TRADITION, ORIGINALISM, AND GENERAL FUNDAMENTAL LAW

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Judges and scholars have puzzled over the place of tradition within an originalist approach to constitutional interpretation. Traditionalism is increasingly prominent in the Supreme Court's rights jurisprudence,[1] particularly as some originalist Justices express concerns over the longstanding tiers-of-scrutiny framework.[2] But the relevance of tradition to originalism is far from obvious. "[I]t has never been clear to me what work 'tradition' is supposed to be doing" in originalist analysis, Judge Newsom writes.[3] Sherif Girgis concurs, observing that relying on tradition "has no obvious justification in originalist terms," since traditions "reflect neither an attempt to discern original meaning nor an attempt to defer to the constitutional interpretations of past actors."[4] From a modern perspective, traditionalism and originalism are

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1. *See* Mark DeGirolami, *Traditionalism Rising,* 24 J. CONTEMP. LEGAL ISSUES 9, 10–12 (2024); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance,* 101 TEX. L. REV. 1127, 1130 (2023); Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition,* 118 NW. U. L. REV. 433, 435 (2023).

2. *See* N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2129 (2022); Ramirez v. Collier, 142 S. Ct. 1264, 1286–88 (2022) (Kavanaugh, J., concurring).

3. United States v. Jimenez-Shilon, 34 F.4th 1042, 1051 n.2 (11th Cir. 2022) (Newsom, J., concurring).

4. Sherif Girgis, *Living Traditionalism,* 98 N.Y.U. L. REV. 1477, 1487–88 (2023); *see* Vidal v. Elster, 144 S. Ct. 1507, 1531-32 (2024) (Barrett, J., concurring in part).

in tension. Traditions are alive, and the Constitution is supposed to be dead.[5]

Yet traditionalism was central to American rights jurisprudence at the Founding and during Reconstruction.[6] In both periods, elites recognized a cross-jurisdictional body of customary "general law,"[7] including rules that were deemed "fundamental."[8] This body of general fundamental law included certain general fundamental rights, which were thought to be part of each jurisdiction's fundamental law.[9] Indeed, the federal Constitution recognized these rights in several

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5. *See* Michael C. Dorf, *The Undead Constitution,* 125 HARV. L. REV. 2011, 2011 (2012) (reviewing JACK M. BALKIN, LIVING ORIGINALISM (2011) and DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)) ("Justice Scalia has repeatedly championed what he calls the 'dead Constitution.'").

6. Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution,* 1998 U. ILL. L. REV. 173, 175 (discussing customary law at the Founding); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment,* 76 STAN. L. REV. 1185, 1238 (2024) (discussing the relevance of "principles of customary fundamental law"). For pathbreaking work on how Americans conceptualized the customary constitution in the eighteenth century, see 1 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS (1987). For a more accessible summary of eighteenth-century customary constitutionalism, see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 9–34 (2004).

7. *See* Caleb Nelson, *The Persistence of General Law,* 106 COLUM. L. REV. 503, 505 (2006) (defining general law as "rules that are not under the control of any single jurisdiction, but instead reflect principles or practices common to many different jurisdictions").

8. *See* Jonathan Gienapp, *Written Constitutionalism, Past and Present,* 39 L. & HIST. REV. 321, 337–49 (2021) (summarizing views of general fundamental law at the Founding); Baude et al., *supra* note 6, at 1196–99 (summarizing views of general fundamental rights in the nineteenth century). *See generally* JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE (2024) (discussing eighteenth-century notions of fundamental law).

9. *See* Jud Campbell, *General Citizenship Rights,* 132 YALE L.J. 611, 635–36 (2023); *see, e.g.*, Corfield v. Coryell, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3,230). For identification of the date of *Corfield,* see Gerard N. Magliocca, *Rediscovering* Corfield v. Coryell, 95 NOTRE DAME L. REV. 701, 701 n.2 (2019). Justice Washington's opinion in *Corfield* is often described as embracing a "fundamental rights" approach to the Privileges and Immunities Clause, but this description is not quite accurate. The key distinction that Washington drew was between *general* fundamental rights, which the Clause secured, and those rights grounded in *local* law, which the Clause did not reach. *See* Baude et al., *supra* note 6, at 1205–06. Thus, under Washington's approach, a right could be "fundamental" (under *local* law) and yet still not within the scope of the Privileges and Immunities Clause. For a visual depiction of this point, see Campbell, *supra,* at 647.

respects. Article IV required states to reciprocally recognize these rights under the Privileges and Immunities Clause,[10] and the Fourteenth Amendment eventually secured them against abridgment by a citizen's own state under the Privileges or Immunities Clause.[11] The Bill of Rights, too, referred to many of these customary rights.[12]

Although the Constitution recognized and secured general fundamental rights in these various ways, the rights themselves were not thought to be grounded in their enumeration.[13] Rather, the thinking went, these rights already existed under general fundamental law and were thus already part of the fundamental law of each jurisdiction. On this view, the Bill of Rights *declared* the existence of certain rights that circumscribed federal power, but the text was not the source of those limits.[14] Members of the First Congress, for example, treated the underlying rights as binding even prior to the ratification of the Amendments.[15] And before and after the Civil War, Republicans viewed state authority as being circumscribed in the same way.[16] In other words, although the federal and state constitutions often referred to general

10. *See* Campbell, *General Citizenship*, *supra* note 9, at 635–36.

11. U.S. CONST. Amend. XIV, § 1; *see* Baude et al., *supra* note 6, at 1212–25.

12. *See* Jud Campbell, *Determining Rights,* HARV. L. REV. *(*forthcoming 2025).

13. *See* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 94–100 (2011); Baude et al., *supra n*ote 6, at 1199–1202. As Stephen Sachs has argued, "the Constitution often interacts with unwritten law without actually turning it into constitutional law." Stephen E. Sachs, *The Unwritten Constitution and Unwritten Law,* 2013 U. ILL. L. REV. 1797, 1803 (citing Stephen E. Sachs, *Constitutional Backdrops,* 80 GEO. WASH. L. REV. 1813 (2012)).

14. *See* Campbell, *Determining Rights, supra* note 12. In addition to the particular customary rights appearing in the Bill of Rights, the Ninth Amendment recognizes the likely existence of others.

15. *See* Congressional Debates (Jan. 21, 1791) (statement of Rep. Fisher Ames), *in* 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 342 (William Charles DiGiacomantonio et al. eds., 1995).

16. Baude et al., *supra* note 6, 1214–15, 1217–21. For earlier work on the so-called "*Barron* contrarians," see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 153–57 (1998); Jason Mazzone, *The Bill of Rights in the Early State Courts,* 92 MINN. L. REV. 1, 32–55 (2007). For further discussion of general fundamental law in the nineteenth century, see Maureen E. Brady, *The Domino Effect in State Takings Law: A Response to* 51 Imperfect Solutions, 2020 U. ILL. L. REV. 1455, 1457–68; Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law,* 74 TUL. L. REV. 1263, 1264–65 (2000).

fundamental rights individually (*e.g.*, "freedom of speech") and collectively (*e.g.*, "privileges and immunities of citizens"), the rights themselves remained grounded in general fundamental law, not in constitutional text.

In light of this history, perhaps traditionalism is more consistent with originalism than it first appears. If those who adopted the Bill of Rights in 1791 and the Fourteenth Amendment in 1868 were referring to a body of general fundamental rights, including customary rights, then maybe originalism requires recourse to traditions, including traditions that continued changing after 1791 and 1868.[17] Perhaps, then, reports of the Constitution's death were premature.

This Essay evaluates how originalists[18] should grapple with the jarring idea that the content of fundamental law was partly constituted by an evolving body of traditions. Although informed by my historical work, this Essay takes for granted that Americans at the Founding and during Reconstruction designed the Bill of Rights and the Fourteenth Amendment to refer to general fundamental rights, including certain customary rights. With that history in view, this Essay focuses on the jurisprudential questions that originalists must confront when evaluating whether and how to rely on traditions.

To begin, Part I frames the jurisprudential problem in terms of specifying the determinants of law. Part II then lays out two distinct "originalist" approaches to identifying the content of fundamental law in the past. These two approaches are "track one" originalism—which uses *modern criteria* for identifying earlier constitutional content—and "track two" originalism—which uses *historical criteria* for identifying earlier constitutional content. Part III then explores potential differences in how "track one" and "track two" originalists should think about general fundamental law, as well as the different conceptual problems that they will face. The point of this Essay is not to

17. *See* Baude et al., *supra* note 6, at 1247–53.

18. Nearly every constitutional approach looks to history to some extent. *See* Larry D. Kramer, *Madison's Audience,* 112 HARV. L. REV. 611, 676 (1999); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409, 1415 (1990). "Non-originalists" of various stripes will thus face similar conceptual problems in wrestling with the issues explored in this Essay. For ease of exposition, however, this Essay refers only to "originalists" and "originalism."

resolve these quandaries. Rather, my goals are to show, first, that shifts in how Americans have approached fundamental law raise a methodological issue that originalists need to consider and, second, that whether traditionalism comports with originalism may depend on how originalists resolve that issue. The Essay ends with a brief conclusion.

I. THE JURISPRUDENTIAL PROBLEM

We often say that judges must interpret legal texts, such as statutes and constitutions.[19] With that framing, the priority of original meaning naturally follows. After all, statutes and constitutions are historically enacted texts. And as historical, linguistic artifacts, they should be construed by discerning (as best we can) the original meaning of their language.[20] Aside from interpreting the fine arts, this is just how communication works.[21]

If only it were that easy. The key problem is the premise. The threshold task of judges is *not* to interpret statutes or constitutions.[22] Rather,

19. *See* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take,* 82 FORDHAM L. REV. 545, 547 & n.11 (2013).

20. *See, e.g.,* Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism,* 84 NOTRE DAME L. REV. 1607, 1657 (2009) ("[T]he Constitution is a historic textual event, textually expressing meaning at a particular time—the Founding.").

21. Some argue to the contrary, but they are swimming upstream. *See, e.g.,* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 15–16 (2015) (arguing that the First Amendment ought to be read like a poem, focusing on what its words mean *to us*).

22. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation,* 130 HARV. L. REV. 1079, 1083 (2017) ("The crucial question for legal interpreters isn't 'what do these words mean,' but something broader: What law did this instrument make?"); Mitchell N. Berman, *The Tragedy of Justice Scalia,* 115 MICH. L. REV. 783, 787 (2017) ("[T]ext, meaning, and law are distinct concepts and phenomena."); Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication, in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 219 (Andrei Marmour & Scott Soames eds., 2011) ("It is uncontroversial that . . . the meaning of a statute's text is highly relevant to the statute's contribution to the content of the law. But it is highly controversial what role the meaning of the text plays in explaining a statute's contribution to the content of the law."); Mark Greenberg, *Legal Interpretation and Natural Law,* 89 FORDHAM L. REV. 109, 127 (2020) (arguing that "legal interpretation [of legal texts]

the initial responsibility of judges is to identify the present-day content of the law, including fundamental law.[23] Of course, virtually everyone agrees that the content of our law *somehow* relates to the meaning of historically enacted texts, including statutes and constitutions. Nonetheless, "law" and "texts" are not the same type of things,[24] and recognizing that distinction is descriptively and normatively significant.

As a descriptive matter, our own practices belie the notion that all of our law is textually grounded.[25] For instance, notwithstanding the reputed death of federal common law in *Erie Railroad Co. v. Tompkins*,[26] common-law rules abound in federal law.[27] The same is true with respect to federal constitutional law, which features unenumerated rules and principles, as originalist Justices have recognized.[28] Of course, interpreters may remain normatively skittish about this fact.[29] But at least descriptively, unwritten law is something that judges routinely

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seeks legal provisions' contributions to the content of the law"); Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J. L. & PUB. POL'Y 817, 821 (2015) ("What's important about the Constitution of 1788 isn't what it *said,* but what it *did:* the legal rules it added to the American corpus juris, the contribution (to use Mark Greenberg's phrase) it made to the preexisting body of law."); *see also* Lawrence B. Solum, District of Columbia v. Heller *and Originalism,* 103 NW. U. L. REV. 923, 953 (2009) (noting a conceptual distinction between "the meaning of the constitutional text and the content of the rules of constitutional law").

23. *See, e.g.,* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Berman & Toh, *supra* note 19, at 551 ("[A] normative theory of constitutional interpretation must presuppose a theory of the ultimate determinants or criteria of validity of our law.").

24. *See supra* note 22.

25. *See* William Baude, *Beyond Textualism?,* 46 HARV. J. L. & PUB. POL'Y 1331, 1336 (2023) ("[O]ur legal system relies not just on written texts but also on an unwritten law."); Sachs, *Unwritten Constitution, supra* note 13, at 1798 (noting the existence of "unwritten [law], like rules of common law, equity, and admiralty").

26. 304 U.S. 64 (1938).

27. *See* Nelson, *supra* note 7, at 505; *see also* Baude & Sachs, *supra* note 22, at 1097–1121 (tracing background interpretive principles that the authors call the "law of interpretation").

28. *See, e.g.,* Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485, 1496, 1498 (2019) (holding that "interstate sovereign immunity is preserved in the constitutional design" and noting the existence of "many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice").

29. *See, e.g.,* John Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts,* 113 YALE L.J. 1663, 1671 (2004).

apply. And its existence at least demonstrates the conceptual distinction between identifying law and interpreting texts.[30]

As a normative matter, differentiating "law" and "text" is equally important. The threshold task of judging is to identify the law, not to interpret legal texts.[31] Yet when someone instinctively treats "text" and "law" as interchangeable terms, she unwittingly engages in legal analysis by word play—assuming that interpreting the text and identifying the law are the same thing, even though conceptually they are not. Nobody would misidentify University of Richmond students for arachnids, even though they are known as "spiders." Yet interpreters commit precisely the same fallacy when they treat "text" and "law" as interchangeable terms.[32] And that conceptual slippage raises concerns that judges might misidentify law by misunderstanding how law is constituted.[33]

Jurisprudence is difficult, of course, and scholars have offered many ways of identifying the determinants of law, including the particular sources and methods used to identify law.[34] Some prefer a variant of

30. *Accord* Berman & Toh, *supra* note 19, at 571–72 (observing that nontextual determinants of law "are too common across the globe, and are too prominent within our own experience to make plausible that they are incompatible with the very nature of law, of constitutionalism, of democracy, or any such").

31. *See supra* note 23.

32. *See supra* note 22.

33. My point is not that "good judges" need to have a fully theorized account of "law" in order to perform their jobs. *Cf.* Evan D. Bernick, *Eliminating Constitutional Law,* 67 S.D. L. REV. 1 (2022). But judges who apply "law" must at least rely on implicit, ingrained assumptions about what determines law. And we should critically evaluate those assumptions.

34. The determinants of law include *fundamental determinants,* which are the ultimate criteria for identifying law, and *non-fundamental determinants,* which are the particular legal sources and methods recognized as determinants of law by virtue of the fundamental determinants. *See* Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standard vs. Fundamental Determinants,* 130 HARV. L. REV. F. 105, 112–14 (2017). For example, the fundamental determinant of law for H.L.A. Hart was the rule of recognition, which might, in turn, point legal actors toward non-fundamental determinants such as statutes and customs. This essay focuses on a particular non-fundamental determinant—legal content in the past.

positivism.[35] Others prefer some normative account.[36] My goal here is not to pick among these, or to say anything particular about how our law is constituted. Any plausible theory would acknowledge the central role of enacted legal texts. But custom could play a role, too. To figure that out, however, a thoughtful judge needs to begin with a jurisprudential theory—an account of what determines legal content.[37]

In identifying the content of *our* law, we are not bound by the jurisprudential theories of ages past.[38] Originalist scholars widely agree on that point,[39] and for good reason. As William Baude and Stephen Sachs put it, "[w]hether and how past law matters today is a question of current law, not one of history."[40] Ultimately, what counts as *our* fundamental law must be governed by *our* jurisprudential choices. So in order to know whether and how traditions are relevant to

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35. *See, e.g.*, William Baude & Stephen E. Sachs, *The Official Story of the Law,* 43 OXFORD J. OF LEGAL STUD. 178 (2023); Mitchell N. Berman, *Our Principled Constitution,* 166 U. PA. L. REV. 1325 (2018).

36. *See, e.g.*, Mark Greenberg, *The Moral Impact Theory of Law,* 123 YALE L.J. 1288 (2014).

37. *See* Berman & Toh, *supra* note 19, at 551. Evan Bernick and Chris Green attempt to elide these jurisprudential issues by focusing instead on "a theory of the Constitution itself." Evan D. Bernick & Christopher R. Green, *What is the Object of the Constitutional Oath?,* 128 PENN. ST. L. REV. 1, 25 (2023). According to them, "[a] philosophical tradition of the conceptual boundaries of the word 'law' obviously cannot control the nature of an actual entity, the Constitution." *Id.* at 25–26. But these statements merely illustrate the problem. Bernick and Green are correct that a modern theory of law is not needed to identify the historical features of an eighteenth-century document. That is because "law" and "text" are fundamentally different concepts. But originalists are not in the business of making antiquarian claims about historical texts. Rather, originalism uses the past to identify the content of fundamental law today. And in order to identify the content of fundamental law today, one needs to know (even if implicitly) how that fundamental law is determined.

38. *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning,* 101 BOS. U. L. REV. 1953, 2042 (2021).

39. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 30–31 (rev. ed. 2014) (rejecting the authority of the Founders in establishing constitutional legitimacy); William Baude, *Is Originalism Our Law?,* 115 COLUM. L. REV. 2349, 2352 (2015) (defending originalism using a Hartian positivist theory); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 19 (2013) (defending originalism using a consequentialist theory).

40. William Baude & Stephen E. Sachs, *Originalism and the Law of the Past,* 37 L. & HIST. REV. 809, 810 (2019).

constitutionalism today, we need to wrestle with the basic question of how our fundamental law is constituted.

II. ORIGINALISM'S TWO TRACKS

The previous discussion framed legal and constitutional analysis in terms of identifying *our* law, including *our* fundamental law, using *our* jurisprudential criteria. But recognizing that present-day responsibility does not preclude giving authority to the past. Rather, a modern theory of law can point us backward, treating certain aspects of history and tradition as constitutive of our law. Indeed, all constitutional interpreters put *some* emphasis on the text of the written Constitution and its "original meaning," however defined.[41] And rightly so. Identifying the content of law today often requires identifying the content of law in the past.[42]

Indeed, looking elsewhere is a common feature of choice-of-law analysis. For example, although California judges use California's choice-of-law rules to identify applicable law, they will not always wind up applying California law. Rather, California's choice-of-law rules sometimes point judges elsewhere—perhaps to another state's substantive law, or even to another state's choice-of-law rules. Although identifying the sources of law is *ultimately* a question of California law, state judges sometimes apply another jurisdiction's law. And much in the same way, identifying *our* law often requires looking backward to the law of the past.

Assume that we have consulted our jurisprudential criteria, and those criteria point us backward—requiring us to engage in some form of historical inquiry. For instance, assume that our legal theory instructs that our fundamental law is constituted, at least in part, by the law of the past. At this point, we face an additional jurisprudential choice: *What criteria should we use to identify the law of the past?* In other words: *What sources and methods should we use to identify the law of the*

41. *See supra* note 18. *See generally* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024).

42. *See* Baude & Sachs, *supra* note 40, at 810.

past? It is at this point in the analysis that originalists diverge onto two tracks: "track one" and "track two."[43]

A. Track One

Originalists who opt for "track one" use *our* legal criteria to identify the fundamental law of the past. These originalists, of course, care a great deal about historical facts, such as what the Framers and Ratifiers said about various Clauses. Historical facts matter. But these track-one interpreters evaluate those facts through some *present-day* standard to arrive at conclusions about "the law" of the past, even though those conclusions may not reflect how people at the time actually understood the content of their law.

Suppose, for instance, that an originalist's jurisprudential theory embraces a form of Austinian positivism that conceptualizes "law" as solely produced through commands issued by institutions with law-making authority. On this view, the originalist will look backward to the law of the past to identify the content of present-day law. But in doing so, he will naturally apply an Austinian positivist lens—one that focuses on earlier legal enactments while filtering out legal claims that are inconsistent with the precepts of Austinian positivism.[44] For example, the Austinian positivist might find repeated Founding-Era invocations of natural law, but that evidence would not alter his view that natural law simply does not count as "law"—whether today or at the Founding.

Or return to the choice-of-law analogy. In some situations, Georgia's choice-of-law rules require applying South Carolina law. Importantly, South Carolina judges have embraced the realist account of common-law decisions as "judge-made law," and thus treat holdings of the Supreme Court of South Carolina as definitive statements of South Carolina law. Yet when Georgia's judges apply South Carolina law, they do *not* consider themselves equally constrained by South Carolina

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43. Part II draws on Jud Campbell, *Originalism's Two Tracks*, 104 B. U. L. REV. 1435 (2024) (reviewing BALKIN, *supra* note 41, and GIENAPP, *supra* note 8).

44. *Cf.* Alexander v. Sandoval, 532 U.S. 275, 287–88 (2001) (explaining that a textualist approach to interpreting a statute was appropriate even though that approach did not reflect the interpretive norms that prevailed when the statute was enacted).

precedents. Rather, Georgia takes an old-school perspective, rejecting the notion that the content of the common law is constituted by whatever the judges in each state say.[45] Instead, Georgia judges make their own assessment of the content of the common law in other states using traditional common-law reasoning.[46] In essence, Georgia imposes its own jurisprudential methods when identifying the common law of other jurisdictions. In much the same way, track-one originalists use *their own* legal criteria to identify the fundamental law of the past.

B. Track Two

Originalists who opt for "track two," by contrast, use *historical* criteria to identify the fundamental law of the past. These originalists care not only about a variety of surface-level historical facts, such as what the Framers and Ratifiers said about various Clauses. They also seek to employ the Founders' own beliefs about the sources of law and the proper methods of construing those sources. To understand the fundamental law that actually existed at the Founding, these originalists would say, we need to use the Founders' criteria for identifying law.

Again, a choice-of-law analogy can help illuminate this approach. In some situations, Wisconsin's choice-of-law rules require looking to Illinois law. Wisconsin courts have mostly rejected the use of legislative history in construing statutes, but Illinois courts have not.[47] Yet in contrast to Georgia's approach to common law, Wisconsin courts that construe Illinois statutes consult legislative history. In this situation, Wisconsin choice-of-law rules recognize that the methods of construing Illinois statutes are not the same as those used in Wisconsin. Yet Wisconsin judges identify Illinois law in the same way as Illinois courts identify that law. In essence, Wisconsin law borrows Illinois's methods rather than imposing its own. Similarly, track-two originalists use *historical* criteria to identify the fundamental law of the past.

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45. *See* Michael Steven Green, Erie*'s Suppressed Premise,* 95 MINN. L. REV. 1111, 1126–27, 1126 n.89 (2011).

46. This is apparently true regardless of whether the law is deemed general or local in character. *Id.* at 1126 n.89.

47. *Cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism,* 119 YALE L.J. 1750, 1799–1803 (2010).

C. The Originalist Divide

Like other interpreters, originalists are not always transparent about their jurisprudential commitments, so it is often unclear whether originalists operate on track one or track two—or whether they even appreciate the difference. Moreover, originalists may believe that their views about the sources and methods used to identify fundamental law align with the Founders' views, rendering the choice between track one and track two a false conflict. As it turns out, a growing body of historical scholarship disputes that equivalency,[48] but originalists have only just begun to grapple with that work and its implications for originalist theory and practice.

Some originalists, however, recognize the distinction between the two tracks and are explicit about which track they prefer. Although viewing "original meaning" in very different ways, Jack Balkin and Larry Solum are equally candid about being track-one originalists. "[A]rticulating the original public meaning is not a simple job of reporting what happened at a certain magical moment in time," Balkin explains. "It is a theoretical and selective reconstruction of elements of the past, brought forward to the present and employed for present-day purposes."[49] In his own way, Solum agrees. "Inquiry into the founding generation's beliefs about the nature of law is interesting and valuable," he acknowledges. "But it is simply a mistake," he continues, "to equate their beliefs about the nature of law with the actual nature of law in 1787."[50] According to Solum, "original meaning"

48. This is one of the key upshots of my own work as well as the pathbreaking work of Jonathan Gienapp, who has just published the leading account of how Founding-Era constitutional assumptions departed from those that many originalists hold today. *See* GIENAPP, *supra* note 8; *see also* Jud Campbell, *The Emergence of Neutrality,* 131 YALE L.J. 861, 873–74 (2022) ("The early twentieth century witnessed a revolution in views about the nature of rights—where they came from; the identity of their interpretive guardians; their means of enforcement; and their relationship to history, the common law, and morality.").

49. BALKIN, *supra* note 41, at 121.

50. Solum, *supra* note 38, at 2042.

must thus be identified using present-day criteria, which he draws from contemporary linguistic philosophy.[51]

Meanwhile, other originalists operate on track two. John McGinnis and Michael Rappaport, for example, insist that constitutional content should be identified using Founding-Era criteria, which they call "original methods."[52] William Baude and Stephen Sachs similarly explain that in order to understand the law of the past, one needs to account for how earlier generations thought about the determinants of law.[53] As Sachs puts it, "[t]o find out the law that the Constitution made, the relevant way to read the document's text would be according to the rules of the time, legal and otherwise, for turning enacted text into law."[54] Along similar lines, Bernie Meyler's "common law originalism" asserts that common-law concepts enumerated in the

51. *See id.* at 1967–75. To be sure, Solum's theory is "thicker" than Balkin's "thin" account of "original meaning," incorporating eighteenth-century context in various ways that Balkin's account does not. Solum's approach thus bears a closer resemblance to track two than Balkin's approach. Conceptually, however, Balkin and Solum agree on a crucial point—namely, that *modern* criteria specify the sources and methods used to identify "original meaning."

In responding to a related paper, Larry Solum comments that I make "a grave conceptual error" in placing his approach on track one based on his use of modern linguistic philosophy. "Historical linguistics and the philosophy of language," Solum writes, "do not employ 'modern criteria' that are opposed to contextual understanding of history." Larry Solum, *Legal Theory Blog* (Jan. 10, 2025), https://lsolum.typepad.com/legaltheory/2025/01/campbell-on-against-constitutional-originalism-by-gienapp.html [https://perma.cc/BGW2-36N2]. But Solum misapprehends my point. I do not think that using modern techniques to understand earlier communication necessarily distorts the past. *See* Campbell, *supra* note 43, at 1441–42 (rejecting that view). Rather, the reason that Solum's approach belongs on track one is that he identifies the object of his historical inquiry—the original "public meaning" of the written Constitution's text—using modern jurisprudential premises, regardless of how the Founders viewed the determinants of fundamental law.

52. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

53. *See, e.g.*, Baude, *supra* note 39, at 2358 (asking whether rules about determining legal content "have a legal pedigree to the Founding"); *see also* Baude & Sachs, *supra* note 22 (discussing the "law of interpretation").

54. *See* Sachs, *supra* note 22, at 821.

federal Constitution should be viewed using an eighteenth-century approach to common law.[55]

The distinction between track one and track two is somewhat obscured by agreement among originalists that identifying the content of our law is ultimately framed by modern jurisprudential assumptions.[56] The distinction is also obscured by William Baude and Stephen Sachs's appealing but slippery claim that originalists should simply look to the "law of the past," which they characterize as "a highly limited version of the historical inquiry."[57] Yet as we saw in the choice-of-law setting, different methods are available for identifying another jurisdiction's "law," and so too for identifying the "law of the past." One might superimpose modern attitudes about law onto historical evidence (track one), or one might employ historical premises about law and filter the historical evidence through those methods (track two). And because of large gulfs between earlier and present-day views of law, these can turn out to be *very* different approaches.[58] It is thus important to keep our distinctions straight—to identify the appropriate track—and to recognize that operating on track two requires developing familiarity with an unfamiliar legal culture.

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55. *See* Bernadette Meyler, *Towards a Common Law Originalism,* 59 STAN. L. REV. 551, 556 (2006) (criticizing some versions of originalism for attempting to identify the content of common-law terms while "ignoring the larger framework within which the particular doctrines of the common law functioned"); *see also* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 356 n.17 (2020) ("To the extent there is a disagreement between historians, who seek to understand what actual people believed in the past, and a certain strand of 'New Originalists,' who seek either what they think is the best meaning or that dictated by philosophy of language, I side with the historians.").

56. *See supra* notes 38–40.

57. Baude & Sachs, *supra* note 40, at 813. What makes their claim slippery is that the *usual* process of identifying the law of the past does not account for changes in the determinants of law. *See* Campbell, *supra* note 48, at 873 ("Most doctrinal histories retell the 'official story' in *our terms*—explicitly focusing on Supreme Court opinions and implicitly adopting modern attitudes about the nature of constitutional rights."). In other words, identifying the law of the past *in the track-one sense* is familiar to lawyers and well within their training, but lawyers generally are *not* trained and experienced as intellectual historians, which is the perspective needed to identify the law of the past *in the track-two sense.*

58. The qualifier ("can") is important, because various approaches on track one will bear varying degrees of similarity to track-two originalism. *See supra* note 51.

III. ORIGINALISM AND TRADITION

This Part begins by reintroducing the puzzle of general fundamental law. It then considers how originalists on track one and track two might account for this history, and thus how they might incorporate tradition into their respective approaches. The Part concludes by briefly showing that similar conceptual problems arise with respect to codified traditions.

A. General Fundamental Law

We live in an "age of statutes."[59] The content of our law predominantly comes from enacted legal texts. And interpreters routinely express confusion or disdain about other sources of law.[60]

Yet prior to the early twentieth century, Americans tended to think differently about the sources and methods of identifying law. Theirs was an age of general law. Of course, enacting a legal text was one way of altering law. But legal content routinely came from other sources, too, including tradition.

Importantly, referencing a customary legal rule in a statute or constitution did not necessarily alter its customary grounding. As English jurist Thomas Rutherford explained,

> Every rule of action, which is enjoyned by a civil legislator and committed to writing, does not immediately become a written civil law. Such laws, as are established by long and uninterrupted usage or custom, may certainly be committed to writing, as well as any other: but this does not change them from unwritten into written laws.[61]

59. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–3 (1982).

60. For an extreme case, see Michael Stokes Paulsen, *The Text, the Whole Text, and Nothing but the Text, So Help Me God: Un-Writing Amar's Unwritten Constitution,* 81 U. CHI. L. REV. 1385, 1385 (2014) ("Ours is a system of *written* constitutionalism. There are only sound conclusions and inferences—or unsound ones—from the text itself.").

61. 2 THOMAS RUTHERFORD, INSTITUTES OF NATURAL LAW 290 (Cambridge, J. Bentham 1756).

Rather, written instruments could be "declaratory"—stating the existence of a rule or principle that remained grounded elsewhere.[62] Not only was it a mistake to think of texts as the only source of law, it was also a mistake to think that textually enumerated rules necessarily obtained their force or content from their enumeration.[63]

Originalists today tend not to approach constitutional text in this way. When the Constitution refers to another source of law, such as the common law, originalists usually treat the enacted text as having *constitutionalized* the common-law rule—elevating it to constitutional status and freezing its content at the moment of ratification.[64] This, of course, has led to a flurry of scholarship about the "original meaning" of various parts of the Bill of Rights.[65] It has further teed up an intriguing debate over whether those rights should be understood based on their meaning at the time of their original enactment in 1791 or, instead, their subsequent "incorporation" against the states in 1868.[66]

Crucially, however, textualizing rights is not what the people who designed the Bill of Rights and the Fourteenth Amendment thought they were doing. As originally understood, the Bill of Rights and the Fourteenth Amendment *declared* the existence of general fundamental rights that remained grounded in natural and customary law.[67] As the thinking went, these rights did not obtain their force or content from their enumeration. And so, as a historical matter, it is wrong to say that the legal content of these rights was fixed in constitutional amber in

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62. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND [3] (London, M. Flesher 1644) (noting that a statute could be "introductory of a new law, declaratory of the old, or mixt"); *see also, e.g.*, HENRY FLOOD, THE CELEBRATED SPEECHES OF COLONEL HENRY FLOOD ON THE REPEAL OF THE DECLARATORY ACT 3 (Dublin, C. Campbell 1782) ("It is a first principle of law, that a Declaratory Act only declares the law to be what it was before; that is to say, that it only declares, and that it does not alter the law.").

63. *See* Campbell, *supra* note 12.

64. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 603 (2008).

65. *See, e.g.*, McConnell, *supra* note 18 (exploring the original meaning of the Free Exercise Clause).

66. *See, e.g.*, *Bruen*, 142 S. Ct. at 2138; Kurt T. Lash, *Respeaking the Bill of Rights: A New Doctrine of Incorporation*, 97 IND. L.J. 1439, 1447–50 (2022); Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 979, 983–85 (2012).

67. *See* Campbell, *supra* note 12; Baude et al., *supra* note 6.

1791 or 1868. To the extent that these rights were grounded in custom, their legal content could change, just as the common law had evolved over time.[68]

B. General Fundamental Law and the Two Tracks

But what should originalists do with this history? How should they account for earlier notions of general fundamental law? The answer depends largely on whether originalists are operating on track one or track two.

For track-one originalists, traditions cannot determine the content of the law unless *modern* criteria identify tradition as a source of fundamental law. Of course, many customary practices existed in the past, just as they do today, but those traditions are not *constitutionally* relevant unless one's theory of law says so. And it would seem that for most track-one originalists, tradition has little, if any, relevance.[69] To be sure, originalists operating on track one still might look to tradition as a way of resolving constitutional underdeterminacy.[70] Indeed, Justice Scalia sometimes looked to post-ratification traditions, which he thought supplied an objective and administrable way of resolving constitutional uncertainty.[71] And that made sense in an era when originalism was largely meant to discipline judicial discretion. But as originalism has gradually shifted away from a theory of *adjudication*

68. *See* Baude et al., *supra* note 6, at 1248; Meyler, *supra* note 55, at 555.

69. It is hard to prove this claim given how few originalists have identified whether they are operating on track one or track two. But at least Judge Newsom disavows the use of tradition on track one. *See* Judge Kevin Newsom, Keynote Address at the History and Tradition Symposium (Feb. 17, 2024). Judge Newsom's conclusion is consistent with Sherif Girgis's characterization of public-meaning originalism. *See* Girgis, *supra* note 4, at 1487–88 (observing that traditions are often neither probative of original meaning nor reflections of self-conscious "liquidations" of constitutional underdeterminacy). As Girgis aptly observes, however, it is possible for a text to refer to customs that are constitutive of a right. *Id.* at 1512-14.

70. Solum & Barnett, *supra* note 1, at 448, 454–55.

71. *See, e.g.*, McIntyre v. Ohio Elections Comm'n 514 U.S. 334, 371–85 (1995) (Scalia, J., dissenting) (relying on tradition where original meaning is unclear); Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (opinion of Scalia, J.) (defending reliance on tradition because of its constraining effect on judicial judgment).

and more toward a theory of *law*,[72] the basis for looking to post-enactment traditions has substantially eroded.[73] If the original public meaning of the Constitution's text is the exclusive determinant of constitutional law, as originalists often now assert,[74] then what is the point of looking to tradition?[75]

Track-two originalists, however, cannot disclaim the relevance of tradition in this way, using a present-day jurisprudential claim about the determinants of law. Rather, track-two originalists believe that identifying the law of the past requires a deeper form of historical inquiry, locating how the Founders conceptualized their own law. Originalists, Stephen Sachs explains, "need to learn more about [the Founders'] legal system as a whole."[76] And as we have seen, what one learns when looking to the past is that American legal culture previously accepted that fundamental law was partly determined by evolving customs, and not merely by the fixed meaning of enacted texts. Thus, for track-two originalists, certain traditions *are* part of American fundamental law.

Of course, one might think that recognizing an evolving body of constitutional law is the essence of *non*-originalism. Yet as Sachs aptly observes, originalists on track two have a different reason for looking to traditions. "[A]ttention to custom," he explains, can be "determined by the past, not just by the present."[77] For originalists, whether the

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72. *See* Berman & Toh, *supra* note 19, at 546, 556–60; *see, e.g.*, Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 779 (2022) (defending the view that originalism is best understood, first and foremost, as a claim about the determinants of fundamental law).

73. Insofar as originalism was a method of disciplining judicial judgment, it (arguably) worked in tandem with traditionalism. But insofar as originalism is a claim about legally enacted text as the exclusive determinant of fundamental law, traditionalism is in tension with originalism.

74. *See* GIENAPP, *supra* note 8, at 21–25, 30–32.

75. It bears emphasis that track one is not logically incompatible with treating tradition as a source of fundamental law (if one has sound jurisprudential reasons to do so), just as track two is not logically incompatible with denying tradition as a source of law (if one has sound historical reasons to do so).

76. Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 162 (2017). I am taking liberties with the bracketed portion of the quotations. Sachs was writing of the imagined land of Freedonia.

77. *Id.* at 164.

content of present-day fundamental law includes evolving traditions "depends on [the Founders'] original customs, not current opinion."[78] On this telling, the distinguishing feature of "originalism" is not a commitment to a substantive view about the determinants of fundamental law but is instead a commitment to a historically grounded method for identifying those determinants.[79] Originalists on track two can thus look to tradition so long as the Founders did too.[80]

Not surprisingly, then, originalists on track two have shown a growing interest in general fundamental law. In a recent paper, for example, William Baude and Robert Leider argue that the right to keep and bear arms is a general fundamental right—one recognized and secured but not created by the Second Amendment and the Fourteenth Amendment.[81] And the right should thus be explicated, they insist, in the manner of eighteenth- and nineteenth-century common law—an approach that permits doctrinal development in response to new conditions yet denies judicial authority to make law.[82] In a further nod to the authority of history, Baude and Leider also acknowledge the importance of legislative determinations of fundamental rights.[83] In

78. *Id.*

79. Along similar lines, Evan Bernick and Chris Green distinguish "first-order originalism"—defined as a substantive commitment to textually determined content—from "second-order originalism"—defined as a methodological commitment to following the Founders' views about the determinants of fundamental law. *Cf.* Bernick & Green, *supra* note 37, at 6. Notably, their distinction does *not* replicate the division between "track one" and "track two" originalism, which relates solely to the method for identifying the determinants of fundamental law—that is, track one and track two each relate to what Bernick and Green refer to as the "second-order" issue.

80. Baude, *supra* note 39, at 2358.

81. The Fourteenth Amendment was thought to "secure" preexisting rights by creating a federal forum for their enforcement against states. Prior the Fourteenth Amendment, a state's violation of these rights did not raise a question "arising under" federal law, and therefore federal courts were usually incapable of hearing these claims. *See* Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243 (1833); Baude et al., *supra* note 6, at 1202–05.

82. *See* William Baude & Robert Leider, *The General Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467, 1495–98 (2024).

83. Crucially, Baude and Leider recognize that fundamental rights were generally regulable through ordinary legislation, even though this way of conceptualizing fundamental rights eroded substantially in the twentieth century. *See id.* at 1504-05.

short, they argue, judges should return to a historical view of general fundamental law.

C. Codifying Tradition

Even if originalists reject tradition as a determinant of our fundamental law, earlier traditions might still inform how originalists read constitutional text. As Randy Barnett and Larry Solum observe:

> Some constitutional provisions may point to tradition (or something very similar) as the content or substance of the provision. For example, the Preservation Clause of the Seventh Amendment requires that the "right of trial by jury" "at common law" be preserved. The content of the common-law right may be constituted by traditional practices that provide the communicative content of the phrase "trial by jury" in conjunction with "at common law."[84]

On this way of thinking, the *grounding* of fundamental rights is in legally enacted texts, such as the Seventh Amendment, but the *content* of those rights is principally identified by looking to Founding-Era traditions,[85] or perhaps to the "respoken" traditions of the 1860s.[86]

Reliance on traditions that existed at the time a constitutional provision was created and ratified seems uncontroversial, at least from an originalist perspective. After all, such traditions likely informed how the Framers and Ratifiers understood certain terms. Consequently, there is little to say about this use of tradition. But two points are worth flagging.

First, not all traditions are *legally* relevant. Consider, for example, the conflicting traditions of expressive freedom at the Founding. Back then, elites widely acknowledged that seditious libel could be constitutionally punished, so long as the rules were narrowly defined.[87] This approach to press freedom was consistent with a long tradition in Anglo-American law.[88] Yet it is also true that, despite its vituperative

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84. Barnett & Solum, *supra* note 1, at 447.

85. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 627 (2008).

86. *See* Lash, *supra* note 66, at 1441.

87. *See* Jud Campbell, *The Invention of First Amendment Federalism*, 97 TEX. L. REV. 517, 530 n.49 (2019) (collecting sources).

88. *See id.* at 529-30.

character, public discourse in the late-eighteenth century rarely triggered seditious-libel prosecutions.[89]

So which of these traditions did the Speech and Press Clauses embrace? Should we understand the "freedom of speech, or of the press" as a reference to existing *legal* traditions? Or should we rely on the *experiential* traditions of the Founders? Both aspects of history could potentially have informed original meaning. But knowing how to evaluate that context requires a thicker account of what types of facts determine "original meaning." In this way, "original meaning" is not something that we just discover, like a coin on the sidewalk. Rather, it is something that an originalist must reconstruct, as best she can, by filtering historical evidence through some interpretive sieve.[90]

And that leads into the second point: Even if an originalist is considering *textually grounded* fundamental law, she will still run into the same sorts of problems that divided originalists onto track one and track two. That is, an originalist will still have to make jurisprudential choices about how to identify the relevant tradition. And she must decide whether to make those choices using modern criteria (track one) or instead identify the tradition as viewed by the Founders themselves (track two).

Each path presents its own difficulties. On track one, the reconstructed tradition may be anachronistic, bearing little resemblance to how Americans actually understood their own law.[91] Modern interpreters, for instance, might only look to *written* sources of law to identify an earlier tradition, even though Americans in the past generally did not view law in that way.[92] Such an approach might be

89. For scholarship emphasizing this fact, see AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 51-53 (2012); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS xv-xvi (1985); STEPHEN D. SOLOMON, REVOLUTIONARY DISSENT: HOW THE FOUNDING GENERATION CREATED THE FREEDOM OF SPEECH 8-9 (2016).

90. *See* Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 82 (2016); Richard H. Fallon, Jr., *The Chimerical Concept of Original Meaning*, 107 VA. L. REV. 1421, 1430–33 (2021).

91. *See* Campbell, *supra* note 57, at 874.

92. *Cf.* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99, 157-58 (2023) (critiquing *Bruen* for focusing only on

jurisprudentially defensible, but it would risk creating a deeply ahistorical view of "original meaning."

On track two, however, originalists might encounter historical conflicts over how legal traditions were determined. For instance, the Founders did not all agree about how to identify customary law.[93] Indeed, as noted above, there was not even consensus about whether to look to top-down *legal* traditions or bottom-up *experiential* traditions. Originalists on track two attempt to resolve these issues in different ways. Some argue that it is virtually always possible to resolve ambiguities of this sort simply by resorting to the interpretive rules used at the Founding.[94] If so, then track two is sufficient to identify the content of our fundamental law. Others suggest that when the law of the past runs out, we must fall back on *present-day* default rules.[95] On this view, the law of the past does not always tell us everything that we need to know. Either way, though, originalists operating on track two only use *historical* criteria to identify the law of the past.

CONCLUSION

Those who designed the original Constitution, the Bill of Rights, and the Fourteenth Amendment believed that fundamental law could be grounded in tradition, and not just in legally enacted texts. On their view, general fundamental rights formed part of the fundamental law of each jurisdiction, and although the Constitution recognized and

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sources of law that are readily accessible, particularly "given that most regulation and enforcement was local and therefore less likely to be preserved digitally today.").

93. *See* Meyler, *supra* note 55, at 555–56.

94. John McGinnis and Michael Rappaport argue that a "51-49" rule existed at the Founding that called for the resolution of virtually any difficulty by simply selecting, on balance, the most legally persuasive choice. *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 942 (2021). Thus, while admitting the possibility of legal underdeterminacy, *see* McGinnis & Rappaport, *supra* note 52, at 775 & nn.81–82, they seem to think that the law of the past was almost fully determinate.

95. Baude & Sachs, *supra* note 40, at 816. In this limited context, when track two is insufficient to identify the content of law in the past, Baude and Sachs could be understood to operate on track one. But in my view they are better understood as saying that the law of the past must sometimes be supplemented by the law of the present—not that the law of the past should be identified using modern criteria.

secured those rights in various respects, it generally did not alter their content or their customary grounding. But whether and how originalists should account for earlier ideas of general fundamental law is unclear. Indeed, contemporary originalists are split over whether to approach these questions from a present-day or historical perspective.

Given profound shifts in how Americans view the grounding of fundamental law, the conceptual divide between these two branches of originalism carries significant implications for modern constitutional law, including the status of post-ratification traditions. How originalists respond depends on jurisprudential choices that history alone cannot answer. But the earlier flourishing of general fundamental law, along with its twentieth-century decline, have created a challenge that originalists need to consider.[96]

96. For further discussion, see Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory,* 110 HARV. L. REV. 1785 (1997); Jack Goldsmith, Erie *and Contemporary Federal Courts Doctrine,* 2023 HARV. J.L. & PUB. POL'Y PER CURIAM Spring 2023, art. 17, at 1, https://journals.law.harvard.edu/jlpp/erie-and-contemporary-federal-courts-doctrine-jack-goldsmith/ [https://perma.cc/P3M4-G2Q8]; Lawrence Lessig, *The Brilliance in Slaughterhouse: A Judicially Restrained and Original Understanding of "Privileges or Immunities",* 26 U. PA. J. CONST. L. 1 (2024).