article IV phrase “this Union.” See Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL’Y 45, 51–52 (1994) (denying “that something in the Constitution could tell us to what ‘this Constitution’ refers”); see also *supra* note 7; *infra* Strauss, note 153. Christopher Green argues that “this Constitution,” unlike “this Union,” is a “historically confined



Constitution's historical text.<sup>89</sup> To be clear, the documentarian premise does not mean that most U.S. inhabitants know any of the historical text's roughly 4500 words. The documentarian premise likewise takes no comprehensive position on what complex, abstract, and perhaps dynamic referent lies behind "the Constitution." The *only* linguistic implication of the documentarian premise is that the minimum public meaning of "the Constitution" includes the historical document.<sup>90</sup>

In light of the documentarian premise, an oath to support the Constitution necessarily creates a promise to support the historical document known by that name.<sup>91</sup> This claim is more modest than it may initially appear—and far more modest than the claims that many scholars

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textual self-reference." Christopher R. Green, "*This Constitution*": *Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1612 (2009). In support of that claim, Green observes, for example, that the Presidential Eligibility Clause contains an exemption for anyone who is a "Citizen of the United States, at the time of the Adoption of this Constitution." *Id.* at 1665 (citing U.S. CONST. art. II, § 1, cl. 5). But one can believe both that "this Constitution" is dynamic and that its "Adoption" was in 1789. In any event, the Constitution's text alone cannot disclose the oath's current public meaning.

<sup>89</sup> See Green, *supra* note 88, at 1643–47, 1645 n.120 (collecting examples of officials framing their oaths in terms of "the historic Constitution"); see also Fallon, *supra* note 25, at 1812 ("[T]he Constitution is the document and set of amendments thereto . . .").

<sup>90</sup> To illustrate the documentarian premise's widespread purchase, consider an intriguing exchange between Judge Richard Posner and Professor Jed Rubenfeld. When Judge Posner derided as "formalism" the idea "that the judge has some kind of moral or even political duty to abide by constitutional or statutory text, or by precedent," Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002), Rubenfeld plausibly responded based in part on the oath: "Posner's statement could be said to amount to an express repudiation of his oath of office. In fact, Judge Posner's view seems to make the oath a kind of lark. The whole point of an oath is to create a moral or political duty." Jed Rubenfeld, *A Reply to Posner*, 54 STAN. L. REV. 753, 767 (2002). Yet Judge Posner had endorsed "pragmatic" decisions that are "not foreclosed by the language or background of the amendment or the case law applying it." Posner, *supra*, at 739. In a later work, Judge Posner added that the Constitution included "a loyalty oath rather than a directive concerning judicial discretion." RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 73 (2003). Again, however, Judge Posner's striking comments distract from his acquiescence to a more banal consensus: "The loyalty demanded" is not just to "the United States," but also to "its accepted official practices, which include loose judicial interpretation of the constitutional text and occasional overruling of decisions interpreting that text." *Id.* But see H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* 5 (2008) (arguing based in part on Judge Posner's "tone" in this passage that Judge Posner does indeed believe "that a judge has no kind of moral or even political duty to abide by constitutional text").

<sup>91</sup> Gudridge reaches a similar conclusion without recourse to promising or public meanings. In Gudridge's view, the oath lacks specific substantive content because it was designed to maintain public appearances of loyalty to the new constitutional order. See Gudridge, *supra* note 7, at 401 (arguing that the obligation of the oath was "an obligation to 'expound,' to show that, for example, the judge's conclusions were traceable, in a persuasive enough way, to the Constitution (or some other pertinent legal instrument), and thus to show that for the judge, 'the constitution forms . . . [a] rule for his government'"). Gudridge then argues that his theory has significant implications for constitutional practice. See *id.* at 403–04. But see *infra* Section II.B (rejecting oath-based arguments for conclusions similar to Gudridge's).

have made on behalf of the oath.<sup>92</sup> To support the historical document is simply to adopt an interpretive theory tethered to the Constitution's text and history. Text and history are therefore morally essential components of legal reasoning for those who wish to speak either as or with oath-bound officials. Happily, that conclusion lines up well with actual constitutional practice. Even those who deplore textualism and originalism nonetheless orient their claims in and around the historical document.<sup>93</sup> The oath both justifies and reinforces that limited but fundamental degree of methodological consensus.<sup>94</sup>

Consider a more specific example. Assume (as may be true) that the Eighth Amendment's reference to "unusual" punishments originally meant novel,<sup>95</sup> yet as a result of linguistic drift, the Court today reads "unusual" to mean infrequent.<sup>96</sup> Even given those assumptions, understanding the Eighth Amendment to prohibit infrequent punishments would not run afoul of the oath or the documentarian premise. In abiding by the contemporary public meaning of the Constitution and tracing their constitutional duty to the words of the historical document, officials would be acting fully in accord with their promissory obligations under the documentarian premise.<sup>97</sup> To conclude that the official would necessarily violate her oath when she abandons the Constitution's original public meaning, one would have to

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<sup>92</sup> For example, Michael Stokes Paulsen cites the Oath Clause as a central part of his argument that the Constitution itself commands that it be read in a textualist fashion (while noting that his argument "is in a sense circular"). See Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 868–70 (2009). But as Andrew Coan has argued, "One can be committed to a written constitution in any number of ways . . . the vast majority of which do not entail an originalist interpretive approach." Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1028–29 (2010); see also *id.* at 1042 (criticizing Paulsen's oath-based argument for "a conflation of 'the Constitution' with its original public meaning").

<sup>93</sup> In fact, it is now an open question whether leading theories of originalism are fundamentally different from leading theories of living constitutionalism. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011); James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1523, 1524 (2011).

<sup>94</sup> For this reason, Samaha overstates his case when he posits that "[o]fficial oaths and affirmations are no help" in providing "constraints on interpretive method" because "[t]hey refer to 'the Constitution,' whatever that means, and apparently not 'as interpreted by method *x*.'" Samaha, *supra* note 52, at 645.

<sup>95</sup> See John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1745 (2008) ("As used in the Eighth Amendment, the word 'unusual' was a term of art that referred to government practices that are contrary to 'long usage' or 'immemorial usage.'").

<sup>96</sup> See, e.g., *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) ("The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910))).

<sup>97</sup> See, e.g., Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1144 (2014) (arguing that "[t]he word 'unusual' also signifies that when a punishment is imposed *irregularly against certain suspect classes of people*, the Constitution demands action from the judiciary to scrutinize the punishment").

outpace the documentarian premise and accept the more debatable claim that *original* public meanings are the exclusive, or at least ultimate, source of the oath's content.<sup>98</sup>

In drawing officials' attention to the historical document, the oath fulfills an important coordination function. Under several leading theories of constitutional fidelity, the document is thought to earn public endorsement in large part because it serves as "a focal point"<sup>99</sup> or "a plan for conducting politics."<sup>100</sup> But any text is equally capable of serving as a plan, and numerous contenders readily spring to mind, ranging from Lincoln's "Gettysburg Address" to King's "I Have a Dream" speech, to the five hundred forty-fourth volume of the United States Reports. To some extent, these fixed points are in fact authoritative in our constitutional order. Indeed, each of these sources has helped overcome constitutional arguments avowedly rooted in the document. Yet the historical document is indispensable because it is the most widely and consistently powerful of all these sources. That unique salience is in part a product of the oath. While it does not tell officials how to support "the Constitution," the oath does at least prompt them to focus attention on a particular text.<sup>101</sup> That shared starting point, renewed with each new official, shapes (but does not control) later argument.

To a great extent, the process of voting for officeholders helps to maintain the documentarian premise.<sup>102</sup> In principle, prospective officials could announce unorthodox views of "the Constitution" and thereby shape

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<sup>98</sup> For the leading argument that the public meaning of "the Constitution" and the oath does entail a form of originalism, see Baude, *supra* note 87. *But see, e.g.*, Samaha, *supra* note 52, at 645 (denying that "any one interpretive method dominate[s] the public or official mind").

<sup>99</sup> Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 709 (2011); David A. Strauss, *Legitimacy, "Constitutional Patriotism," and the Common Law Constitution*, 126 HARV. L. REV. F. 50, 51 (2012) (arguing that "the text serves as a kind of common ground, a focal point").

<sup>100</sup> BALKIN, *supra* note 93, at 39 (arguing that the "words" of the Constitution "coordinate interactions so that people do not have to decide on the ground rules of political life each time they have a disagreement").

<sup>101</sup> See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 48 (2000) ("When all pledge allegiance to the same object, an obvious focal point arises for coordination among officials and between government and citizenry."); *see also* Levinson, *supra* note 99, at 708 ("Maintaining coordination around the existing, and therefore focal, order will always be much easier than attempting to re-coordinate around some alternative constitutional regime."). As argued in the main text, it is reasonable to accept the starting point of "the Constitution" and then conclude that decisional law should be decisive. *See, e.g.*, Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1380–81 (1997); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 110 (1997); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 907–11 (1996); *see also infra* Section III.B (discussing precedent).

<sup>102</sup> *See supra* Section I.B (discussing the role of voting and public opinion).

or augment the meaning of their promises.<sup>103</sup> If the idea caught on, such announcements could alter the meaning and practice of taking the oath. But those possibilities are largely academic, given the actual political culture of the United States. Prospective officials who tried to exempt themselves from the oath's conventional meaning would invite public criticism, since the American people generally honor the historical document and want to be governed by it. And, in fact, prospective officials almost uniformly extol the historical document.<sup>104</sup> So there is at least a strong presumption that the oath entails a commitment to act on that basis. To understand the oath in any other way would be out of touch, like mistaking a wedding vow ("I do") for a punch line.

This oath-based picture of constitutional argument runs contrary to scholars' and judges' frequent assumption that the correct method of ascertaining the Constitution's meaning is fixed across generations. Those who support living constitutionalism or originalism or any other constitutional theory typically posit that their own preferred methodological approach is, was, and always will be correct. Theories of constitutional interpretation thus purport to be timeless, despite the fact that different constitutional theories have predominated at different historical moments. As a result, proponents of particular schools of thought sometimes adjudicate methodological disputes from the distant past. But to issue this type of critique, commentators must reason from an Archimedean point outside historical debates over constitutional meaning. Critics might say, for instance, that a particular judicial decision is bad—now, then, and forevermore—because it had bad consequences or was unjust. These criticisms are coherent, but they generally do not take the form of legal disagreement, at least when judged by the standards of actual historical participants in legal practice. At other times, judges and scholars assert that the Constitution itself necessarily compels a particular mode of interpretation yielding a particular legal conclusion; but, again, that strong claim is unfounded. No document—no matter how old—can authoritatively dictate how it ought to be read.<sup>105</sup>

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<sup>103</sup> For example, Judge Harry Pregerson candidly stated during his confirmation hearing that he would follow his conscience over "the law" in the event of a conflict between them. *See* Baude, *supra* note 98, at 2396 (discussing this incident). These remarks may have expressed an idiosyncratically permissive view of the Constitution or the oath. *See also* *Wallace v. Castro*, 65 F. App'x 618, 619 (9th Cir. 2003) (Pregerson, J., dissenting) ("In good conscience, I cannot vote to go along with the sentence imposed . . .").

<sup>104</sup> *See, e.g., The Nomination of Elena Kagan To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 185 (2010) (statement of Elena Kagan: "[T]he Constitution is a kind of genius document.").

<sup>105</sup> *See supra* Section I.A.

The constitutional oath provides a more satisfying approach. Legal methods and outcomes are the subject of lively controversy, not just in ivory towers but also in presidential debates, the halls of Congress, and the popular press. The views that emerge from those disputes place a gloss on the oath as taken by every U.S. official. Ideas that were once tendentious or disputed become foundational, or the reverse can occur. And to the extent there is consensus on the meaning of “the Constitution,” that consensus view becomes the moral duty of every oath-taker. Thus, the public meaning and moral implications of the same oath—consisting of the same words—can vary with time. Using the oath as a framework for critique, yesterday’s officials can be evaluated either *as* or *by* interpreters situated within their own historical norms and practices. That is, prior officials can be evaluated *as* historically situated interpreters in the sense that their conduct can be compared with the then-contemporaneous meaning of their oaths. Or prior officials can be evaluated *by* situated interpreters in the sense that their conduct can be compared with the oath’s present-day meaning. For example, *Lochner*-era jurists could be criticized for failing to live up to the interpretive and substantive views embodied in their own oaths, or they could be criticized from the standpoint of the interpretive and substantive understandings that underlie present-day oaths.<sup>106</sup> Either of these approaches eliminates the need for an Archimedean point from which prior interpreters can be judged as eternally right or wrong.

With all this in mind, President Obama’s famous oath-taking mishap can be viewed in a new light. As many readers will remember, the President, abetted by the Chief Justice, performed his first oath of office in a slightly garbled way that did not perfectly match the text of Article II.<sup>107</sup> Once the inauguration ceremony was concluded, the oath’s key social functions had arguably been fulfilled. Thousands had gathered, millions had watched, and the new President had clearly evinced his devotion to the Nation and the Constitution. It would have been easy to say that the ceremony achieved its dual purposes of honoring the President while allowing him to publicly commit himself to the nation. Indeed, some commentators suggested that the President could legally have adopted

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<sup>106</sup> For discussion of the common practice of condemning past decisions like *Lochner v. New York*, 198 U.S. 45 (1905), without accounting for then-extant law, see Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 404–05 (2011). *Lochner*’s public status may have entered a new period of contestation. See generally DAVID E. BERNSTEIN, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011); George F. Will, *The 110 Year-Old Case That Still Inspires Supreme Court Debates*, WASH. POST (July 10, 2015), [https://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa\\_story.html](https://www.washingtonpost.com/opinions/110-years-and-still-going-strong/2015/07/10/f30bfe10-2662-11e5-aae2-6c4f59b050aa_story.html) [http://perma.cc/G9WF-8L9C].

<sup>107</sup> See *infra* notes 108–10.

exactly that attitude.<sup>108</sup> Yet the President chose to retake the oath, in a ceremony with media witnesses. There was only one explanation: the oath's validity was open to question due to its failure to adhere to the constitutional text.<sup>109</sup> In fact, the President's agents issued statements saying as much.<sup>110</sup>

These events at once reflected and reinforced the power of textual argument. Though he likely viewed his first oath as legally sufficient, the President acknowledged the plausibility of textual criticism. By taking the oath (again) under those circumstances, the President reinforced a particular public understanding of what the oath means: obedience to the Constitution's written words.<sup>111</sup> The President may also have established a substantive precedent that had not existed the day before: mistakes in reciting the oath call for a do-over. Remarkably, the very act of taking the oath had informed its content.

2. *Promised Rules.*—Viewing constitutional obligation as a form of promise keeping also illuminates the dynamism and content of substantive constitutional law. As argued above, “the Constitution” has always referred in part to a document. But it has also always connoted much more than that—though that additional meaning is both contested and dynamic. At any given historical moment, “the Constitution” connotes what might be called a thick meaning—that is, a consensus public understanding of basic constitutional principles. To the extent that “the Constitution” conveys that kind of thick public meaning at a particular point in time, officeholders subscribe to it by taking the oath.

In the antebellum era, for example, swearing to support “the Constitution” was sometimes viewed as an endorsement of the institution of slavery. In the view of Frederick Douglass, the oath entailed an act of

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<sup>108</sup> See Richard Primus, *Constitutional Expectations*, 109 MICH. L. REV. 91, 93 (2010) (asserting that the error was “legally inconsequential,” while recognizing that the “deviation from the text struck people as wrong—wrong enough to warrant staging the ritual again”).

<sup>109</sup> The legal implications of an invalid presidential oath could be significant. Cf. *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1235 (2015) (Alito, J., concurring) (“There is good reason to think that those who have not sworn an oath cannot exercise significant authority of the United States.” (citing 14 Op. Atty. Gen. 406, 408 (1874); 15 Op. Atty. Gen. 280, 281 (1877))).

<sup>110</sup> White House Counsel Gregory B. Craig's statement acknowledged that the do-over was “because there was one word out of sequence” in the oath. See Jeff Zeleny, *I Really Do Swear, Faithfully: Obama and Roberts Try Again*, N.Y. TIMES, Jan. 22, 2009, at A1 (quoting Gregory B. Craig). According to Jeffrey Toobin's reporting, prominent administration attorneys David Barron, Greg Craig, and Daniel Meltzer, as well as Chief Justice Roberts, all believed that it was appropriate for President Obama to retake the oath. See JEFFREY TOOBIN, *THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT* 1–15 (2012).

<sup>111</sup> See TOOBIN, *supra* note 110, at 1–5 (recounting David Barron's internal executive branch arguments based on the increasing prevalence of textualism).

“treachery” because it was “an oath to perform that which God has made impossible.”<sup>112</sup> After the Civil War, the oath took on new meaning. Unionists hoped that the oath would signify the South’s rejection of slavery.<sup>113</sup> And, in many contexts, the oath surely did mean just that. Yet many southerners persisted in viewing the oath instead as an act of reluctant, rueful, and potentially temporary acquiescence.<sup>114</sup> Decades later, an analogous debate would arise over the oath and certain “anti-American” ideologies. The oath was frequently understood to convey a rejection of communism and socialism.<sup>115</sup> Yet that view, too, came under attack by those—including members of the Supreme Court—who felt that the Constitution stood apart from, and perhaps above, even the most fundamental disputes of political ideology.<sup>116</sup> These examples reflect the fact that the oath, like any social practice, has a public meaning that is necessarily contextual.

The Second Amendment supplies a more recent example. Just a few decades ago, the overwhelming public understanding was that the Second Amendment did not confer an individual right to bear arms, and myriad judicial decisions shared that premise.<sup>117</sup> Gradually, however, debate shifted public understandings.<sup>118</sup> Thereafter, the Court adopted the newly ascendant view that the Second Amendment did confer individual rights.<sup>119</sup> What to make of these events? Originalists focus on the content of the public debate, which revealed long-overlooked historical evidence that the Second

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<sup>112</sup> Frederick Douglass, *Oath to Support the Constitution*, NORTH STAR, Apr. 5, 1850; see also *supra* text accompanying notes 55–57.

<sup>113</sup> See generally HAROLD MELVIN HYMAN, ERA OF THE OATH: NORTHERN LOYALTY TESTS DURING THE CIVIL WAR AND RECONSTRUCTION (1954). Congressman James A. Bayard, Jr., resigned over his opposition to the Ironclad Test Oath, which demanded not just present but past and perpetual allegiance. See CONG. GLOBE, 38th Cong., 1st Sess. App’x 31–32 (1863) (statement of Hon. J.A. Bayard); Brion T. McClanahan, A Lonely Opposition: James A. Bayard, Jr. and the American Civil War (2006) (unpublished Ph.D. dissertation, University of South Carolina).

<sup>114</sup> See Harold M. Hyman, *Deceit in Dixie*, 3 CIV. WAR HIST. 65, 71 (1957).

<sup>115</sup> See, e.g., *Schneiderman v. United States*, 320 U.S. 118, 119 (1943) (considering whether a communist could take the statutory naturalization oath); see also LEVINSON, *supra* note 7, at 126–54 (discussing *Schneiderman*); HAROLD M. HYMAN, TO TRY MEN’S SOULS: LOYALTY TESTS IN AMERICAN HISTORY 319 (1960) (discussing the House’s preventing Victor Berger from taking the oath on account of his socialism).

<sup>116</sup> See, e.g., *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 606–08 (1967) (discussing loyalty oaths and invalidating certain legal disabilities imposed for refusing to disavow communism); *Bond v. Floyd*, 385 U.S. 116, 137 (1966) (requiring Georgia to allow a Vietnam War objector to take the oath for a seat in the state legislature).

<sup>117</sup> *District of Columbia v. Heller*, 554 U.S. 570, 638 & n.2 (2008) (Stevens, J., dissenting) (explaining that “[s]ince our decision in [*United States v. Miller*, 307 U.S. 174 (1939)], hundreds of judges have relied on the view of the Amendment we endorsed there”).

<sup>118</sup> See Siegel, *supra* note 74, at 207–12 (recounting this shift).

<sup>119</sup> See *Heller*, 554 U.S. at 636.

Amendment had been thought to confer an individual right, particularly in 1868 (at the Fourteenth Amendment's ratification).<sup>120</sup> This approach offers an *internal* account for the Court's decision—that is, a legal justification for the Justices to choose to rule the way they did.<sup>121</sup> But originalism itself cannot account for the timely appearance of a Court open to originalist arguments specifically oriented toward the Second Amendment (and not, for example, the Privileges and Immunities Clause). Meanwhile, historians and political analysts can emphasize the political mobilization of the National Rifle Association and other interest groups, which promoted their views on policy and law by influencing judicial appointments.<sup>122</sup> This mode of analysis can provide an *external* account of why, as a descriptive matter, the Court reconsidered the Second Amendment when it did, but it cannot explain why the Court should have ruled in accord with popular will on this issue (as opposed to, say, First Amendment issues).

The oath can help. In particular, the oath can provide a normative bridge linking the internal perspective of a jurist with the external realities of politics. Second Amendment revisionism not only included a popular movement that drew sustenance from politics, but also generated an array of textual and historical arguments that informed the public meaning of the oath. So in both town squares and faculty lounges, an understanding of “the Constitution” that was once clear—that is, the absence of a private right to bear arms—became questionable. These mutually supporting popular and intellectual movements created new ambiguity regarding the public meaning of “the Constitution.” Judges who took their oaths under those newly changed circumstances would thus have a different constitutional duty. In this way, the oath's linkage of public meanings and personal obligations yields an account of constitutional change that is both external and internal.<sup>123</sup>

This conclusion yields the intriguing possibility that, in light of the timing of their respective oaths, both Justice Scalia (writing for the Court) and Justice Stevens (for the dissent) fulfilled their constitutional duties in *District of Columbia v. Heller*.<sup>124</sup> As his later writings have made clear,

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<sup>120</sup> See, e.g., Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

<sup>121</sup> On the internal/external distinction, see generally HART, *supra* note 47, at 89–91.

<sup>122</sup> See, e.g., Siegel, *supra* note 74, at 201–36; Michael Waldman, *How the NRA Rewrote the Second Amendment*, POLITICO (May 19, 2014, 9:03 PM), <http://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856> [<http://perma.cc/MY92-VQ6P>].

<sup>123</sup> Here, too, the oath can mediate the moral demands of popular constitutionalism. See *supra* text accompanying note 74.

<sup>124</sup> 554 U.S. 570.



Justice Stevens quite plausibly remembers consensus when it came to the meaning of the Second Amendment:

When I joined the court in 1975, that holding [in *United States v. Miller*] was generally understood as limiting the scope of the Second Amendment to uses of arms that were related to military activities. During the years when Warren Burger was chief justice, from 1969 to 1986, no judge or justice expressed any doubt about the limited coverage of the amendment, and I cannot recall any judge suggesting that the amendment might place any limit on state authority to do anything.<sup>125</sup>

Note that Justice Stevens dated his sense of consensus from the year he “joined the Court” and further asserted that the consensus came to an abrupt halt in 1986. What happened in that year? Justice Scalia took his oath of office.<sup>126</sup> Justice Scalia had been nominated by President Ronald Reagan, who mainstreamed the constitutional turn in the gun rights movement, including by penning a prominent essay in 1975—within months of Justice Stevens’s oath.<sup>127</sup> And President Reagan’s political rise roughly tracked the ascent of Second Amendment revisionism in the public square.<sup>128</sup> So to the extent that there was a consensus on the substantive meaning of the Second Amendment in 1975, it no longer existed in 1986. Justice Scalia was thus well within the parameters of his oath when he authored the majority opinion in *Heller*. And, in dissenting, Justice Stevens acted in accord with *his* oath.

In the vast majority of cases, however, constitutional duty does not turn on the timing of any particular official’s oath. In general, an official’s promissory obligation to the Constitution has two aspects: first, it requires adherence to certain fixed views of the law; and, second, it requires obedience to contemporaneously understood rules for constitutional

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<sup>125</sup> John Paul Stevens, *The Five Extra Words That Can Fix the Second Amendment*, WASH. POST (Apr. 11, 2014), [https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245\\_story.html](https://www.washingtonpost.com/opinions/the-five-extra-words-that-can-fix-the-second-amendment/2014/04/11/f8a19578-b8fa-11e3-96ae-f2c36d2b1245_story.html) [http://perma.cc/5MB7-Y28H]. Justice Stevens made similar remarks in connection with other cases. *E.g.*, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 803 (2007) (Stevens, J., dissenting) (“It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”); *infra* note 144 (discussing Judge Daughtrey’s dissent in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which includes the phrase: “More than 20 years ago, when I took my oath of office . . .” *Id.* at 436 (Daughtrey, J., dissenting)).

<sup>126</sup> See *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/members.aspx> [http://perma.cc/MS4J-9TXT].

<sup>127</sup> See Siegel, *supra* note 74, at 209–10 (discussing Ronald Reagan, *Ronald Reagan Champions Gun Ownership*, GUNS & AMMO, Sept. 1975, at 34).

<sup>128</sup> See Siegel, *supra* note 74, at 207–29. Also suggesting that the late-1970s were a tipping point, Adam Winkler has argued that academic articles by Don Kates “revolutionized” Second Amendment literature. ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 106, 318 n.23 (2011).

change.<sup>129</sup> For an example of the first aspect, consider the overwhelming public understanding today that the Constitution prohibits racial segregation. Given this decades-old minimum public meaning of “the Constitution,” all current officials—legislative, executive, and judicial—are oath-bound to oppose legislation to recreate Jim Crow. But, as reflected in the oath’s second aspect, an official’s general obligation to adhere to the meaning of “the Constitution” also entails a duty to abide by change rules, or contemporaneously understood rules for constitutional change.<sup>130</sup> The most obvious example of a change rule is the Article V amendment process. In taking the oath, officials assume a general promissory obligation to adhere to later-enacted amendments (much as they must generally adhere to later enacted Article I statutes). Other change rules also lie within the minimum or contestable public meaning of “the Constitution.” For instance, mainstream figures have long believed that certain constitutional principles—such as the Eighth Amendment and the Equal Protection Clause—can change based on new events, including changes in popular views.<sup>131</sup> When officials take the oath against the backdrop of those understandings, their constitutional duty can change, even absent a constitutional amendment.

Change rules are critical in part because they provide a normative account of why officials typically do not attend to the timing of their oaths, even though their promissory obligations are linked to the contemporaneous meaning of “the Constitution.” To illustrate this point, consider the following scenario. Official A takes the oath at Time 1, just *before* a legal change pursuant to a publicly recognized change rule, such as an Article I statute, an Article V amendment, or a judicial precedent. Official B, by contrast, takes the oath at Time 2, just *after* the same legal change. At first blush, the two officials might seem to have divergent promissory obligations, since the state of the law was different at Time 1 as compared with Time 2. But that impression is illusory. Because the legal change by hypothesis occurred pursuant to a change rule that was publicly recognized at the time that Official A took her oath, Official A’s oath incorporates that legal change. As a result, Official A’s promissory

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<sup>129</sup> *Infra* Section III.C (discussing side constraints on constitutional change rules).

<sup>130</sup> See Steven E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 820 (2015) (“Almost every legal system distinguishes authorized changes . . . from the unauthorized changes that happen when society simply abandons or departs from some preexisting rule of law.”).

<sup>131</sup> See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 314–16, 321 (2002) (looking to state legislation to ascertain what is cruel and unusual); Richard A. Posner, *Should There Be Homosexual Marriage? And If So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1585–86 (1997) (arguing that courts should recognize constitutional same-sex marriage rights only if popular opinion shifted in that direction).

obligation is identical to Official B's. This scenario illustrates an important point: the timing of an official's oath is generally relevant only if a legal change has occurred without complying with previously recognized change rules. Examples may include political shifts that did not trigger recognized change rules, such as the rise of New Deal constitutionalism in the 1930s or personal Second Amendment rights in the 1970s and '80s. But the paradigmatic unauthorized change is a revolution.<sup>132</sup>

### B. What the Oath Does Not Mean

As should by now be clear, this Article's refrain is that the constitutional oath creates promissory obligations and so is analytically useful in ways not typically realized. But many interpreters throughout history have argued that the mere existence or text of the oath, shorn of social practices and public understandings, can shed light on which officials have special authority to establish constitutional meaning. In particular, the oath has been enlisted as support for conceptions of (i) the separation of interpretive powers, including theories of judicial supremacy; and (ii) interpretive federalism, including the relationship between federal and state courts. In these areas, the oath actually has much *less* to teach us than has often been supposed.

*I. The Separation of Interpretive Powers.*—The Oath Clause is often cited to buttress different pictures of how various types of federal officials ought to interpret the Constitution. These accounts fall into four general categories: judicial supremacy, departmental equality, executive supremacy, and legislative supremacy. Whatever the merit of these mutually inconsistent but nonetheless widely held views, none finds an independent basis in the Oath Clause.<sup>133</sup>

Like so many other things, arguments about interpretive supremacy begin with *Marbury v. Madison*.<sup>134</sup> There, Chief Justice Marshall asked: "Why otherwise does it [the Constitution] direct the judges to take an oath to support it?"<sup>135</sup> This rhetorical question set up an exclamatory crescendo: "How immoral to impose it [the oath] on them [judges], if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!"<sup>136</sup> The threatened immorality here is *the*

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<sup>132</sup> This possibility is discussed in more detail *infra* Section III.C.

<sup>133</sup> See ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 210 (2012) ("[T]he Oath Clause does not distinguish among [government] agents, and does not state that any agent has pride of place regarding constitutional interpretation.").

<sup>134</sup> See 5 U.S. (1 Cranch) 137 (1803).

<sup>135</sup> *Id.* at 180.

<sup>136</sup> *Id.*

*Constitution's*. The argument is that it would be “immoral” for the Constitution to place “knowing” judges in the position of having a legal duty to break their word. Marshall continued: “If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.”<sup>137</sup> A “crime” indeed—but against what law? Not the law of the United States, since Marshall has labeled it a crime not just “to take” but also “[t]o prescribe” a disingenuous oath, and the Oath Clause is part of the Constitution itself. Instead, Marshall was judging the Constitution against a moral law. And that moral law, whatever its own basis and nature, recognized the “solemn” practice of oath-making. In Marshall’s time and ours, to make a disingenuous oath is to do a moral wrong. So *Marbury* went a good distance toward establishing that oath-bound judges—like other oath-bound officials—have a personal moral duty to justify their actions in light of the Constitution. As we have seen, that basic conclusion is correct.<sup>138</sup>

In time, however, *Marbury*’s seminal holding in favor of judicial review of legislation<sup>139</sup> came to be associated with the more aggressive proposition that the oath requires judges to be supreme in matters of constitutional interpretation. *Cooper v. Aaron* invoked this ahistorically broad understanding of *Marbury* when arguing for outright judicial supremacy in matters of constitutional law.<sup>140</sup> After asserting that the meaning of the Constitution is synonymous with the “interpretation . . . enunciated by this Court,” *Cooper* observed that “[e]very state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, ‘to support this Constitution.’”<sup>141</sup> This argument cannot persuasively rest on the Oath Clause alone.<sup>142</sup> To adapt a classic critique of *Marbury*, the mere existence of an oath of office does not necessitate either judicial review or judicial supremacy.<sup>143</sup> In principle, “the

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<sup>137</sup> *Id.*

<sup>138</sup> *Marbury* didn’t address, for example, dead hand objections. *Supra* Section I.B.

<sup>139</sup> 5 U.S. at 177–78.

<sup>140</sup> *Cooper*, 358 U.S. 1, 18 (1958).

<sup>141</sup> *Id.*

<sup>142</sup> Saikrishna B. Prakash and John C. Yoo point out that Marshall also invoked the then-extant statutory oath for judges. Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 917 (2003); see Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 76. For Prakash and Yoo, “the more specific judicial oath indicated the congressional view that federal judges were to decide cases agreeably to (consistent with) the Constitution while discharging their duties.” Prakash & Yoo, *supra*, at 917.

<sup>143</sup> Cf. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789–1888, at 73 (1985) (“[T]he oath ‘must be understood in reference to supporting the constitution, only as far as that may be involved in his official duty; and consequently, if his official

Constitution” might command absolute judicial deference to the political branches on issues of constitutional law, or deprive judges the power to remedy constitutional violations. *Cooper*’s strong claims must therefore rest not on the existence of the oath alone, but rather on the meaning of “the Constitution.”<sup>144</sup>

Rising to that challenge, a defender of judicial supremacy might reason from the oath’s public meaning. This line of argument would concede that the Oath Clause itself does not command a robust conception of judicial supremacy, but nonetheless contend that the contemporary minimum public understanding of “the Constitution” does. *Cooper* itself gestured in that direction when it posited that “the Country” has accepted not just judicial review but judicial supremacy “as a permanent and indispensable feature of our constitutional system.”<sup>145</sup> At least the first part of that claim seems correct. In the public mind, the existence of robust judicial review now seems inseparable from constitutionalism. However, *Cooper*’s overall message of judicial supremacy seems both too sweeping and too confident—perhaps because *Cooper* was itself trying to shape the societal understandings that it purported to observe. Under longstanding practice, judicial review often amounts to little more than a rubber stamp, as with most Fourteenth Amendment challenges to economic regulation under the rational basis test.<sup>146</sup> And, thanks to political question, abstention, and related jurisdictional doctrines, courts sometimes decline invitations to engage in judicial review.<sup>147</sup> These settled practices can sensibly coexist with judges’ promissory obligation to have some account of how their actions comport with the Constitution. Judicial authority is always a contested subject, and courts’ powers and limitations seem equally baked into the public understanding of the Constitution. Judicial supremacists who rely on the oath elide these uncertainties and nuances.

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duty does not comprehend an inquiry into the authority of the legislature, neither does his oath.” (quoting *Eakin v. Raub*, 12 Serg. & Rawle 330, 353 (Pa. 1825))).

<sup>144</sup> See *DeBoer v. Snyder*, the Sixth Circuit’s ruling against a constitutional right to same-sex marriage. 772 F.3d 388, 421 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In dissent, Judge Martha Craig Daughtrey concluded by invoking her judicial oath taken “[m]ore than 20 years ago.” *Id.* at 436 (Daughtrey, J., dissenting) (citing 28 U.S.C. § 453). Adapting *Cooper*’s oath-based argument for judicial supremacy, Judge Daughtrey drew on the modern judicial oath of office to argue that federal courts must actively protect minority-group rights. *See id.* at 436–37; *see also* Diane P. Wood, *Reflections on the Judicial Oath*, 8 GREEN BAG 2d 177, 186 (2005) (“The term ‘all persons’ in that oath means . . . all human beings . . . [a]nd they are entitled to certain rights even if their ideas, or religion, or personal decisions would be unpopular with a majority.”).

<sup>145</sup> 358 U.S. at 18.

<sup>146</sup> *E.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

<sup>147</sup> *See* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 546 (1985).

Rejecting the judicial supremacy of *Cooper*, prominent officials and scholars have invoked the constitutional oath in defending departmental equality in constitutional interpretation.<sup>148</sup> Because Article VI requires not just judges but legislators and executive officials to take the oath, all of those officials might lay equal claim to interpret the Constitution while discharging their offices. President Andrew Jackson advanced this view in objecting to the Bank of the United States: “Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.”<sup>149</sup> In refusing to be bound by the understandings of “others,” Jackson had in mind the Supreme Court’s decision upholding the Bank as constitutional.<sup>150</sup> Elaborating on that point, Jackson’s next sentence went on to posit a general equality among the branches when it comes to matters of interpretation:

It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.<sup>151</sup>

In short, if the oath calls for interpretation of what “the Constitution” is, then (in Jackson’s view) it must do so equally for all persons who take it.

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<sup>148</sup> See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 62–63 (2005) (explaining that “government officials in each branch would swear oaths to abide by the Constitution” and that “such oaths would discourage—by making *dishonorable*—any legislative logrolls involving proposals that either house deemed unconstitutional,” as well as prevent the President “from signing on to a project that he found to violate his personal pledge”); Frank H. Easterbrook, *Presidential Review*, 40 *CASE W. RES. L. REV.* 905, 910, 920 (1990); John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 *CONST. COMMENT.* 69, 110 (2008) (“Formally, no express clause of the Constitution singles out one branch or the other for exclusive responsibility of constitutional assessment. Indeed, members of all branches take an oath to uphold the Constitution.”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 *GEO. L.J.* 217, 257–59 (1994); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 *CORNELL L. REV.* 1021, 1075 (2006) (“Given the oath that Representatives took to uphold the Constitution, an oath that required them to consider the constitutionality of legislation, it is difficult to see how any contrary view [other than departmentalism] was plausible.”).

<sup>149</sup> Andrew Jackson, *Veto Message (July 10, 1832)*, in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897*, at 576, 582 (James D. Richardson ed., Washington, Government Printing Office 1896). Alexander Bickel made this point as part of his critique of judicial review. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 8 (2d ed. 1986) (arguing that the oath “would seem to obligate each of these officers, in the performance of his own function, to support the Constitution”); see also *United States v. Nixon*, 418 U.S. 683, 703 (1974) (“In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others.”).

<sup>150</sup> See *McCulloch v. Maryland*, 17 U.S. 316 (1819).

<sup>151</sup> Jackson, *supra* note 149, at 582. *But see* Pasha v. Gonzales, 433 F.3d 530, 536 (7th Cir. 2005) (Posner, J.) (denying that oaths are “delegations to every subordinate official to indulge his private interpretations of the Constitution”).

Jackson's argument both underestimated and exaggerated the implications of the oath. On the one hand, Jackson underestimated the oath insofar as he suggested that each oath-bound official must support the Constitution "as he understands it." As argued above, the necessary meaning of a promise, including the one created by the oath, is largely defined by its communicative content—that is, by public meaning of "the Constitution" at the time it is taken.<sup>152</sup> This is what makes an oath so different from an appeal to conscience. In conflating obligations of oaths and of conscience, Jackson intimated a solipsistic vision of constitutional duty, whereby each official can act based on his or her own inner sense of what "the Constitution" must mean.

On the other hand, Jackson exaggerated the implications of the oath insofar as he suggested that the text or public understanding of "the Constitution" required the departmental equality he imagined. As explained in Part I, the oath obliges each official to justify her actions in light of "the Constitution." In that important sense, the oath does call for a thin form of departmentalism. But the mere act of taking an oath cannot in itself dictate whether the Constitution entails any particular distribution of interpretive authority.<sup>153</sup> For example, officials might conscientiously abide by their oaths by deferring extensively to the constitutional views of others. Whether that approach is morally correct turns not on the mere fact of having taken an oath but rather on the oath's content. And, again, the content of the relevant oath is the contemporaneous public meaning of "the Constitution." Jackson's argument for departmentalism thus suffers the same basic problem as *Cooper's* claim of judicial supremacy: it cites the oath, but does not mine the public meaning of "the Constitution." If anything, proponents of departmental equality are in a weaker position, since they espouse a less widely accepted position and so are even less able to assert a consensus public understanding in their favor.

Then there is the controversial and now relatively marginal notion of executive interpretive supremacy, which posits that the President has a uniquely expansive constitutional authority.<sup>154</sup> This primacy is often traced

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<sup>152</sup> See *supra* Section II.A.

<sup>153</sup> Cf. David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 121 (1993) ("An oath to uphold the Constitution raises—but does not answer—the question: what does the Constitution require?").

<sup>154</sup> This view is today most closely associated with President Nixon, who famously commented that if the President does something, then it is legal. See *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 19, 1977, at A16 (interview by David Frost). In addition, during oral argument in *United States v. Nixon*, Nixon's attorney suggested that the President might not have felt bound by any judgment by the Court—though Nixon in fact promptly complied with the Court's order. See Alexander & Schauer, *supra* note 101, at 1364. Some proponents of departmental equality have suggested in asides that, given the presidential oath, executive supremacy is

to the President's special Article II oath, which (unlike the general Article VI oath for all federal and state officers) is provided for in so many words and even set off by quotation marks:

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."<sup>155</sup>

Does the President's promise to "preserve, protect, and defend" demand something more than every other officer's duty of "support"?<sup>156</sup> Perhaps the Article VI oath calls for a bilateral promisor–promisee relationship with the public, whereas the Article II oath presumes a trilateral dynamic in which the President and the public must reckon with a third party that endangers the constitutional order. This disparity is somewhat mitigated, however, by various statutory oaths that implement Article VI through language more closely resembling the Article II oath.<sup>157</sup>

More generally, the fact that the Constitution specifies the presidential oath, and does so with such emphatic language, indicates that the President's promise may be especially demanding and unyielding, as compared with the more generic oaths of other officials.<sup>158</sup> And, on the

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as plausible as judicial supremacy. See Easterbrook, *supra* note 148, at 920; Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1262 (2004).

<sup>155</sup> U.S. CONST. art. II, § 1, cl. 8. Interestingly, vice presidents may not be constitutionally required to take an oath, since their office isn't mentioned in either the Article II Presidential Oath Clause or the Article VI Oath Clause. See Seth Barrett Tillman, *Why Our Next President May Keep His or Her Senate Seat: A Conjecture on the Constitution's Incompatibility Clause*, 4 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 32 n.79 (2009) (noting that perhaps the Vice President is "a *sui generis* figure, one to whom the Article VI oath does not clearly apply, nor does any other separate constitutional oath (as with the President)"). Alternatively, the Vice President may be covered by the Oath Clause as an executive officer or, as "President of the Senate," a Senator. U.S. CONST. art. I, § 3.

<sup>156</sup> Cf. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 315 (2d ed. 1997) (positing that the presidential oath's relatively elaborate language rests on the "inarticulate premise that the life of the nation hangs on the preservation of the Constitution"); David M. Driesen, *Toward A Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 86 (2009) ("This locution includes a duty to obey the Constitution, but it implies a broader duty to try to prevent others from undermining it through maladministration of the law."); Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 83 (2007) ("[T]he oath may require more than avoiding constitutional violations and may require a defense of the Constitution, regardless of the source of the threat."); Alexander J. Kasner, Note, *National Security Leaks and Constitutional Duty*, 67 STAN. L. REV. 241, 256, 269 n.161 (2015) (discussing historical sources).

<sup>157</sup> For example, the statutory oath for federal officers, including legislators, includes the phrase: "support *and defend* the Constitution of the United States *against all enemies*, foreign and domestic." 5 U.S.C. § 3331 (2012) (emphases added).

<sup>158</sup> For example, President Andrew Jackson once asserted that the President's constitutional duty "would indeed have resulted from the very nature of his office"; still, "by thus expressing it in the official oath or affirmation, which in this respect differs from that of any other functionary, the [F]ounders of our Republic have attested their sense of its importance and have given to it a peculiar



theory that obligation should not outpace capacity, the President's unique responsibilities may suggest comparably unique powers.<sup>159</sup> The august presidential oath ceremony has certainly reinforced that perception and public expectation.<sup>160</sup> Still, the President's promise does not in itself dictate any special relationship between the "Office of President" and any other office. Article II simply does not spell out what the President must "faithfully execute" or how the President should understand the Constitution.<sup>161</sup> And, again, attention to public understandings, including the public's general acceptance of judicial review, cuts against the executive supremacy.

Finally, the oath is sometimes raised in support of legislative supremacy, though these claims tend to be far more modest than the positions discussed above.<sup>162</sup> For instance, the Supreme Court regularly affords federal and state statutes "a presumption of constitutionality" and so strives to avoid holdings of unconstitutionality.<sup>163</sup> As the Court has said, "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States."<sup>164</sup>

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solemnity and force." Andrew Jackson, *Protest (Apr. 15, 1834)*, in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 69, 70 (James D. Richardson ed., Washington, Government Printing Office 1899).

<sup>159</sup> See *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 310 (1972) (noting "that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to 'preserve, protect, and defend the Constitution of the United States'" and that "[i]mplicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means"); Edward Bates, *Suspension of the Privilege of the Writ of Habeas Corpus*, 10 Op. Att'y Gen. 74, 82 (1861) ("All the other officers of the Government are required to swear only 'to support this Constitution,' while the President must swear to 'preserve, protect, and defend' it, which implies the power to perform what he is required in so solemn a manner to undertake."); see also Paulsen, *supra* note 154, at 1263 & n.14 (discussing the foregoing authorities and arguing that "[i]t would have made little sense for the Framers to have imposed on the President a constitutional duty that he did not have the constitutional power to fulfill").

<sup>160</sup> Cf. EDWARD DUMBAULD, *THE CONSTITUTION OF THE UNITED STATES* 275–76 (1964) (suggesting that the presidential oath is "for the most part a ceremonial formality" in that the inauguration is "an important social occasion" and the oath "itself adds nothing to the President's powers").

<sup>161</sup> See William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 310 (2011) ("The faithful-execution half of the oath simply requires the President to execute his office. That office is defined by the Constitution (and perhaps by implementing statutes).").

<sup>162</sup> For example, Justice Scalia invoked the oath to argue that the Court should absolutely defer to Congress's designation of where a bill has originated for purposes of the Origination Clause. See *United States v. Munoz-Flores*, 495 U.S. 385, 409 (1990) (Scalia, J., concurring in the judgment) ("The President, after all, is bound not to sign an improperly originated . . . bill by the same oath that binds us not to apply it . . ." (emphasis omitted)).

<sup>163</sup> E.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing the limits of the "presumption of constitutionality" afforded to federal economic legislation).

<sup>164</sup> *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981); see also *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) ("The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one . . ."); Nat'l

Therefore, “we must have due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government.”<sup>165</sup> This reasoning has also undergirded the avoidance canon, whereby the Court creatively interprets Congress’s handiwork so as to protect it from invalidation. Most recently, in *Northwest Austin Municipal District v. Holder* the Court cited the oath while aggressively reinterpreting part of the Voting Rights Act (VRA).<sup>166</sup> The argument, at least on the surface, was that the Court should do summersaults to respect Congress’s considered, oath-bound judgment regarding the VRA’s constitutionality.

As these examples indicate, salient arguments for legislative supremacy are typically far more modest and nuanced than equivalent arguments for judicial supremacy or departmental equality. That nuance allows legislative supremacy to more closely capture current doctrine and practice but cannot be extracted from the Oath Clause alone. Instead, the Court’s picture of limited legislative supremacy is best taken as a reminder that *any* division of interpretive authority must be constructed in light of the Constitution’s public meaning at the time each official’s oath is taken.<sup>167</sup>

Perhaps a promise to support the Constitution does convey a consensus norm of separated interpretive powers. But, if so, that norm must be quite subtle and reticulated, since it would have to accommodate each of the mutually inconsistent conceptions of separated powers outlined above—all of which (with the possible exception of presidential supremacy) have significant contemporary public support. As a purported consensus on these topics becomes more clear-cut, it also becomes less likely to be a true consensus.

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*Endowment for the Arts v. Finley*, 524 U.S. 569, 604 n.3 (1998) (Souter, J., dissenting) (arguing that “Members of Congress must take an oath or affirmation to support the Constitution, and we should presume in every case that Congress believed its statute to be consistent with the constitutional commands” (citation omitted)); *Knox v. Lee*, 79 U.S. 457, 531 (1870) (“A decent respect for a coordinate branch of the government demands that the judiciary should presume . . . that there has been no transgression of power by Congress” because “all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule.”); *supra* note 3 (discussing *Illinois v. Krull*, 480 U.S. 340 (1987)).

Sometimes, the oath is cited as a reason for the Court to ascribe special force to longstanding legislative practices. *E.g.*, *INS v. Chadha*, 462 U.S. 919, 977 (1983) (White, J., dissenting) (“I find it incomprehensible that Congress, whose Members are bound by oath to uphold the Constitution, would have placed these mechanisms in nearly 200 separate laws over a period of 50 years.”).

<sup>165</sup> *Edwards v. Aguillard*, 482 U.S. 578, 618–19 (Scalia, J., dissenting) (quoting *Rostker*, 453 U.S. at 64); *see also* *Printz v. United States*, 521 U.S. 898, 956 n.17 (1997) (quoting the same language).

<sup>166</sup> 557 U.S. 193, 203–05 (2009) (quoting *Rostker*’s argument from the oath, 453 U.S. at 64).

<sup>167</sup> *See supra* Section II.A.

2. *Interpretive Federalism.*—The Framers’ primary purpose in adding the Oath Clause was likely to ensure that even the most parochially minded state officers would feel “bound” to the federal Constitution.<sup>168</sup> In that important respect, the Framers succeeded. For the reasons above, the act of promising to “support” the Constitution has the same moral force, and serves the same coordinating function, for state as well as federal officers. So at its inception, the Oath Clause demanded, and helped foster, the inclusion of state officers in a national community of constitutional interpreters.<sup>169</sup> This all may seem banal today, but it had major consequences—and was hardly taken for granted—during the nation’s early years. This sensitive issue reemerged in the wake of the Civil War, when Congress chose in Section 3 of the Fourteenth Amendment to bar from state and federal office all previously oath-bound officials who had joined the Confederacy.<sup>170</sup> This provision recognized that officers had committed a distinctive and more serious wrong, as compared with other citizens.<sup>171</sup>

Since the founding of the nation, however, the oath’s evenhanded applicability to state and federal officers has been cited as part of the “parity” debate—that is, the debate over the interchangeability of federal and state courts.<sup>172</sup> A famous example appears in *Martin v. Hunter’s Lessee*, which established the Supreme Court’s ability to review state court judgments.<sup>173</sup> One argument against such review was that it was unnecessary, since “state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity.”<sup>174</sup> The Court, per Justice Story, “very cheerfully” agreed with the premise of that argument, but found its conclusion overcome by the Constitution’s apparent reluctance to trust state courts on

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<sup>168</sup> See THE FEDERALIST NO. 27 (Alexander Hamilton) (“[A]ll officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath.”); *id.* NO. 44 (James Madison) (arguing that “the State magistracy should be bound to support the federal Constitution” in part because “[t]he members and officers of the State governments . . . will have an essential agency in giving effect to the federal Constitution”).

<sup>169</sup> See AMAR, *supra* note 58, at 206 (pointing out that the Articles of Confederation did not require all judges “to take an oath to support the Articles,” much less to hold them as supreme over state law).

<sup>170</sup> U.S. CONST. amend. XIV, § 3.

<sup>171</sup> See AMAR, *supra* note 148, at 394 n.\* (explaining that “section 3 of the Fourteenth Amendment rendered certain Confederate officials who had betrayed antebellum loyalty oaths ineligible to serve in Congress, federal office, or state government unless two-thirds of each congressional house voted to lift the ineligibility”); Re & Re, *supra* note 46, at 1623.

<sup>172</sup> See generally RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 299–303 (7th ed. 2015) (discussing various classic views on the parity debate).

<sup>173</sup> 14 U.S. 304 (1816).

<sup>174</sup> *Id.* at 346.

matters touching federal jurisdiction and by the need for uniform interpretation.<sup>175</sup> Later decisions consolidated this compromise view, whereby the Court trusts—but also stands ready to verify—that state judges are fulfilling their oaths.<sup>176</sup> Having established that federal courts can review state court judgments, the Court has gone on to cite the oath as a reason to defer to state courts. For example, the Court argued from the oath in *Brecht v. Abrahamson*, which established that a lax harmless error standard applied in federal habeas corpus review.<sup>177</sup> And the *Bush v. Gore* dissenters cited the oath as a reason to respect the Florida Supreme Court’s reading of Florida election law.<sup>178</sup>

The oath’s role in the parity debate illustrates both the intuitive power and the limits of promissory obligation. On the one hand, the Court has repeatedly viewed the oath as a significant constraint on state courts. Promises matter, and officers tend to take them seriously.<sup>179</sup> That point is relevant to the extent that parity skeptics worry that state judges might act in bad faith, deliberately failing to support “the Constitution” as they understand it.<sup>180</sup> On the other hand, the oath’s ability to foster parity turns in large part on whether state and federal courts have the same understanding of “the Constitution,”<sup>181</sup> and it is anxiety on that point that occupies many parity skeptics. Further, even well-intentioned promisors who intend to

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<sup>175</sup> See *id.* at 346–48.

<sup>176</sup> In a still-cited 1884 decision, for example, the Court announced:

Upon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof . . . for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it . . . . If they fail therein, . . . the party aggrieved may bring the case from the highest court of the State in which the question could be decided to this court for final and conclusive determination.

*Robb v. Connolly*, 111 U.S. 624, 637 (1884); see also *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 891 (2009) (Roberts, C.J., dissenting) (“All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”).

<sup>177</sup> 507 U.S. 619, 636, 638 (1993) (“Absent affirmative evidence that state-court judges are ignoring their oath, we discount petitioner’s argument that courts will respond to our ruling by violating their Article VI duty to uphold the Constitution.” (citing *Robb*, 111 U.S. at 637)); see also *Sumner v. Mata*, 449 U.S. 539, 549 (1981) (“State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted, all are not doing their mortal best to discharge their oath of office.”).

<sup>178</sup> 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting) (“There is no cause here to believe that the members of Florida’s high court have done less than ‘their mortal best to discharge their oath of office . . . .’” (quoting *Mata*, 449 U.S. at 549)).

<sup>179</sup> For another example of the Court using the oath to undergird empirical claims, see *supra* note 3 (discussing *Krull* and the exclusionary rule).

<sup>180</sup> See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1119 (1977) (rejecting the “notion that acknowledging a comparative advantage to federal courts need imply that state trial judges violate their oaths by consciously refusing to enforce federal rights”).

<sup>181</sup> See *supra* note 83 (discussing possibility of multiple interpretive communities).

fulfill their obligations can fail to do so, including because they make mistakes, and that possibility, too, forms a large portion of the literature criticizing the parity thesis.<sup>182</sup> The fact that state judges take the oath, then, has only limited relevance to the parity debate. On balance, the oath does not make state courts significantly more or less worthy of deference than other officers who take the oath, such as federal legislative or executive branch officials. The degree to which any of these oath-bound officers possesses interpretive authority must depend on factors that lie outside the Oath Clause.

The Court's most extensive recent debate over interpretive federalism appeared outside the parity debate in the anticommandeering decision *Printz v. United States*.<sup>183</sup> The basic question in *Printz* was whether the federal government could direct state executive officials to implement a federal program.<sup>184</sup> The dissenters argued that, in taking the oath, state officers become *more* subject to federal regulation than the average citizen.<sup>185</sup> The dissenters also pointed to historical sources, particularly Hamilton's Federalist No. 27, which noted (with emphasis in the original) that "all officers, legislative, executive, and judicial in each State will be bound by the sanctity of an oath"<sup>186</sup> and, therefore, those officers "will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*."<sup>187</sup> Leading commentators agree that Hamilton meant to endorse federal commandeering.<sup>188</sup> But that position turned not on the oath itself, but rather on Hamilton's view of how far Congress's "constitutional authority extends." Whatever its other errors, the *Printz* majority at least got this point right: invoking the oath only "brings us back to the question . . . whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution."<sup>189</sup>

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<sup>182</sup> See FALLON ET AL., *supra* note 172, at 299–303.

<sup>183</sup> 521 U.S. 898 (1997).

<sup>184</sup> *Id.* at 902.

<sup>185</sup> *Id.* at 942–43 (Stevens, J., dissenting).

<sup>186</sup> THE FEDERALIST NO. 27 (Alexander Hamilton); see *Printz*, 521 U.S. at 971 (Souter, J., dissenting) (quoting THE FEDERALIST NO. 27).

<sup>187</sup> See *Printz*, 521 U.S. at 947 (Stevens, J., dissenting) (quoting THE FEDERALIST NO. 27).

<sup>188</sup> See, e.g., Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 YALE L.J. 1104, 1133–38 (2013) (discussing the Oath Clause and commandeering).

<sup>189</sup> See *Printz*, 521 U.S. at 925 (responding to the dissent's argument regarding the Oath and Supremacy Clauses).

In sum, the oath helps create, intensify, and bound constitutional obligation. Even without establishing a particularized conception of “the Constitution” or, relatedly, of how to distribute interpretive authority throughout the government, the oath provides officials a normative basis and guidepost for constitutional reasoning.

### III. PROMISE-BREAKING, OR THE LIMITS OF CONSTITUTIONAL FIDELITY

The oath suggests limits on constitutional fidelity: once an official’s personal reasons for promissory fidelity expire, so too might the official’s duty to adhere to the Constitution.<sup>190</sup>

#### A. *When Promises Run Out*

Viewing constitutional obligation as a kind of promise implies that the Constitution’s moral force is not absolute, but limited. Of course, a promise should not be dispensed with simply because the promisor prefers to do so. And because a promise is a real, even if psychological, constraint, the Constitution is correct to say that someone who submits to the oath is “bound” by it.<sup>191</sup> In many instances, that bond will obligate officials to take action that would otherwise seem pointless, undesirable, or even counterproductive. Yet it would be too much to say that the oath imposes an unconditional duty. While we have seen that the oath has public support, democratic legitimacy does not translate into boundless moral authority, and even solemn promises may have to be broken in emergencies.<sup>192</sup> So while the oath can be viewed as an “exclusionary reason,” in that it entirely precludes consideration of certain types of reasons, including nonmoral preferences,<sup>193</sup> few would view the oath as excluding *all* reasons other than

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<sup>190</sup> Some commentators suggest that officials can escape the oath through resignation, but one cannot resign from a promise. Rather, the oath may: demand resignation when staying on would entail a constitutional violation; permit resignation when constitutional factors are in equipoise; or prohibit resignation when an incumbent official has a distinctive ability or intention to support the Constitution and thereby mitigate others’ constitutional violations. See Schauer, *Questions*, *supra* note 22, at 102 (“Assuming that you do have positional obligations, and assuming that they are overridden by general moral obligations, it does not seem to follow that resignation is morally necessary.”).

<sup>191</sup> U.S. CONST. art. VI, cl. 3; see also *supra* note 3 (discussing *Krull*).

<sup>192</sup> See, e.g., W.D. ROSS, *THE RIGHT AND THE GOOD* ch. 2 (Philip Stratton-Lake ed., 1930) (providing a classic account of the defeasible imperative to fulfill promises).

<sup>193</sup> See J. Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOUR OF H. L. A. HART* 210, 228 (P.M.S. Hacker and J. Raz eds., 1977). For instance, the oath might absolutely prohibit official action that defies “the Constitution” based on self-interested political considerations. In his sophisticated study of this subject, Jeffrey Brand-Ballard agrees that “[w]hen a judge swears his oath, he promises that he will fulfill his judicial duties in every case that he decides,” and further contends that this promissory obligation simply excludes nonmoral considerations, such as laziness, self-advancement, and other personal preferences. JEFFREY BRAND-BALLARD, *LIMITS OF*

legal reasons. So the oath may sometimes allow nonlegal reasons to overcome legal ones.

This line of reasoning suggests that officials' duty to adhere to legal rules is qualified in that the moral force behind those rules is not always morally decisive, even for officials bound to apply them. After all, there are many plausible reasons for thinking that promises are binding, and those differences might lead officials to disagree as to the limits of their promissory obligations. A consequentialist, for instance, might deviate from the oath when doing so is sure to produce vastly greater happiness over time.<sup>194</sup> By contrast, a religious or deontological promisor might steadfastly adhere to her oath, no matter the cost.<sup>195</sup> As these examples illustrate, the very same words read in the very same time and context might have radically varying claims to allegiance, depending on the reader's personal views of fidelity. So to know what officials ought to do in light of their oaths, it is insufficient to know what the Constitution is. It is also important to know about the practice of promise-keeping. In this sense, the nature of promissory obligation critically informs the practical import of the Constitution.

In some instances, an official's view of promising can be of even greater practical import than her view of the Constitution itself. To illustrate this point, imagine two hypothetical judges named Antonin and Anthony. Judge Antonin thinks that "the Constitution" refers to a rigidly defined set of historical meanings and practices. By contrast, Judge Anthony thinks that "the Constitution" represents a set of rather ambiguous values entrusted to posterity. Based on this description, it is tempting to assume that Antonin will adhere to an inflexibly static jurisprudence, whereas Anthony's decisions will be more impressionistic and open to change. After all, Antonin's view of "the Constitution" is far more

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LEGALITY: THE ETHICS OF LAWLESS JUDGING 143–47 (2010). But Brand-Ballard's narrow view of promissory obligation is questionable. If someone promises not to give to a worthy charity, for example, that promise might exclude or outweigh moral reasons for giving to that charity. *See supra* notes 42, 50 and accompanying text.

<sup>194</sup> *See* Fallon, *supra* note 25, at 1850 ("If upholding a previously unrecognized right would likely trigger a public backlash, more harmful than helpful to the interests that the right would be crafted to protect, the anticipated consequences provide a morally relevant reason for a court to stay its hand."); Elinor Mason, *We Make No Promises*, 123 PHIL. STUDIES 33, 44 (2005) (arguing that "any attempt to justify the practice of promising must end up relying on utilitarian considerations").

<sup>195</sup> *See, e.g.*, IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 14–15 (James W. Ellington trans., 3d ed. 1993) (1785). Providing a juridical example, Justice Story concluded that the oath demanded that he: "do my duty as a [j]udge, under the Constitution and the laws of the United States, be the consequences what they may. That Constitution I have sworn to support, and I cannot forget or repudiate my solemn obligations at pleasure." Letter from Joseph Story to Ezekiel Bacon, *supra* note 23, at 430–31. For treatment of this epochal tension between law and morality, including judges' invocation of the oath, see ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 149–58 (1975).

determinate than Anthony's. But if Antonin's commitment to "the Constitution" is mediated by a flexible theory of promise-keeping, he might turn out to be eager to bend or abandon his fixed notion of "the Constitution" in light of other interests. And, conversely, Anthony may believe that his oath to uphold "the Constitution" is ironclad, making almost all other interests beside the point. Given all this, it might turn out that Antonin is the dynamic jurist whereas Anthony is more static—even though their views of "the Constitution" would suggest precisely the opposite.

Constitutional litigation and scholarship generally focus on what the Constitution is or commands. Yet those subjects do not come close to exhausting the range of factors relevant to the practical content of constitutional obligation. In addition to knowing about the Constitution, it is also critically important to understand the moral reasons for officials' allegiance to the Constitution.<sup>196</sup>

### B. *Precedent as Promising*

In the eyes of many jurists and commentators, precedent is not a product of constitutional fidelity, but rather a pragmatic "exception" to it.<sup>197</sup> The oath points toward a more nuanced view: precedent is largely a function of officials' promissory obligations.<sup>198</sup>

Start with the prominent theory that promissory duty is simply an instantiation of the more general obligation not to cause harm.<sup>199</sup> On this view, promises are generally binding because the violation of a promise harms promisees. But when the fulfillment of a promise actually causes promisees greater harm, then promissory obligation subsides. This view of promising tracks prominent theories of precedent. Indeed, officials from James Madison to Antonin Scalia have offered similar reasoning in highlighting stability as a reason for adhering to admittedly erroneous precedent.<sup>200</sup> And the modern Court has likewise pointed to harm avoidance

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<sup>196</sup> For an example, see *infra* text accompanying note 213 (discussing Lincoln).

<sup>197</sup> *E.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 414 (2012) ("[Precedent] is an exception to textualism (as it is to any theory of interpretation) born not of logic but of necessity.").

<sup>198</sup> In a similar vein, Joseph Raz has cast promises (partly) as exclusionary reasons and argued that while "[p]eople have an obligation to keep their promises," the "presence of reasons of a certain kind will justify breaking a promise." JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 140 (1975). As Raz pointed out, this picture of promissory duty is comparable to *stare decisis* within common law courts, which have authority to overrule or change precedent but "only for certain kinds of reasons." *Id.*

<sup>199</sup> *See, e.g.*, DWORKIN, *supra* note 31, at 304.

<sup>200</sup> *See, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 139 (1997) ("The whole function of [precedent] is to make us say that what is false under proper analysis must nonetheless be held true, all in the interest of stability."); Letter from James Madison to



as perhaps the dominant reason for adhering to erroneous precedent.<sup>201</sup> These pragmatic appeals to consequences may seem out of place for those who trace constitutional fidelity to a historical document, as opposed to modern case law.<sup>202</sup> As Senator Sam Ervin colorfully put it in 1967, “I have taken an oath to uphold the Constitution, not the mental aberrations of Supreme Court Justices.”<sup>203</sup> But if officials’ promissory obligations are grounded in a principle of harm avoidance, then attention to consequences would make sense under *any* view of “the Constitution.” While pragmatic theories of promissory obligation usually counsel constitutional fidelity, those theories would point the other way when fidelity threatens extraordinary harm.

Yet promising is often thought to be about more than just harm avoidance, and the law of precedent reflects those other strands of promissory reasoning as well. Under conventionalist theories, failing to discharge a promissory obligation is unfair for much the same reason that free riding is unfair: because it simultaneously exploits and diminishes a shared social resource—namely, the reliability of promises.<sup>204</sup> On this view, each explicit promise can be understood as having an added promissory subtext. Not only does the promisor explicitly commit herself to fulfilling the substance of her specific promise, but she also implicitly commits herself to maintain, or at least not subvert, the larger social institution of promising. One objection to conventionalist theories is that no single violation of a promise is likely to undermine the institution of promising. But promises sometimes take on special weight, and violating a promise in those instances can have unusual import. As to a particular individual, for instance, a single promise of sufficient solemnity can be of such

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Mr. Ingersoll, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 183–85 (Philadelphia, J.B. Lippincott & Co. 1831) (“[I]s not the judge under the same oath [as a legislator] to support the law? Yet, has it ever been supposed that he was required or at liberty to disregard all precedents, however solemnly repeated and regularly observed, and, by giving effect to his own abstract and individual opinions, to disturb the established course of practice in the business of the community?”).

<sup>201</sup> *E.g.*, *Payne v. Tennessee*, 501 U.S. 808, 827–28 (1991) (emphasizing both reliance and workability).

<sup>202</sup> See Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL’Y 23, 24 (1994); see also Amar, *supra* note 101, at 83 (arguing that the Constitution “explicitly obliges all officials to swear oaths to the document, not to conceded misinterpretations of it”); *supra* note 88.

<sup>203</sup> *Civil Rights Act of 1967: Hearings on S. 1026, S. 1318, S. 1359, S. 1362, S. 1462, H.R. 2516, and H.R. 10805 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 90th Cong. 298 (1967) (statement of Senator Samuel James Ervin); see also *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (arguing that a judge “remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it” (quoting William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949))).

<sup>204</sup> See Niko Kolodny & R. Jay Wallace, *Promises and Practices Revisited*, 31 PHIL. & PUB. AFF. 119, 119–20 (2003) (discussing practice-based accounts of promising and proposing hybrid view); RAWLS, *supra* note 30, at 305–06.

consequence that a failure to adhere to it might permanently discredit the promisor.<sup>205</sup> In that scenario, the promisor would have done more than simply fail to live up to an articulated promise. In addition, the promisor would have squandered his ability to make future promises and perhaps even degraded the institution of promising—to everyone’s disadvantage. Think of the proverbial boy who cried wolf, whose past lies prevented him (and others?) from credibly rallying opposition to actual wolves.

The Supreme Court’s famous decision in *Planned Parenthood v. Casey*<sup>206</sup> supplies an example of how conventionalist insights already operate within the law of stare decisis. To simplify the situation, in *Casey* the Court was asked to overturn *Roe v. Wade*<sup>207</sup> and thereby eliminate the constitutional right to abortion. The Court chose to sustain the “essential holding” of *Roe*, in part for reasons of harm avoidance of the type discussed above.<sup>208</sup> For instance, *Roe* had established a workable doctrinal rule, and many people had come to rely on it.<sup>209</sup> But instead of resting on harm avoidance, *Casey* went on to characterize *Roe*’s guarantee of a right to abortion as a promise in its own right. According to *Casey*, *Roe*’s “promise of constancy, once given, binds its maker.”<sup>210</sup> The Court repeatedly emphasized “the obligation of this promise.”<sup>211</sup> The concern here is that, if such an important precedential promise as *Roe* were overturned, then the Court might lose its capacity to enter into any reliable promises in the future. The Court made this point by explicitly comparing itself with an individual promisor: “Like the character of an individual, the legitimacy of the Court must be earned over time.”<sup>212</sup> If the Court violated a major promise, it might become significantly less reliable as a precedential promisor—and its ability to function within the separation of powers would be significantly undermined, rendering all constitutional law that much more vulnerable. So to fulfill its promise to “the Constitution” writ large,

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<sup>205</sup> See, e.g., HUME, *supra* note 76, at 350–51 (“When a man says *he promises any thing*, he in effect . . . subjects himself to the penalty of never being trusted again in case of failure.” (emphasis added)).

<sup>206</sup> 505 U.S. 833 (1992).

<sup>207</sup> See *id.* at 844 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

<sup>208</sup> See *Casey*, 505 U.S. at 845–46, 854–61.

<sup>209</sup> See *id.* at 855–56; see also *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (emphasizing the importance of reliance considerations for stare decisis).

<sup>210</sup> *Casey*, 505 U.S. at 868. Echoing promissory notions of changed circumstances, *Casey* also disapproved deviation from a precedential “promise” when the Court’s “understanding of the issue has not changed so fundamentally as to render the commitment obsolete.” *Id.*; cf. FRIED, *supra* note 82, at ch. 2 (discussing role of changed circumstances in excusing imposition of reliance harms).

<sup>211</sup> *Casey*, 505 U.S. at 868; see also *id.* at 876 (discussing “*Roe*’s own promise that the State has an interest in protecting fetal life or potential life”).

<sup>212</sup> *Id.* at 868.

the Court felt that it also had to keep, or at least not blatantly violate, its promise in *Roe*.

Similar promissory reasoning appears in President Abraham Lincoln's "Message to Congress" near the start of the Civil War.<sup>213</sup> In a famous passage, Lincoln sought to justify his decision to suspend the writ of habeas corpus and undertake other potentially unlawful emergency actions at the commencement of hostilities. As Lincoln himself recognized, his actions had been undertaken without legislative authorization and, therefore, "without resort to the ordinary processes and forms of law."<sup>214</sup> Lincoln's many critics argued "that one who is sworn to 'take care that the laws be faithfully executed' should not himself violate them."<sup>215</sup> But Lincoln recognized that his "sworn" obligation weighed on both sides of the issue: "To state the question more directly, are all the laws, *but one*, to go unexecuted and the government itself go to pieces, lest that one be violated?"<sup>216</sup> Lincoln's rhetorical question arguably assumes a kind of constitutional consequentialism, where each "unexecuted" law counts equally against a particular course of action. Yet Lincoln's question also raises a more fundamental worry—namely, that only by transgressing his oath in one instance could *the institution* of the oath be preserved. As Lincoln put it in his next sentence: "[W]ould not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"<sup>217</sup> This is not just a question about the comparative magnitude of two potential violations. Rather, this is a question about whether "the Government should be overthrown," leaving "the official oath" truly "broken" beyond repair. Lincoln's point resembles the one raised in *Casey*: in adhering to a general promise of constitutional fidelity, an official can become incapable of discharging any promise at all. So in addition to considering arguments from the meaning of the Constitution, Lincoln considered arguments rooted in the nature of promissory obligation.

Viewing precedents as promises also sheds light on what might be called "persistent dissent"—that is, an individual Justice's avowed willingness to discount, but not categorically ignore, the precedential force

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<sup>213</sup> Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421 (Roy P. Basler ed., 1953).

<sup>214</sup> *Id.* at 429.

<sup>215</sup> *Id.* at 430.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

of decisions from which the Justice personally dissented.<sup>218</sup> This phenomenon resembles the “persistent objector” doctrine in international law, whereby immediate and abiding objections to emerging international norms are thought to relieve sovereign nations of otherwise binding international duties.<sup>219</sup> Likewise, a jurist’s public act of repudiating a precedent at the time of its instantiation may provide a special degree of moral immunity from the precedent.

To explore persistent dissent, consider three ways in which judicial decisions might generate promissory obligations:

(1) Judicial precedents can become so closely associated with “the Constitution” that they form part of the public meaning of the oath.<sup>220</sup> For any given official, this possibility is limited to salient judicial decisions that predate the official’s oath.

(2) The oath’s public meaning might incorporate a principle of stare decisis, thereby committing officials to adhere to authoritative judicial decisions.<sup>221</sup> This logic can apply to judicial decisions that either pre- or post-date any given official’s oath.

(3) A judge’s act of joining a precedential decision could be viewed as a new promise to abide by that decision.<sup>222</sup> This can occur only for new decisions that a judge joined *after* her oath.

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<sup>218</sup> See Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 447–48 (2008); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1721 n.70 (2013) (collecting examples). For example, in *Coleman v. Court of Appeals of Maryland*, Justices Ginsburg and Breyer engaged in persistent dissent on a specific point, while Justices Sotomayor and Kagan accepted the relevant precedent, which predated their tenure. 132 S. Ct. 1327, 1339 n.1 (2012) (Ginsburg, J., dissenting) (persisting in dissenting from precedents such as *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)).

<sup>219</sup> See JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 28 (8th ed. 2012).

<sup>220</sup> For example, in *Dickerson v. United States*, 530 U.S. 428 (2000), the Court declined to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in part because “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.” 530 U.S. at 443; see also Ronald Steiner et. al., *The Rise and Fall of the Miranda Warnings in Popular Culture*, 59 CLEV. ST. L. REV. 219, 220 n.8, 236 (2011) (discussing polls from 1984 and 1991 respectively showing that 93% of Americans “knew that they had a right to an attorney” upon arrest and that 80% “knew that they had a right to remain silent” (first citing Jeffrey Toobin, *Viva Miranda*, NEW REPUBLIC, Feb. 16, 1987, at 11–12; and then citing SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950–1990*, at 51 (1993)).

<sup>221</sup> Consider Chief Justice Hughes’s famous statement that “the Constitution is what the judges say it is.” Governor Charles Evans Hughes, Speech Before the Elmira Chamber of Commerce (May 3, 1907). Or take Justice Frankfurter’s equivalent statement: “Undoubtedly the Constitution is what the Supreme Court interprets it to be.” Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 683 (1916).

<sup>222</sup> E.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 868 (1992) (casting major judicial decisions as “promises”); *Payne v. Tennessee*, 501 U.S. 808, 842 (1991) (Souter, J., concurring) (supporting the overruling of a precedent that “promises more than it can deliver” and represented a “false promise”); cf. FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO*

These three views of the relationship between promissory obligation and precedent might be called precedent's "promissory pathways."

The distinct limitations associated with these three types of promissory duty supply a plausible basis for persistent dissents. When a Justice engages in persistent dissent, the first promissory pathway would not apply: a decision from which a particular Justice dissented could not possibly have formed part of the background meaning of "the Constitution" when the Justice took her own oath. Likewise, the third promissory pathway would not apply, since a dissenting Justice would not have endorsed the majority decision. Only the second promissory pathway might apply, since a general duty to follow authoritative case law would apply to all the Court's decisions. And even that pathway might be questionable, since the precedential decision at issue could have issued in defiance of applicable change rules, such as rules of precedent and stare decisis.<sup>223</sup> The upshot is that—for those who subscribe to all three promissory pathways above—the promissory basis for stare decisis may be significantly weakened with respect to judicial decisions from which the judge herself dissented. Thus, persistent dissenters might plausibly assert a special degree of moral freedom: they can either continue to oppose the legal rule at issue, or they can accept the disputed rule and undertake a new promissory commitment to it.

### C. Revision, or Revolution

Can someone who has taken an oath to the Constitution ethically work to change it, such as by supporting a constitutional amendment?<sup>224</sup> At first,

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LEGAL REASONING 179 (2009) ("When a court provides a reason for a decision, therefore, it can be thought of as entering into a social practice not unlike the social practice of promising."); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 649 (1995) ("[J]ust as making a promise induces reasonable reliance, giving a reason creates a prima facie commitment on the part of the reason giver to decide subsequent cases in accordance with that reason."). A precedent is best viewed as a conditional promise, or a promise subject to reserved options defined by stare decisis. See *supra* note 198 (discussing Raz's views on this point); cf. Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1461 (2013) ("Precedents are not promises, and when the Court chooses to overturn a prior decision, it does nothing more than exercise an option that it previously reserved.").

<sup>223</sup> For example, Justice Stephen Breyer joined Justice Sandra Day O'Connor in dissenting in *Apprendi v. New Jersey*, partly on the ground that the Court's decision was impermissible under principles of stare decisis. 530 U.S. 466, 533 (2000) (O'Connor, J., dissenting). Justice Breyer then refused to "accept" *Apprendi* for over a decade, before finally agreeing with its application. See *Allelyne v. United States*, 133 S. Ct. 2151, 2166–67 (2013) (Breyer, J., concurring). More recently, Justice Breyer joined Justice John Paul Stevens in dissenting from *Citizens United v. FEC*, which also rested in part on stare decisis. 558 U.S. 310, 393, 408 (2010) (Stevens, J., dissenting). Justice Breyer still refuses to accept *Citizens United*. See *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (Breyer, J., dissenting) ("[E]ven if I were to accept *Citizens United* . . .").

<sup>224</sup> For a thoughtful discussion by a then-sitting congressman, see Vic Snyder, *You've Taken an Oath to Support the Constitution, Now What? The Constitutional Requirement for a Congressional Oath of Office*, 23 U. ARK. LITTLE ROCK L. REV. 897 (2001).

the answer seems obvious: Yes.<sup>225</sup> So long as the oath-bound official adheres to Article V, she acts in accord with the Constitution's own procedures and so "supports" the Constitution itself. At least some delegates to the Constitutional Convention expressed this view, asserting that a "constitutional alteration of the Constitution, could never be regarded as a breach of the Constitution, or of any oath to support it."<sup>226</sup> This view is generally sound. As noted above in Part II, the oath encompasses minimum public understandings as to how the Constitution itself can change.<sup>227</sup> So in swearing support for "the Constitution," an official assumes a general duty to abide by the results of the publicly understood Article V process. By contrast, an oath-bound official would not have a promissory duty to recognize a subsequent procedurally defective amendment. So if (i) Official A took the oath, (ii) a procedurally defective amendment later became publicly accepted as part of "the Constitution," and finally (iii) Official B took the oath, then Official A's oath would not encompass the defective amendment but Official B's would.

This analysis provides a new normative perspective on a significant period of constitutional resistance. After the Civil War, the Reconstruction Amendments purportedly became part of the Constitution. But as Bruce Ackerman has argued—and as many believed at the time—the Amendments did not strictly comport with the Article V process.<sup>228</sup> There was therefore a strong argument that the Amendments defied what had previously been the publicly understood process for amending the Constitution. Given all this, the Justices who had taken their oaths before these events—i.e., most of the Court—arguably lacked a promissory obligation toward the newly "adopted" Amendments. The Amendments might be compared with the results of a coup d'état: they represented the new de facto regime, but only as a result of procedural irregularity. The Justices may therefore have lacked a promissory obligation to adhere to the Amendments' broad meaning. That normative conclusion roughly accords with actual events, as amendments that many understood to be

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<sup>225</sup> See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 501 (1994) ("Even if oath-takers ratify a 'new Constitution,' they are not in the process violating or betraying the old one, but acting in pursuance of its deepest norms, practicing what it preaches, flattering and honoring its framers by legally imitating them.").

<sup>226</sup> See JAMES MADISON, 2 THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 304 (Gaillard Hunt & James Brown Scott eds., 1987) (statement attributed to Nathaniel Gorham).

<sup>227</sup> See *supra* Section II.A.2.

<sup>228</sup> See BRUCE ACKERMAN, 2 WE THE PEOPLE: TRANSFORMATIONS 102–15 (1998) (arguing in part that southern states were excluded from Congress on questionable grounds when the Fourteenth Amendment passed and then were forced to ratify it). *But see* AMAR, *supra* note 148, at 365–75 (arguing that the Reconstruction Congress reasonably adapted Article V to unprecedented challenges).

transformative at the time of their adoption quickly ended up being construed very narrowly in light of pre-War principles.<sup>229</sup> By contrast, Justices and other officials today take oaths to a Constitution whose public meaning is tethered to relatively broad understandings of the Reconstruction Amendments. Indeed, it is difficult to think of what “the Constitution” today stands for if it does not stand for the elimination of slavery, segregation, and racial voting tests. The same principles that received a cold judicial reception in the 1870s are now key to the promissory obligations of contemporary officials.

The oath also generates substantive side-constraints on the Article V process. In fact, Article V itself expressly provides not one, but two substantive side-constraints on constitutional change.<sup>230</sup> Additional side-constraints may be implicit. As argued in Part II,<sup>231</sup> the minimum public meaning of the Constitution today includes such principles as the impermissibility of racial segregation. That prohibition is so fundamental that abandonment of it might leave “the Constitution” unrecognizable. A basic commitment to racial equality is simply an integral part of the minimum public meaning of the Constitution. The same could be said of amendments forbidding the possession of books, or requiring all parents to surrender their children to an adoption program, or limiting the vote to military veterans. In effecting radical change, these nominal “amendments” would leave the Constitution not just worse and weaker, but unrecognizable.<sup>232</sup> That Constitution would no longer be “*this* Constitution.”<sup>233</sup> So when an official today promises to support “the

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<sup>229</sup> See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78–82 (1873). The oath thus affords a normative counterpart to Ackerman’s sociological account of the federal courts’ reaction to the Reconstruction Amendments. See BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* 95–97 (1991) (arguing that judges who “were first socialized into the law during the latter days of the preceding regime” might be predisposed to preserve it). In the absence of a promissory obligation to adhere to procedurally defective amendments, officials should of course contemplate other moral considerations, such as the amendments’ effect.

<sup>230</sup> U.S. CONST. art. V (protecting slave trade until 1808 and state parity in the Senate).

<sup>231</sup> See *supra* Section II.A.2.

<sup>232</sup> See U.S. CONST. art. V (governing constitutional amendments). Officers bound to “support” the Constitution might also be obliged to oppose such proposals on the ground that they would leave the Constitution worse and weaker than it was before—much as someone who has promised to support a friend might resist the friend’s self-destructive plans.

<sup>233</sup> U.S. CONST. art. VI (emphasis added); see Jason Mazzone, *Unamendments*, 90 IOWA L. REV. 1747, 1747 (2005) (arguing that an “amendment” must “keep the Constitution on its original course,” not pursue “something new”); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 756–57 (1980); see also Richard Albert, *The Unamendable Core of United States Constitution*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* (Andras Koltay ed., forthcoming 2015); Aharon Barak, *Unconstitutional Constitutional Amendments*, 44 ISR. L. REV. 321 (2011) (surveying different approaches across countries); Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea*, 61 AM. J. COMP. L. 657, 711–13 (2013) (arguing that the global trend is toward unamendable

Constitution,” she in no way commits herself to supporting apartheid by Article V amendment. If such a radical amendment were adopted, the official’s preexisting promissory obligation—to a very different set of texts, values, and practices—would simply expire, given its inapplicability to the-Constitution-as-amended. Indeed, continued fidelity to the old Constitution might be impossible.

These conclusions illuminate the moral position of the constitutional founders. The American colonists had sworn allegiance to a Crown that tolerated significant home rule consistent with the (unwritten) constitutional rights of British citizens. But, over time, the Crown changed its policies toward the colonies in substantial respects, and no colonist had promised timidity in the face of royal oppression. So it should be no surprise that the same people who sloughed off oaths to King George immediately took new oaths to the United States.<sup>234</sup> Most of the Framers still cared a great deal about oaths—but only in situations where oaths had continuing moral force.<sup>235</sup>

In sum, procedurally defective and substantively radical constitutional changes can undermine, or even extinguish, officials’ promissory duty to the Constitution.

#### CONCLUSION: A CONSTITUTION OF PROMISES

The oath can help with abiding legal conundrums. For example, the oath ameliorates the dead hand problem, justifies the gradualist dynamism of constitutional law, and suggests when precedent should be followed or

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amendments); Note, *The Faith to Change: Reconciling the Oath to Uphold with the Power to Amend*, 109 HARV. L. REV. 1747, 1747 (1996).

<sup>234</sup> For example, the Continental Congress imposed an oath of allegiance to the United States that, in the same breath, required federal officers to “renounce, refuse and abjure any allegiance or obedience to” King George. See HYMAN, TO TRY MEN’S SOULS, *supra* note 115, at 82–83; see also THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (“[W]e mutually pledge to each other our Lives, our Fortunes and our sacred Honor.”); Dep’t of Transp. v. Ass’n of Am. R.Rs., 135 S. Ct. 1225, 1235 n.\* (2015) (Alito, J., concurring) (“It is noteworthy that the first statute enacted by Congress was ‘An Act to regulate the Time and Manner of administering certain Oaths.’” (citing Act of June 1, 1789, ch. 1, §1, 1 Stat. 23)); AMAR, *supra* note 58, at 422 (pointing out that the Framers “publicly renounced their old vows in the very process of making new promises to stand together in opposing the tyrant King George”).

<sup>235</sup> The Framers chose to demand oaths of various kinds not just in Article VI, but also in Article II’s Presidential Oath Clause, Article I’s impeachment provisions, the Fourth Amendment’s Warrant Clause, and the Fourteenth Amendment’s Section 3. See U.S. CONST. art. I, § 3; *id.* art. VI; *id.* amend. IV; *id.* amend. XIV, § 3; see also AMAR, BIOGRAPHY, *supra* note 148, at 301 (citing the Oath Clauses of Articles II and VI as proof of “the evident importance placed by the framers on personal oaths of allegiance”); HYMAN, TO TRY MEN’S SOULS, *supra* note 115, at 86 (“Revolutionary leaders” including George Washington, John Jay, and John Adams agreed that loyalty oaths were valuable or even necessary); LEVINSON, *supra* note 7, at 91 (arguing that the Framers “took immense care to require oaths of allegiance as part of a sound framework of government”).



overruled. The oath can do this work (and more) both because it imposes certain minimal duties on officials and provides a framework for assessing when officials have a moral reason to follow the legal dictates of the Constitution. Whether officials view “the Constitution” through the lens of originalism, living constitutionalism, or any other interpretive theory, they have to reckon with the promissory obligations incurred by taking office. The moral demands of the Constitution derive not from automatic adherence to texts, stories, or power, but rather from officials’ personal commitments, undertaken with public support, to occupy roles defined in part by adherence to law. The result of all those commitments is a complex, shifting web of promissory duties that morally link officials not just with one another, but also with members of the public. The result, in other words, is a Constitution of promises.

