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# ESSAY

## IS ORIGINALISM OUR LAW?

William Baude\*

*This Essay provides a new framework for criticizing originalism or its alternatives—the framework of positive law.*

*Existing debates are either conceptual or normative: They focus either on the nature of interpretation and authority, or on originalism's ability to serve other values, like predictability, democracy, or general welfare. Both sets of debates are stalled. Instead, we ought to ask: Is originalism our law? If not, what is? Answering this question can reorient the debates and allow both sides to move forward.*

*If we apply this positivist framework, there is a surprisingly strong case that our current constitutional law is originalism. First, I argue that originalism can and should be understood inclusively. That is, it permits doctrine like precedent if those doctrines can be justified on originalist grounds. Second, I argue that our current constitutional practices demonstrate a commitment to inclusive originalism. In Supreme Court cases where originalism conflicts with other methods of interpretation, the Court picks originalism. By contrast, none of the Court's putatively anti-originalist cases in fact repudiate originalist reasoning. These judicial practices are reinforced by a broader convention of treating the constitutional text as law and its origin as the framing. So while constitutional practice might seem, on the surface, to be a pluralism of competing theories, its deep structure is in fact a nuanced form of originalism.*

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\* Neubauer Family Assistant Professor of Law, University of Chicago. Thanks to Stephen Sachs and other participants in an August 2013 colloquium on The Current State of Originalism who originally convinced me that this Essay needed to be written. Further thanks to Matthew Adler, Larry Alexander, Charles Barzun, Mitch Berman, Samuel Bray, Corey Brettschneider, Jud Campbell, Josh Chafetz, Nathan Chapman, Michael Dorf, Justin Driver, Chad Flanders, James Fleming, Ed Foley, David Fontana, Heather Gerken, Tom Ginsburg, David Golove, Christopher Green, Michael Green, Alon Harel, Orin Kerr, Marty Lederman, Brian Leiter, Jim Lindgren, Michael McConnell, Judith Miller, Caleb Nelson, Rick Pildes, Jeff Pojanowski, Eric Posner, Alex Potapov, David Pozen, Zachary Price, Danny Priel, Ketan Ramakrishnan, Michael Rappaport, Richard Re, Adam Samaha, Steve Sanders, Fred Schauer, Micah Schwartzman, Matt Shapiro, Scott Shapiro, Lawrence Solum, Kevin Stack, Asher Steinberg, James Stern, Geof Stone, David Strauss, Brian Tamanaha, Mila Versteeg, Kevin Walsh, Barrett Young, and other participants in many workshops, who collectively provided many incisive comments but never quite persuaded me that this Essay should be abandoned. Finally, thanks to Nickolas Card for research assistance and the Alumni Faculty Fund and SNR Denton Fund for research support.

*Third, I suggest that originalism's positive legal status has important normative implications for today's judges. Judges promise to follow the law, and their judicial authority is premised on the assumption that they do. So if an inclusive version of originalism is the law, judges ought not be the ones to change it. Courts ought to privilege our current legal conventions over academic theories that are anti-originalist and against narrower forms of originalism as well.*

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## INTRODUCTION

Debates about originalism are at a standstill, and it is time to move forward. The current debates are generally either conceptual or normative: The conceptual debates focus “on the nature of interpretation and on the nature of constitutional authority.”<sup>1</sup> Originalists rely on an intuition that the original meaning of a document is its real meaning and that anything else is making it up. But the intuition is contested: Critics respond that there is no inherent concept of interpretation and that other countries with written constitutions are not necessarily originalist.<sup>2</sup>

The normative debates, meanwhile, focus on originalism’s ability to serve various values, “democratic self-governance, the rule of law, stability, predictability, efficiency, and substantive goodness among them.”<sup>3</sup> But the values are contested, and so are the empirical claims about whether those values are served and at what expense.

Yet there is a third way to assess originalism—and constitutional theories more broadly—by looking to our positive law, embodied in our legal practice. We ought to ask: Is originalism our law? If not, what is? This question has been called “one of the two most difficult questions in legal philosophy.”<sup>4</sup> But if it can be answered, it has the potential to reorient the debates and allow both sides to move forward. This move is the “positive turn.”<sup>5</sup>

1. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. Rev. 1, 37–38 (2009) (emphasis omitted) [hereinafter Berman, *Bunk*].

2. See Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. Pa. L. Rev. 1025, 1088–91 (2010) (arguing writtenness does not necessarily imply originalism); Cass R. Sunstein, *There Is Nothing that Interpretation Just Is*, 30 Const. Comment. 193, 193 (2015) (denying inherent concept of interpretation).

3. Berman, *Bunk*, supra note 1, at 38.

4. Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 San Diego L. Rev. 623, 642 (2014) [hereinafter Alexander, *Theories*]. Alexander’s *other* most difficult question, “how it is possible for law to be normative,” is addressed by Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. (forthcoming 2016) (on file with the *Columbia Law Review*), and discussed infra section III.A.

5. The “positive turn” evokes the basic tenets of legal positivism: that the content of the law is determined by certain present social facts and that moral considerations do not necessarily play a role in making legal statements true or false. See John Gardner, *Legal Positivism: 5 ½ Myths*, 46 Am. J. Juris. 199, 222–25 (2001) [hereinafter Gardner, *Legal Positivism*] (“[A]ccording to soft legal positivists, there is no law that depends for its validity on its merits just in virtue of the nature of law, i.e. necessarily.”); Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 N.Y.U. L. Rev. 1035, 1056–57 (2008) (discuss-

If originalism is the law, then neither the conceptual nor normative justifications need to bear as much weight. Originalists need not prove that originalism is inherent in “the nature” of constitutions or interpretation, just that it is a convention of *our* interpretation of *our* Constitution. Similarly, originalists need not show that originalism is the first-best legal arrangement as a normative matter so long as we agree that government officials should obey the law. The result would be a defense of originalism that is contingent but truer to our actual commitments.

On the other side, the positive turn provides a surer basis for critics of originalism who think it is a nefarious and revolutionary dogma. If originalism is *not* the law, then there is no simple case for why federal judges have the authority or obligation to be originalist. If something other than originalism is the law, then there is a ready-made answer to the perennial originalist challenge, *what is the coherent alternative?*<sup>6</sup> The legal status quo is the coherent alternative.

Having framed the question, this Essay argues that a version of originalism is indeed our law. That version is a somewhat inclusive version of originalism—a version that allows for some precedent, for some evolving construction of broad or vague language. At the same time, that version is not infinitely inclusive—it allows for precedent and evolving interpretations only to the extent that the original meaning *itself* permits them. In other words: “[T]he original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision.”<sup>7</sup>

I will acknowledge at the outset that this type of originalism may be frustrating to those who knew originalism in its unruly youth. But as I will try to show, this definition is coherent, consistent with much modern originalist scholarship, and most important, consistent with our practice. It is what Justice Kagan meant when she said that “sometimes [the Framers] laid down very specific rules, sometimes they laid down broad principles. Either way, we apply what they say, what they meant to do. And so, in that sense, we are all originalists.”<sup>8</sup> And it may be what Justice Alito meant when he said that he is “a practical originalist”: he “start[s] out with original-

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ing moral fallibility of law); Brian Leiter, *Why Legal Positivism?* 1 (2009) (unpublished manuscript), <http://ssrn.com/abstract=1521761> (on file with the *Columbia Law Review*) (discussing positivist “slogan” that “there is no necessary connection between law and morality”). But this Essay relies on lawyers’ assumptions rather than technical jurisprudence. *Infra* note 80. Indeed, even some “natural law” theorists also agree that many features of a legal regime are contingent on the social facts of a particular society. See, e.g., John Finnis, *The Truth in Legal Positivism*, in *The Autonomy of Law* 195, 195 (Robert P. George ed., 1996) (discussing law’s “variability and relativity to time, place, and polity”).

6. I call this the “bear principle,” after Justice Scalia’s oft-repeated parable. See *infra* section IV.B.

7. *Infra* section I.A.

8. Clip: Kagan Confirmation Hearing, Day 2, Part 1 (C-SPAN television broadcast June 29, 2010), <http://www.c-span.org/video/?c2924010/clip-kagan-confirmation-hearing-day-2-part-1> (on file with the *Columbia Law Review*).

ism,” and the Constitution’s “meaning does not change,” but when applying a “broadly worded” provision, “all you have is the principle and you have to use your judgment to apply it.”<sup>9</sup> But of course one can resist my terminology without resisting my substantive claims.

The substantive point is that this concept of originalism is a coherent middle position. It rejects some more radical forms of originalism that have an outsized voice in American legal culture; those forms of originalism must be justified through nonpositive analysis.<sup>10</sup> It also stands in contrast to the widely repeated view that the practice of American constitutional law is pluralist. Pluralists argue that our practice is a set of competing methods, none of which dominates the others.<sup>11</sup> Whereas those pluralist conceptions are flat, under my view they are hierarchically structured, with originalism at the top of the hierarchy.<sup>12</sup>

If I’m right about all of this, originalist judging can potentially be justified on a much more straightforward and plausible normative ground—that judges have a duty to apply the law, and our current law, in this time and place, is this form of originalism. That account might disappoint both stricter originalists and nonoriginalists alike, but it should also reorient their debates going forward. And even if I’m wrong about my positive account, milder versions of these normative conclusions nonetheless follow. Originalism is still a legally privileged methodology, and originalist judging is likely still permissible. Either way, the positive turn helps move past the current debates and justify a form of originalism that does not derive from the dead hand.<sup>13</sup>

9. Matthew Walther, Sam Alito: A Civil Man, *Am. Spectator* (May 2014), <http://spectator.org/articles/58731/sam-alito-civil-man> [<http://perma.cc/79PM-JETQ>].

10. See Joel Alica, Originalism and the Rule of the Dead, 23 *Nat’l Aff.* 149, 161 (2015) (expressing skepticism about something like inclusive originalism and submitting “[l]egal conservatives . . . would do better to insist on the rule of the dead”).

11. See Philip Bobbitt, *Constitutional Interpretation* 155–62 (1991) [hereinafter Bobbitt, *Interpretation*]; see also Ian C. Bartrum, *Metaphors and Modalities: Meditations on Bobbitt’s Theory of the Constitution*, 17 *Wm. & Mary Bill Rts. J.* 157, 159 (2008) [hereinafter Bartrum, *Metaphors and Modalities*] (rejecting “tempt[ation] to look outside the practice for a means of resolution—perhaps by ranking the modes of argument”); Pamela S. Karlan, *Constitutional Law as Trademark*, 43 *U.C. Davis L. Rev.* 385, 400 (2009) (“[A]rguments about what the Constitution commands and prohibits have always looked to multiple sources of authority . . .”).

12. Richard Fallon has previously put forward a similar hierarchy, arguing that “the implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed . . . by arguments concerning the framers’ intent,” Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *Harv. L. Rev.* 1189, 1193–94 (1987) [hereinafter Fallon, *Constructivist Coherence Theory*], but his notion of hierarchy appears to be substantially weaker than mine. See *id.* at 1246 (denying “higher ranked categories represent preferred starting points”).

13. A related jurisprudential turn in originalism has previously been proposed by Mitchell Berman and Kevin Toh, who distinguish carefully between theories of “law” and theories of “adjudication” and argue that “old originalism was (chiefly) a theory of adjudication, whereas new originalism is (chiefly) a theory of law.” Mitchell N. Berman & Kevin

Part I of this Essay briefly explains different ways originalism might relate to other forms of interpretation, and defends an inclusive variety of originalism. Part II then begins the positive inquiry, providing evidence from our higher-order and lower-order practices that point toward inclusive originalism. Part III explains how this positive inquiry can have normative implications. And Part IV shows how even if the positive argument is only partly successful, other normative implications nonetheless follow.

## I. UNDERSTANDING INCLUSIVE ORIGINALISM

This Part explains the concept of “inclusive” originalism. Section I.A distinguishes originalist claims of several different strengths. Section I.B explains what “inclusive” originalism includes and what it doesn’t and why it’s a meaningful middle ground.

### A. *Versions of Originalism*

From a certain, straightforward point of view it may simply seem impossible to describe our current positive law as originalist. Certainly some criticisms of originalism have this tone,<sup>14</sup> and one can see why. If you were describing American law to a Martian or a Finn, you might note that while originalism is frequently invoked in Supreme Court opinions, it is not the only thing that is invoked—and it is not even clear it is the most often invoked. And nearly every originalist has a long list of practices or precedents that he would describe as inconsistent with the original meaning of the Constitution.<sup>15</sup>

But these ways of thinking about whether originalism is the law define originalism too narrowly. They reflect a widespread but mistaken assumption—that originalism must be either the *exclusive* criterion for constitutional law, or *just one among many* valid criteria. In fact there is an important middle possibility.

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Toh, On What Distinguishes New Originalism from Old: A Jurisprudential Take, 82 Fordham L. Rev. 545, 546 (2013) [hereinafter Berman & Toh, New Originalism]; see also Mitchell N. Berman & Kevin Toh, Pluralistic Nonoriginalism and the Combinability Problem, 91 Tex. L. Rev. 1739, 1739 (2013) [hereinafter Berman & Toh, Combinability] (distinguishing between “a position about what the law is or consists of” and “a position about how judges should decide or adjudicate constitutional disputes”). I won’t adhere to precisely the same framework and terminology, but I will similarly divide my inquiry into the positive question of what constitutes our constitutional law and the normative question of what judges ought to do.

14. See, e.g., Frank Cross, The Failed Promise of Originalism 134 (2011); Richard H. Fallon, Jr., Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence, 86 N.C. L. Rev. 1107, 1129–32 (2008) [hereinafter Fallon, Hartian].

15. See, e.g., Gary Lawson, The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1232–49 (1994) (arguing administrative state violates original meaning of Constitution in multiple respects).

To see it, consider these four possible relationships that originalism<sup>16</sup> could have with American law:

- (1) The strongest position would be “exclusive originalism”—this would be the idea that judges should look *only* to the original meaning of the Constitution and apply that meaning to the facts of a given dispute. All other sources of law, such as precedent or practice or policy, would be categorically forbidden.
- (2) A moderate position would be “inclusive originalism.”<sup>17</sup> Under inclusive originalism, the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision. This means that judges can look to precedent, policy, or practice, but only *to the extent that the original meaning incorporates or permits them*.<sup>18</sup>
- (3) A weak position would be a form of pluralism: Originalism is *part* of the law. Under this position, originalism is a method of decision, but not the only criterion for other methods of decision. So judges may consider precedent instead of originalism in some cases, even if the original meaning would not permit precedent. At the same time, there are at least some cases where the original meaning applies on its own authority. Hence, (4), below, is rejected. (As we will see, there are several variants of this position, with one important question being whether there is a “meta-rule” that governs conflicts between originalism and others sources of law.)<sup>19</sup>
- (4) The most anti-originalist position would be that originalism is not at all a source of law. Those who want to apply the original meaning in any case are actually urging a change in the law, and their project must be justified on that ground, if at all. (One could also subdivide this position in many ways.)

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16. This list is intended to be agnostic about various intramural disputes over what, exactly, original meaning *is*. My own view, following that espoused by Stephen E. Sachs, is that the original meaning is constructed by the original legal rules, and hence is “the Founders’ law, including lawful changes.” Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 *Harv. J.L. & Pub. Pol’y* 817, 819 (2015) [hereinafter Sachs, *Change*]. But most of this Essay’s claims do not depend on that narrow point.

17. There is of course a sense in which this form of originalism also relies “exclusively” on originalism to pedigree a constitutional decision. But it is useful to distinguish the two just as some within jurisprudence find it useful to distinguish between “inclusive” and “exclusive” legal positivism. See generally Kenneth Einar Himma, *Inclusive Legal Positivism*, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 125 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter *Oxford Handbook*]; Andrei Marmor, *Exclusive Legal Positivism*, in *Oxford Handbook*, *supra*, at 104.

18. I say “incorporates” or “permits” to encompass two different ways originalism might deal with other methods. See *infra* section I.B.

19. Interestingly, even many scholars who themselves criticize originalism concede that (3) is true and originalism is part of the law. See sources cited *infra* notes 307–310.



It is probably right that there is no way a positivist could subscribe to (1), since it outright rejects sources of law that judges uncontroversially use every day. And it is also true that possibility (3) seems weak enough that it might be dismissed as trivial<sup>20</sup> (though as I will discuss eventually,<sup>21</sup> it is not quite as weak of a claim as it seems).

But the big mistake is to assume that (1) and (3) are the only possibilities. In fact, the intermediate possibility (2) is distinct, plausible, and important.

### B. *Understanding the Plausibility of Inclusive Originalism*

What exactly does it mean to suggest that originalism is the criterion for other methods of interpretation? How would that work? Originalism might incorporate other legal doctrines into itself, the same way that American law might choose to incorporate a foreign legal rule or an economic standard. Originalism might also simply permit a given actor to choose a rule governing some defined issue, the same way that a court might be allowed to choose rules governing its own proceedings. Indeed, while more work should be done here, I will suggest that originalism is most plausibly understood as incorporating and permitting such doctrines.

1. *Evolving Terms.* — At a most basic level, it does not take any fancy theoretical footwork to see that fixed texts can harness what seem to be changing meanings. Though the text may have originally been *expected* to apply in a particular way to a particular circumstance, that does not mean that its original meaning always must apply in the same way. Similarly, originalists can sensibly apply legal texts to circumstances unforeseeable at the time of enactment. This is because a word can have a fixed abstract meaning even if the specific facts that meaning points to change over time.<sup>22</sup>

The standard legal examples are the word “unreasonable” in the Fourth Amendment<sup>23</sup> or the words “cruel and unusual” in the Eighth.<sup>24</sup> Even more obvious examples might be the reference to “property” in the

20. See Berman, Bunk, *supra* note 1, at 19–20 (noting many originalists are “not satisfied by a disposition on the part of interpreters to, shall we say, take original meanings and principles ‘seriously,’ or pay them substantial regard”).

21. See *infra* Part IV (discussing implications of recognizing originalism as one part of our law).

22. See Christopher R. Green, *Originalism and the Sense–Reference Distinction*, 50 *St. Louis U. L.J.* 555, 559–60 (2006) [hereinafter Green, *Sense–Reference Distinction*].

23. U.S. Const. amend. IV. But see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 *Mich. L. Rev.* 547, 686–93 (1999) (arguing “unreasonable” had more technical legal meaning than is usually recognized today).

24. U.S. Const. amend. VIII; 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) (“[T]he word ‘unusual’ was a term of art that referred to government practices that are contrary to ‘long usage’ or ‘immemorial usage.’”).

Fifth Amendment,<sup>25</sup> which can extend to new forms of property that did not exist in 1791 (cars, not just carriages), or to “armies” in Article I, which can include armies that have modern weaponry and vehicles (airplanes, not just muskets).<sup>26</sup>

This is not to say that the Constitution’s text is infinitely malleable. It is definitely not.<sup>27</sup> Rather, the degree of malleability is a question about each particular word or clause at issue. As Chris Green puts it, “The choice of language is a choice about what sorts of changes should make a difference to the set of future applications.”<sup>28</sup> Similarly, David Strauss writes, “this choice between generality and specificity is a crucial constitutional decision,” and originalists ought not impose greater specificity than the Framers did.<sup>29</sup> The point is simply that the Constitution’s terms may have significantly more flexibility than the simplest conception of originalism would imply.

2. *Devices for Resolving Ambiguity and Vagueness.* — The Constitution’s text is generally central to originalism. At the same time, texts can be ambiguous or vague and that ambiguity or vagueness must be resolved.<sup>30</sup> Originalists then turn to devices like “construction” (a much-debated accessory to interpretation),<sup>31</sup> “liquidation” (a method of resolving ambiguity or vagueness through past practice),<sup>32</sup> and presumptions (like the

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25. U.S. Const. amend. V.

26. U.S. Const. art. I, § 8, cl. 12.

27. See generally John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. Ill. L. Rev. 737, 739 [hereinafter McGinnis & Rappaport, *Abstract Meaning*] (arguing seemingly abstract provisions may not turn out to be abstract upon further investigation).

28. Green, *Sense–Reference Distinction*, supra note 22, at 583.

29. David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 Yale L.J. 1717, 1736–37 (2003) [hereinafter Strauss, *Jefferson*].

30. On the distinction between ambiguity and vagueness, see Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 Const. Comment. 95, 97–98 (2010) [hereinafter Solum, *Interpretation–Construction*]. As Solum notes, many people do not use the terms in their precise senses.

31. See Randy Barnett, *Restoring the Lost Constitution* 120–31 (2d ed. 2014); Keith Whittington, *Constitutional Constructions: Divided Powers and Constitutional Meaning* 3–9 (1999); Solum, *Interpretation–Construction*, supra note 30; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 455–56 (2013) [hereinafter Solum, *Constitutional Construction*].

32. See William Baude, *Sharing the Necessary and Proper Clause*, 128 Harv. L. Rev. Forum 39, 48 (2014), [http://cdn.harvardlawreview.org/wp-content/uploads/2014/11/vol128\\_Baude.pdf](http://cdn.harvardlawreview.org/wp-content/uploads/2014/11/vol128_Baude.pdf) [<http://perma.cc/J7ML-4XCG>] (“Liquidation (think ‘liquidated damages’) was a term for settling the meaning of a contested or vague legal provision through practice.”); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 10–21 (2001) [hereinafter Nelson, *Stare Decisis*] (similar).

presumption of constitutionality).<sup>33</sup> So long as these devices are themselves permitted by many versions of originalism.

Some originalists, most prominently Rappaport and McGinnis, resist “construction,” and other “sources of law extrinsic to the Constitution” as being inconsistent with originalism.<sup>34</sup> For present purposes this disagreement is beside the point: Rappaport and McGinnis agree that originalism permits devices for resolving ambiguity and vagueness. They argue that the devices most consistent with originalism are the “original methods,”—i.e., “the interpretive methods that the enactors would have deemed applicable to the constitution.”<sup>35</sup> If, for example, liquidation through practice or a presumption of constitutionality were originally permitted, then their continued use today does not create a conflict between positive law and originalism.

A different originalist vision treats such devices as a background rule of law—one that is not in the text itself but is still used to discern its legal effect.<sup>36</sup> If these background rules have a legal pedigree to the Founding, then they too are consistent with inclusive originalism.<sup>37</sup>

A full catalog of the appropriate devices is probably a book-length project, and there may be plenty of disagreement about *what* methods are permissible for resolving constitutional ambiguity and vagueness. All sorts of approaches are attributed to the Founding,<sup>38</sup> and resolving them will require doing the historical and interpretive work. For present purposes, the point is once again that originalism supports at least some methods that do not look, superficially, like originalism. What is important is not whether or not constitutional interpreters always look exclusively at the original meaning, but whether they look at those things in cases where the original meaning would say not to.

3. *Precedent.* — Finally, originalist reasoning permits a doctrine of precedent, or *stare decisis*. There are a few notable originalists who disa-

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33. See Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 Harv. J.L. & Pub. Pol’y 411, 421–28 (1996) (explaining how burdens of proof operate as presumptions that resolve indeterminacy).

34. John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution* 142–43 (2013) [hereinafter McGinnis & Rappaport, *Good Constitution*].

35. *Id.* at 82.

36. See Stephen E. Sachs, *The “Unwritten Constitution” and Unwritten Law*, 2013 U. Ill. L. Rev. 1797, 1803–10 [hereinafter Sachs, *Unwritten Law*] (describing “interpretive rules” that are “outside the written text”).

37. For more on such rules, and an argument that they are inevitable, see William Baude & Stephen Sachs, *The Law of Interpretation* (unpublished manuscript) (on file with the *Columbia Law Review*).

38. See, e.g., Martha Nussbaum, *Reply to Diane Wood, Constitutions and Capabilities: A (Necessarily) Pragmatic Approach*, 10 Chi. J. Int’l L. 431, 431–36 (2010) (describing “[c]apabilities [a]pproach” that arguably “shaped the public meaning of key elements of the text” at Founding).

gree, claiming that the Constitution itself mostly forbids such a doctrine.<sup>39</sup> But most originalists do not think so. Indeed, they have a wide variety of theories reconciling precedent and originalism. Some hold that originalism permits rules of precedent as a form of common law;<sup>40</sup> some suggest that precedent is permissible so long as it is not clearly erroneous;<sup>41</sup> some argue that precedent is permissible because it was a rule of common law at the Founding,<sup>42</sup> or supports the same values as originalism.<sup>43</sup>

This point is crucial to the positive turn, but it has been so well-covered by so many scholars that I will recapitulate it only briefly. The key is that the textualist case against *stare decisis* is too quick. Article III empowers judges to decide cases and implicitly requires them to follow the law in doing so, while Article VI confirms that the Constitution is a form of binding and supreme law. But an originalist must understand these provisions, as they were originally read, in the context of the common law.<sup>44</sup>

An obvious and uncontroversial example of such a common-law rule is waiver. A judge is not required to adjudicate a constitutional claim if a

39. See Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 Ave Maria L. Rev. 1, 3–4 (2007) [hereinafter Lawson, *Mostly Unconstitutional*] (arguing Court should “mostly never” “choose precedent over direct examination of constitutional meaning” (internal quotation marks omitted)); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 Const. Comment. 289, 289 (2005) [hereinafter Paulsen, *Corrupting Influence*] (“*Stare decisis* contradicts the premise of originalism . . .”).

40. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 Duke L.J. 503, 525–31 (2000) (“There is good reason to believe that most of what we know as the law of precedent in federal court is general law . . .”); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. Rev. 803, 828 (2009) [hereinafter McGinnis & Rappaport, *Precedent*] (“[G]iven the absence of an alternative source of law and its conformity with the history, the argument for treating precedent as a matter of common law is compelling.”).

41. See Nelson, *Stare Decisis*, supra note 32, at 83–84.

42. See Stephen E. Sachs, *Constitutional Backdrops*, 80 Geo. Wash. L. Rev. 1813, 1863–66 (2012) [hereinafter Sachs, *Backdrops*] (“*Stare decisis* might simply be a recognized common law doctrine . . . Having (allegedly) been in effect at the time of the Founding, . . . it therefore continues to be in effect today.”).

43. See Robert H. Bork, *The Tempting of America* 159 (1990) (“[T]hose who adhere to a philosophy of original understanding are more likely to respect precedent than those who do not.”); Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 Vand. L. Rev. 105, 108–09 (2015) (“Asking judges to defer to the pronouncements of their predecessors can be a useful mechanism of judicial constraint, which is a value that many originalists have long prized.”); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 Va. L. Rev. 1437, 1473–77 (2007) (arguing *stare decisis* supports principles of popular sovereignty).

44. See McGinnis & Rappaport, *Precedent*, supra note 40, at 823–29 (“There are strong reasons for concluding that the Framers’ generation would have understood the judicial power [in Article III] to include the minimal concept of precedent . . .”); Sachs, *Backdrops*, supra note 42, at 1865 (noting precedent was “one of the well-understood background assumptions of the common law” at time Framers were drafting (internal quotation marks omitted) (quoting Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 Yale L.J. 1535, 1577 (2000))).

party has not raised it. This is not because rules of waiver trump the Constitution, but rather because the Constitution itself asks judges to decide cases in the original way—subject to certain well-established common-law principles.<sup>45</sup>

To an originalist, precedent can operate the same way. Precedent, like waiver, was a well-established common-law-doctrine at the time of the Founding.<sup>46</sup> Hence the original meaning of Articles III and VI allows judges to apply precedent. As with waiver, that is true even though applying precedent will sometimes lead judges away from what might seem like the purest originalist outcome in a given case. A party whose originalist claim is foreclosed by a valid waiver rule or a valid rule of precedent will lose; but that is because inclusive originalism permits rules of waiver and precedent.

Similarly, deciding cases on the basis of precedent does not conflict with Article V by creating some sort of unauthorized constitutional amendment.<sup>47</sup> In *form*, relying on precedent to decide a case instead of first-order legal materials is no different than relying on a previous judgment and the law of *res judicata* instead of first-order legal materials. If one accepts the binding force of judgments as consistent with the original Constitution (as one should),<sup>48</sup> then one should be open to historical arguments that precedent is required or permitted as well.<sup>49</sup>

I have described inclusive originalism as both “requiring” and “permitting” these other methods of interpretation and decision. That is because sometimes originalism will point to one right method, and other times it will allow some decisionmaker to use one of several methods. A method like the use of evolving language is likely an example of a submethod that is *required* by originalism. Giving evolving terms their intended evolving meaning is necessary to be faithful to their original sense. By contrast, methods like precedent and waiver are probably better described as *permitted*. Because of their common-law scope and status, judges have a certain amount of discretion both in articulating the rules and in deciding whether to apply them in a particular case. The exact breadth of that

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45. See Sachs, *Unwritten Law*, *supra* note 36, at 1819–21 (“[O]ur legal language is what logicians call ‘defeasible’: we ordinarily state legal rules subject to unnamed exceptions that defeat their operation in particular cases.”).

46. McGinnis & Rappaport, *Precedent*, *supra* note 40, at 813–23 (enumerating many pieces of evidence establishing acceptance of doctrine of precedent at time of Founding); Sachs, *Unwritten Law*, *supra* note 36, at 1832 (discussing common law practice of *stare decisis*).

47. Thanks to Larry Alexander for this challenge.

48. See William Baude, *The Judgment Power*, 96 *Geo. L.J.* 1807, 1809 (2008) [hereinafter Baude, *Judgment Power*] (“[T]he judicial power is the power to issue binding judgments.”).

49. McGinnis & Rappaport, *Precedent*, *supra* note 40, at 829 (making this analogy).

discretion is a fair question,<sup>50</sup> but for present purposes it is enough to see that inclusive originalism authorizes and bounds such doctrines.

Because originalism permits a doctrine of precedent, many of its most obvious conflicts with modern practice go away. Richard Fallon points to paper money and social security as examples of widely accepted practices that (he says) have questionable originalist pedigrees.<sup>51</sup> They are “constitutionally valid today because they are recognized as such under what H.L.A. Hart classically described as practice-based ‘rules of recognition’ for determining constitutional validity, and they would remain valid even if it could be established decisively that they are incompatible with the original understanding.”<sup>52</sup>

But paper money and social security have been upheld by the Supreme Court.<sup>53</sup> If originalism permits precedent to control those questions, then our current regime may be consistent with originalism even if an originalist would not have decided those precedents in the first place. It is not necessarily unoriginalist to adhere to an unoriginalist precedent. It would be different if the Court issued openly nonoriginalist opinions that were widely accepted “not merely as final, but as properly rendered.”<sup>54</sup> Fallon appears to believe that this is the case. As I will discuss, I am not convinced that it is.<sup>55</sup>

4. *Is This Really a Kind of Originalism?* — To some readers, the above conception of originalism may seem like cheating. The implicit theory behind this criticism is that *true* originalism is “exclusive” originalism, not merely “inclusive” originalism.<sup>56</sup> Some would say that once originalism accommodates precedent and flexible language, it has lost its distinctive meaning.<sup>57</sup> But even if this is a dispute over labels, there are good reasons that the label “originalism” is apt.

50. My instincts lie close to the view implied in Nelson, *Stare Decisis*, supra note 32, but the matter deserves further study and may be examined somewhat in Baude & Sachs, supra note 37.

51. Fallon, *Hartian*, supra note 14, at 1113.

52. *Id.* (footnote omitted).

53. *Helvering v. Davis*, 301 U.S. 619, 634 (1937) (upholding payment of social security “Old Age Benefits”); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 529 (1870) (upholding law making paper money “legal tender”).

54. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 *Calif. L. Rev.* 535, 548 (1999).

55. See *infra* section II.B.2.

56. See, e.g., Cross, supra note 14, at 133–34.

57. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 *Geo. L.J.* 713, 715, 744–64 (2011) (claiming by accommodating precedent and flexibility “originalism has sacrificed . . . the very thing that made it what it is”); James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 *Tex. L. Rev.* 1785, 1788–94 (2013) (arguing new originalism lacks “one unified view”); Karlan, supra note 11, at 400–01 (“Originalism has become a blanket term describing constitutional interpretation, rather than a distinctive form of a generic practice.”).

The first reason is that it's a label used by originalists. Prominent originalist scholars disagree about a lot, but a lot of them in fact agree on the use of precedent and other methods of decision that have an originalist pedigree. This kind of inclusive originalism is potentially consistent with a range of approaches from McGinnis's and Rappaport's "original methods" approach<sup>58</sup> to Jack Balkin's "living originalism"<sup>59</sup> to Bernadette Meyler's "common-law originalism."<sup>60</sup> It is consistent with Lawrence Solum's observation that originalism is a family of theories united by principles of fixation and constraint.<sup>61</sup> Even critics of originalism such as Paul Brest<sup>62</sup> and Mitch Berman<sup>63</sup> have accepted this kind of inclusive framework as a kind of originalism. To be sure, it may well be that some conceptions of originalism in politics or in the popular press do not always accept these distinctions,<sup>64</sup> but those more radical theories may not be embraced by the positive turn.

Second, this kind of nonexclusive originalism makes sense and captures the animating justifications for originalism. Remember, the point in each case is that the choices embodied in the original meaning are authoritative. So to the extent that the original Constitution unambiguously foreclosed the use of precedent<sup>65</sup> or any other source, that choice would be authoritative. (Notice that even the most ardent believers in precedent do not think that constitutional precedents should trump subsequent constitutional amendments that overrule them—as the Eleventh Amendment overruled *Chisholm v. Georgia*,<sup>66</sup> as the Fourteenth Amendment overruled *Dred Scott v. Sandford*,<sup>67</sup> as the Sixteenth Amendment overruled *Pollock v. Farmers' Loan & Trust Co.*,<sup>68</sup> and as the Twenty-Sixth Amendment overruled *Oregon v. Mitchell*.<sup>69</sup>)

58. McGinnis & Rappaport, *Good Constitution*, supra note 34, at 139–43.

59. Jack M. Balkin, *Living Originalism* (2011) [hereinafter Balkin, *Living*].

60. Bernadette Meyler, *Towards a Common Law Originalism*, 59 *Stan. L. Rev.* 551, 593–600 (2006).

61. Solum, *Constitutional Construction*, supra note 31; Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 *U. Ill. L. Rev.* 1935, 1942–43.

62. See Paul Brest, *The Misconceived Quest for Original Understanding*, 60 *B.U. L. Rev.* 204, 223, 231–34 (1980) (discussing "moderate originalism").

63. See Berman, *Bunk*, supra note 1, at 10, 20, 22, 29–31 (describing as "modest variant of strong originalism" that "interpreters must accord original meaning . . . lexical priority when interpreting the Constitution").

64. See Colby, supra note 57, at 776–78 (decrying popular conception of originalism).

65. As for instance, it would, if one accepted the arguments made by Lawson, *Mostly Unconstitutional*, supra note 39, or Paulsen, *Corrupting Influence*, supra note 39.

66. 2 U.S. (2 Dall.) 419 (1793).

67. 60 U.S. (19 How.) 393 (1857).

68. 157 U.S. 429 (1895).

69. 400 U.S. 112 (1970); see Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 *Tul. L. Rev.* 991, 993 & n.7 (1987) (acknowledging legitimacy of overruling these decisions by amendment); see also Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 *Notre Dame. L. Rev.* 2253, 2277 (2014) [hereinafter Sachs,

At the same time, the decision *not* to eliminate all discretion is also a choice that an originalist must respect. The decision to use language that encompasses changing circumstances, the decision to incorporate or permit precedent, and the decision to use vague language subject to existing law for resolving vagueness are all originalist decisions, and *rejecting* them would be odd. “Why be more ‘originalist’ than the Founders, or more Catholic than the Pope?”<sup>70</sup>

Just as one is a textualist by looking to a law’s purpose if it is directly placed in the text; just as one obeys federal law even if it incorporates state law; one is an originalist by using whatever kinds of authority the original meaning permits. This form of inclusive originalism simply requires all other modalities to trace their pedigree to the original meaning.

Finally, this kind of inclusive originalism is meaningfully distinct from nonoriginalist competitors. Unlike pluralist theories in which different methodologies compete and have their own source of authority, inclusive originalism has one methodology that rules them all. That hierarchy keeps originalism from being infinitely capacious and means that other methods are always subject, in principle, to historical falsification.

Having understood the basic idea of inclusive originalism, let’s now turn to the heart of the positive inquiry. Is this moderate form of originalism our law?

## II. THE POSITIVE INQUIRY

A long time ago, the Constitution was enacted as the self-proclaimed “supreme Law of the Land.”<sup>71</sup> We all know that. At the same time, we also know two other things: One is that no document can make itself supreme law just by saying so. After all, the Articles of Confederation also purport to be binding law.<sup>72</sup> For that matter, so does the Confederate Constitution.<sup>73</sup> On their own terms, all three documents purport to govern a state like South Carolina, so it cannot be the documents themselves that decide which one governs.<sup>74</sup>

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Constitution-in-Exile] (wondering what would happen to *Brown v. Board of Education* if Fourteenth Amendment were repealed).

70. Sachs, *supra* note 16, at 821; see also Stephen G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 *Notre Dame L. Rev.* 483, 503 (2014) (“The Constitution uses rules when it means to use rules, and it uses standards when it means to use standards . . . . To discover the meaning of the Constitution, one cannot start with a presumption in favor of one or the other . . . .”).

71. U.S. Const. art. VI, cl. 2.

72. Articles of Confederation of 1781, art. XIII, para. 1 (“And the Articles of this confederation shall be inviolably observed by every State . . . .”).

73. Const. of the Confederate States of 1861, art. VI, cl. 3 (“This Constitution . . . shall be the supreme law of the land . . . .”).

74. See Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 *Harv. J.L. & Pub. Pol’y* 45, 52 (1994) [hereinafter Schauer, *Necessary Externality*] (making similar point about legal status of document he drew up and stuck in



The second thing is that whatever one thinks of the initial proclaiming, a lot has happened since then. There have been formal amendments, of course, but also other changes in how judges and other people think about constitutional requirements.

Some scholars claim that those changes are unwritten amendments, which mean that the *textual* Constitution is no longer the *true* Constitution of the current United States.<sup>75</sup> Those unwritten amendments might not comply with Article V, but so what? If they became law on their own, they could trump Article V, just as the Constitution could trump the Articles of Confederation, and just as the Articles could trump British law.<sup>76</sup> And even those who would not go so far as to say that document itself has been superseded might say that our *legal rules for understanding that document* have been superseded.<sup>77</sup> (The original rules are originalist by definition.<sup>78</sup>) That is a different form of unwritten amendment. As Reva Siegel has put it:

The living have not assented to Article V as the sole method of constitutional change. And if we are to construe the living as having implicitly consented to any constitutional understanding or arrangement, it is to the Constitution as it is *currently* interpreted, with its many pathways of change.<sup>79</sup>

This is where the positive inquiry kicks in. To ask whether the written Constitution and the original interpretive rules are the law today is to ask a question about *modern social facts*. There are different jurispruden-

his pocket); see also Frederick Schauer, *The Force of Law* 79 (2015) [hereinafter Schauer, *Force*] (repeating this example).

75. Bruce Ackerman, *We the People: Transformations* 92 (1998) (“I accept th[e] challenge [of legal positivism].”); David A. Strauss, *The Neo-Hamiltonian Temptation*, 123 *Yale L.J.* 2676, 2680 (2014) [hereinafter Strauss, *Neo-Hamiltonian*] (“Ackerman, to his credit, does not accept Hamilton’s suggestion that the will of the People is embedded in the written Constitution alone. We the People have other ways of changing the Constitution.”); see also Heather K. Gerken, *The Hydraulics of Constitutional Reform: A Skeptical Response to Our Undemocratic Constitution*, 55 *Drake L. Rev.* 925, 930–32 (2007) (citing more than dozen other sources); David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 *Tex. L. Rev.* 1969, 1981 (2013) (stating “Constitution we actually have” is “an evolutionary one, not one that is under glass”).

76. Fred Schauer also gives the example of the Rhodesian Unilateral Declaration of Independence trumping British law. Schauer, *Force*, *supra* note 74, at 79–80.

77. See Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 *Wm. & Mary L. Rev.* 1115, 1117–18 (2012) [hereinafter Adler, *Contestation*] (suggesting there is consensus on text but not interpretive method); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 *Colum. L. Rev.* 606, 644 (2008) [hereinafter Samaha, *Dead Hand Arguments*] (same). On the general idea of interpretive rules as law, see Baude & Sachs, *supra* note 37.

78. See John Harrison, *On the Hypotheses that Lie at the Foundations of Originalism*, 31 *Harv. J.L. & Pub. Pol’y* 473, 474 (2008) (“[Immediately after the Founding,] every interpreter’s methodology, whatever it was, had to be ‘originalist,’ because the origin had been so recent.”).

79. Reva B. Siegel, *Heller and Originalism’s Dead Hand—In Theory and Practice*, 56 *UCLA L. Rev.* 1399, 1405 (2009).

tial formulations for making this inquiry and this Essay won't attempt to resolve the questions of technical jurisprudence.<sup>80</sup> Instead, it will make a preliminary effort to show our constitutional practice can and should be understood as originalist.

This is ultimately an empirical question, of a sort. But because it is a question about a complicated custom, it is very difficult to answer it simply by coding cases and measuring their outcomes, or surveying a group of people.<sup>81</sup> Our legal practices involve recourse both to high levels of abstraction and to more specific reasoning necessary to resolve particular cases.

This Part canvasses these two different aspects of American legal practice—higher-order practices that operate at a fairly high level of abstraction, such as widespread conventions about the Framers, and lower-order practices, specifically how the Supreme Court publicly reasons about constitutional law. I suggest that these practices, understood together, point toward inclusive originalism.

#### A. *Higher-Order Practices*

Some positive evidence for originalism lies in our higher-order practices—namely the attribution of authority to the Framers, the lack of any acknowledged rupture in the legal order, and the continued usage of the institutions created by the original Constitution. I doubt that these higher-order practices will prove decisive by themselves, but they help to set the stage for understanding our lower-order practices, so I will canvas them quickly before moving on.

1. *The Framers' Authority.* — Some originalists might pursue an argument that the Constitution's status derives from our basic convention of

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80. Three important versions of legal positivism are those espoused by Hart, Joseph Raz, and Scott Shapiro. H.L.A. Hart, *The Concept of Law* (3d ed. 2012); Joseph Raz, *The Authority of Law* 237 (2d ed. 2009) [hereinafter Raz, *Authority*]; Joseph Raz, *Between Authority and Interpretation* (2009); Scott J. Shapiro, *Legality* (2011). Hart will sometimes make appearances in the footnotes here because his work is more frequently invoked in the relevant legal scholarship. Accord Lawrence B. Solum, *Semantic Originalism* 140 n.361 (U. of Ill. Pub. Law and Legal Theory Res. Papers Series, No. 07-24, 2008), <http://ssrn.com/abstract=1120244> (on file with the *Columbia Law Review*) [hereinafter Solum, *Semantic*] (similar observation); see also Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 Harv. L. Rev. 1787, 1805–06, 1848 (2005) (following Hart's framework). But none of this should be taken to be an assertion in technical jurisprudence, just a lawyer's operating assumption. See Solum, *Semantic*, supra, at 140 n.361 (expressing "agnostic[ism]" as between Hart's theory and its most contemporary rivals").

81. On the question of who one would survey, see Hart, supra note 80, at 101–03; infra notes 224–227 and accompanying text. For survey efforts, see generally Donald L. Drakeman, *What's the Point of Originalism?*, 37 Harv. J.L. & Pub. Pol'y 1123, 1133–38 (2013); Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 Colum. L. Rev. 356, 362–70 (2011). An experimental study is Kathryn Bi, *Lay Judgments of Constitutional Interpretation* 15–23 (unpublished manuscript) (on file with the *Columbia Law Review*).

revering the Framers<sup>82</sup>: First, they would say, it is simply empirically obvious that the U.S. Constitution is accepted as law today in the United States.<sup>83</sup> (That dispenses with the hypotheticals about the Articles of Confederation, the Confederate Constitution, and the contents of Fred Schauer’s pocket.)

Second, it is empirically true, if slightly less obvious, that the Constitution is accepted in a particular way. We accept it as a legal command enacted by people in authority hundreds of years ago, made law through the process of ratification (and later amended). That is why we call certain people of 1787–1789 the “Framers” and “Ratifiers”—because they are the ones who made it law. Indeed the Constitution itself contains both a date and old signatures on it, which we honor as part of the current text. Once the Constitution is understood as an old and binding legal text, that helps ground its old meaning.<sup>84</sup>

Of course subsequent amendments—or at least amendments after the first twelve—have only an indirect connection to the Framers. But they all purport to be enacted pursuant to the formal process of Article V, which is itself the work of the Framers and Ratifiers. One could thus see even the subsequent amendments, if properly enacted, as indirectly pedigreed to the Framers.<sup>85</sup> Similarly, a claim that the subsequent amendments did not comply with Article V would be a threat to orthodox originalism.<sup>86</sup> Alternatively, those who substantially revere the Framers might think that subsequent amendments should be narrowly construed, though few originalists today explicitly so argue.<sup>87</sup>

Hence, recognition of the Framers’ authority might support a legal principle of originalism. While legal theorists have claimed for a long time that nobody has authority just “because I said so,”<sup>88</sup> and all the more so when that body is long dead, it’s still plausible that our *current* legal practice is to treat the dead *as if* they had legal authority.

Versions of this argument may be the most sympathetic way to understand what Jamal Greene has called “ethical arguments” for original-

82. Again, to the extent this view turns on popular rather than official views, it cannot be traced to Hart’s technical jurisprudence, *supra* note 81, but I suspect that it has sufficient purchase for some that it is worth discussing here.

83. E.g., Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig’s Theory of Translation*, 65 *Fordham L. Rev.* 1435, 1454 (1997).

84. Saikrishna B. Prakash, *Overcoming the Constitution*, 91 *Geo. L.J.* 407, 436 (2003) (reviewing Richard H. Fallon, Jr., *Implementing the Constitution* (2001)) (discussing this intuition).

85. See Sachs, *Change*, *supra* note 16, at 839, 845 (noting Article V amendments are consistent with the Founders’ rule of change).

86. See Ackerman, *supra* note 75, at 99–115 (discussing implications of Thirteenth and Fourteenth Amendments’ putative noncompliance with Article V); see also Sachs, *Change*, *supra* note 16, at 854–55 (acknowledging threat).

87. See generally Jamal Greene, *Fourteenth Amendment Originalism*, 71 *Md. L. Rev.* 978, 1014 (2012) (arguing originalists neglect Fourteenth Amendment and attributing this to “cultural affinity” announced by originalism).

88. E.g., Laurence Claus, *Law’s Evolution and Human Understanding* 29–37 (2012).

ism. Greene notes that there is a specifically American practice of reverence for the constitutional Framers<sup>89</sup> and that the “Constitution is a source of political identity for many Americans, and as a symbol of American sovereignty it is a potent reference for narratives of both restoration and redemption.”<sup>90</sup> And while Greene himself is skeptical of originalism, he suggests that to the extent that originalist arguments hold sway in America, it is because they construct a narrative connecting our current social facts to the founding era.<sup>91</sup>

2. *No Revolutions.* — An alternative, abstract formulation is put forward by Stephen Sachs. Originalism, Sachs argues, can be recast as an account of lawful change:

What originalism requires of legal change is that it be, well, *legal*; that it be lawful, that it be done according to law . . . . The originalist claim is that each change in our law since the Founding needs a justification framed in legal terms, and not just social or political ones. To put it another way, originalists believe that the American legal system hasn’t yet departed (even a little bit) from the Founders’ law in the way that the colonies threw off the British yoke or the states got rid of the Articles of Confederation.<sup>92</sup>

Essentially, Sachs argues that originalism is our law if there have been no revolutions in the law since the Founding.<sup>93</sup>

Sachs argues that this belief is “[t]he official story of American law” and “reflected in the attitudes of lawyers and academics.”<sup>94</sup> As he puts it, “[I]f you go into court in a constitutional case and say, ‘well, Judge, the original Constitution is against us, but we superseded it through an informal amendment in 1937,’ *you will lose.*”<sup>95</sup> That is ultimately a positive claim about our lower-order practices, which I will examine shortly.

3. *Basic Structures.* — Who is the President? Who is in Congress? Who is on the Supreme Court? These are some of the foundational questions of constitutional law, and yet there is nearly universal agreement about how to answer them. That suggests that our constitutional system has at least some easy cases in which we are capable of reaching widespread legal agreement.

These easy cases are not resolved on policy grounds, or even on intuitive unwritten notions of legitimacy. They are instead decided on the ba-

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89. Jamal Greene, *On the Origins of Originalism*, 88 *Tex. L. Rev.* 1, 63–71 (2009) [hereinafter *Greene, Origins*].

90. *Id.* at 81 (emphasis omitted).

91. *Id.* at 82–88.

92. Sachs, *Change*, *supra* note 16, at 820–21.

93. *Id.* at 844–45 (“[F]rom the Founding on, [originalism] requires that changes be lawful . . .”).

94. *Id.* at 870.

95. *Id.* at 871.

sis of the constitutional text.<sup>96</sup> The President is the person who is picked by the electoral college, whose members are picked by the states.<sup>97</sup> And despite some grouching, that result is widely accepted even when somebody else wins the popular vote.<sup>98</sup> Even the deeply controversial decision in *Bush v. Gore* did not concern a challenge to the text's electoral college, but rather the lawful method for picking those electors and the Court's role in adjudicating it.<sup>99</sup>

Similarly, Congress and the Supreme Court are both selected according to the constitutional process. While people regularly suggest that either process needs reform, nobody suggests that the superior process is *thereby* the law despite its deviation from the text.

One might suggest that the easy cases are decided by contemporary practice, not by the text or its original meaning. On this account it is something of a coincidence that our current practice for deciding who is the President, or when he or she must stand for election, is the one originally prescribed. But it seems unlikely that practice is the best account. Using the Presidency again as an example, by 2000, the electoral college had not picked a popular-vote loser for President since 1888, so it was not contemporary practice that told us that the electoral vote trumps the popular vote. On the other side, by the 1930s there was a very longstanding practice limiting Presidents to two four-year terms.<sup>100</sup> But when Franklin Roosevelt sought and received a third term, it was not received as the kind of constitutional violation that it would be if Ronald Reagan or Bill Clinton had done so after the enactment of the Twenty-Second Amendment.

More plausibly, one might suggest, as David Strauss has, that the text governs in these cases because it acts as "a focal point" whose answer is normatively "acceptable."<sup>101</sup> Yet as Strauss acknowledges, the reason that it is the text's answer, rather than some other proposal, that serves as the focal point is bound up with "the Constitution's cultural salience."<sup>102</sup> The

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96. See Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 *Notre Dame L. Rev.* 1907, 1913–14 (2014) ("The precise text of the Constitution controls our structure, and we do not ignore the text of the Constitution simply because it was ratified 225 years ago, or may be outdated, or has not adapted to modern conditions.").

97. U.S. Const. art. II, § 1.

98. Presidents John Quincy Adams, Rutherford Hayes, Benjamin Harrison, and George W. Bush all had lower popular-vote totals than their competitors. Robert A. Dahl, *How Democratic Is the American Constitution?* 79–80 (2001).

99. 531 U.S. 98, 110 (2000) (invalidating recount ordered by Florida Supreme Court).

100. See Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 *U. Ill. L. Rev.* 1847, 1855–57 (discussing "tradition of the two-term presidency"); see also Akhil Reed Amar, *America's Constitution: A Biography* 433–35 (2005) (noting ambiguities in this tradition).

101. Strauss, *Jefferson*, *supra* note 29, at 1733. For sophisticated and elaborate discussion, see Russell Hardin, *Liberalism, Constitutionalism, and Democracy* 88–114 (1999).

102. Strauss, *Jefferson*, *supra* note 29, at 1734.

positivist extension of that insight would be that the Constitution's cultural salience is, specifically, a widespread practice of treating the Constitution as law.

Questions like this—and many others about basic structure—are what Fred Schauer calls the “Easy Cases.”<sup>103</sup> And while it is not obvious that we can extend them to the “hard cases,” Schauer argues that we can. The easy cases indicate the priority of the text in limiting when other methods can be employed:

The language of the text, therefore, remains perhaps the most significant factor in setting the size of the frame . . . . An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of the document, and only insofar as the interpretation is within the boundaries at least suggested by that language.<sup>104</sup>

To be sure, these observations about the basic structure might only establish the priority of the constitutional *text*, and not necessarily its original meaning.<sup>105</sup> After all, the meaning of many of the words in the electoral provisions of the Constitution may not have changed since 1787. Yet even establishing that priority is an important point given the many legal theories that rely on nontextual theories of constitutional law.

4. *The Problem of Abstraction.* — It may seem fruitless to try to derive any sort of concrete claim about what the law is from social facts as thin or abstract as the ones above. Matthew Adler, for instance, has expressed skepticism about the use of “some vacuous criterion like ‘consistent with the U.S. Constitution,’” demanding instead “a genuine, meaningful standard that could actually furnish a right answer to [an interpretive] dispute.”<sup>106</sup> A related version of this objection has sometimes been framed as the problem of “theoretical disagreement.”<sup>107</sup>

Yet a certain amount of reasoning from abstraction is common in legal interpretation. For example, it is frequently the case that lawyers disagree about what the law requires—whether a given kind of behavior is criminal, what principles determine how it should be punished, or whether a particular official is authorized. But it is also frequently the case that even while lawyers disagree about what the law requires in these situations,

103. Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 431 (1985).

104. *Id.* at 430–31.

105. Hardin, for example, suggests that the original “intentions” of the Framers rapidly became obsolete, Hardin, *supra* note 101, at 112, though it is less clear what he thinks of original meaning or inclusive originalism. Cf. *id.* at 113 (quoting Madison on “liquidation”).

106. Adler, *Contestation*, *supra* note 77, at 1131.

107. Ronald Dworkin, *Law's Empire* 4–6 (1986). For explication and critique, see generally Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. Chi. L. Rev. 1215 (2009) [hereinafter Leiter, *Explaining*].

they might agree that the way to figure out who is right is to read the U.S. Code.<sup>108</sup>

Similarly, a seemingly theoretical disagreement can be illusory if both parties agree about the ultimate grounds for resolving their disagreement.<sup>109</sup> This means that legal convention must be taken as we find it. If our legal conventions converge on concrete and specific practices, there will be less disagreement than if they are abstract, but that does not mean that we cannot have abstract legal conventions. But there is force to Adler's point. If the positive turn is going to advance the conversation, it will likely do so because of our lower-order, more concrete practices.

B. *Lower-Order Practices (What the Court Says)*

One key way of understanding our collective legal commitments in concrete terms is by examining the practice of our courts. Indeed, the practice of our courts is often marshaled as one of the key positive *challenges* to originalism.

I will look to the Supreme Court in particular. Why? The practice of lower-court judges is generally neutral as to the relevant disputes. Nonexclusive originalists, like nearly everybody else, generally accept that lower courts should rely on higher-court precedents rather than reasoning from first principles, and that is indeed what lower courts generally do. In other words, there is a shared consensus under almost every theory (including originalism) that lower courts are bound by "vertical precedent," so almost all the data points are uninformative. But competing theories do disagree about how the Supreme Court ought to decide cases, making it a useful place to look.

To be clear, I don't mean to insist that a complete inquiry should be limited *solely* to looking at what the Supreme Court says—at a minimum one would need to know whether and why courts have such legal status. So it may ultimately be important to look to official practice beyond judges.<sup>110</sup> But the Supreme Court's practice is a readily available source of evidence of official attitudes, it is often thought to be inconsistent with originalism, and it is an important place to start.<sup>111</sup>

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108. See generally Sachs, *Constitution-in-Exile*, supra note 69, at 2263 ("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."). For an analogous argument from the natural law perspective, see Allan Beever, *The Declaratory Theory of Law*, 33 *Oxford J. Legal Stud.* 421, 428–29 (2013).

109. See Leiter, *Explaining*, supra note 107, at 1236–38 (arguing *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), invoked by Dworkin, supra note 107, at 21–23, does not really contain theoretical disagreement).

110. See Leslie Green, *Notes to the Third Edition*, in *Hart*, supra note 80, at 309, 317 [hereinafter *Green, Notes to the Third Edition*] (discussing whether judges have special role, compared to other officials, in constituting rule of recognition).

111. The importance of the Court in such positive inquiries has been recognized by Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the*

My examination of currently established Supreme Court doctrine yields at least two observations. First, in cases where the Court acknowledges a conflict between original meaning or textual meaning and another source of constitutional meaning, the text and original meaning prevail. Second, across the larger run of cases that do not feature an explicit clash of methodologies, the Court never contradicts originalism. Indeed, the canonical cases that are most frequently invoked as examples of anti-originalism are actually reconcilable with originalism.

The point of looking at these cases is not to ask whether the Supreme Court's decisions are *correct* as a matter of original meaning. It is implausible that every single Supreme Court decision is correct under *anybody's* theory of constitutional meaning. And even if by some miracle, all of the decisions did match one theory, that would surely be temporary.<sup>112</sup> Rather, the point is to look to how the Supreme Court *justifies* its rulings, as evidence of what counts as a legally sufficient justification in our current system of constitutional law.

For the same reason, the cases that are the most important challenge to originalism's legal status are those cases that are currently important, uncontested, and/or broadly accepted. After all, the relevant inquiry is not so much whether, as a descriptive matter, the Supreme Court has *always* been doing originalism without knowing it,<sup>113</sup> the question is whether our current legal commitments, which might be embodied in certain Supreme Court cases, undermine the ultimate authority of originalism. And as Sachs writes: "This argument doesn't pose a conceptual problem, but an empirical one; it depends on how many 'fixed star[s] in our constitutional constellation' we actually have."<sup>114</sup>

Or in Hart's words:

Up to a certain point, the fact that some rulings given by a scorer are plainly wrong is not inconsistent with the game continuing: they count as much as rulings which are obviously correct; but there is a limit to the extent to which tolerance of incorrect decisions is compatible with the continued existence of the same game, and this has an important legal analogue. The fact that isolated or exceptional official aberrations are tolerated does not mean that the game of cricket or baseball is no longer being played. On the other hand, if these aberrations are frequent, or if the scorer repudiates the scoring rule, there must

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Rule of Recognition, in *The Rule of Recognition and the U.S. Constitution* 47, 60 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

112. See Sachs, *Constitution-in-Exile*, supra note 69, at 2256 ("Because history proceeds at its own pace . . . any constitution worth its salt may spend a good bit of time in exile.").

113. On why it need not be "always," see *infra* section II.C.2.

114. Sachs, *Constitution-in-Exile*, supra note 69, at 2277 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).



come a point when either the players no longer accept the scorer's aberrant rulings or, if they do, the game has changed.<sup>115</sup>

So has the Supreme Court repudiated the scoring rule or produced frequent aberrations? I will suggest not.

1. *Originalism's Priority*. — Let us first consider how the Court handles what it perceives as direct conflicts between different sources of constitutional law, starting with the very recent decision in *NLRB v. Noel Canning*,<sup>116</sup> about the meaning of the Recess Appointments Clause.<sup>117</sup> *Noel Canning* demonstrates the shared interpretive principles that may underlie even seemingly deep methodological division.

The majority opinion, written by Justice Breyer, invalidated the appointments only because of the Senate's pro forma sessions, to which the Court gives some deference. The majority could have stopped there, but they did not, instead choosing to resolve the much broader questions that had split the lower courts—what counts as a “recess” under the clause, and when does a vacancy “happen”? On both questions, the majority gave the executive branch a big victory, endorsing modern practice despite arguments from text, structure, and original meaning. Meanwhile, the concurring opinion, written by Justice Scalia, is in substance a dissent with respect to the broader questions. Justice Scalia announced the opinion from the bench, as Justices usually do with strong dissents, and the members of the concurrence did not join a single word of the majority opinion. (In his other concurring opinion that day Scalia wrote: “I prefer not to take part in the assembling of an apparent but specious unanimity.”<sup>118</sup>)

Parts of *Noel Canning* read like a contentious victory of pragmatism over originalism. Justice Breyer noted that his view of the clause “is reinforced by centuries of history, which we are hesitant to disturb” and that “Justice Scalia would render illegitimate thousands of recess appointments reaching all the way back to the founding era.”<sup>119</sup> He concludes: “[W]e interpret the Constitution in light of its text, purposes, and ‘our whole experience’ as a Nation. And we look to the actual practice of Government to inform our interpretation.”<sup>120</sup> Justice Scalia accused the ma-

115. Hart, *supra* note 80, at 144. In assessing any disagreement, note that the original meaning of the amended Constitution can be *yielded* by an ultimate rule of recognition on which all may agree: “The rule of recognition is a customary rule of judges and other officials, but it is not legislated and is not positive law. In particular, it is not the formal constitution or any part of it. (Such a constitution must itself be validated by the rule of recognition.)” Green, Notes to the Third Edition, *supra* note 110, at 317.

116. 134 S. Ct. 2550 (2014).

117. I should note that I coauthored an amicus brief in the case. Brief of Constitutional Law Scholars as Amicus Curiae in Support of Respondents, *Noel Canning*, 134 S. Ct. 2550 (2014) (No. 12-1281).

118. *McCullen v. Coakley*, 134 S. Ct. 2518, 2548 (2014) (Scalia, J., concurring).

119. *Noel Canning*, 134 S. Ct. at 2577.

120. *Id.* at 2578 (citation omitted) (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920)). It is not clear whether this is intentional, but interpreting “the Constitution in

majority of “sweep[ing] away the key textual limitations on the recess-appointment power”<sup>121</sup> and of allowing “the Executive [to] accumulate power through adverse possession.”<sup>122</sup>

Justice Scalia also made the methodological stakes explicit:

The real tragedy of today’s decision . . . is the damage done to our separation-of-powers jurisprudence more generally . . . . The Court’s embrace of the adverse-possession theory of executive power (a characterization the majority resists but does not refute) will be cited in diverse contexts, including those presently unimagined, and will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.<sup>123</sup>

But while the opinions appear on their surface to reflect deep division about the status of the constitutional text and its original meaning, that appearance may be illusory. For all that the opinions disagree strongly about how to read the Clause and what its purpose was, they actually do agree—at least in theory—about the role of the text and its original meaning.

Justice Scalia accuses the majority of letting modern practice trump the “clear text.”<sup>124</sup> But the majority does not purport to have the authority to do that. Rather, the majority *first* concludes that the text is “ambiguous,” looking to the text and structure of the Constitution and evidence of its original meaning.<sup>125</sup>

It claims that its construction is permissible because “the Framers likely did intend the Clause to apply to a new circumstance that so clearly falls within its essential purposes, where doing so is consistent with the Clause’s language.”<sup>126</sup> That is the device of abstraction, noted above,<sup>127</sup> and it is expressly hemmed in by—i.e., it must be “consistent with”—“the Clause’s language.”<sup>128</sup>

The Court points to James Madison’s views about how practice could “liquidate [and] settle the meaning” of ambiguous clauses.<sup>129</sup> That is a permissible device for resolving ambiguity, noted above.<sup>130</sup> But again, it

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light of its text” seems to suggest that the Constitution and “its text” aren’t exactly the same; what sense would it make to interpret a document “in light of itself”?

121. *Id.* at 2592 (Scalia, J., concurring).

122. *Id.* at 2617 (Scalia, J., concurring).

123. *Id.* at 2617–18 (Scalia, J., concurring).

124. *Id.* at 2617 (Scalia, J., concurring).

125. *Id.* at 2553 (majority opinion).

126. *Id.* at 2565.

127. *Supra* section I.B.1.

128. *Noel Canning*, 134 S. Ct. at 2565.

129. *Id.* at 2560 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 447, 450 (G. Hunt ed. 1908)).

130. *Supra* section I.B.2.

recognizes that for such liquidation to be permitted, “[t]he question is whether the Clause is ambiguous.”<sup>131</sup>

In sum, the majority felt the need to fight its way free from the text—to demonstrate ambiguity—before it could turn to subsequent practice. (Similarly, Justice Scalia agreed that when there is “an ambiguous text and a clear historical practice,” the practice controls.<sup>132</sup>)

Notably, the executive branch did not take the same view. When Solicitor General Donald Verrilli was defending the appointments at oral argument, Justice Scalia asked him this question point-blank: “What do you do when there is a practice that . . . flatly contradicts a clear text of the Constitution? Which . . . of the two prevails?”<sup>133</sup>

The Solicitor General, like the majority, resisted the premise of the question, but he *first* responded that “the practice has to prevail.”<sup>134</sup> Yet it does not appear that that view has been recognized as the law.

The question of conflict between clear original meaning and other sources of law (like practice or policy) does not arise that often. Many opinions are simply silent on the question of methodological clashes. Other times the Court attempts to mediate the conflict by emphasizing the way that originalism can accommodate rules of law like precedent and the like.<sup>135</sup>

For instance, *Noel Canning* cited other cases that it claimed “have continually confirmed Madison’s view” of liquidation.<sup>136</sup> Not all of the cases make their methodological hierarchy explicit, but several confirm the view in *Noel Canning*. In *The Pocket Veto Case* the Court endorsed “practical construction” through practice, saying “long settled and established practice is a consideration of great weight in a proper interpretation of . . . a constitutional provision the phraseology of which is in any respect of *doubtful meaning*.”<sup>137</sup> And in *Mistretta v. United States*, the Court first discussed the text and original history before concluding that subsequent practice provided “additional evidence.”<sup>138</sup>

And yet when there are explicit clashes, the original meaning wins. For instance, in *INS v. Chadha*,<sup>139</sup> the Court famously invalidated the legislative veto on formalistic, textual grounds. In response to “policy arguments” in favor of the legislative veto, the Court did not meet them on their own terms, but rather said that “policy arguments supporting even

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131. *Noel Canning*, 134 S. Ct. at 2568.

132. *Id.* at 2617 (Scalia, J., concurring).

133. Transcript of Oral Argument at 6, *Noel Canning*, 134 S. Ct. 2550 (No. 12-1281).

134. *Id.* at 6–8.

135. See Fallon, Constructivist Coherence Theory, *supra* note 12, at 1240–43 (observing Court generally attempts to reconcile seemingly competing methods).

136. *Noel Canning*, 134 S. Ct. at 2560 (citing remaining cases in this paragraph).

137. 279 U.S. 655, 689–90 (1929) (emphasis added).

138. 488 U.S. 361, 399–401 (1989).

139. 462 U.S. 919 (1983).

useful ‘political inventions’ are subject to the demands of the Constitution,” and that those demands were textually “[e]xplicit and unambiguous.”<sup>140</sup> Similarly, it closed with a coda reaffirming that the original meaning of the text was not subject to critique on consequentialist grounds:

The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.<sup>141</sup>

Similarly, the Supreme Court’s originalist opinion in *District of Columbia v. Heller* announced the supremacy of the original meaning over policy concerns:

The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.<sup>142</sup>

Yet there is not an important case that does the opposite.

Analogously, the regular use of precedent by the Supreme Court in constitutional cases does not pose a threat to constitutional textualism or originalism, because precedent’s pedigree is itself consistent with originalism.<sup>143</sup> But the Court’s periodic *rejection* of precedent in favor of original meaning suggests that precedent is not the ultimate source of law.

Indeed original meaning may be one of the most powerful bases for overturning precedent. That is how, after decades of ad hoc adjudication

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140. Id. at 945.

141. Id. at 959 (citation omitted).

142. 554 U.S. 570, 634–35 (2008).

143. Supra section I.B.3.

under *Ohio v. Roberts*,<sup>144</sup> the Court eventually invoked the original meaning of the Confrontation Clause in *Crawford v. Washington*.<sup>145</sup>

Invoking the text's original meaning allows overruling courts to say that a precedent was "wrong the day it was decided," which is a key to the Court's ability to overrule its precedents.<sup>146</sup> Similarly, Steven Calabresi has surveyed the Court's practice of overruling precedent in the twentieth century and argues that "in our constitutional culture there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution and of appealing to it to trump both contrary caselaw and contrary practices and traditions."<sup>147</sup>

Again, it is true that most cases do not raise a question of priority either way. But when they do, inclusive originalism appears to have the highest priority.

## 2. *The Surprising Absence of Anti-Originalist Cases*

a. *Explicit Challenges to Originalism?* (Blaisdell, Brown, Miranda, Lawrence). — Let us now turn to cases that have been argued to show that originalism is not the law, or not the ultimate account of our legal practice.

One of the most frequently cited examples of an anti-originalist opinion is the New Deal decision of *Home Building & Loan v. Blaisdell*.<sup>148</sup> *Blaisdell* interpreted the Contract Clause of the Constitution to permit Minnesota to impose a temporary mortgage moratorium. In doing so, the Court is said to have "expressly rejected originalism,"<sup>149</sup> and to have "freely conceded" that the law violated the "original understanding."<sup>150</sup> The opinion is said to be "blatant anti-originalism"<sup>151</sup> and a "significant non-originalist triumph[]." <sup>152</sup> Even Randy Barnett, who claims that "the

144. 448 U.S. 56, 65–66 (1980) (holding confrontation rights turn on "indicia of reliability").

145. 541 U.S. 36, 60 (2004) (overruling *Roberts* in favor of "original meaning of the Confrontation Clause").

146. Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. Rev. 677, 696–98 (2005).

147. Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 Ala. L. Rev. 635, 637 (2006); see also Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 34 n.29 (2000) (discussing "triumph of the document over the doctrine" in incorporating Bill of Rights).

148. 290 U.S. 398 (1934).

149. Erwin Chemerinsky, *The Elusive Quest for Value Neutral Judging: A Response to Redish and Arnould*, 64 Fla. L. Rev. 1539, 1541 (2012).

150. Charles A. Bieneman, *Legal Interpretation and a Constitutional Case: Home Building & Loan Association v. Blaisdell*, 90 Mich. L. Rev. 2534, 2537 (1992).

151. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. Pa. L. Rev. 1, 18 (1998).

152. Jamal Greene, *Selling Originalism*, 97 Geo. L.J. 657, 677–78 (2009) [hereinafter Greene, *Selling*].

Supreme Court has rarely repudiated original meaning expressly” concedes that “[p]erhaps the closest it came to this was in . . . *Blaisdell*.”<sup>153</sup>

Part I helps us to see that these claims are mistaken. It may well be that the *outcome* of *Blaisdell* was wrong as a matter of original meaning, as Justice Sutherland argued for the four horsemen in dissent. But the *reasoning* of *Blaisdell* is surprisingly anodyne.

On its face, the moratorium seemed to impair pre-existing contractual rights, despite the constitutional requirement that “[n]o [s]tate . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts.”<sup>154</sup> The Court noted that the lower courts had nonetheless “upheld the statute as an emergency measure,” and also discussed the role of emergency.<sup>155</sup> In affirming the lower court, the Supreme Court first insisted that changed circumstances could not change the meaning of the Constitution:

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system.

While emergency does not create power, emergency may furnish the occasion for the exercise of power. “Although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed.”<sup>156</sup>

The Court’s specific theory of emergency powers was also perfectly consistent with modern originalist views about resolving open-textured phrases:

When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to “coin money” or to “make anything but gold and silver coin a tender in payment of debts.” But where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the pro-

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153. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *Fordham L. Rev.* 411, 432 (2013).

154. U.S. Const. art. I, § 10.

155. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 420 (1934).

156. *Id.* at 425–26 (quoting *Wilson v. New*, 243 U.S. 332, 348 (1917)).

cess of construction is essential to fill in the details. That is true of the contract clause.<sup>157</sup>

To be sure, there is some reason to believe that Founding-era lawyers would have *expected* a mortgage moratorium to violate the Contract Clause.<sup>158</sup> But originalism often requires one to read the constitutional text beyond its specific expectations. Even the dissent agreed, for example, that “[t]he provisions of the federal Constitution, undoubtedly, are pliable in the sense that in appropriate cases they have the capacity of bringing within their grasp every new condition which falls within their meaning.”<sup>159</sup> The debate between the majority and the dissent was a debate about the level of abstraction at which the text was originally written.

Again, the Court might have been *wrong*, as a textual matter, to conclude that the Contract Clause was “general” and “admit[ted] of construction,”<sup>160</sup> but it was asking precisely the kinds of question about the original meaning of the Contract Clause that I have argued that originalism ought to embrace. As Thomas Colby has observed, “if we read Hughes’ language with an anachronistic, New Originalist eye to terminology, it actually appears to be a paragon of the New Originalism rather than nonoriginalism.”<sup>161</sup>

Another canonical nonoriginalist opinion is *Miranda v. Arizona*.<sup>162</sup> *Miranda* is usually put forth not as an example of an *anti*-originalist decision so much as a *prophylactic* one.<sup>163</sup> The canonicity of *Miranda* seems to legitimate a certain kind of prophylactic decisionmaking. For example, David Strauss argues that by analogy to *Miranda*, “the most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the ‘real’ first amendment.”<sup>164</sup> The key worry is not just that *Miranda* is an example of a constitutional “decision rule,”<sup>165</sup> but that it is a particularly anti-originalist one where the

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157. *Id.* at 428.

158. See *id.* at 453–56 (Sutherland, J., dissenting) (discussing original expectations); Jed Rubenfeld, Reply to Commentators, 115 *Yale L.J.* 2093, 2093–94 (2006) (arguing *Blaisdell* “repudiate[s] a foundational Application Understanding”).

159. *Blaisdell*, 290 U.S. at 451 (Sutherland, J., dissenting).

160. *Id.* at 428 (majority opinion); see McGinnis & Rappaport, Abstract Meaning, *supra* note 27, at 768 (accusing *Blaisdell* of committing abstract meaning fallacy).

161. Colby, *supra* note 57, at 767.

162. 384 U.S. 436 (1966).

163. See generally William Baude, Understanding Prophylactic Supreme Court Decisions, *Jotwell* (July 14, 2014), <http://conlaw.jotwell.com/understanding-prophylactic-supreme-court-decisions> [<http://perma.cc/W3G7-R484>] (reviewing John F. Stinneford, The Illusory Eighth Amendment, 63 *Am. U. L. Rev.* 437 (2013)) (discussing debates about *Miranda* as “prophylactic”).

164. David A. Strauss, The Ubiquity of Prophylactic Rules, 55 *U. Chi. L. Rev.* 190, 198 (1988).

165. Mitchell N. Berman, Constitutional Decision Rules, 90 *Va. L. Rev.* 1, 61 (2004) [hereinafter Berman, Decision Rules]; see also Mitchell N. Berman, Aspirational Rights and the Two-Output Thesis, 119 *Harv. L. Rev. Forum* 220, 221 (2006), available at

Court successfully claimed the power to make constitutional law that exceeded the law created by the written Constitution itself.<sup>166</sup>

Yet a closer examination of *Miranda* and its subsequent interpretation does not show the triumph of prophylactic, supratextualist lawmaking. *Miranda* itself, for example, does not first (1) describe the requirement of the constitutional text, and then (2) create an additional rule to provide the prophylactic protection. Rather, the *Miranda* Court flirted with at least three different theories of what constituted impermissible compulsion,<sup>167</sup> and its rule *underprotected* against two of them (trickery and custodial interrogation). In other words *Miranda* may well be a constitutional decision rule, but not a “prophylactic” one in this sense.

Instead, the narrative of *Miranda* as a “prophylactic” decision seems to derive in part from the many subsequent cases that cabined *Miranda*’s reach.<sup>168</sup> Calling *Miranda* “prophylactic” seemed to justify making further exceptions to it on a policy basis. The apparent idea is that as judge-made doctrine, *Miranda* was either illegitimate or at least of lesser status.<sup>169</sup> While the Court did not carry this logic so far as to justify overruling *Miranda* itself, when it preserved *Miranda* it did so by reemphasizing its connection to the constitutional ban on compelled testimony.<sup>170</sup> Indeed, the Court’s opinion in *Dickerson v. United States* uses the word “prophylactic” only once, in quoting and distinguishing the prior cases.<sup>171</sup>

The *Miranda* example is complicated. It does not actually dispute Strauss’s point that much constitutional doctrine is phrased at a more specific level than the constitutional text and necessarily takes into account the Court’s institutional capacity. But it does suggest that even in doctrinal areas that seem to be explicitly based on common-law decisionmaking, it is important that there be a textual and originalist claim at the core of the doctrine.

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[http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2488&context=faculty\\_scholarship](http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2488&context=faculty_scholarship) [<http://perma.cc/QBL6-ZYMU>] (providing further elaboration).

166. It is also possible that this distinction is illusory, see Berman, Decision Rules, *supra* note 165, at 43–50 (suggesting it is), in which case the existence of constitutional doctrine, even prophylactic doctrine, is unlikely to be particularly threatening to inclusive originalism.

167. Stinneford, *supra* note 163, at 464.

168. See *New York v. Quarles*, 467 U.S. 649, 653–55 (1984) (describing *Miranda* as “prophylactic” and rejecting *Miranda* claim); *Michigan v. Tucker*, 417 U.S. 433, 439 (1974) (same combination); cf. *Michigan v. Payne*, 412 U.S. 47, 53 (1973) (labeling *Miranda* “prophylactic” and ruling against analogous claim).

169. See Barry Friedman, The Wages of Stealth Overruling (with Particular Attention to *Miranda v. Arizona*), 99 *Geo. L.J.* 1, 19–20 (2010) (suggesting this was theme of Rehnquist Court’s *Miranda* jurisprudence).

170. See *Dickerson v. United States*, 530 U.S. 428, 432–34 (2000) (describing history leading up to *Miranda*); see also *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 73 n.4 (2009) (“[T]he underlying requirement at issue in . . . [*Miranda*] that confessions be voluntary had roots going back centuries.” (internal quotation marks omitted)).

171. 530 U.S. at 438.



Then, of course, there is *Brown v. Board of Education*.<sup>172</sup> *Brown* is utterly canonical. As Michael McConnell has famously written, “Such is the moral authority of *Brown* that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”<sup>173</sup> And *Brown* is frequently cited as an embarrassment to originalists.<sup>174</sup> If *Brown* does repudiate the original meaning of the Fourteenth Amendment, that is a big problem for the positive-law theory of originalism.<sup>175</sup>

But *Brown* did not repudiate originalism and did not ignore it either. Before issuing its decision, the Court called for reargument specifically on several aspects of the original meaning of the Fourteenth Amendment, asking the parties to address:

1. What evidence is there that the Congress which submitted and the State legislatures and conventions which ratified the Fourteenth Amendment contemplated or did not contemplate, understood or did not understand, that it would abolish segregation in public schools?

2. If neither the Congress in submitting nor the States in ratifying the Fourteenth Amendment understood that compliance with it would require the immediate abolition of segregation in public schools, was it nevertheless the understanding of the framers of the Amendment

(a) that future Congresses might, in the exercise of their power under section 5 of the Amendment, abolish such segregation, or

(b) that it would be within the judicial power, in light of future conditions, to construe the Amendment as abolishing such segregation of its own force?

3. On the assumption that the answers to questions 2(a) and (b) do not dispose of the issue, is it within the judicial power, in construing the Amendment, to abolish segregation in public schools?<sup>176</sup>

That is the general kind of inquiry that inclusive originalism asks the Court to make. And *Brown* itself spends several pages at the very beginning of the opinion fighting the original-meaning question to a draw,

172. 347 U.S. 483 (1954).

173. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 952 (1995) [hereinafter McConnell, *Originalism*]; see also Akhil Reed Amar, *America’s Unwritten Constitution* 247 (2012) [hereinafter Amar, *Unwritten Constitution*] (noting *Brown* has “special constitutional authority”); Greene, *Selling*, supra note 152, at 679 (“Polite company requires, after all, that constitutional methodologies be premised on *Brown*’s correctness . . .”).

174. See McConnell, *Originalism*, supra note 173, at 951–52 (citing sources).

175. But see Sachs, *Constitution-in-Exile*, supra note 69, at 2278 (“The general structure of our constitutional practices leans against the idea that *Brown*, or any other accepted constitutional landmark, effectively stands on its own bottom.”).

176. *Miscellaneous Orders*, 345 U.S. 972, 972–73 (1953). There were also two remedial questions. See id.

concluding that “[t]his discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”<sup>177</sup>

Similarly, Alexander Bickel’s famous article on *Brown* argues that the Fourteenth Amendment was originally meant to be read at a high, and perhaps evolving, level of abstraction that justified the Supreme Court’s decision.<sup>178</sup> Bickel’s article was based on a memo he had written as a law clerk for Justice Felix Frankfurter.<sup>179</sup> Frankfurter apparently “had asked Bickel to prepare the memorandum so that Frankfurter would be in a position to counter claims by lawyers for the Southern states that the framers of the Fourteenth Amendment intended to allow states to adopt segregated education if they chose.”<sup>180</sup> Ultimately, Mark Tushnet and Katya Lezin report, “Frankfurter was satisfied that Bickel’s research at least neutralized the states’ claim.”<sup>181</sup> This episode provides evidence that *Brown* was just as afraid of originalism as originalism is afraid of *Brown*. Of course, since 1954, *Brown*’s political and legal foundations have become secure. But it remains important that nothing in *Brown*’s official canonicity contradicts originalism’s legal status.<sup>182</sup>

A closer example of explicitly anti-originalist reasoning from the Supreme Court may come in its recent cases about liberty and same-sex relationships. In *Lawrence v. Texas*, the Court invalidated Texas’s ban on “certain intimate sexual conduct.”<sup>183</sup> In doing so, the Court did “note[] that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter,” relying on several amicus briefs.<sup>184</sup> But it also equivocated on the importance of that history. It said

177. *Brown*, 347 U.S. at 489.

178. Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *Harv. L. Rev.* 1, 59–65 (1955).

179. Mark Tushnet & Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 *Colum. L. Rev.* 1867, 1882 n.84 (1991).

180. *Id.* at 1919.

181. *Id.*; see also Richard Kluger, *Simple Justice* 618–19 (1975) (quoting Thurgood Marshall on originalist arguments: “A nothin’-to-nothin’ score means we win the ball game.”).

182. The *Brown*–Bickel thesis about the original meaning of the Fourteenth Amendment might also be the best way to read seemingly antihistoric election law cases like *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 669 (1966) (“[T]he Equal Protection Clause is not shackled to the political theory of a particular era.”), and *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (“Representation schemes once fair and equitable become archaic and outdated.”). It is also possible that those cases reflect a method of analysis that the Court would never repeat anew today outside of precedent, *infra* section II.C.2, and that they are partly for this reason not exactly part of the modern constitutional canon. Compare Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 *Const. Comment.* 295, 296 (2000) (“[S]ustained attention to democracy itself has been startlingly absent from the constitutional canon . . . .”), with Jamal Greene, *The Anticanon*, 125 *Harv. L. Rev.* 379, 392 n.68 (2011) (“These cases are . . . arguably part of the constitutional canon.”).

183. 539 U.S. 558, 562 (2003).

184. *Id.* at 568.

that it “need not enter this debate in the attempt to reach a definitive historical judgment,”<sup>185</sup> and ultimately went on to say: “In all events we think that our laws and traditions in the past half century are of most relevance here.”<sup>186</sup> *Lawrence* can be read as being content to find historical ambiguity and therefore postpone any true conflict with originalism, like *Brown*, but ultimately it may itself be ambiguous on this score.

The Court continued the thread in *Obergefell v. Hodges*,<sup>187</sup> where it concluded that the Fourteenth Amendment required states to license same-sex marriages. Yet that opinion seemed to pick the originalist route.

First, the Court noted that the interpretation of fundamental rights protected by the Fourteenth Amendment was “guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements,”<sup>188</sup> which sounds in ordinary “new originalism.”

Second, the Court added, in a nod to *Lawrence*, that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries,”<sup>189</sup> which *might* seem to reject the inclusive originalist framework.

But, third, the Court then argued that this evolving reasoning itself had an originalist pedigree:

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.<sup>190</sup>

This final claim about the Fourteenth Amendment’s original meaning has a structure quite similar to Bickel’s defense of *Brown*, and it is a structure that is consistent with inclusive originalism. Again, “[w]hy be more ‘originalist’ than the Founders, or more Catholic than the Pope?”<sup>191</sup> And once again, this sort of living originalism might also be subject to historical and legal falsification—maybe the Framers of the Fourteenth Amendment *did* “presume to know the extent of freedom in all of its dimensions,” or maybe the Court is right that they didn’t. Or maybe they didn’t presume to know, but also didn’t leave the Court the power to

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185. *Id.*

186. *Id.* at 571–72.

187. 135 S. Ct. 2584 (2015).

188. *Id.* at 2598.

189. *Id.* (citing *Lawrence*).

190. *Id.*

191. Sachs, Change, *supra* note 16, at 821.

expound that freedom as it did.<sup>192</sup> But asking those questions is what an inclusive originalist would do.

So even in one of its most potentially anti-originalist moments, the Court ultimately claimed fidelity to the Amendment's original authors.

b. *Implicit Challenges to Originalism?* (Roe, Reed, Gideon . . . ). — So the key cases that are sometimes thought to explicitly repudiate originalism do not necessarily do so upon closer examination. But of course the list of potential fixed stars does not necessarily end there. Several other cases are sometimes listed not because they say anything *outright* contrary to originalism, but because they are thought to be so obviously inconsistent with originalism that they implicitly reject it. Because these cases do not say anything outright, I am not sure how much weight they ought to have, but I consider them here.

*Roe v. Wade*<sup>193</sup> may well be too deeply contested to serve as a constitutional “fixed star” that might defeat a commitment to originalism. At the same time, if *Roe* repudiates originalism, and a significant number of officials support *Roe*'s reasoning, that might at least show that a significant number repudiate originalism. Yet the opinion in *Roe* is not obviously hostile to originalist reasoning. The very first sentences of the substantive analysis of the case caution that “[i]t perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage,” and that they derive from “the latter half of the 19th century.”<sup>194</sup> Later, the Court added: “It was not until *after the War Between the States*,” (and hence, the Court seems to imply, after the Fourteenth Amendment) “that legislation began generally to replace the common law.”<sup>195</sup> And in a later portion of its opinion that holds that the unborn are not themselves “persons” protected by the

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192. Though mostly beside the present point, it is worth noting that many originalists did suggest that there were plausible originalist arguments in favor of the claimants' position. E.g., Steven G. Calabresi & Hannah Begley, *Originalism and Same Sex Marriage* 3 (Nw. Pub. Law, Research Paper No. 14-51, 2014), <http://ssrn.com/abstract=2509443> (on file with the *Columbia Law Review*); Michael Ramsey, *Is There an Originalist Case for Same-Sex Marriage?*, *The Originalism Blog* (Mar. 25, 2013), <http://originalismblog.typepad.com/the-originalism-blog/2013/03/is-there-an-originalist-case-for-same-sex-marriage-michael-ramsey.html> [<http://perma.cc/PEZ2-RVXJ>]; Mike Rappaport, *More on Originalism and Same Sex Marriage: A Response to Mike Ramsey*, *Library of Law & Liberty* (Apr. 25, 2013), <http://www.libertylawsite.org/2013/04/25/more-on-originalism-and-same-sex-marriage-a-response-to-mike-ramsey> [<http://perma.cc/Y5S4-MJUE>]; Francis Wilkinson, *Originalism, Scalia, and Gay Marriage: An Interview with Jack Balkin*, *Bloomberg View* (Mar. 26, 2013, 10:05 AM), <http://www.bloombergview.com/articles/2013-03-26/originalism-scalia-and-gay-marriage-an-interview-with-jack-balkin> [<http://perma.cc/96XL-TSG5>]. But see William N. Eskridge Jr., *The Marriage Equality Cases and Constitutional Theory*, 2015 *Cato Sup. Ct. Rev.* 111, 112–21 (arguing there were strong originalist arguments that *Obergefell* court did not adopt).

193. 410 U.S. 113 (1973).

194. *Id.* at 129.

195. *Id.* at 139 (emphasis added).

Fourteenth Amendment, the *only* real arguments are textual and originalist.<sup>196</sup>

Obviously many originalists oppose *Roe*; indeed, some have claimed that people are originalists *because* they oppose *Roe*.<sup>197</sup> But from the point of view of positive theory, *Roe* seems at most like a case where the “scorer” was “wrong,” rather than one where it “repudiate[d] the scoring rule.”<sup>198</sup>

Moreover, it is noteworthy that later attempts by legal officials to solidify the legal status of *Roe* have turned on precedent, rather than non-originalist reasoning. For instance, when the Supreme Court explicitly confronted and reaffirmed the “essential holding” of *Roe* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, it did so on the basis of precedent.<sup>199</sup> Similarly, Supreme Court nominees have been asked to concede *Roe*’s status as precedent or “super precedent.”<sup>200</sup>

Similarly, Mary Anne Case maintains that “no version of original meaning . . . holds much promise for yielding” constitutional rules against sex discrimination and that a committed feminist ought to reject originalism for that reason.<sup>201</sup> One could draw from this argument a claim that the Court’s widely accepted decisions holding sex discrimination unconstitutional show that originalism is not entirely the law.

On balance, though, I would reject this claim as well. When Ruth Bader Ginsburg was litigating on behalf of the ACLU, she asserted that “[b]oldly dynamic interpretation, departing radically from the original understanding, is required” to yield a constitutional rule against sex discrimination.<sup>202</sup> If that kind of claim had been made by the Court, it would probably be a counterexample to originalism’s legal status. But the Court’s reasoning in its important sex discrimination cases has not gone

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196. See *id.* at 157–58 (canvassing text’s use of word “person” first, before then relying on claim that “throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today,” and then finally noting lower courts had reached same conclusion).

197. See George Kannar, Comment, The Constitutional Catechism of Antonin Scalia, 99 *Yale L.J.* 1297, 1309 (1990) (“It is not unkind to attribute former Attorney General Meese’s espousal of [originalism] . . . to a result-oriented interest in eliminating affirmative action and overruling *Roe v. Wade*.”).

198. Hart, *supra* note 80, at 144. But see John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 *Yale L.J.* 920, 947 (1973) (claiming, though not as originalist, *Roe* “is not constitutional law and gives almost no sense of an obligation to try to be”).

199. 505 U.S. 833, 854–69 (1992). To be sure, *Casey*’s theory of precedent has in turn been criticized by originalists, see, e.g., McGinnis & Rappaport, Good Constitution, *supra* note 34, at 189–91, but that is a question of the substance of the doctrine, not the authority.

200. Michael J. Gerhardt, Super Precedent, 90 *Minn. L. Rev.* 1204, 1226–30 (2006).

201. Mary Anne Case, The Ladies? Forget About Them. A Feminist Perspective on the Limits of Originalism, 29 *Const. Comment.* 431, 445, 448 (2014).

202. Ruth Bader Ginsburg, Sexual Equality Under the Fourteenth and Equal Rights Amendments, 1979 *Wash. U. L.Q.* 161, 161.

that far—not the recent decision in *United States v. Virginia*,<sup>203</sup> nor the original generative decision in *Reed v. Reed*.<sup>204</sup>

So the cases' reasoning does not seem to directly confront originalism, which may be enough to close the matter. But for those who might think these cases are an implicit rejection of originalism it is worth noting that originalists have recently argued that the original meaning of the Fourteenth Amendment, perhaps influenced by the Nineteenth, does forbid sex discrimination.<sup>205</sup> Others have argued that even if the Court's sex discrimination cases could be shown to be wrong as a matter of original meaning, they should be preserved as "entrenched precedent."<sup>206</sup> This doctrine, too, ultimately seems consistent with the legal status of originalism.

On occasion, *Gideon v. Wainwright*<sup>207</sup> is offered as another example of a fixed star that refutes the legal status of originalism.<sup>208</sup> It is not entirely clear that *Gideon* remains a fixed star today,<sup>209</sup> but if it is, it is another example of a case that seems relatively neutral toward originalist reasoning. *Gideon* required states to provide counsel to the indigent, through a combination of the Sixth Amendment's "right . . . to have the assistance of counsel for his defense" and the Fourteenth Amendment's right to "due process."<sup>210</sup> Since the Sixth Amendment at the time of the Founding was thought only to vindicate the right to hire one's own counsel,<sup>211</sup> *Gideon* seems like it ought to be a rejection of originalism.

203. 518 U.S. 515 (1996).

204. 404 U.S. 71, 76 (1971). The four-Justice opinion in *Frontiero v. Richardson* recounts the "long and unfortunate history of sex discrimination," but it also purports to be an application of "'traditional' equal protection analysis," as laid out by precedent, to new facts. 411 U.S. 677, 682–88 (1973) (plurality opinion) (Brennan, J.).

205. See Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 Tex. L. Rev. 1, 2–3 (2011) (claiming sex discrimination violates original meaning of Fourteenth and Nineteenth Amendments); see also Michael Stokes Paulsen, Does the Constitution Prescribe Rules for Its Own Interpretation?, 103 Nw. U. L. Rev. 857, 901 (2009) (stating sex discrimination "largely" violates original meaning of Fourteenth Amendment). But see Ward Farnsworth, Women Under Reconstruction: The Congressional Understanding, 94 Nw. U. L. Rev. 1229, 1230 (2000) (arguing Fourteenth Amendment "was understood not to disturb the prevailing regime of state laws imposing very substantial legal disabilities on women").

206. McGinnis & Rappaport, Good Constitution, *supra* note 34, 181–85.

207. 372 U.S. 335 (1963).

208. See William P. Marshall, Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory, 72 Ohio St. L.J. 1251, 1264–66 (2011) ("*Gideon* . . . reflects the progressive understanding of how constitutional guarantees should be applied to meet existing conditions.").

209. *Id.* at 1265 & n.103 (noting some are skeptical of *Gideon* "[p]erhaps" because it is "not originalist").

210. U.S. Const. amends. VI, XIV.

211. Alexander Holtzoff, The Right of Counsel Under the Sixth Amendment, 20 N.Y.U. L.Q. Rev. 1, 7–8 (1944).

And yet the opinion in *Gideon* itself, written by Justice Black, is almost entirely about precedent. The Court saw *Gideon* as posing a conflict between several lines of cases: The Court had previously held (in *Johnson v. Zerbst*<sup>212</sup>) that federal courts must provide counsel to the indigent but also held (in *Betts v. Brady*<sup>213</sup>) that state courts need not. On the other hand it had also held that fundamental federal rights should be incorporated against the states. In *Gideon*, the Court concluded that the incorporation principle was sufficiently strong to justify overruling *Betts*.<sup>214</sup> (That incorporation principle, by the way, had long been championed by Justice Black on straightforwardly originalist grounds.<sup>215</sup>) Originalism did not force the Court to disentangle these precedents in a particular way, and the Court's opinion did not contradict it.

To be sure, it may well be that if one went back to first principles, one could conclude that the *results* in *Gideon* (and presumably *Johnson*) were wrong. (Although even that point would require an investigation of whether the Due Process Clause's original meaning now requires counsel in light of the way criminal trials are currently run.<sup>216</sup>) But again, it is hard to see in this putatively nonoriginalist *outcome*, now protected by precedent, a fixed star that repudiates originalism.

### C. *Two Complications and a Conclusion*

This basic picture of our constitutional practices—both in Supreme Court decisions and at a more general level—is of course just a beginning, but hopefully it is the beginning of an answer to the positive question. Here, I'll consider two important complications to that picture and then summarize the results. Section II.C.1 deals with the possibility that judicial statements about interpretation are insincere; section II.C.2 deals with the possibility that our law was once unoriginalist and has become originalist only recently; section II.C.3 provides a conclusion for all of Part II.

1. *Judicial Insincerity*. — The previous section suggested that canonical Supreme Court opinions are consistent with inclusive originalism. This analysis of this part of our lower-order practices assumes, however, that we can take what judges say about the law as evidence of what the law is. That may seem naïve, or at least contestable. Many scholars believe

212. 304 U.S. 458 (1938).

213. 316 U.S. 455 (1942).

214. *Gideon v. Wainwright*, 372 U.S. 335, 341–42 (1963) (collecting cases).

215. See *Adamson v. California*, 332 U.S. 46, 89–91 (1947) (Black, J., dissenting) (“[T]he original purpose of the Fourteenth Amendment [was] to extend to all the people of the nation the complete protection of the Bill of Rights.”); Akhil Reed Amar, 2000 Daniel J. Meador Lecture: Hugo Black and the Hall of Fame, 53 *Ala. L. Rev.* 1221, 1223–34 (2002) (crediting modern incorporation doctrine to Black).

216. See, e.g., Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 *Calif. L. Rev.* 929, 945–46 (1965) (suggesting due process rationale); see also Akhil Reed Amar, *Sixth Amendment First Principles*, 84 *Geo. L.J.* 641, 707–08 (1996) (same).

they can provide better accounts of the *true* criteria of judicial decisionmaking.

For instance, Richard Primus maintains that certain widely invoked claims about constitutional law should be seen as “continuity tenders”—formulaic statements by which a governing group invokes connection with tradition.<sup>217</sup> These statements are “symbolic” and “it would miss the point . . . to insist on making reality conform to the world that the formula seems to describe.”<sup>218</sup> Primus suggests that the American claim that the federal government has limited powers and the English claim that law is made by the “Queen-in-Parliament” are examples of ritual continuity tenders.<sup>219</sup>

Primus suggests that many invocations of Founding-era views are symbolic in this way.<sup>220</sup> Eric Posner has similarly suggested that invocations of originalism are symbolic. As Posner puts it, to the branches of the federal government:

[T]he founding-era document is little more than a rhetorical flourish, used strategically. That is our political culture, one that happens to require ritual obeisance to the founders. Thus would the Roman priests examine the entrails of birds in preparation for a great political event. How long would one of those priests have lasted if he really thought he could discover in those entrails the will of the gods?<sup>221</sup>

To some extent these arguments sidestep the premise of this Essay and its predecessors,<sup>222</sup> and a full discussion of this kind of legal realism may require a separate treatment elsewhere. But I will briefly state that I do think it is a mistake to dismiss the public reasoning by which the Court purports to justify its actions.

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217. Richard Primus, *Why Enumeration Matters*, 114 *Mich. L. Rev.* (forthcoming 2016) (manuscript at 8), <http://ssrn.com/abstract=2471924> (on file with the *Columbia Law Review*).

218. *Id.* (manuscript at 10).

219. *Id.* (manuscript at 13–27); cf. Hart, *supra* note 80, at 107–08, 111 (discussing “what the Queen in Parliament enacts is law” as “rule of recognition”).

220. Primus, *supra* note 217, (manuscript at 19–23).

221. Eric Posner, *Originalism Class 4: Brown* (Jan. 30, 2014), <http://ericposner.com/originalism-class-4-brown/> [<http://perma.cc/66QH-ZU63>]. The post is part of a dialogue arising out of a class we taught together, and this section expands on part of my response. Will Baude, *Originalism, the Bear Principle, and the Reading of Entrails, Volokh Conspiracy* (Jan. 31, 2014), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/31/originalism-the-bear-principle-and-the-reading-of-entrails> [<https://perma.cc/P4G3-XA5C>] [hereinafter Baude, *Bear Principle*]; see also Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*, 41 *Boundary 2: Int'l J. Literature & Culture* 227, 231 (2014) (“[T]hey’ve been reshaping the law as they like, reciting originalist slogans as they go, in the spirit of rowers who sing together as they lay on the oars. The music does not make the boat go, but it encourages the crew.”).

222. See *supra* note 111 and accompanying text (noting previous inquiries have looked to Supreme Court opinions).



Consider this scenario: Suppose we lived in a world whose judicial system looked, to most legal observers, exactly like ours—judges issued opinions based on the Constitution, the U.S. Code, the common law, and the various precedents interpreting them. But suppose a few canny professors figured out that the judges were all secretly part of an Illuminati conspiracy, ruling entirely for the benefit of their secret overlords and just pretending they were following the Constitution and these other sources. Would we say that actually the Illuminati instructions *are the law* because they describe the secret practice of the judges? Or would we say that the judges were part of a widespread conspiracy to *subvert the law*? I would say the latter, and I think many others would as well.

One possible reason for this is that Supreme Court opinions might give us evidence of how the rest of our legal system works even if the authors have mixed reasons for writing them the way they do. Perhaps judicial opinions reflect not only the legal beliefs of the authoring Justice, but the norms of that Justice's colleagues, and the norms generally accepted by other parts of official practice.<sup>223</sup>

Furthermore, while Hart's positivist theory seems to look to the practice of government officials,<sup>224</sup> a popular-constitutionalist alternative holds that positive constitutional law comes from popular practice rather than official practice.<sup>225</sup> Under this alternative, American citizens are treated as the authors of our constitutional law and hence the jurisprudential equivalent of government officials.<sup>226</sup> Under this alternative, judicial invocation of original meaning may reflect that those authorities are what have popular purchase.<sup>227</sup>

More generally, I think Primus and Posner are too ready to characterize high-level claims about law as only symbolic. They are certainly not only symbolic in form, the way an epigraphic quotation is. They *look* like legal arguments. It may well be true that our high-level formulae and low-level practices are not always consistent. But it is not clear that the high-level formulae should be dismissed as insincere any more than the low-level practices should be dismissed as opportunistic. So long as legal interpreters strain to reconcile the two, to show that the practices and the formula are consistent, that is evidence that the formula is thought to

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223. That is why I said they were exemplary rather than exhaustive. See *supra* text accompanying note 111.

224. See Green, Notes to the Third Edition, *supra* note 110, at 361 ("For Hart, ultimate rules of recognition inhere in customary practices by officials.")

225. See Matthew D. Adler, Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?, 100 Nw. U. L. Rev. 719, 729–45 (2006) (outlining this alternative); see also Schauer, Force, *supra* note 74, at 207 n.17 (citing sources).

226. See Strauss, Neo-Hamiltonian, *supra* note 75, at 2678 ("One way or another . . . the People are the final authority on what the Constitution requires.")

227. Barry Friedman, The Will of the People 367–76 (2009) (discussing connection between popular will and Supreme Court opinions); see also sources cited *supra* notes 81–84 (discussing popular beliefs about originalism).

have some bite. For instance, the fact—if it is true—that interpreters throughout history have tried to find ways to characterize text as ambiguous<sup>228</sup> does not show that unambiguous text is empty or symbolic; if anything, it shows that it is thought binding.

I am not certain about these things, and this may be a dispute as to which neither side has met a compelling burden of proof, but there is reason to be cautious about categorical rejections of sincerity.<sup>229</sup> Primus acknowledges, for instance, that some Justices believe that the limited powers formulation is not just a ritual,<sup>230</sup> which suggests that the answer might well differ for different groups of judges.

2. *Constitutional Interregnums*. — In claiming that our current social practices represent originalism, I am not necessarily claiming that originalism has *continuously* been the law. One *could* maintain that the original meaning of the Constitution has always been the law (with formal amendments, of course)—as much in 1880 or 1970 as in 1789 or today.<sup>231</sup> But contemporary positivist originalism need not make so strong a claim. Contemporary legal regimes can also claim faith with the distant past while skipping over intermediate regimes that adopted a different rule of recognition. The intermediate regime becomes a sort of constitutional interregnum, like the Protectorate of Oliver Cromwell before the Restoration.<sup>232</sup>

For instance, it may well be true that certain periods of our constitutional history would not present as much positive legal support for originalism as there is today. Despite the gestures at originalism in cases like *Brown* and *Roe*, portions of the Warren and Burger Courts, for example, might be seen as a period during which the generally accepted constitutional law was something other than originalism.<sup>233</sup>

228. Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 *Duke L.J.* 1213, 1238–67 (2015).

229. Cf. Micah Schwartzman, *Judicial Sincerity*, 94 *Va. L. Rev.* 987, 991 (2008) (defining and defending duty of judicial sincerity).

230. Primus, *supra* note 217 (manuscript at 18) (“None of this is to claim that Justices who articulate internal limits are in the secret recesses of their minds saying, ‘I will appear to take internal limits seriously, but I will also ensure that Congress retains the ability to regulate more or less as it sees fit.’”).

231. See James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 *B.U. L. Rev.* 1, 4 (1991) [hereinafter Gardner, *Positivist Foundations*] (“[O]ur courts, for better or for worse, continue to speak the language of originalism—as indeed they have since the founding of the republic.”).

232. See Sachs, *Change*, *supra* note 16, at 847–48 (making this point). Tangentially, for a deep exploration of legal continuity in English law, see generally Richard S. Kay, *The Glorious Revolution and the Continuity of Law* (2014).

233. See, e.g., Gardner, *Positivist Foundations*, *supra* note 231, at 13 (asserting departure from originalist tradition during part of late twentieth century); Edwin Meese III, *Reagan’s Legal Revolutionary*, 3 *Green Bag 2d* 193, 196 (2000) (criticizing courts’ abandonment of originalism from late 1950s through 1970s). But see Amar, *Unwritten Constitution*, *supra* note 173, at 141–99 (discussing “general fidelity of the Warren Court

More historically, one might well make similar claims about constitutional law in the post-Reconstruction part of the nineteenth century. During that time period the Supreme Court repeatedly embraced a theory of “inherent powers” that dispensed with the constitutional constraints of the text.<sup>234</sup> I have elsewhere suggested that such a doctrine “is at odds with the basic idea of enumeration” and can find “no indication in the text.”<sup>235</sup>

At the same time, other historical periods might provide comparable or stronger support for positivist originalism. For instance, the Reconstruction Amendments were enacted in putative compliance with Article V of the original Constitution rather than in open defiance of it.<sup>236</sup> Franklin Roosevelt responded to the constitutional challenges to his legislative agenda by emphasizing that his arguments were truer to the Constitution’s original understanding.<sup>237</sup>

Indeed some critics appear to believe that the nonpluralist form of originalism was first invented in the 1980s by Attorney General Meese and Justice Scalia.<sup>238</sup> While I know of no originalist who holds this view of the history,<sup>239</sup> and I find it rather dubious myself, originalism could be the positive law *even if that were true*. For purposes of our *current* law, established by our current social practices, adjudicating these historical disputes does not matter.

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to the deepest ideals of the written Constitution”); Cross, *supra* note 14, at 92–98 (highlighting use of originalism by Warren and Burger courts).

234. See Sarah H. Cleveland, Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs, 81 *Tex. L. Rev.* 1, 250 (2002) (chronicling this trend in “cases over Indians, aliens, and territories”); see also William Baude, Rethinking the Federal Eminent Domain Power, 122 *Yale L.J.* 1738, 1802–03 (2013) [hereinafter Baude, Rethinking] (suggesting it extended to domestic constitutional disputes as well).

235. Baude, Rethinking, *supra* note 234, at 1801; see also Michael D. Ramsey, The Constitution’s Text in Foreign Affairs 1–43 (2007) (arguing “inherent” powers idea is “extra-constitutional”). But see Johnathan O’Neill, Originalism in American Law and Politics 24 (2005) (claiming originalism was dominant in late nineteenth century).

236. See John Harrison, The Lawfulness of the Reconstruction Amendments, 68 *U. Chi. L. Rev.* 375, 390–93 (2001) (arguing Reconstruction purported to comply with constitutional rules); see also Baude, Rethinking, *supra* note 234, at 1812 (“The Constitution was not abolished and replaced; it was amended.”). But see Ackerman, *supra* note 75, at 113–15, 241–47 (suggesting enactment process was self-consciously not formalist).

237. Franklin D. Roosevelt, Address on Constitution Day (Sept. 17, 1937), <http://www.presidency.ucsb.edu/ws/?pid=15459> [<http://perma.cc/2GGU-25PC>]; see also Balkin, Living, *supra* note 59, at 87, 310 (discussing Roosevelt’s invocation of original meaning).

238. See Robert Post & Reva Siegel, Originalism as a Political Practice: The Right’s Living Constitution, 75 *Fordham L. Rev.* 545, 547, 554–61 (2006) (linking originalism’s “claim of methodological exclusivity” to 1980s political practice). Others have provided this view more pointedly in conversation. Cf. Philip Larkin, *Annus Mirabilis*, in *High Windows* 34, 34 (1974).

239. See, e.g., Office of Legal Policy, Original Meaning Jurisprudence: A Sourcebook 2, 50–57 (1987) (claiming originalism has “predominated” for most of American history).

Chronicling these eras of constitutional law<sup>240</sup> might well be valuable for other purposes. For instance, we might want to emphasize originalism's fragility and contingency,<sup>241</sup> or to figure out when, as a matter of legal realism, originalist arguments are most likely to hold sway.

But for purposes of understanding our *current* legal commitments, the past matters only to the extent we currently grant it such authority. That is why the previous discussion<sup>242</sup> focused on cases that remain important and perhaps canonical *now* rather than analyzing, say, *Escobedo v. Illinois*,<sup>243</sup> or the *Passenger Cases*,<sup>244</sup> which were very important, but only in their day.

3. *A Conclusion.* — So what does all of this add up to? I am not saying that everything that has ever happened, or even everything that happens today, is consistent with what an originalist would do. But I am saying that when you look at our current legal commitments, as a whole, they can be reconciled with originalism. Indeed, not only can they be reconciled, but originalism seems to best describe our current law.

Our higher-order practices point toward textualism and originalism. Our lower-order practices are messier, but once originalism is understood inclusively, they actually seem to point toward inclusive originalism as well.

And even if there are a few counterexamples in our lower-order practices, they do not necessarily mean that originalism can't be our law. First, those lower-order practices must be understood in light of our higher-order practices, which continue to point toward some form of originalism. And if the lower-order counterexamples become sufficiently frequent or sufficiently blatant, one must ultimately make the tough positive judgment about whether "the game has changed" because of those mis-scores.<sup>245</sup>

If this picture of our practice is correct, it suggests debates about originalism may have relied on a false dichotomy. One need not choose between a hard form of originalism that excludes all other forms of legal reasoning and a soft form of originalism that treats originalism as just one form among many. There is a middle position: Originalism is not one methodology among many; it is first among equals.

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240. For a historical survey of theories on constitutional meaning, see Morton J. Horwitz, Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 41–64 (1993).

241. Cf. Greene, Origins, *supra* note 89, at 87–88 (suggesting increasing demographic diversity and the 2008 financial crisis might revitalize nonoriginalist theories); Meese, *supra* note 233, at 193 ("I am not sure that originalism has won an enduring victory.").

242. *Supra* section II.B.2.

243. 378 U.S. 478 (1964).

244. 48 U.S. (7 How.) 283 (1849).

245. Hart, *supra* note 80, at 144.

### III. IMPLICATIONS OF THIS UNDERSTANDING OF ORIGINALISM

The foregoing account of originalism's legal status is descriptive. But of course originalists and their critics are ultimately arguing about how judges *ought* to decide cases. So the question remains how this descriptive account of our legal practice has normative implications. While that question is not the main contribution of this Essay, I nonetheless advance some tentative thoughts here about how the positivist turn may have normative payoff. In a nutshell, it's because judges ought to obey the law—at least as a *prima facie* matter. This normative argument is much thinner and more broadly accepted than first-order normative justifications for originalism. If a positive inquiry into our practices suggests that inclusive originalism is the law, then it has a privileged normative position compared to stricter and looser methods of interpretation.

Section III.A sketches out some of the reasons for the widely-accepted judicial duty to obey the law, as well as possible limits to that duty. Section III.B puts a finer point on what is required or forbidden if there is a judicial duty to inclusive originalism. Section III.C discusses a different implication: the contingent nature of American originalism and its implications (or lack thereof) for state and foreign constitutions.

#### A. *Judicial Duty*

Let's first, in section III.A.1, consider the duty itself, and then, in section III.A.2, consider its limits.

1. *The Obligation.* — The legal status of originalism is important for how judges decide cases. It is generally agreed that judges have some kind of *prima facie* obligation to remain within the bounds of the law—whatever those bounds may be.<sup>246</sup> Indeed, this may be why, as Judge Posner writes, “most judges most of the time downpedal the creative or legislative role in judging;”<sup>247</sup> and why, as Michael McConnell recounts, “[w]hen the late Justice William J. Brennan, Jr. was asked in a television interview why the Nazis should be permitted to march through a neighborhood inhabited by Holocaust survivors, he responded: ‘the First Amendment, the First Amendment, the First Amendment.’”<sup>248</sup>

Legal interpretation is a deeply authority-based practice, in which interpreters point to some decision made by somebody outside themselves

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246. This is a moral intuition, not an axiom of legal positivism. Gardner, *Legal Positivism*, *supra* note 5, at 213–14. And it brackets the question of indeterminacy. *Id.* at 211–12. For analysis of the indeterminacy problem by originalists, see Christopher R. Green, *Constitutional Theory and the Activismometer: How to Think About Indeterminacy, Restraint, Vagueness, Executive Review, and Precedent*, 54 *Santa Clara L. Rev.* 403, 408–15 (2014); Gary Lawson, *Proving the Law*, 86 *Nw. U. L. Rev.* 859, 862–67 (1992).

247. Richard A. Posner, *Response, Some Realism About Judges: A Reply to Edwards and Livermore*, 59 *Duke L.J.* 1177, 1181 (2010).

248. Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 *Geo. Wash. L. Rev.* 1127, 1129 (1998).

and argue that it settles the dispute. Proponents of various interpretive methodologies each attempt to burden shift, claiming that their methodology is required by, or at least part of, “the law,” and the other side is attempting to change the law.<sup>249</sup> The general convention that judges should enforce the law, whatever it is, makes it important to figure out what the law is.

This kind of reasoning is latent in arguments about originalism and judicial behavior too. Robert Post and Reva Siegel accuse originalism’s proponents of seeking “relentlessly to change the Constitution without recourse to Article V amendments.”<sup>250</sup> By contrast, originalists generally believe that judges may, or perhaps ought to, decide constitutional cases in accordance with originalism. For example, Nelson Lund writes: “Supreme Court Justices should just apply the law,” namely “originalism.”<sup>251</sup>

These views illuminate the stakes of originalism’s legal status. If I am right that some form of originalism is the law, then the Post/Siegel critique loses force against that version of originalism. Originalism may sometimes result in individual practices or doctrines being modified, but not because judges are changing the law. Judges are acting properly by using such originalism, and indeed judges would be required to use it. By contrast, if originalism—or a more extreme form of it—is not the law, then judges ought not use it in deciding cases.

For most lawyers the premise that judges should apply the law may seem sufficiently obvious that it requires no further discussion. Yet having just stressed a positive or descriptive account of law it may seem odd to suggest that originalism’s legal status has important normative implications.<sup>252</sup> Indeed, in some camps it is hotly debated whether most people have any obligation to obey the law.<sup>253</sup> But there are two good reasons to

249. See Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, in *The Rule of Recognition*, supra note 111, at 193, 206–09 (noting this pattern); see also William N. Eskridge, Jr., *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 *St. Louis U. L.J.* 865, 867 (2013) (“The public face of judging in this country is positivism . . .”).

250. Post & Siegel, supra note 238, at 557.

251. Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court’s Errors*, 19 *Geo. Mason L. Rev.* 1029, 1029 (2012); see also Ian Bartrum, *Two Dogmas of Originalism*, 7 *Wash. U. Juris. Rev.* 157, 179 (2015) (“[T]he originalist protagonists of the 1980s seemed almost to take this point for granted.”); Berman & Toh, *New Originalism*, supra note 13, at 547 (“Originalists . . . take for granted—[usually] implicitly in varying degrees—that the law that the Constitution imposes is equivalent to the semantic contents of the inscriptions in the constitutional text, and, consequently, that discerning the semantic contents of the constitutional text is equivalent to discovering the constitutional law.”).

252. See Samaha, *Dead Hand Arguments*, supra note 77, at 643–45 (arguing little of normative consequence follows from “brute fact” of positive acceptance).

253. See Alexander, *Theories*, supra note 4, at 642 (noting “one of the two most difficult questions in legal philosophy”: “[H]ow can we be obligated to comply with the law when compliance conflicts with the deliverances of our first-order practical reasoning?”). For accounts, compare Mark Greenberg, *The Moral Impact Theory of Law*, 123 *Yale L.J.*

think that *judges in particular* have a prima facie obligation to give some normative weight to the law.

One argument for this duty is promissory, and it has recently been put forth at length by Richard Re.<sup>254</sup> All judges take an oath to uphold the Constitution and follow the law.<sup>255</sup> Re argues that the oath gives the Constitution normative force in our world because it is the solemn assertion of a promise, with all the moral force that a promise carries.<sup>256</sup> (Of course, many philosophers are skeptical about the moral force of promises too,<sup>257</sup> suggesting that immoral promises or coerced promises might lack moral weight. But Re bolsters his claim by turning to the democratic context of the oath,<sup>258</sup> which I consider shortly.)

The oath, Re argues, is a promise by the officeholder to obey the public understanding of “this Constitution” at the time of the oath.<sup>259</sup> If so, 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. This is important because it demonstrates the stakes of the positive inquiry: What *is* the public understanding of “this Constitution?” If I am right that a form of originalism is indeed our law today, then Re shows how this form of originalism can have normative force.

For those who are skeptical of the promissory theory, there is also an additional basis for this normative argument, grounded in democratic

1288 (2014) (arguing law changes our moral obligations), with Claus, *supra* note 88 (denying this), and Louis Michael Seidman, *On Constitutional Disobedience* (2012) (same).

254. Re, *supra* note 4, at 7–23; see also Christopher R. Green, *Equal Citizenship, Civil Rights, and the Constitution: The Original Sense of the Privileges or Immunities Clause* 25–26 (2015) (providing valuable elaboration).

255. The actual text is:

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.

28 U.S.C. § 453 (2012). The “duties” mentioned in the oath have traditionally been understood to require judges to apply the law, as explained by Philip Hamburger, *Law and Judicial Duty* 316–17 (2008).

256. Re, *supra* note 4, at 11–14.

257. See, e.g., Larry Alexander, Was Dworkin an Originalist? 14–15 (Univ. of San Diego Sch. of Law, Working Paper No. 15-185, 2015), <http://ssrn.com/abstract=2576416> (on file with the *Columbia Law Review*) (“[C]onsenting or promising . . . carries no moral weight.”); see also Jeffrey Brand-Ballard, *Limits of Legality: The Ethics of Lawless Judging* 146–47 (2010) (“[M]oral reasons can undermine or override promissory obligations.”).

258. Re, *supra* note 4, at 15–23.

259. *Id.* at 23–36. The “time of the oath” constraint also raises important questions about how judges should conduct themselves when legal revolutions post-date their oath of office, see generally *id.* at 56–59, but that’s an issue I won’t tackle here.

theory and judicial role.<sup>260</sup> Judges exercise unusual government power to do things that mere mortals often cannot rightly do. Judges can order people locked up and rule their property and other rights away. What's more, they do so subject to minimal safeguards, usually subject to review only by other judges.<sup>261</sup> That power can only be justified as nontyrannical as part of law, accompanied by a duty to obey the law. As Joseph Raz has put it, "there can be no other way in which [judges] can justify imprisoning people, interfering with their property, jobs, family relations, and so on."<sup>262</sup> Since judicial power is a construction of law in the first place, judges usurp power when they transgress the terms of the grant.

These arguments can also be combined. Democratic theory and judicial role help to explain why the oath is not illegitimately coercive. Re says: "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."<sup>263</sup> And the argument from judicial role is bolstered by the explicit promise judges make before assuming that role. As (Judge) Frank Easterbrook has put it: "In exchange for receiving power and lifetime tenure I agreed to limit the extent of my discretion."<sup>264</sup>

These arguments do not claim that law has its own moral force. Rather, they claim that judges have duties to the law either because of the promises they make or their power to act in the law's name.

2. *Its Limits.* — This duty is not at all absolute. First, it is possible that a judge's duty to follow the law can be outweighed in some cases by more pressing moral concerns.<sup>265</sup> This means that the positive turn can postpone and transform normative questions about interpretation, but it cannot wholly eliminate them. Obeying the law is still a normative choice.

260. See Brand-Ballard, *supra* note 257, 156, 157–78 (2010) (distinguishing arguments grounded in "oath" from those grounded in "judicial role" and finding latter more availing).

261. See Baude, *Judgment Power*, *supra* note 48, at 1810 (2008) (noting appeal and other review processes "are internal to the Judiciary").

262. Joseph Raz, *On the Authority and Interpretation of Constitutions*, in *Constitutionalism* 152, 160 (Larry Alexander ed., 1998); see also Raz, *Authority*, *supra* note 80, at 237 (acknowledging promises and community status can produce *special* obligations to obey law even if there is no *general* duty to obey law).

263. Re, *supra* note 4, at 16.

264. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *Geo. Wash. L. Rev.* 1119, 1122 (1998).

265. See Brian Leiter, *Book Review*, 56 *J. Legal Educ.* 675, 677 (2006) (reviewing Ronald Dworkin, *Justice in Robes* (2006) and *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Scott Hershovitz ed., 2006)) ("Positivists have always been clear that a judge's legal duty to apply valid law can be overridden by moral or equitable considerations in any particular case . . ."). See generally Amar, *Unwritten Constitution*, *supra* note 173, at 419–48 (arguing "conscience" can trump written law in specific circumstances); Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process 197–256* (1975) (discussing when opposition to slavery could override obedience to law).



For instance, if it turns out that all judges openly decide cases on the basis of astrology, it does not follow that astrological judging is morally obligatory, or even morally defensible. Astrology might be so irrational that its conventional legal status is irrelevant. So if originalism is as irrational as astrology, presumably judges should ignore originalism even if it is the law.<sup>266</sup> Maybe so. But notice how much the positive turn has transformed the normative question. Rather than asking whether originalism is the best way to constrain judges, or whether it will maximize human welfare in the long run, we are now asking whether it is as bad as astrology. That is a burden of proof that most originalists would be happy to rise to.

A different way in which the duty—especially the promissory variant—might be qualified is in cases where a person openly says, before being selected as a judge, that he or she would defy the law in some cases. Consider the example of Ninth Circuit Judge Harry Pregerson, who was asked at his confirmation hearing what he would do if the law required a result “that offended your own conscience.”<sup>267</sup> Pregerson replied: “I have to be honest with you. If I was faced with a situation like that and it ran against my conscience, I would follow my conscience.”<sup>268</sup> It is possible that such a statement diminishes at least the promissory duty to obey the law.<sup>269</sup> Again, however, this is an unusual case; most judges do not say that they would defy the law, and even Judge Pregerson did not say that he would do so most of the time.

In sum, originalism’s legal status affects the channels of constitutional change. Legal status notwithstanding, it is surely possible to argue that some other methodology that is not the law should be adopted. And if these arguments *work*—if they result in widespread agreement about the new methodology—then that methodology will be the law instead. (One could say the same thing about political revolutions—what begins as a coup can eventually become the new lawful authority.<sup>270</sup>)

But before these nonlawful methodologies have been adopted, arguments that they should be adopted for the first time face an additional hurdle that the current regime need not: the need to justify legal

266. Thanks to Alon Harel for making this argument to me. See Case, *supra* note 201, at 449–50 (comparing originalism to astrology); Steven D. Smith, *Decisional Originalism: A Response to Critics*, Library of Law & Liberty (Dec. 19, 2014), <http://www.libertylawsite.org/liberty-forum/decisional-originalism-a-response-to-critics> [<http://perma.cc/2WSJ-BQ4Y>] (comparing horoscopes and originalism).

267. Selection and Confirmation of Federal Judges: Hearings Before the Comm. on the Judiciary, 96th Cong. 450 (1979) (statement of Sen. Alan Simpson).

268. *Id.* (statement of J. Pregerson).

269. See Paul M. Collins, Jr. & Lori A. Ringhand, *Supreme Court Confirmation Hearings and Constitutional Change 2* (2013) (celebrating confirmation hearings as mechanism of constitutional change); cf. *Out of the Past* (RKO Radio Pictures 1947) (“I never told you I was anything but what I am. You just wanted to imagine I was.”).

270. Cf. Schauer, Force, *supra* note 74, at 83–85 (discussing revolutions that created new legal authority).

change.<sup>271</sup> If the argument is addressed to a federal judge, it must overcome the claim that the judge would be violating his or her oath, breaking his or her promise to uphold the law. People could rightly complain, “We commissioned you to enforce the law, and even to make law interstitially where necessary, but what makes you think that you can change the law to something else?”

More generally, interpretive methods that are outside the legal space will have to answer a normative question of institutional legitimacy. If the method in question is a *change* in the law, why is the addressee of the method the appropriate institution to engage in constitutional change? (Should our current Senators engage in constitutional change? Our current President? And would the theorists be willing to subscribe to a consistent theory of constitutional change, or is it wholly opportunistic—e.g. “the institutions that should engage in constitutional change are whichever ones agree with me and can get away with it?”) None of these questions are unanswerable. But if the positive turn moves forward, they will be the next questions to be answered.

#### B. *What Does It Require or Forbid?*

If judges have some obligation to follow the original meaning of the Constitution, what practical effect does that obligation take? Originalism obligates judges to a particular method of reasoning, both by placing the original meaning at the top of the pyramid of authority and by providing a test for which other methods may be used in the lower steps. This does not necessarily rule out any particular result in any particular case as an analytic matter, but it affects the kinds of arguments judges should consider.

As we have seen, the kinds of judicial reasoning that are *in principle* consistent with an inclusive understanding of originalism are quite diverse. And while I have not tried to show that all American constitutional interpretation has always been consistent with originalism, one might still wonder what kinds of reasoning are excluded by it. In other words, what kind of reasoning would—if adopted—falsify my claims?<sup>272</sup>

Consider this example: In 2007 Eric Posner and Adrian Vermeule published a book called *Terror in the Balance*, arguing that the executive branch ought to receive broad constitutional deference in dealing with national security emergencies.<sup>273</sup> Their arguments were consequentialist

271. For an argument that such change may not be problematic, see Adam M. Samaha, *On the Problem of Legal Change*, 103 *Geo. L.J.* 97, 142 (2014).

272. The question of what kinds of reasoning would falsify is separate from the question of *how much* of that reasoning is necessary to falsify, a harder question which I won't resolve here in light of the tentative and provocative nature of this Essay. See Hart, *supra* note 80, at 144–47, for one possibility.

273. Eric A. Posner & Adrian Vermeule, *Terror in the Balance: Security, Liberty, and the Courts* (2007).

ones and were met with a review by Gary Lawson who added that their account also “tracks—albeit unwittingly—sound, originalist constitutional interpretation.”<sup>274</sup> With admirable candor, however, Posner and Vermeule declined the support, explaining that “Lawson’s approach is hostage to the historical sources,” which they regarded as “an odd and undesirable property.”<sup>275</sup> They thus made clear that their normative argument rests *on its own bottom*, not on an originalist pedigree; that is the kind of argument that I argue is excluded from our current law.

Similarly, inclusive originalism would diverge from the “common law constitutionalism” put forward by David Strauss, under which judges reason based on a combination of tradition and moral judgment.<sup>276</sup> Both methods use precedent for much workaday adjudication, but there the similarity ends. Common law constitutionalism affirmatively rejects the primary authority of the Framers or the constitutional text,<sup>277</sup> whereas originalism depends on it.

The positive account also excludes some strong forms of originalism. Steve Smith, for example, memorably advocates for the retrieval of “[t]hat Old-Time Originalism,” which operates at a narrow level of abstraction, looks to the intent of the Framers, and rejects some more fluid interpretive moves as philosophers’ tricks.<sup>278</sup> Other originalists insist on a version of originalism that largely excludes the use of precedent, or at least of nonoriginalist precedent.<sup>279</sup> These versions of originalism also face a positive challenge. They probably cannot be derived from our current practices. Those current practices find ambiguity and resort to precedent too frequently for old-fashioned, specific originalism to be the law in itself.

Hence, under the positive account of originalism, judges are not at liberty to adopt either of these kinds of theories unless they do one of two things: They must either conclude that as a matter of historical evidence and originalist analysis that the proposed theory is in fact correctly entailed by inclusive originalism—i.e. that it is the one that is consistent

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274. Gary Lawson, *Ordinary Powers in Extraordinary Times: Common Sense in Times of Crisis*, 87 B.U. L. Rev. 289, 293 (2007).

275. Eric A. Posner & Adrian Vermeule, *Originalism and Emergencies: A Reply to Lawson*, 87 B.U. L. Rev. 313, 317 (2007).

276. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877 (1996).

277. See *id.* at 886–87, 904–05 (“The vision of the common law is precisely that the law is the product not of a few exceptional lawgivers (or one lawyering generation), but of many generations of lawyers and judges.”).

278. See Steven D. Smith, *That Old-Time Originalism*, in *The Challenge of Originalism: Theories of Constitutional Interpretation* 223, 223–24 (Grant Huscroft & Bradley W. Miller eds., 2011) (arguing for less “philosophical sophistication” in originalist interpretation). For related views, see Alicea, *supra* note 10, at 149–52 (arguing against originalist methods which “reject[] the authority of the past and the duties rightfully imposed by our forebears”).

279. See *supra* note 39 and accompanying text (discussing several such originalists).

with the Founding-era practices. Or they must self-consciously engage in legal change or legal restoration—and confront the normative problems that raises.

### C. *Originalism's Contingency*

Understanding originalism in a positive light also informs how we ought to think about interpretation of foreign and state constitutions. These practices can each be “right” in their own legal cultures without casting serious doubt on the authority of others. Of course one might learn much about the wisdom of various methods of constitutional interpretation by studying what others do, but the legal *authority* of each method is contingent on local social facts.

1. *State Constitutions.* — Many scholars seem to assume that the case for originalism in state constitutional law simply mirrors that for originalism in federal constitutional law. For example, one of the leading books on state constitutional interpretation discusses originalism as a parallel to the federal debate.<sup>280</sup> Other originalists imply in passing that the two might be distinguishable,<sup>281</sup> but the principles of distinction have not been fleshed out. Understanding the positivist premise for originalist decisionmaking helps us to understand whether existing state constitutional practice should be originalist.

If the case for originalism rests on facts like “having a written constitution,” and “having a form of popularly enacted higher law,” then that case for originalism applies with the same force to state constitutions, which are also written and enacted popularly as a form of higher law. (At least they are today—Jack Rakove has observed that the first post-revolutionary constitutions were promulgated legislatively and therefore not thought to bind the legislature more than any other statute.<sup>282</sup>)

On the other hand, if the case for originalism rests on normative claims like the Constitution’s association with liberty or desirable enactment procedure, or the need to constrain unelected federal judges, these facts may be contingent. Some state constitutions are more protective of liberty than others and they are enacted and amended in different ways,<sup>283</sup> and some are interpreted by elected judges.<sup>284</sup>

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280. G. Alan Tarr, *Understanding State Constitutions 194–99* (1998) (drawing comparisons between state constitutions and federal Constitution in originalism analysis).

281. E.g., Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 Va. L. Rev. 1, 25–28 (2015).

282. Jack N. Rakove, *Original Meanings* 96–108 (1996) (discussing adoption by “surrogate legislatures”); Jack N. Rakove, *Fidelity Through History (or to It)*, 65 Fordham L. Rev. 1587, 1603–04 (1997) (same).

283. See G. Alan Tarr, *State Constitutional Design and State Constitutional Interpretation*, 72 Mont. L. Rev. 7, 14–15 (2011) (describing variation in “changeability” among state constitutions).

284. Jack L. Landau, *Some Thoughts About State Constitutional Interpretation*, 115 Penn St. L. Rev. 837, 849–50 (2011).

If positivist originalism is correct, then the answer will turn on each state's political and legal culture.<sup>285</sup> For example, Connecticut courts regularly declare that their "state constitution is an instrument of progress . . . and should not be interpreted too narrowly or too literally."<sup>286</sup> Delaware courts say that "constitutional law to some extent may be likened to a progressive science" that turns on "the present day meaning of the particular language."<sup>287</sup> Meanwhile, the Michigan Supreme Court's "goal in construing our Constitution is to discern the original meaning attributed to the words of a constitutional provision by its ratifiers."<sup>288</sup> If these judicial statements indeed reflect the law of those states, then perhaps originalism is the duty of judges in Michigan, and not in Connecticut.

2. *Foreign Constitutions.* — The positive turn also helps us understand the diversity of interpretive practices in other constitutional systems. The standard report is that "[o]riginalism is mostly unknown outside of the United States,"<sup>289</sup> or at least that "[o]riginalism has less traction in many other countries."<sup>290</sup> And this report is supposed to discomfit American originalists, by showing that originalism is not inherent in the nature of a written constitution<sup>291</sup> and that originalism is not "uniquely suited to judicial review of a written constitution in a democracy."<sup>292</sup> The positive turn helps to show why the foreign experience should not be so discomfitting.

First, once we focus on inclusive, and not merely exclusive, originalism, some other putatively nonoriginalist countries might be originalist after all.<sup>293</sup> Canadian constitutional doctrine, for example, explicitly in-

285. See James A. Gardner, *Interpreting State Constitutions* 226–27 (2005) ("[T]he search for a methodology of state constitutional interpretation must begin with the question: what function have the people of the state in fact assigned to their courts?").

286. *State v. Jenkins*, 3 A.3d 806, 854 (Conn. 2010). The phrase seems to have originated in *State v. Dukes*, 547 A.2d 10, 19 (Conn. 1988).

287. *State v. Cannon*, 190 A.2d 514, 516 (Del. 1963) (cited in *Dukes*, 547 A.2d at 19).

288. *People v. Nutt*, 677 N.W.2d 1, 6 (Mich. 2004).

289. Jack Balkin, *Why Are Americans Originalist?*, in *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* 309, 309 (Richard Nobles & David Schiff eds., 2015) [hereinafter Balkin, *Americans*]; see also Kim Lane Scheppele, *Jack Balkin Is an American*, 25 *Yale J.L. & Human.* 23 (2013) (highlighting originalism as "distinctively American").

290. Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 652 (2d ed. 2006).

291. See Coan, *supra* note 2, at 1068–70 (describing large democracies with written constitutions but without originalism).

292. Greene, *Origins*, *supra* note 89, at 62.

293. See Balkin, *Americans*, *supra* note 289, at 309–10 (distinguishing between "thin version of original meaning" and version offering "exclusive approach to interpretation"—the version "that mystifies many lawyers and judges outside the United States"). But see Coan, *supra* note 2, at 1070 n.162 ("This seems exceedingly unlikely.").

vokes a metaphor of the law as a “living tree.”<sup>294</sup> External observers generally reject any role for originalism in Canadian law,<sup>295</sup> and so do internal observers.<sup>296</sup> And yet the doctrine might be squared with inclusive originalism, because the “living tree” phrase long predates the current 1982 Constitution Act. One could therefore argue that the original meaning of the act incorporated the living tree metaphor.<sup>297</sup>

Yet there do still seem to be some examples of countries that are not originalist even in the inclusive sense, because their legal regime has open transgressions against original meaning. For instance, in “an all too well-known classical example,”<sup>298</sup> the 1958 Constitution of the Fifth Republic of France contained a preamble that was well understood not to be a formal part of the legally operative constitutional text.<sup>299</sup> But in 1971, the French Constitutional Council nonetheless gave the preamble operative force and declared proposed legislation to violate a principle of freedom of association it found in the preamble.<sup>300</sup> According to one scholar, “this decision changed entirely the substance of formal constitutional law” and amounted to “no less than a revolution in the legal meaning of the word.”<sup>301</sup>

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294. *Edwards v. Attorney General (Persons)*, [1930] AC 124, 136 (Can. P.C.) (appeal taken from S.C.C.); see also *Re Same Sex Marriage*, [2004] 3 S.C.R. 698, para. 22 (Can.).

295. See Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. Ill. L. Rev. 815, 839 (highlighting Canada’s lack of interest in originalism); Greene, *Origins*, supra note 89, at 20–40 (explaining living nature of Canada’s Charter); Mark Tushnet, *The Charter’s Influence Around the World*, 50 *Osgoode Hall L.J.* 527, 540 (2013) (discussing Canada’s “living tree” constitutional philosophy).

296. E.g., Peter W. Hogg, *Canada: Privy Council to Supreme Court*, in *Interpreting Constitutions: A Comparative Study* 55, 83 (Jeffrey Goldsworthy ed., 2006) (“Originalism has never enjoyed any significant support in Canada.”).

297. See Joel C. Bakan, *Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought*, 27 *Osgoode Hall L.J.* 123, 148–53 (1989) (discussing methods of Canadian constitutional interpretation); see also Vicki C. Jackson, *Constitutions as “Living Trees”?* *Comparative Constitutional Law and Interpretive Metaphors*, 75 *Fordham L. Rev.* 921, 947–54 (2006) (discussing historical basis and boundaries of “living tree” metaphor).

298. Otto Pfersmann, *The Only Constitution and Its Many Enemies*, in *Constitutional Topography: Values and Constitutions* 45, 60 (András Sajó & Renáta Uitz eds., 2010).

299. 1958 Const. pml. (Fr.), available in translation at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/constitution\\_anglais\\_oct2009.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais_oct2009.pdf) [<http://perma.cc/33Z2-2RZA>]; see *Travaux préparatoires de la Constitution du 4 Octobre 1958* (cited in Alec Stone Sweet, *The Juridical Coup d’Etat and the Problem of Authority*, 8 *Ger. L.J.* 915, 922 n.20 (2007)).

300. See *Conseil constitutionnel [CC] [Constitutional Court] décision No. 71-44 DC*, July 16, 1971, J.O. 7114 (Fr.); cf. Mila Versteeg, *Unpopular Constitutionalism*, 89 *Ind. L.J.* 1133, 1142 n.41 (2014) (noting this case is outlier and globally preambles have not generally been thought justiciable).

301. Pfersmann, supra note 298, at 60. For similar assessments, see Stone Sweet, supra note 299, at 922 (describing this development as “*juridical coup d’etat*”); Louis Henkin, *Revolutions and Constitutions*, 49 *La. L. Rev.* 1023, 1046–47 (1989) (“Constitutional review in France today is probably not what the framers of the French Constitution contemplated.”).

Similar examples are noted in interpretation of the German Constitution and the Treaty of Rome.<sup>302</sup> And one might also include the new regime of Israeli constitutionalism brought forth by Chief Justice Aharon Barak, who has himself described it as a “constitutional revolution,”<sup>303</sup> and which appears not to claim any serious legal pedigree to the original legal meaning of the Basic Laws.<sup>304</sup>

Each of these examples could be investigated on its own terms. They are meant only to show that there seem to be a diversity of practices. On the other side, originalism is a part of Australian constitutional debate, though it appears embattled.<sup>305</sup> And a few scholars have recently argued that originalism is an important part of the constitutional culture in other places, such as Turkey, Malaysia, and Singapore.<sup>306</sup>

The implication of the positive turn is to lower the stakes of this comparative originalism. As with state constitutions, grounding original-

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302. Stone Sweet, *supra* note 299, 919–22, 924–27 (giving these as other examples of “juridicial coup d’état”). For yet another example elsewhere, see S.P. Sathe, *India: From Positivism to Structuralism*, in *Interpreting Constitutions*, *supra* note 296, at 245.

303. Aharon Barak, *HaMahapecha HaHukatit: Zechuyot Adam Mugaḥot [The Constitutional Revolution: Protected Human Rights]*, 1 *Law & Gov’t in Isr.* 9 (1992–1993) (quoted in Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 *Colum. Hum. Rts. L. Rev.* 309, 311 (1995)); see also Itzhak Zamir & Allen Zysblat, *Public Law in Israel* 47–48 (1996) (describing revolutionary success of Israeli Supreme Court in forging “remarkable statement of basic rights and freedoms”).

304. See Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 *Am. U. Int’l L. Rev.* 585, 635–36 (2003) (“The fact that the Israeli judiciary ultimately holds responsibility for evaluating subsequently passed Basic Laws against this highly subjective norm imbues the two new Basic Laws with a previously unrealized supra-legislative potential for judicial review.”); Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 *Am. J. Comp. L.* 585, 591–99 (1996) (“[T]he High Court was able, by judicial interpretation and judicial activism, to establish in the case law several universal individual and human rights, of the kind that are usually entrenched in national constitutions elsewhere.”); Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner’s Critique of Aharon Barak’s Judicial Activism*, 49 *Harv. Int’l L.J. Online* 1, 2–3 (2007), available at [http://law.huji.ac.il/upload/Medina\\_response\\_to\\_Posner1.pdf](http://law.huji.ac.il/upload/Medina_response_to_Posner1.pdf) [<http://perma.cc/3MUJ-7U2F>]. But see Hon. Dalia Dorner, *Does Israel Have a Constitution?*, 43 *St. Louis U. L.J.* 1325, 1329–30 (1999) (making textual argument).

305. See Jeffrey Goldsworthy, *Australia: Devotion to Legalism* 144–52, in *Interpreting Constitutions*, *supra* note 296, at 106; Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation*, 25 *Fed. L. Rev.* 1 (1997) (arguing Australia has “no tradition of non-originalist interpretation”); see also Greene, *Origins*, *supra* note 89, at 41–62 (calling Australian originalism “faint-hearted”). These sources should be noted with the caveat, thanks to David Fontana, *Comparative Originalism*, 88 *Tex. L. Rev.* See Also 189, 192–93 (2010), <http://www.texaslrev.com/wp-content/uploads/Fontana-88-TLRS-189.pdf> [<http://perma.cc/QZ8Q-R2NG>] that one not confuse what foreign *scholars say* with what foreign *courts do*.

306. See Yvonne Tew, *Originalism at Home and Abroad*, 51 *Colum. J. Transnat’l L.* 780, 800–31 (2014) (describing constitutional culture in Malaysia and Singapore); Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 *Vand. J. Transnat’l L.* 1239, 1252–87 (2011) (describing constitutional culture in Turkey).

ism in positive law allows originalists to acknowledge some foreign practices as nonoriginalist without having to argue that they are conceptually incoherent or lead to the supposedly bad consequences of nonoriginalism. Indeed, a positivist originalist might say that when in Rome one ought to do as Romans do.

#### IV. CODA: AN ALTERNATIVE TAKE ON THE POSITIVE TURN

The bulk of this Essay argued for a middle position—that originalism (inclusive of other methodologies consistent with originalism)—is our law. But that claim is certainly not airtight. What should one conclude if one is not fully persuaded by the descriptive claim?

The same evidence canvassed above, should still lead the skeptic to conclude that originalism is at least *part* of the law. (This is the postponed claim (3) from our initial taxonomy.) Mitch Berman describes as nearly universal the view that original meaning is “relevant” and acknowledges that total rejection of originalism “is not a live competitor in contemporary debates.”<sup>307</sup> Michael Dorf writes that “virtually all practitioners of and commentators on constitutional law accept that original meaning has some relevance to constitutional interpretation.”<sup>308</sup> Philip Bobbitt includes it as one of the primary “modalities” of constitutional argument.<sup>309</sup> Lawrence Solum amasses further evidence.<sup>310</sup> On this picture, presumably precedent, practice, moral justice, or other things are also part of the law—parts that operate independently of their originalist pedigree.

But even so, there might not be that many parts. Theories of our constitutional practice that list a larger number of competing components of the law often stop at a handful. Richard Fallon counts five (text, original intent, “theory,” precedent, and policy).<sup>311</sup> Phillip Bobbitt counts six (dropping “theory” and “policy,” and adding “structure,” “prudence,” and “ethics”).<sup>312</sup> And depending on one’s specific points of departure, one might not need even that many. Even for skeptics of the preceding account: Are there any important legal commitments we have that cannot be encompassed by originalism and precedent? Or perhaps originalism plus a boldly dynamic Equal Protection Clause?

307. Berman, Bunk, *supra* note 1, at 10 n.21.

308. Michael Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 *Geo. L.J.* 1765, 1766 (1997).

309. Philip Bobbitt, *Constitutional Fate: Theory of the Constitution 12–22* (1982) [hereinafter Bobbitt, *Fate*]. Bobbitt calls it the “historical modality,” which he distinguishes from the “textual modality.” There is much to quibble with in his descriptions, but my point is only that he does not deny its status as a mode of legal argument in the United States.

310. Solum, *Semantic*, *supra* note 80, at 2–12 (arguing rules of constitutional law include at least some content “fixed by the original public meaning of the text”).

311. Fallon, *Constructivist Coherence Theory*, *supra* note 12, at 1194.

312. Bobbitt, *Fate*, *supra* note 309, at 7–8, 93.



In any event, however many modalities or components one finds, the positive inquiry can make some progress in that world. The idea that originalism is one legitimate factor among several others may seem banal, but I make two nonbanal claims about it. First, even if our law contains multiple independent components or modalities, no judge is actually required to use them. In other words, in a world of methodological pluralism, methodological pluralism is not necessarily required. Second, my previous claims about judicial duty still limit the scope of judicial discretion.

A. *Is Methodological Pluralism Required?*

If inclusive originalism and some additional nonincluded methods are both part of the law, are judges legally required to use both, or may they instead choose to use one method exclusively? I think the best account of our practices is that pluralism is *not* required.

For pluralism to be legally *required* would mean that there is some legal rule (we might call it a “meta-rule”) governing how the different components of the law interact. The argument in Part II—now rejected by assumption—could be recast in terms of a meta-rule that originalism is the criterion for other methodologies. If that is not the meta-rule, is there a different one?

Phillip Bobbitt’s position is not entirely clear, but he can be read to argue that there is. On one hand, he purports to reject the “enterprise of providing a meta-rule that would resolve conflicts among the modalities”<sup>313</sup> and has recently reaffirmed: “My own answer is that there is no hierarchy of modal forms.”<sup>314</sup> (“Modalities” are what Bobbitt calls the different techniques for constructing constitutional law.)

On the other hand, what Bobbitt appears to mean by this is not that there are *no meta-rules at all*, but rather that there is a meta-rule forbidding hierarchy. He says that elevating a single modality is to “construct an ideology,” which is “mistaken.”<sup>315</sup> And he recently wrote of the “unfortunate habit of ‘ideologizing’ a particular mode as the one true method of constitutional interpretation, though one sees this more in the academy than on the bench.”<sup>316</sup> If there were no meta-rule at all, there would be

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313. Bobbitt, *Interpretation*, supra note 11, at 155.

314. Phillip C. Bobbitt, *The Age of Consent*, 123 *Yale L.J.* 2334, 2372 (2014) [hereinafter Bobbitt, *Consent*]; see also Bobbitt, *Fate*, supra note 309, at 58 (“[Modalities] do not seem to mesh with each other and do not join issue on a common ground according to common rules.”).

315. Bobbitt, *Interpretation*, supra note 11, at 22; see also J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *Tex. L. Rev.* 1771, 1790 (1994) (“Bobbitt believes that originalists make a fundamental mistake. They convert what is only one modality of constitutional argument into a criterion for all constitutional interpretation.”).

316. Bobbitt, *Consent*, supra note 314, at 2370 n.137. For more instances of ambiguity, compare Philip Bobbitt, *Reflections Inspired by My Critics*, 72 *Tex. L. Rev.* 1869, 1874 (1994) (“I reserved the resolution of such conflicts for the conscience of the decider.”),

nothing *wrong* with “ideologizing” one mode, even if others were not required to agree. To be sure, Bobbitt may intend this criticism of “ideology” as a freestanding normative argument, not a legal argument. But if that is so, it is not clear what would give this argument force, if law does not.

In any event, if there is a *legal* duty to be a pluralist, this has important implications. If originalism is only part of the law, and if it is *also legally required* to give some consideration to other modalities, then it is not lawful for a government official to be a hardcore originalist. (Indeed, Bobbitt seems to say that Judge Robert Bork should not have been confirmed as a Supreme Court Justice because he privileged one modality over all the others.<sup>317</sup>) On this view, one not only may, but must, allow other considerations to temper originalism in some fashions.

It is not clear that all of the current members of the Supreme Court could satisfy this requirement. Take Justice Scalia: He once famously described himself as a “faint-hearted originalist,” noting that even though the original meaning of the Cruel and Unusual Punishments Clause (as he understood it) permitted the imposition of flogging, he would not vote to uphold flogging as a punishment.<sup>318</sup> But in more recent years, Justice Scalia has recanted. In a July 2011 interview recounted in May 2013 by Marcia Coyle, “Scalia said he has ‘recanted’ being a ‘faint-hearted originalist.’ ‘I think I would vote to uphold it if there were a state law providing for notching of ears. I think I would say it’s a stupid idea but it’s not unconstitutional.’”<sup>319</sup> Scalia’s recantation implies that his commitment to originalism will always dominate his policy or moral judgments—including in what Bobbitt would call the “prudential” or “ethical” modalities.<sup>320</sup>

To be sure, Justice Scalia also continues to adhere to precedent. He has written that “*stare decisis* is not *part* of my originalist philosophy; it is a pragmatic *exception* to it,”<sup>321</sup> and he has continued to adhere to this external view of precedent even after his recantation.<sup>322</sup> It is not clear that he needs to make this concession—as we have seen, most theories of originalism tolerate a certain amount of constitutional precedent—so it is not clear that he should really be taken as adhering to two separate mo-

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with *id.* (“Of course, the decider had to be conscientious in the first place.”). See also Bartrum, *Metaphors and Modalities*, *supra* note 11, at 159 & n.13 (discussing Bobbitt’s conception of “conscience”).

317. See Bobbitt, *Interpretation*, *supra* note 11, at 106–10 (“[T]he constitutional case against the nomination had been made.”); see also Balkin & Levinson, *supra* note 315, at 1793–94 (interpreting this passage).

318. Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. Cinn. L. Rev.* 849, 864 (1989) [hereinafter *Scalia, Lesser Evil*].

319. Marcia Coyle, *The Roberts Court: The Struggle for the Constitution* 165 (2013).

320. See generally Bobbitt, *Fate*, *supra* note 309, at 59–73, 93–122.

321. Antonin Scalia, *A Matter of Interpretation* 140 (Amy Gutmann ed., 1997).

322. See Antonin Scalia & Bryan A. Garner, *Reading Law* 414 (2012) (“[*Stare decisis*] is an exception to textualism . . . born not of logic but of necessity.”). But see also *id.* (“*Stare decisis* has been a part of our law from time immemorial . . .”).

dalities.<sup>323</sup> But in any event, by expressly subordinating other forms of reasoning to precedent and originalism, Justice Scalia seems to reject modern pluralism.

Similarly, Justice Clarence Thomas is even more well known for his elevation of the original meaning of the Constitution as the ultimate method of constitutional decisionmaking. Some have claimed that he does not believe in precedent at all, and while this is an exaggeration, his views seem to raise the pluralist challenge even more starkly. Is either Justice making some kind of *legal* error in elevating original meaning over other, nonderivative forms of legal argument?

I do not think so. Even if inclusive originalism is not the only rule of constitutional law, the evidence discussed in Part II still suggests enough to defeat the claim that some form of eclecticism is *required*. On the evidentiary standards that would reject my claim that originalism is the ultimate law, I doubt one could find sufficient agreement on any other meta-rule today, even a meta-rule forbidding hierarchy among the modalities.<sup>324</sup>

If there is no such meta-rule, then when it comes to interpretive contestation, we are in an area “partly unregulated by the law.”<sup>325</sup> Larry Alexander has expressed pessimism about such contestation, arguing that without a meta-rule “when two opposed lawyers invoke different modalities as constituting ‘the law,’ either they are arguing past each other, or else they are urging the court to choose, perhaps for this case only, their favored modality.”<sup>326</sup> Indeed, says Alexander, “each modality represents a different Constitution . . . . [B]ecause it is incredible to believe that advocates are invoking a modality—a Constitution—and asking the court to choose it for this case only, the modalities conception collapses.”<sup>327</sup>

If this pessimism pushes one to accept the stronger claim advanced in Part II, so much the better.<sup>328</sup> But if we do have different competing legal regimes, then the contested issues in constitutional law will take

323. Cf. Mitchell N. Berman, Judge Posner’s Simple Law, 113 Mich. L. Rev. 777, 804 (2015) (“[N]either Scalia nor Garner is a legal theorist, and many things they say that touch on theory are just confused. So some charitable reconstruction is called for.”).

324. See Adler, Contestation, *supra* note 77, at 1121–24 (summarizing deep contestation over interpretive methodology); Balkin & Levinson, *supra* note 315, at 1790 (“[T]here may be no consensus concerning whether debates about the legitimate forms of constitutional argument are themselves a legitimate part of constitutional discourse.”).

325. Hart, *supra* note 80, at 272–76.

326. Larry Alexander, Telepathic Law, 27 Const. Comment. 139, 146–47 (2010) [hereinafter Alexander, Telepathic].

327. *Id.* at 147. For a counterpoint, see Berman & Toh, Combinability, *supra* note 13, at 1762–84 (arguing there is nothing incoherent about absence of a meta-rule).

328. Accord Alexander, Telepathic, *supra* note 326, at 147 (“At most, considerations of justice can be invoked when an authoritative *standard* needs to be given content, or invoked as *evidence* of original meaning. All of the other modalities mentioned by Bobbitt and others, can, I believe, be shown to be derivative of original meaning or precedent.”).

place on nonlegal terms.<sup>329</sup> Participants can still try to *convince* others to adopt their interpretive methodology, using whatever nonpositivist arguments for adoption are persuasive. (And of course they can also try to convince others that there *really is* a legal agreement at bottom.) But law has by hypothesis run out.

In the end, this means that even if our constitutional law is not entirely originalist, a judge is legally entitled to be an originalist nonetheless—or to be a pluralist, or something in between. The positive turn neither compels nor forbids a form of originalism.

### B. *The Boundaries of Comparison (Originalism and the Bear Principle)*

The positive turn provides boundaries to the kinds of nonlegal arguments one must make to defend or attack originalism. For example, once legal arguments run out, one might pick between legal interpretive methods based on whether they will promote national well-being, suppress judicial manipulation (i.e., “constrain judges”), or cohere with principles of popular sovereignty. (I will call such nonlegal arguments “normative” arguments, but I don’t mean to exclude other kinds of nonlegal arguments one might imagine.) But originalism’s status as law affects the way such arguments should be made.

Originalists are known to invoke what I call “the bear principle.”<sup>330</sup> Like one of two hunters fleeing a hungry bear, originalism can say: “I don’t have to outrun the bear; I just have to outrun you.”<sup>331</sup> In other words, originalism’s ability to produce good outcomes, constrain judges, or implement democratic values must be judged on a relative basis.

But relative to what? In many institutional contexts, arguments will implicitly be limited to those methods that are currently lawful. In such a context, the normative arguments for originalism need not render it superior to *all conceivable* competitors. It need only be superior to other competitors that are also part of the law.

Once again, this reframes and narrows the normative arguments relevant to originalism. Originalism’s defenders need not argue that the method is the *only* way, or even the *best* way, to adhere to popular sovereignty. They need merely argue that it is a *better* way than using precedent or practice. They need not argue that it is the only way, or even the best way, to constrain judges. They need merely argue that the better ways

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329. See Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 *Hastings L.J.* 1601, 1601 (2015) (arguing “there is very little actual ‘law’ in federal constitutional law in the United States” and Supreme Court therefore “operates as a kind of super-legislature, albeit one with limited jurisdiction.”).

330. Baude, *Bear Principle*, *supra* note 221.

331. *Id.* Versions of the bear joke are regularly told by Justice Scalia. See Stephen Breyer, *Making Our Democracy Work: The Yale Lectures*, 120 *Yale L.J.* 1999, 2014 (2011); Charles Fried, *On Judgment*, 15 *Lewis & Clark L. Rev.* 1025, 1034 (2011). He has put the point less colorfully in print. See Scalia, *Lesser Evil*, *supra* note 318, at 855.

(like Waldronian abolition of judicial review<sup>332</sup>) are outside the bounds of our current legal practice.

This is why, for instance, Justice Breyer emphasizes that his pragmatic alternative to originalism has “well-established, traditionally American roots.”<sup>333</sup> So one might answer the question “must [originalism] be defended empirically?”<sup>334</sup> by saying: “only against other methodologies that have similar legal support in our legal practice.”

#### CONCLUSION

Is originalism our law? The resolution of that dispute turns out to be critical to debates about how judges should behave, and yet it is a dispute that most originalist scholarship ignores. On balance, I think the answer is “yes.”

Although, at a surface level, many of our existing legal practices may seem to be inconsistent with an exclusive adherence to original meaning, the inconsistency is largely illusory. The best account of our legal practices points toward a certain kind of originalism, an inclusive but nonpluralist one, as the trumping criterion of constitutional law.

This positive turn answers the dead-hand argument famously leveled against originalism: The earth belongs to the living, so why should constitutional law be controlled by the decisions of the dead? The original meaning of the Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document’s past. So the decisions of the dead still govern, but only because we the living, for reasons of our own, receive them as law.

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332. Eric Posner, *Originalism Class 7: The Evolving Constitution*, at <http://ericposner.com/originalism-class-7-alternatives-to-originalism/> [<http://perma.cc/MY8U-R328>] (“I prefer Waldron’s view that judicial review should be junked altogether . . . . Alas, Waldron’s position is as remote from American reality as Mars.” (discussing Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *Yale L.J.* 1346 (2006))).

333. Breyer, *supra* note 331, at 2014.

334. Cf. Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 *U. Chi. L. Rev.* 636, 657–58 (1999).