

The Power of Promises

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Richard M. Re, *Promising the Constitution*, 110 **Nw. U. L. Rev.** (forthcoming, 2016), available at [SSRN](#).

Many questions about the meaning of the Constitution are disputed. But however we answer those questions, at some point most of us come to a different question: so what? Why do those words on a page have any moral grip on the three-dimensional world of human beings? In one of my favorite new articles of the summer, *Promising the Constitution*, Professor [Richard Re](#) takes on this question and its implications. The answer, he says, is the constitutional oath, which simultaneously commands much less and much more than many have assumed. (Full disclosure: Re is a friend and former classmate.)

Re's article makes three major contributions. The first is to argue that the oath is what gives the Constitution normative force in our world. We should see the oath not as an empty political ritual, but as a solemn assertion of a promise, with all the moral force that a promise carries. Of course, many philosophers are skeptical about the moral force of promises; but Re surmounts their objections by turning to the democratic context of the oath. While immoral promises and coerced promises might lack moral weight, the constitutional oath today should be seen as neither.

Second, Re argues that the oath's content has been misunderstood and overextended. Champions of interpretive pluralism sometimes argue that the oath empowers each branch, each officer, or each state to interpret the Constitution for themselves. Champions of judicial supremacy argue instead that the oath binds each office-holder to the Supreme Court's interpretations. Re argues that the oath simply does not resolve such questions of separation of powers or federalism.

Third, Re argues that the oath binds each office-holder to the public understanding of "this Constitution" *at the time of the oath*. That formulation, in turn, has important implications. It means that the moral content of the constitutional promise is a positive question. To figure out what officers are obligated to do tomorrow, we must look to how our Constitution is understood today.

That formulation also tells us how officeholders should react to different kinds of constitutional change. The oath to the current Constitution obviously means that one takes for granted any changes that have happened before the taking of the oath. The current Constitution includes various amendments. Oath-takers today necessarily accept those amendments—even if they were once controversial.

But if the duty is focused on the time of the oath, what about subsequent changes? Re argues that the oath to the current Constitution includes the currently lawful rules of constitutional change, such as Article V. (Law professors debate whether there are others.) So a new amendment, or a new Supreme Court judgment, is generally part of the old oath. But there's a catch: if a change is *legally revolutionary*, then it's not part of one's previous oath. The oath's relationship to revolution may provide the hidden logic of Reconstruction jurists who narrowly read the Fourteenth Amendment, and of modern Justices who perpetually dissent from certain decisions that were issued over their initial outcry.

This is a lot of important ground to cover. But my enthusiasm for the piece is heightened because of the interpretive question it doesn't cover: what *is* the current public understanding of "this Constitution?" Re observes a few elements of consensus, but is largely agnostic on this question. It's a question that I have attempted to answer elsewhere, albeit briefly, in [this](#) essay on the "positive turn," and more extensively in a forthcoming essay, *Is Originalism Our Law?*

argue that as a positive matter, our constitutional law today is an inclusive form of originalism. (Steve Sachs makes related arguments, to which I am also indebted, [here](#) and [here](#).)

Re's article demonstrates the stakes of that positive inquiry. If he is right that the oath commits officeholders to today's Constitution, then we must discern whether today's Constitution is one that continues to have its original meaning. And if, as I believe, a form of originalism is indeed our law today, then Re shows how originalism can continue to have normative force: not because of the deeds that were done by the dead, but because of the promises that are made by the living.

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