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## False Positivism: The Failure of the Newest Originalism

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## False Positivism: The Failure of the Newest Originalism

Guha Krishnamurthi\*

*Originalism is a juggernaut. It pervades our constitutional discourse, and it has become a fort and font of constitutional legitimacy. A number of our most prominent jurists and legal thinkers are self-described originalists and, in myriad constitutional cases, originalist argumentation demands our serious attention. Notwithstanding, originalists have struggled to forge any meaningful consensus on the most foundational issues. Among the serious problems, originalist theories have each struggled to navigate between preserving core features and fixed stars of our law and remaining a distinctive theory with fidelity to “original meaning.”*

*The newest effort in this struggle is the so-called “positive” turn in originalism. Positivist originalism seeks to refocus constitutional interpretation from normative questions – about morality, linguistics, interpretation, and authority – to what the law actually is, as embodied by our legal practice. This focus, we are told, comes from H.L.A. Hart’s legal positivism – a theory of law based on social facts and the actual behavior of officials in the legal system. The resulting positivist originalism – which contends that our law includes the original precepts and methods of the founding era – promises to provide historical and empirical conditions for the validation of our law, without appeal to theoretical questions about the law.*

*The project of positivist originalism fails. I proffer four criticisms of positivist originalism: First, positivist originalism’s commitments contravene key insights of legal positivism. Second, positivist originalism, and its real-world formulation called original-law originalism, do not actually describe our practice of law (or do so trivially). Third, the methodology of positivist originalism cannot sustain its conclusion, in*

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\* Assistant Professor, South Texas College of Law. I would like to thank Daniel Aguilar, Susannah Barton Tobin, Charles Barzun, Mitchell Berman, Joshua Braver, Ryan William Copus, Erik Encarnacion, Mark Graber, Charanya Krishnaswami, Brian Leiter, the Honorable Goodwin H. Liu, Alexander Platt, Peter Salib, Eric Segall, Larry Solum, Simon Stern, Mark Tushnet, and Eric Vogelstein. All errors and omissions are mine. D.C. Makinson, *Paradox of the Preface*, 25 ANALYSIS 205, 205–07 (1965).

*light of the facts that our obligation to follow the law is at best qualified and because there are equally good competing theories describing our law. Fourth, beyond these internal flaws, positivist originalism fails to solve any of the problems that have continually plagued the originalist enterprise. Thus, the project of positivist originalism cannot fulfill its aims and is unlikely to do so without appealing to the very theoretical questions it was devised to avoid.*

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## INTRODUCTION

Originalism is a juggernaut. It pervades our constitutional discourse, and it has become a fort and font of constitutional legitimacy. A number of our most prominent jurists and legal thinkers are self-described originalists and, in myriad constitutional cases, originalist argumentation demands our serious attention.<sup>1</sup> Notwithstanding, originalists have struggled to forge a consensus on the most foundational issues.<sup>2</sup>

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1. Indeed, at least five of the current active Supreme Court Justices have explained that they follow originalist jurisprudence or described themselves as originalists. See Jack M. Balkin, *The New Originalism and the Uses of History*, 82 *FORDHAM L. REV.* 641, 669 n.66 (2013) (“Justice Thomas describes himself as an original meaning originalist . . .”); Neil M. Gorsuch, *Justice Neil Gorsuch: Why Originalism Is the Best Approach to the Constitution*, *TIME* (Sept. 6, 2019, 8:00 AM), <https://time.com/5670400/justice-neil-gorsuch-why-originalism-is-the-best-approach-to-the-constitution/> (arguing that originalism is the best approach to constitutional interpretation); Matthew Walther, *Sam Alito: A Civil Man*, *AM. SPECTATOR* (Apr. 21, 2014, 12:00 AM), <https://spectator.org/sam-alito-a-civil-man/> (quoting Justice Alito saying he was a “practical originalist”); *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf> (Justice Kagan stating “we are all originalists”); Eric J. Segall, *Judicial Originalism as Myth*, *VOX* (Feb. 27, 2017, 10:10 AM), <https://www.vox.com/the-big-idea/2017/2/27/14747562/originalism-gorsuch-scalia-brown-supreme-court> (“Six years ago, one of our most liberal justices, Elena Kagan, stated during her confirmation hearing that ‘we are all originalists.’”); *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 2*, C-SPAN, 1:59:45–1:59:56 (Sept. 5, 2018), <https://www.c-span.org/video/?449705-10/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-2&start=7167> (then-nominee Kavanaugh responding to Senator Michael Shumway Lee that he is an originalist). What the Justices precisely mean by originalism is up for question. Justice Kagan likely means something different from Justice Thomas, in that Justice Kagan likely does not mean that original meaning is lexically prior to all other considerations. But what is evident is that originalism occupies such an important role in constitutional jurisprudence that judges, and potential judges, feel compelled to identify with it.

Moreover, the Federalist Society, which is often characterized by its commitment to originalism, has been extremely influential in the selection of court of appeals and district court judges. See, e.g., Charles R. Kesler, *Thinking About Originalism*, 31 *HARV. J.L. & PUB. POL’Y* 1121, 1121 (2008) (“If the Federalist Society is associated with a single word, it is ‘originalism.’”); David Montgomery, *Conquerors of the Courts*, *WASH. POST* (Jan. 2, 2019), <https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/> (discussing the huge impact of the Federalist Society on the lower courts).

2. See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 *N.Y.U. L. REV.* 1 (2009) [hereinafter Berman, *Originalism Is Bunk*]; Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 *U. PA. J. CONST. L.* 1161 (2013); Thomas B. Colby & Peter J. Smith,

Originalists have struggled to agree upon the proper object of original meaning—for example, among the framers’ intentions, the ratifiers’ intentions and understandings, and the public’s understanding. Indeed, for each of these candidate originalist objects, there are strong objections to their feasibility, including in their epistemic accessibility and their connection with any normative good that we wish to further or preserve.<sup>3</sup>

Enmeshed in that debate about originalist object is the question about the strength of the originalist thesis. Are originalists merely saying that we must pay some attention to original meaning; that we should give strong, presumptive weight to original meaning; that we should first decide cases solely on the basis of original meaning, and only then appeal to other considerations? Depending on the answer to the question of strength, originalism may reduce to being uncontroversial but trivially true, or it may be a robust contention that has proven hard to justify.<sup>4</sup>

Moreover, there is the overarching question about the nature of the justification for originalism: Is originalism conceptually the only way to engage in interpretation of the Constitution? Or is it simply that originalism achieves the best consequentialist results, in terms of stability, notice, predictability, and cabining judicial discretion? On this front, whichever road originalists have chosen, there has been a long queue of challenges undercutting both the conceptual and consequentialist arguments proffered for originalism.<sup>5</sup>

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*Living Originalism*, 59 DUKE L.J. 239 (2009) [hereinafter Colby & Smith, *Living Originalism*]; Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011) [hereinafter Colby, *New Originalism*]; Richard H. Fallon, Jr., *Are Originalist Constitutional Theories Principled, or Are They Rationalizations for Conservatism?*, 34 HARV. J.L. & PUB. POL’Y 5 (2011); Eric Berger, *Originalism’s Pretenses*, 16 U. PA. J. CONST. L. 329 (2013); Richard H. Fallon, Jr., *The Political Function of Originalist Ambiguity*, 19 HARV. J.L. & PUB. POL’Y 487, 487, 492 (1996).

3. Colby & Smith, *Living Originalism*, *supra* note 2, at 248–52 (discussing the history of the various objects of original meaning).

4. Berman, *Originalism Is Bunk*, *supra* note 2, at 10–12, 17–24 (discussing the various positions on the “strength” of originalism).

5. *Id.* at 52–56, 60–65 (offering objections to conceptual arguments for originalism); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 10–11 (1996) (explaining that originalism cannot often establish a fixed meaning, thus undercutting many of the consequential benefits); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 586–99 (2008) (same).

Among all of these, one problem for originalism has proven particularly pressing: Does originalism—with a focus on understandings of the world from over 230 years ago<sup>6</sup>—cohere with, account for, and preserve the core features and commitments of our legal system and society? The question is especially demanding given societal evolution on issues of individual freedom and identity, race, class, sex, gender, and sexual orientation, all in the light of modernity and technology.

In light of these steep challenges, a new wave of originalism—called “positivist originalism”—has arisen.<sup>7</sup> The scholars behind positivist originalism, William Baude and Stephen E. Sachs, explain that the animating principle is to refocus the principal question of constitutional interpretation. Instead of asking whether interpretive theories have benefits in terms of values, such as “democratic self-governance, the rule of law, stability, predictability, [and] efficiency,” Baude and Sachs claim that we should instead focus on what the law *is*, as embodied by our legal practice.<sup>8</sup> They claim that, by attending to how we practice law, we can generate a specific theory of our law—called “original-law originalism”—that remains faithful to the original law and original methods of interpreting the law while accounting for our core legal commitments. This, we are told, comes from a study of legal positivism, particularly of the variety espoused by H.L.A. Hart, which asserts that we understand what the law is by examining social facts and the actual behavior of the officials of our legal system. Most importantly, Baude and Sachs claim that in doing this, we can arrive at historical, empirical validation criteria for the law while bypassing theoretical questions about morality, meaning, interpretation, or authority.

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6. Some forms of originalism may recognize that the Reconstruction Era profoundly change the Constitution, such that the original meaning may take foot in that period instead. Even still, the question remains whether we should look to understandings from over 150 years ago.

7. See, e.g., William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455 (2019) [hereinafter Baude & Sachs, *Grounding Originalism*]; William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & HIST. REV. 809 (2019); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) [hereinafter Baude, *Is Originalism Our Law?*]; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817 (2015) [hereinafter Sachs, *Legal Change*]; William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103 (2016) [hereinafter Baude & Sachs, *Originalism’s Bite*].

8. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2351 (quoting Berman, *Originalism Is Bunk*, *supra* note 2, at 38).

Myriad scholars, including Charles Barzun, Mark Greenberg, Richard Primus, and Eric Segall, have presented robust challenges to the project of positivist originalism. Barzun and Greenberg have shown that Baude and Sachs's theory of positivist originalism underspecifies the legal positivist theory of law supporting it, that the choice is of significant consequence, and that choice implicates the very theoretical questions Baude and Sachs suggest they can avoid.<sup>9</sup> Primus shows that the evidence that Baude relies upon, primarily judicial opinion language, cannot sustain positivist originalism, because insofar as that privileges constitutional discourse over constitutional decision-making, that cannot arise from a focus on practice alone.<sup>10</sup> And Segall contends that original-law originalism has little relevance to the actual practice of law, especially the Supreme Court, where political ideology is most operative in deciding cases.<sup>11</sup>

Building upon these critiques, I contend that positivist originalism and original-law originalism fail in their aims and that they cannot succeed without an appeal to the very theoretical questions they were designed to circumvent. In this Article, I make four principal claims:

*First*, positivist originalism fails to heed key insights of legal positivism. Legal positivism tells us that the law is determined by the social facts. Positivist originalism and original-law originalism focus on judicial decisions and opinion language. But they fail to consider other relevant social facts—for example, judges' commitments to broad goals of our polity, like democracy and efficiency. These implicate theoretical questions about the law that help determine how officials act and thus must be part of the inquiry of what our law is.

*Second*, as a factual matter, positivist originalism and original-law originalism either fail to describe our current law or do so trivially. Historically, our practice of law was very different at the time of the founding. Indeed, our understanding of precedent and stare decisis—which undergird the common law—has evolved

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9. See, e.g., Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323 (2017); Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105 (2017).

10. See Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44 (2016).

11. See Eric J. Segall, *Originalism off the Ground: A Response to Professors Baude and Sachs*, 34 CONST. COMMENT. 313 (2019).

greatly since the founding era. Original-law originalism is defined to include the original meaning of the Constitution plus original methods of interpreting the Constitution. Understood literally, however, original-law originalism does not describe our law, because our current practice of applying precedent and stare decisis is not an original method of interpreting the Constitution. And, if viewed more expansively, the original-law originalist methodology seems to describe the approach of every case without providing any meaningful validation or falsification criteria for whether a case was decided correctly. This capaciousness should be unwelcome for both clear-thinking nonoriginalists *and* originalists. Moreover, the putative positive evidence for original-law originalism is inconclusive at best. And, indeed, the fact that there were constitutional “interregna” – times where the Constitution was not interpreted pursuant to original-law originalism – reveals that our law is not original-law originalism.

*Third*, even deriving some moral obligation to continue our practice of law will not sustain positivist originalism and original-law originalism, due to the presence of other relevant legal considerations and other competing theories. Granting normative weight to actual practice, the strongest conclusion to draw is that there is a prima facie obligation to follow our practice. But that is too weak to sustain original-law originalism because if other legal considerations can trump the purported original law, then that theory reduces to a form of pluralism. Moreover, there are other interpretive theories that model the law just as well, if not better, and so picking between the theories will inevitably require an appeal to theoretical debates.

*Fourth*, positivist originalism and original-law originalism offer no progress in responding to the main problems facing originalism. The first problem is the motivation for originalism. Originalists have proffered conceptual and consequentialist arguments, which in turn have been challenged. Positivist originalism offers no path forward in repairing these arguments and solidifying the foundational motivation for originalism. The second problem for originalism is whether it preserves key features of our law. Here too positivist originalism and original-law originalism fail to provide meaningful conditions to recognize what the law is, and thus these theories cannot recognize what is our law.



Most strikingly, these theories cannot even tell us that cases like *Korematsu*, *Plessy v. Ferguson*, and *Lochner* are not part of our law.

This Article proceeds in six parts. First, in Part I, I proffer a brief history of originalism's evolution, along with an account of some of the main problems with originalism as a theory of interpretation. Then in Part II, I set forth the frame and contours of positivist originalism and original-law originalism. Thereafter, I offer my principal responses to positivist originalism and original-law originalism: In Part III, I argue that positivist originalism and original-law originalism are not positivist theories and that their methodology brings nothing new to understanding the law. In Part IV, I contend that positivist originalism and original-law originalism are either false or trivially true in modeling our law. In Part V, I demonstrate that original-law originalism cannot be sustained by its own logical conclusion and requires appeal to theoretical questions to justify it over competing theories. In Part VI, I show that positivist originalism and original-law originalism make no headway in solving the existing problems for originalism.

## I. A SHORT HISTORY OF ORIGINALISM

### A. *The Evolution from Old to New*

Originalism grew out of a discontent with the so-called judicial activism of the Warren Court, especially in the wake of *Roe v. Wade*.<sup>12</sup> A new wave of scholars and jurists, including Robert H. Bork, Justice William H. Rehnquist, Attorney General Edwin Meese III, and Raoul Berger all wrote important pieces criticizing the supposed judicial activism in favor of methods of interpretation that would instead grasp at the original intentions of the Constitution.<sup>13</sup> In determining these intentions, early scholars of originalism focused on the intent of the framers and ratifiers of the

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12. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1134 (2003) [hereinafter Kesavan & Paulsen, *The Interpretive Force*]; Colby & Smith, *Living Originalism*, *supra* note 2, at 247. The term "originalism" itself was created by Paul Brest. See Earl M. Maltz, *The Failure of Attacks on Constitutional Originalism*, 4 CONST. COMMENT. 43, 56 n.1 (1987) (citing Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980)).

13. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1134–35; Colby & Smith, *Living Originalism*, *supra* note 2, at 248.

Constitution.<sup>14</sup> This generated pressing questions: How do we understand collective intention, what to do when framer and ratifier intentions conflict, at what level of generality should intention be understood, and what if the relevant intentions were self-referentially not intended to control?<sup>15</sup>

This led some to shift the focus from original intent to original understanding—namely, that of the ratifiers.<sup>16</sup> This move was principally motivated by the fact it was the ratifiers who gave the Constitution legal force, but it also purported to alleviate a few problems with the focus on intent, in terms of conflicts between framers and ratifiers and the subjectivity of and difficulty in ascertaining intentions, as opposed to understanding.<sup>17</sup>

Another solution to the question of what was the object of originalist interpretation was a move from a focus on the ratifiers and their understanding of the Constitution to a focus on the public at large and the original public meaning of the Constitution.<sup>18</sup> The foremost proponent of this variety of originalism was Justice Antonin Scalia.<sup>19</sup> This move was in part motivated by the fact that it was the *public*, and not the ratifiers alone, that gave the document legal force and so the focus should be on what the public understood the Constitution to be.<sup>20</sup> It also had other supposed benefits in further allowing originalists to disentangle themselves from the subjective and epistemically difficult inquiry about what the ratifiers believed, instead with a focus on what a hypothetical objective reader of the Constitution would have understood it

14. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1135; Colby & Smith, *Living Originalism*, *supra* note 2, at 248.

15. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1135–37; Colby & Smith, *Living Originalism*, *supra* note 2, at 248.

16. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1137–39; Colby & Smith, *Living Originalism*, *supra* note 2, at 250.

17. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1137–39; Colby & Smith, *Living Originalism*, *supra* note 2, at 250–52.

18. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1140–42; Colby & Smith, *Living Originalism*, *supra* note 2, at 250–52.

19. Antonin Scalia, Address Before the Attorney General's Conference on Economic Liberties (June 14, 1986), in OFF. OF LEGAL POL'Y, U.S. DEP'T OF JUST., ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK app. C (1987).

20. See, e.g., Ian Bartrum, *Two Dogmas of Originalism*, 7 WASH. U. JURIS. REV. 157, 182 (2015) (explaining this justification for original public meaning).

to mean.<sup>21</sup> But there remained substantial debate on how we learn what the original public meaning is.<sup>22</sup> In particular, there were questions about whether to consider framer intent and ratifier understanding at all in ascertaining the original public meaning.<sup>23</sup>

Alongside the moves from original intent to original meaning and from subjective meaning to objective meaning, there have been many other theoretical moves in the development of a “new” originalism: “the move from actual to hypothetical understanding; [] the embrace of standards and general principles; [] the embrace of broad levels of generality; [] the move from original expected application to original objective principles; [] the distinction between interpretation and construction; and [] the distinction between normative and semantic originalism.”<sup>24</sup> These have translated into different conceptions of originalism’s nature: whether it is the only permissible theory of legal interpretation as a conceptual matter, or whether it is contingently the best theory, given our commitments and empirical facts about the world.<sup>25</sup>

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21. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1140–42; Colby & Smith, *Living Originalism*, *supra* note 2, at 250–52.

22. Colby & Smith, *Living Originalism*, *supra* note 2, at 252–55.

23. *Id.* at 254.

24. Colby, *New Originalism*, *supra* note 2, at 719–20.

In the interest of brevity, and because it has been ably done by Thomas Colby, Mitch Berman, and Stephen Griffin, among others, I have said little about the new originalism. *See, e.g.*, Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1188–92 (2008). But among the theory’s main exponents are Keith Whittington, Randy Barnett, Lawrence Solum, and Jack Balkin. *See, e.g.*, Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599 (2004); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Lawrence B. Solum, *Semantic Originalism* (Univ. of Ill. Coll. of Law, Ill. Pub. Law & Legal Theory Research Paper Series, No. 07-24, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1120244](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549 (2009).

25. To be sure, originalism itself is not one “thing”; there are many different originalisms. As Mitchell N. Berman observes, there are at least four dimensions on which originalist theories may differ. Berman, *Originalism is Bunk*, *supra* note 2, at 9–14. The first is object—what an originalist theory focuses on as conveying original meaning, like framers’ intent, ratifiers’ understanding, and original public meaning. *Id.* at 9–10. The next is strength—how important original meaning is in determining the law. It could be the sole consideration in determining the law, the lexically prior consideration in determining the law, the presumptive determinant of the law, a weight consideration in determining the law, or simply a consideration of determining the law. *Id.* at 10–12. Another basis is status—the nature of the originalist claim. Originalist theories may maintain that interpretation should look to the original meaning because, as a contingent matter, it is beneficial, or that interpretation should look to original meaning because it is conceptually necessary, for

Of course, theories that assert that the originalist object of original public meaning of the text must merit some, but not necessarily dispositive, consideration in interpretation do little to distinguish originalism from any other type of constitutional interpretation.<sup>26</sup> It is a completely uncontroversial claim that original meaning plays some role in interpretation. No other plausible theory of constitutional interpretation says otherwise.

So, for originalism to be a distinct theory of constitutional interpretation it must be stronger than that, and most clear-thinking originalists recognize this. But there are still a variety of options for the originalist. As suggested above, originalists may hold that original meaning is the sole and exclusive consideration, that it is the lexically prior consideration, that it is a presumptively dispositive consideration, or that it is a weighty consideration.<sup>27</sup> Depending on the details, the latter two—presumptive and weighty originalism—may lead such an originalism back into the anodyne and uncontroversial, because it is firmly ensconced in our legal tradition that we “begin [or start] with the text” of the thing being interpreted, whether that be a statute, regulation, treaty, or constitution.<sup>28</sup> However that debate shakes out, the important point is that to be a distinct, meaningful theory of constitutional interpretation, originalism must be sufficiently strong—it must significantly privilege original meaning above other considerations.<sup>29</sup>

For clarity, I will refer to these varieties of originalism collectively as “normative originalism.” To be sure, the term is not intended to be monolithic, and it is not intended to exclude theories that appeal to positive facts. But the critical feature of positivist

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examples. *Id.* at 12–14. Finally, there is subject—who the originalist thesis applies to. It could be that it is just a judicial doctrine, a doctrine for officials, or for all people. *Id.* at 14. As a consequence, Berman suggests that this may lead to over 72 different prima facie plausible accounts of originalism. *Id.*

26. See Berman, *Originalism Is Bunk*, *supra* note 2, at 10 n.21.

27. *Id.* at 10–12.

28. *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (“Statutory interpretation, as we always say, begins with the text . . . .”); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 204 (2011) (“Our analysis begins with the text of Regulation Z in effect at the time this dispute arose.”); *Medellín v. Texas*, 552 U.S. 491, 506 (2008) (“The interpretation of a treaty, like the interpretation of a statute, begins with its text.”); *Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019) (“We start with the text of the Fifth Amendment.”).

29. Indeed, Berman argues that originalism must be the exclusive or lexical prior variants. Berman, *Originalism Is Bunk*, *supra* note 2, at 22.

originalism is its positive focus, and thus “normative originalism” is intended to encompass the complement of originalist theories.

*B. The Principal Arguments for and Against Originalism*

A key question for originalism—and indeed for any interpretive methodology—is its purpose. To this end, normative originalists have offered conceptual or metaphysical arguments and consequentialist arguments for its adoption.

The conceptual or metaphysical arguments for originalism contend that originalism is necessary based on the nature of constitutional interpretation, the writtenness of the Constitution, or the nature of constitutional authority.<sup>30</sup> But such arguments have proven a shaky foundation for the originalist enterprise.<sup>31</sup>

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30. Berman, *Originalism Is Bunk*, *supra* note 2, at 39 (discussing the argument from intentionalism); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 47–61 (1999) (discussing the argument from writtenness); Jeffrey Goldsworthy, *Interpreting the Constitution in Its Second Century*, 24 MELB. U. L. REV. 677, 683 (2000) (proffering an argument from constitutional structure and authority).

31. For example, according to Whittington’s argument from the writtenness of the Constitution, the Constitution was devised in response and in contrast to an English system that did not adequately preserve rights. WHITTINGTON, *supra* note 30, at 50–53. This was in part because of the lack of fixedness and the consequent malleability of the English constitution. The framers believed that reducing the Constitution to writing—which conveyed the relevant authorial intent of the Constitution—would help enforce those rights. *Id.* at 51. And thus, based on the very purposes of the Constitution, the original meaning of the Constitution—that is, the authorial intent—should govern the interpretation of the Constitution. *Id.* at 59–61.

A compelling response to Whittington’s argument is that the written Constitution could have sought to enforce those rights through some pathway other than directly through the original meaning. As Whittington himself observes, the Constitution could have been conceived of as “a fixed referent for political debate, a promissory note, or as essentially indeterminate.” *Id.* at 62. In these avatars, originalism may not be the correct mode of constitutional interpretation, because it may be that other factors and facts, other than the original meaning of the Constitution, are relevant to its interpretation.

Whittington responds that these different conceptions of the Constitution are “easily assimilated into originalism.” *Id.* at 78. Whittington’s point is seemingly that if the Constitution was conceived differently, then that would be the original meaning of the Constitution and that is rightly the focus of our constitutional interpretation. But suppose the Constitution becomes a fixed political referent and it functions appropriately, despite the original intentions of the framers. Then the Constitution could simply continue to operate as a fixed political referent. Furthermore, and perhaps more relevantly, under a conception of the original meaning of the Constitution as a malleable fixed political referent, constitutional interpretation may just look very much like any other kind of nonoriginalism—taking into

Other arguments for normative originalism are steeped in the contingent consequences that arise from it. Principally, the claim is that originalism, in focusing on original meaning, provides a fixed point that is objectively knowable and equally and easily accessible—which in turn provide notice, predictability, and stability.<sup>32</sup> That fixed point provides a gauge to assess and cabin exercises of judicial discretion.<sup>33</sup> In Whittington's words,

[T]he central problem of constitutional theory was how to prevent judges from acting as legislators and substituting their own substantive political preferences and values for those of the people and their elected representatives. . . . By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them.<sup>34</sup>

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account a plethora of other factors, facts, and norms of argumentation other than original meaning.

Beyond that, it is also unclear and underspecified how much fixedness and lack of malleability the framers—or more accurately some subset of the framers—wanted. It might have been that they desired some level of fixedness, but still wished to maintain some flexibility. For that, perhaps another method of fixation, for example, that takes into account something more than original meaning, might have been sufficient.

Other such arguments for originalism fail for similar reasons, in my estimation. *See, e.g.,* Goldsworthy, *supra* note 30, at 683 (arguing that the structure of the Constitution, with explicit grants of power and an amendment process, requires fidelity to original meaning in interpretation); Berman, *Originalism Is Bunk*, *supra* note 2, at 39 (discussing the argument from intentionalism and providing a fulsome response to these “hard” arguments for originalism).

32. *See, e.g.,* Edwin Meese III, Att’y Gen., Speech Before the American Bar Association, in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9 (Federalist Soc’y 1986) (“By seeking to judge policies in light of principles, rather than remold principles in light of policies, the Court could avoid both the charge of incoherence and the charge of being either too conservative or too [sic] liberal.”); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 *NW. U. L. REV.* 226, 290 n.320 (1988) (“The rules issuing from original intentions adjudication will be more knowable and more stable than those from any other plausible model of judicial review.”); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427, 429 (2007); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not As Radical As It Sounds*, 22 *CONST. COMMENT.* 257, 259 (2005); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 *YALE L.J.* 541, 551–52 (1994).

33. *See, e.g.,* Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 *SAN DIEGO L. REV.* 823, 825 (1986) (defending originalism on the basis of its “capacity to control judges”); *see also* ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* 12 (1992) (discussing the benefit of cabining judicial discretion); Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 863–64 (1989).

34. Whittington, *supra* note 24, at 602.

Indeed, Thomas Colby writes, “Originalism was born of a desire to constrain judges. Judicial constraint was its heart and soul—its *raison d’être*.”<sup>35</sup>

These claims have proven to be largely specious and illusory. Regardless of the originalist object, there are serious problems with determining the original meaning due to the lack of reliable evidence on particularized issues.<sup>36</sup> Additionally, the theory that there is a right answer about what a provision means, especially in contexts regarding constitutional provisions that will be the source of modern litigation, is at best a legal fiction and most likely indeterminate.<sup>37</sup>

Moreover, there is the albatross of a problem regarding accessibility. The kind of historical methodology often extolled to determine framers’ intent, ratifiers’ intent, and original public meaning is advanced and requires expertise not available to the public. Just consider Randy Barnett’s explanation of the methodology with respect to original public meaning: “[E]stablishing the semantic meaning of the words in the text, given the publicly available context, requires a survey of relevant usage. The search for original public meaning should be as systematic and comprehensive as possible with respect to any source one surveys, reporting deviant as well as predominate usage.”<sup>38</sup> And for framers’ and ratifiers’ intents, the methodology will also include

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35. Colby, *New Originalism*, *supra* note 2, at 714.

36. Kesavan & Paulsen, *The Interpretive Force*, *supra* note 12, at 1134–39; Colby & Smith, *Living Originalism*, *supra* note 2, at 248–52; Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO STATE L.J. 1085, 1087–90 (1989).

37. Berger, *supra* note 2, at 347; Mark Tushnet, *Heller and the New Originalism*, 69 OHIO STATE L.J. 609, 617 (2008) (“The new originalism seeks the original public meaning of constitutional terms, but there is (was) no single such meaning, again at least for interesting constitutional terms.”); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 10–11 (1996) (explaining that originalism cannot often establish a fixed meaning); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 586–99 (2008) (“In the cases in which the fear of judicial discretion is most acute, judges cannot render their decisions on the basis of the original public meaning of the Constitution for the simple reason that there never was such a meaning.”); Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court’s Quest for Original Meaning*, 52 UCLA L. REV. 217, 282–86 (2004) (“The fact that the historical record is susceptible to . . . conflicting interpretations means that there is significant room for judges to slant the historical record to serve instrumentalist goals.”).

38. Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 416 (2013).

comprehensive research of historical manuscripts and documents, often inaccessible to the public.<sup>39</sup>

On the other side of the ledger, normative originalism seems to carry heavy costs in that it fails to preserve core features of our law and legal practice and decisions that have become fixed points in our constitutional framework. As a matter of particular decisions, consider those relating to school desegregation, such as *Brown v. Board of Education*,<sup>40</sup> *Bolling v. Sharpe*,<sup>41</sup> and further progeny. These cases, by their own terms, did not appeal to original meaning in grounding their conclusions. As the chief example, consider *Brown*. There the Court considered whether de jure segregation of students in public schools violated the Equal Protection Clause of the Fourteenth Amendment.<sup>42</sup> The case arose out of Topeka, Kansas, where per the local law, school districts had maintained separate school facilities for black and white students.<sup>43</sup>

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39. This has led some originalists, chiefly Larry Solum, to posit the famous distinction between interpretation and construction. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1278 (2019) (“Constitutional Interpretation is . . . to be the activity that discerns the meaning (understood as communicative content conveyed by linguistic meaning in context) of the constitutional text. Constitutional Construction is . . . to be the activity that determines the legal effect (including the decision of constitutional cases and the specification of constitutional doctrines) given to the constitutional text.”). The principal idea is that in some cases, the task of interpretation will discern the original meaning of the Constitution that will fully determine the legal effect in that case, and the construction process simply applies the result of interpretation. *Id.* But in other cases, the interpretation will **not** determine the legal effect—they are underdeterminate. In these cases, originalists must engage in more laborious construction—that will **not** appeal to original meaning. *See id.* However, what goes into construction—which is not defined by original meaning—is up for grabs. The originalist cannot cabin judicial discretion in the activity of construction any more than nonoriginalists and attempts at doing so look rather similar to many nonoriginalist, pluralist theories of interpretation. *See, e.g.,* Amy Barrett, *Introduction*, 27 CONST. COMMENT. 1, 3 (2010) (“The existence of this ‘construction zone’ has prompted some self-proclaimed ‘living constitutionalists’ to defect to originalism on the rationale that the two theories are not, in fact, polar opposites.”); Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 U. PA. J. CONST. L. ONLINE 1, 13 (2017) (“In the context of constitutional adjudication, the endorsement of constitutional construction amounts to the ‘view that courts are authorized to impose constitutional rules other than those adopted by the constitutional [enactors],’ a position that more or less defines nonoriginalism.”) (quoting Keith Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 408 (2013)).

40. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

41. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

42. *Brown*, 347 U.S. at 486–88.

43. *Id.* at 486 n.1.



A class action was filed on behalf of Black students and their parents, challenging the segregated schooling.<sup>44</sup> The district court held that, under *Plessy*, the schools were substantially equal and therefore that the regime was constitutional.<sup>45</sup> The Court held that segregation in public schools on the basis of race deprived Black children of equal educational opportunities and thus violated the Equal Protection Clause.<sup>46</sup> In so doing, the Court effectively overruled its prior decision in *Plessy* that “separate but equal” facilities were constitutionally permissible,<sup>47</sup> stating that “separate educational facilities are inherently unequal.”<sup>48</sup> In the opinion, the Court specifically observed, “In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.”<sup>49</sup>

This last point is critical. The decision in *Brown* is generally understood to be a repudiation of originalist thinking. It eschews the idea that the proper focus is on the original meaning of the Fourteenth Amendment, in 1868, and that the Court must consider the evolving circumstances to properly evaluate the law. As a historical matter, the authors of the Amendment, the ratifiers of the Amendment, or the public at large would not have interpreted the Fourteenth Amendment’s Equal Protection Clause to prohibit racial segregation in schools. But the Court set aside those facts to rule otherwise.

Then consider another school desegregation case *Bolling v. Sharpe*. There, the government action segregating public schooling was not state action, but federal-government action in the District of Columbia.<sup>50</sup> However, Section 1 of the Fourteenth Amendment declares “[n]o State shall . . .”<sup>51</sup> Thus, because the Fourteenth Amendment limits the action of the state government and not the

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44. *Id.*

45. *See id.* The case before the Supreme Court was consolidated with similar challenges in 5 other states. *Id.*

46. *Id.* at 493.

47. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

48. *Brown*, 347 U.S. at 495.

49. *Id.* at 492-93.

50. *Bolling v. Sharpe*, 347 U.S. 497, 497 (1954).

51. U.S. CONST. amend. XIV, § 1.

federal government, the *Bolling* Court, unlike in *Brown*, could not rely on the Fourteenth Amendment to find school segregation in D.C. unconstitutional. Instead, the Court relied on the Due Process Clause of the Fifth Amendment to hold the federal action unconstitutional.<sup>52</sup> The originalist problem in *Brown* is further exacerbated, because beyond the historical fact that the framers, ratifiers, and founding-era public would not have found racial segregation unconstitutional, it does not seem plausible that the Fifth Amendment's Due Process Clause reaches racial segregation in public schools.<sup>53</sup> Moreover, there is a striking lack of textual and historical analysis in the opinion, suggesting that the opinion is thoroughly nonoriginalist in character.<sup>54</sup>

Consider also the decisions upholding laws prohibiting private discrimination under the Commerce Clause, such as *Heart of Atlanta Motel* and *Katzenbach*.<sup>55</sup> Those too are of questionable

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52. U.S. CONST. amend. V; *Bolling*, 347 U.S. at 497, 498.

53. Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1880 (2006) (“[I]t is widely accepted, by those who defend the decision as well as those who attack it, that [*Bolling*’s] doctrinal innovation cannot be easily justified by the Fifth Amendment’s text or its history . . . .”); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 428–59 (2010) (examining evidence indicating that the public understanding of the Fifth Amendment’s Due Process Clause in 1791 likely did not encompass substantive rights).

54. Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 VA. L. REV. 493, 496 (2013) (“The *Bolling* Court made no effort to ground its holding in the original meaning of the Fifth Amendment and only a cursory effort to reconcile its decision with either the text of the Due Process Clause or the Court’s own earlier interpretations of that provision.”). *But see* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (proffering an originalist argument for *Brown*).

55. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (upholding Congress’ power to prohibit private race discrimination in places of public accommodation, like hotels, under the Commerce Clause powers); *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964) (upholding Congress’ power to prohibit private race discrimination in places of public accommodation, like restaurants, under the Commerce Clause powers).

originalist vintage.<sup>56</sup> And so are the decisions extending Equal Protection doctrines in discrimination based on sex and gender.<sup>57</sup>

All of these cases—*Brown*, *Bolling*, *Heart of Atlanta Motel*, and *Katzenbach*—are so important and foundational to our jurisprudence to be canonical, such that some scholars have called them “fixed points.”<sup>58</sup> A theory of constitutional interpretation that fails to preserve the fixed points is one that is disruptive and, indeed, fails to be a theory of our law. In Lawrence Solum’s words, “Given these starting points, originalism must be rejected if it is inconsistent with *Brown* or if it would endorse *Plessy*.”<sup>59</sup>

Apart from particular decisions, as a more systemic matter consider *stare decisis*.<sup>60</sup> It is the doctrine that a court should decide future cases in accord with the court’s decisions in prior cases.<sup>61</sup> A fundamental tenet of the common law is that like cases should be treated alike, and *stare decisis* is a tool to ensure that goal.<sup>62</sup> The doctrine is not necessarily absolute; that a legal system includes *stare decisis* does not mean that courts cannot reverse course and overturn prior decisions. It only means that prior decisions have weight and that in some cases that weight is sufficient to dictate a particular result in accord with the prior decisions. But, in at least some cases, *stare decisis* will require that the weight of a prior decision is sufficient reason for a court to rule in accord with the prior decision, despite the fact that the court disagrees with the prior decision and believes it to be incorrectly decided.

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56. See, e.g., Cass Sunstein, *Debate on Radicals in Robes*, in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 287 (Steven G. Calabresi ed., 2007); R. George Wright, *The Limits of the Interstate Commerce Power: How to Decide the Close Cases*, 93 S. CAL. L. REV. Postscript 45, 55 (2019) (discussing the Court’s acknowledgement that, in cases such as *Heart of Atlanta Motel* or *Katzenbach*, Commerce Clause power is not primarily concerned with “commerce” as it might be understood by an originalist, but “instead seized upon opportunistically by Congress as an expedient means of promoting some element of morality, equality, justice, or personal dignity”).

57. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME (Sept. 22, 2010), <http://www.time.com/time/nation/article/0,8599,2020667,00.html> (“Nobody thought [the Fourteenth Amendment] was directed against sex discrimination.”).

58. Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 259 (2018).

59. *Id.*

60. *Stare Decisis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

61. *Id.*

62. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 86 (1982) (“[T]he fundamental role of common law courts is to keep like cases being treated alike . . .”).

Thus, *stare decisis* poses a conundrum for originalists.<sup>63</sup> Original meaning provides the content of the law. But suppose, in some case, there is an intervening nonoriginalist precedent that conflicts with the original meaning and would dictate a result that contravenes how the original meaning would decide the case. Then the originalist must make a decision: should the original meaning decide the case or should the nonoriginalist precedent? *Stare decisis* is such an important feature of our legal system that dispensing with it would be a serious departure from our law. Moreover, as shown by the particular cases, there are nonoriginalist judicial decisions that have become an important part of our law, such that there are notice, stability, and predictability interests intricately tethered to those decisions. It would cause enormous disruption in our constitutional practice if they were overturned.<sup>64</sup> This would “entail[] a massive repudiation of the present constitutional order.”<sup>65</sup>

Originalists are not without their responses to the problem of preservation, but questions then arise whether the resultant originalism has impact on the consequential benefits of normative originalism, like in utility and feasibility, coherence, or notice, predictability, stability, and cabining judicial discretion.<sup>66</sup>

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63. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1922 (2017) (recognizing the “tension between *stare decisis* and originalism”); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727 (1988) (“[I]nsistence upon original intent as the only legitimate standard for judicial decisionmaking entails a massive repudiation of the present constitutional order.”); Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 213–14 (2014) (“[Originalism’s] focus on fixed meanings can seem to put originalism at odds with deference to judicial precedents that deviate from the enacted Constitution.”); Barnett, *supra* note 32, at 258–62 (arguing that theory of originalism must reject nonoriginalist precedent); Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court’s Errors*, 19 GEO. MASON L. REV. 1029, 1030 (2012) (“The doctrine and practice of *stare decisis* create a real tension with the principle of originalism, precisely because the Supreme Court undoubtedly has made, and will inevitably continue to make, serious interpretive errors.”).

64. Antonin Scalia, *Response*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW at 133, 139–40 (1997) (recognizing that giving up *stare decisis* would be “disruptive of the established state of things”). Indeed, if *Roe*, *Casey*, *Brown*, *Bolling*, *Heart of Atlanta*, and *Katzenbach*, to name only a few, were of questionable constitutional validity, that would be a sea change in our practice of law.

65. Monaghan, *supra* note 63, at 727 (referring to original-intent originalism).

66. Roughly, I see three kinds of responses for normative originalists with regard to the objection that originalism fails to preserve our law:

## II. POSITIVIST ORIGINALISM AND ORIGINAL-LAW ORIGINALISM

Enter into the scene—courtesy of William Baude and Stephen E. Sachs—a supposedly new conceptualization of originalism.<sup>67</sup> The animating idea of this project is to understand that originalism, properly conceptualized, is not just a theory of interpretation, but a theory of law.<sup>68</sup> Baude and Sachs contend, as a theory of law—that is, a theory of what our law is—it must attend to how law is practiced. This requires a focus on “positive law”—what the law is and not what it ought to be.<sup>69</sup> This is what gives rise to the name “positivist originalism.”

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First, they can bite the bullet and recognize that normative originalism would entail these results, but those bad results can be cured by amendment. Justice Clarence Thomas seems to take this view. See *McDonald v. City of Chicago*, 561 U.S. 742, 812–13 (2010) (Thomas, J., concurring); Marah Stith McLeod, *A Humble Justice*, 127 YALE L.J.F. 196, 205 (2017) (“Justice Thomas has rejected the doctrine of constitutional stare decisis . . .”). This has the problem that many would not accept a theory of law that denies fixed stars.

Second, they can recognize the infelicity in the theory that it must make room for nonoriginalist fixed-point decisions and accommodate nonoriginalist doctrines like stare decisis but argue that this is not a significant problem for originalism as a theory. Justice Antonin Scalia seemed to take this view. Scalia, *supra* note 64, at 139–40 (arguing that stare decisis poses a problem for every theory of interpretation and thus does not pose any specific problem for originalism vis-à-vis any other theory of interpretation). This has the problem that it seems incoherent and unprincipled.

Third, they can argue that normative originalism actually does preserve these particular decisions and procedures. Many scholars have taken up this charge with respect to a number of surprising decisions. E.g., Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 900–07 (2009) (arguing that *Brown* and the *Legal Tender Cases* are in accord with originalism). See generally McConnell, *supra* note 54 (proffering an originalist argument for *Brown*); Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011) (proffering an originalist argument for sex discrimination laws and regulations being constitutional). And others have argued that the doctrine of stare decisis itself is originalist. Polly J. Price, *A Constitutional Significance for Precedent: Originalism, Stare Decisis, and Property Rights*, 5 AVE MARIA L. REV. 113, 114 (2007) (arguing that originalism incorporates stare decisis because the original meaning of the “‘judicial power’ in Article III encompassed significant respect for prior precedent as a starting point for judicial decision making”); Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1347 (2009) (arguing that “there is strong evidence that the Vesting Clause of Article III implicitly incorporated a principle of stare decisis”). The problem here is that these arguments usually proceed by abstracting the Constitution to a high level of generality, which results in more variability in how the Constitution is interpreted and greater room for judicial discretion.

67. See *supra* notes 7–8.

68. Sachs, *Legal Change*, *supra* note 7, at 818.

69. *Id.*; Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1457.

Foundational in attending to our legal practice is understanding that the law is what it is until it is changed.<sup>70</sup> In Baude and Sachs's words,

Officially, we treat the Constitution as a piece of enacted law that was adopted a long time ago; whatever law it made back then remains the law, subject to various de jure alterations or amendments made since. And we identify modern law by way of this past law, the way a *nemo dat* rule identifies today's property holdings by way of yesterday's transfers: explaining how a legal rule enjoys good title today means explaining how it lawfully arose out of the government established at the Founding.<sup>71</sup>

This has led Stephen Sachs to call originalism "a theory of legal change."<sup>72</sup> And this too explains why we should focus on the "original law." If the law is what it was until it was lawfully changed, then we should start with what the law was at the beginning – namely, original-law originalism.

Original-law originalism "is broad and inclusive, in that it serves as a criterion for the rest of our constitutional law, 'including of the validity of other methods of interpretation or decision.'"<sup>73</sup> It is not always followed, just as laws are broken by the citizenry, but it reflects "the 'deep structure' of our constitutional law, present in our frequent practices of identifying, justifying, and debating the content of our law."<sup>74</sup> Moreover, they say this theory of interpretation, original-law originalism, is "exacting in application" and provides empirical conditions of validity and falsifiability.<sup>75</sup> It does not merely reflect policy preferences, but rather it requires and marshals specific historical evidence to resolve legal questions.<sup>76</sup>

#### A. The Content of Original-Law Originalism

Sachs describes original-law originalism with a succinct, recursive definition:

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70. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1457.

71. *Id.*

72. See generally Sachs, *Legal Change*, *supra* note 7.

73. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1457 (citing Baude, *Is Originalism Our Law?*, *supra* note 7, at 2352).

74. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1458.

75. *Id.* (citing Baude & Sachs, *Originalism's Bite*, *supra* note 7, at 104).

76. *Id.*

- (1) All rules that were valid as of the founding remain valid over time, except as lawfully changed.
- (2) A change was lawful if and only if it was made under a rule of change that was valid at the time under (1).
- (3) No rules are valid except by operation of (1) and (2).<sup>77</sup>

From their accounts, this definition seems to characterize both of their individual and joint understandings of original-law originalism.<sup>78</sup> However, what all goes into (1) and (2) is unclear. Seemingly, (1) is designed to capture the original primary rules, while (2) is intended to capture the rules as they have been lawfully changed.<sup>79</sup> More specifically, the law includes the following buckets:

First, there are the particular rules in the Constitution at the founding with their particular original meaning.<sup>80</sup> Importantly, some of these rules do allow for changes, and potentially surprising, outcomes with different factual input. This means that, with our world evolving and changing, the founding-era rules of the Constitution may apply to produce evolved and changed outcomes.<sup>81</sup> Standard examples of these evolving and changed meanings of the rules include the application of “unreasonable” in the Fourth Amendment, “cruel and unusual” in the Eighth Amendment, and “property” in the Fifth Amendment.<sup>82</sup> These evolved and changed meanings may be conceived of as part of and

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77. Sachs, *Legal Change*, *supra* note 7, at 845. Sachs acknowledges that original-law originalism is a variant of “original-methods originalism,” prominently articulated by John O. McGinnis and Michael B. Rappaport. *See generally* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009) [hereinafter McGinnis & Rappaport, *Original Methods Originalism*]. Sachs clarifies that original-law originalism resolves a particular question of original-methods originalism about which methods to use by appeal to positivist theory about which methods were in fact the law. Sachs, *Legal Change*, *supra* note 7, at 883. But importantly, McGinnis and Rappaport’s project is a positive *and* normative one—they make the claim that the theory is the better theory along many normative dimensions. McGinnis & Rappaport, *Original Methods Originalism*, *supra*, at 752–53. That stands in contrast with the main thrust of Baude and Sachs’s project.

78. Sachs, *Legal Change*, *supra* note 7, at 845; Baude, *Is Originalism Our Law?*, *supra* note 7, at 2355 & n.16.

79. Sachs, *Legal Change*, *supra* note 7, at 845.

80. *Id.* at 845–52.

81. *Id.* at 852–55.

82. *Id.* at 855; Baude, *Is Originalism Our Law?*, *supra* note 7, at 2356–57.

interacting with (1) or (2), but regardless they are part of the original-law originalism. Along with this is the explicit rule of change in Article V that sets forth the specific conditions for amending the Constitution.<sup>83</sup>

Next, original-law originalism includes doctrines to resolve ambiguity and vagueness. Examples of these include construction, liquidation, and presumptions.<sup>84</sup> Similarly, original-law originalism includes domesticating doctrines, like adverse possession, statutes of limitation and laches, waiver, mistake, *de facto* constructions, and the like.<sup>85</sup> Whether and to what extent these doctrines were part of the founding-era law is an open question, but the answer to that is resolved by historical reference.<sup>86</sup> These primarily are part of the methods of lawful change under (2).<sup>87</sup>

Finally, there is *stare decisis* and the doctrine of precedent. As Baude observes, there are various justifications for why *stare decisis* is concordant with originalism.<sup>88</sup> But what is clear is that it was part of the founding-era law, and thus it is part of original-law originalism.<sup>89</sup> This too is primarily a method of lawful change under (2).<sup>90</sup>

#### B. Evidence of Original-Law Originalism

Now, what is the evidence that original-law originalism is our law? Baude and Sachs appeal to higher-order practices and lower-order practices that they contend show together that our law conforms to original-law originalism. For higher-order practices, they reference 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.<sup>91</sup>

With respect to lower-order practices, Baude and Sachs appeal to the fact that in particular Supreme Court decisions, originalism

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83. Sachs, *Legal Change*, *supra* note 7, at 855.

84. *Id.* at 856; Baude, *Is Originalism Our Law?*, *supra* note 7, at 2357–58.

85. Sachs, *Legal Change*, *supra* note 7, at 859–60.

86. *Id.* at 879–80; Baude, *Is Originalism Our Law?*, *supra* note 7, at 2358.

87. Sachs, *Legal Change*, *supra* note 7, at 852–64.

88. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2358–59.

89. *Id.*; Sachs, *Legal Change*, *supra* note 7, at 852.

90. Sachs, *Legal Change*, *supra* note 7, at 852.

91. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2366–71; Sachs, *Legal Change*, *supra* note 7, at 844–45.



takes decision-making priority and there is an absence of anti-originalist cases.<sup>92</sup> With respect to this latter claim, Baude argues that many of the supposedly nonoriginalist decisions—*Brown*, *Miranda*, *Lawrence*, *Roe*, *Reed*, and *Gideon*—are arguably originalist.<sup>93</sup>

Baude and Sachs also argue that the claim that original-law originalism is our law does not necessarily contend that it has been our law continuously.<sup>94</sup> Indeed, they recognize that there may have been “constitution interregnums” during which originalism did not govern.<sup>95</sup>

### C. The Connection with Legal Positivism

Baude and Sachs see original-law originalism as a legal positivist theory inspired by H.L.A. Hart. Legal positivism is a theory of what constitutes and determines law. “The most fundamental of positivism’s core commitments is the Social Facts Thesis, which asserts that law is, in essence, a social creation or artefact.”<sup>96</sup> Alongside this foundational assumption is the famous positivist mantra that law has “no necessary connection” to morality—known as the separability thesis.<sup>97</sup> As Les Green has observed, it cannot be taken literally, as there are many obvious “necessary connections” between morality and law.<sup>98</sup> Thus, the exact contours of this thesis are uncertain. At the least, it seems to mean that it is not necessary that morality be a criterion of legal

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92. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2372–86; Sachs, *Legal Change*, *supra* note 7, at 837–38 (citing Baude’s manuscript approvingly for this proposition).

93. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2377–86. Sachs suggests an originalist reading of *Brown*. Sachs, *Legal Change*, *supra* note 7, at 854. Baude also included *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444 (1934), in this list, but later along with Sachs contended that *Blaisdell* was wrongly decided under original-law originalist jurisprudence. Baude & Sachs, *Originalism’s Bite*, *supra* note 7, at 108.

94. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2389; Sachs, *Legal Change*, *supra* note 7, at 848–49.

95. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2389; *see also* Sachs, *Legal Change*, *supra* note 7, at 848–49.

96. Kenneth Einar Himma, *Inclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 126 (Jules Coleman & Scott Shapiro eds., 2002).

97. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 601 n.25 (1957).

98. Leslie Green, *Positivism and the Inseparability of Law and Morals*, 83 *N.Y.U. L. REV.* 1035, 1041–45 (2008).

validity,<sup>99</sup> and the fact that something is law does not necessarily carry moral weight.<sup>100</sup>

Hart's own version of legal positivism proffered the following structure: a legal system is the union of primary and secondary rules. Primary rules are those rules that regulate behavior; they are the rules that are "concerned with the actions that individuals must or must not do."<sup>101</sup> For example, the laws criminalizing murder, rape, and theft are primary rules. Secondary rules are rules about the primary rules. For Hart, these secondary rules are in three types: the rule of recognition, the rules of change, and the rules of adjudication. Importantly, the secondary rules are fixed by convergent practice, with the appropriate attitude of acceptance, among the officials of the legal system that constitutes a social rule—known as the conventionality thesis.<sup>102</sup>

Hart contends then that, for there to be a legal system, regular citizens must generally obey the primary rules, and the officials of the system must, from an internal point of view, accept the secondary rules.<sup>103</sup> Among the secondary rules, the rule of recognition is foremost in importance: it is the rule by which an official in the legal system recognizes putative laws as actual laws. The rule of recognition does this through criteria of validity, that are inferred from social practice and provide "conclusive affirmative indication that it is a rule of the group."<sup>104</sup>

99. *Id.*

100. Hart, *supra* note 97, at 619.

101. H.L.A. Hart, *The Concept of Law* 92 (2d ed. 1994) (with a Postscript edited by Penelope A. Bulloch and Joseph Raz).

102. Guha Krishnamurthi, *Don't Go Breaking My Hart*, Note, 88 TEX. L. REV. 833, 837 (2010); Jules Coleman, *Incorporationism, Conventionality and the Practical Difference Thesis*, in HART'S POSTSCRIPT 99, 101 (Jules Coleman ed., 2001). Importantly, this is not to say that all convergent behavior of officials generates legal rules.

103. HART, *supra* note 101, at 116. What is precisely meant by the internal point of view has been the source of much scholarly consideration. I follow Shapiro in thinking "[t]he internal point of view is the practical attitude of rule acceptance—it does not imply that people who accept the rules accept their moral legitimacy, only that they are disposed to guide and evaluate conduct in accordance with the rules." Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1157 (2006).

104. HART, *supra* note 101, at 92, 107. Here, I set out the contours of legal positivism in terms of Hartian legal positivism. That choice may be a source of controversy, because there are other types of legal positivism, including from Hans Kelsen and Joseph Raz. I will use Hart's theory as a prototype, due to its status among positivist theories, but I think that my arguments proceed assuming any minimally positivist theory. For more on how Baude and Sachs's view disagrees with other positivist theories, see generally Barzun, *supra* note 9.

So, in what way, then, is original-law originalism a positivist theory? There are a couple of mainstays. First, Baude and Sachs both focus on actual practice in fashioning their theory of law. Their idea seems to be, inspired by Hart, that a theory of what the law is must attend to social facts, and specifically how we actually practice law. Second, Baude and Sachs suggest, through this picture, a type of rule of recognition for determining whether some putative law is valid: first, ask whether it was a law that was valid at the time of the founding and, if not, then ask whether it can be traced through lawful changes to a law that was valid at the time of the founding.

*D. The Justification for and Normativity of Original-Law Originalism*

What is the nature of this justification for original-law originalism and why should we be originalists? At the core of the argument is the *prima facie* obligation of officials – primarily judges but also other constitutional actors – to apply the law.<sup>105</sup> Per Charles Barzun’s insightful schematization,<sup>106</sup> the argument proceeds as follows then:

*Premise 1:* The law is whatever is supported by the right kind of social facts.

*Premise 2:* Original-law Originalism is supported by the right kind of social facts.

*Conclusion 1:* Therefore, Original-law Originalism is the law.<sup>107</sup>

*Premise 3:* Officials have a *prima facie* duty to apply the law.

*Conclusion 2:* Therefore, officials have a *prima facie* duty to apply Original-law Originalism.<sup>108</sup>

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105. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2392–93.

106. Barzun, *supra* note 9, at 1339.

107. These first three premises come from Sachs’s account. Sachs, *Legal Change*, *supra* note 7, at 835. Sachs’s formulation of *Premise 1* is “Whatever is supported by the right kind of social facts is part of our law,” but later he clarifies that the position is stronger. *Id.* at 864.

108. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2392–97 (explicitly defending *Premise 3*); Sachs, *Legal Change*, *supra* note 7, at 835. It could also be that the duty to apply the law is *pro tanto*, rather than merely *prima facie*:

A *pro tanto* reason has genuine weight, but nonetheless may be outweighed by other considerations. Thus, calling a reason a *pro tanto* reason is to be distinguished from calling it a *prima facie* reason, [because] . . . a *prima facie* reason appears to be a reason, but may actually not be a reason at all.

SHELLY KAGAN, *THE LIMITS OF MORALITY* 17 (1989).

*Premise 1* is just a core commitment of legal positivism, namely the social facts thesis.<sup>109</sup> Thus, legal positivists will find little to complain about there. And *Conclusion 1* is validly deduced from *Premise 1* and *Premise 2*.

*Premise 2* is the most obvious target of criticism. If it is not the case that original-law originalism is supported by the right kind of social facts, then original-law originalism is not our law and Baude and Sachs will have failed in their project. At first glance, *Premise 3* also seems to be generally uncontroversial. But on further inspection, the reference to duty is highly indeterminate with respect to fixing a particular law and would seem to require appeal to theoretical questions to get any tangible results—the same theoretical questions that Baude and Sachs contend we can circumvent by appeal to positivist originalism.

With respect to this schematization of the argument, I will focus my efforts primarily on *Premise 2* and *Conclusion 2*. I first argue that Baude and Sachs's methodology is flawed in that they ignore important social facts, which implicate theoretical questions. Next, I contend that *Premise 2* is either false or an uninteresting thesis that will not ground a meaningful theory of interpretation. Finally, I argue that *Conclusion 2* is not robust enough to sustain a meaningful originalist theory of interpretation.

#### *E. The Tangible Results*

Finally, Baude and Sachs do offer some tangible results of this original-law originalism—what they call original-law originalism's "bite":

[T]he time has come to start naming names. Without having done the research ourselves, we doubt (say) that the original Constitution let states impair contracts on claims of "economic emergency"—or that this power was ever lawfully conferred since. We likewise doubt the pedigree of modern cases on executive agreements; jury numbers or unanimity; counsel comment on failure to testify; one-person one-vote; diversity jurisdiction for D.C. citizens; "commerce" regulation of wholly intrastate activity; administrative adjudication of private rights; and maybe even commandeering state officers or Article III limits on standing. Maybe the cases are right despite our doubts, or at

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109. Sachs, *Legal Change*, *supra* note 7, at 835.

least tolerable under original doctrines of stare decisis. (Again, we haven't done the research.) And maybe more, or more controversial, cases belong on that list. But the fact that [original-law] originalism brings these cases into doubt, or even disrepute, shows that the theory has real bite.<sup>110</sup>

Of course, the theory also preserves key features of our practice of law, by incorporating them explicitly. Under this original-law originalism, there is no longer the criticism that the theory does not accommodate stare decisis because it explicitly incorporates that. This is similarly the case for a number of the other discussed doctrines, including clarity resolving and domesticating doctrines. What's more, the incorporation of these doctrines is not unprincipled. It looks to the founding-era law, as the original law, and embraces stare decisis and these doctrines on the basis of them being part of the original law.

Importantly, nonoriginalist decisions are problematic for this theory. That is because nonoriginalist decisions, especially a substantial number of them, show that our law is not in fact originalist. A few particular nonoriginalist results may not be enough to falsify the theory. The question, as a positivist theory, is whether there are enough nonoriginalist decisions to show that there is not a consensus of legal officials who understand original-law originalism to be our law.

Relatedly, one question is what impact on the theory there is from canonical nonoriginalist decisions that may have obtained the same result under original-law originalism reasoning. As above, such decisions, especially a substantial number of them, would tend to show that original-law originalism is not our law. But the fact that their results can be duplicated with original-law originalist

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110. Baude & Sachs, *Originalism's Bite*, *supra* note 7, at 108. Baude and Sachs cite the following cases as potentially wrongly decided under original-law originalism: *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444 (1934); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Apodaca v. Oregon*, 406 U.S. 404 (1972); *Williams v. Florida*, 399 U.S. 78 (1970); *Griffin v. California*, 380 U.S. 609 (1965); *Reynolds v. Sims*, 377 U.S. 53 (1964); *National Mutual Insurance Co. v. Tidewater Co.*, 337 U.S. 582 (1949); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Crowell v. Benson*, 285 U.S. 22 (1932); *Printz v. United States*, 521 U.S. 898 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

For a convincing response to *Originalism's Bite*, see Richard A. Posner & Eric J. Segall, *Faux Originalism*, 20 GREEN BAG 2D 109 (2016). "[T]he entire, long history of constitutional adjudication by the Supreme Court demonstrates that originalism does not supply 'resources for deciding cases and resolving ambiguities.'" *Id.* at 112.

thinking blunts any *preservation* objections that might arise. For example, suppose that *Brown* is a nonoriginalist decision, but that there is an originalist reconstruction of the result in *Brown*. That would parry the criticism that originalism would fail to preserve our law because it would preserve *Brown* as a canonical “fixed point” of our law.

Notice though that *stare decisis* does not obviously help in this regard of preserving the law. The doctrine of *stare decisis* is of course helpful in ensuring that adopting original-law originalism will not require that we give up any canonical fixed points of the law. But *stare decisis* will not help in ensuring that those decisions became part of our law in the first place. When the Warren Court was deciding *Brown*, they could not rely on *stare decisis* to come to the conclusion of *Brown*. It was a novel decision. What is needed for original-law originalism to fully preserve our law is that there are justifications of fixed-point canonical nonoriginalist decisions that show that the decisions were legally correct when made and that are rooted in originalism.

### III. POSITIVIST ORIGINALISM IS NOT LEGAL POSITIVIST

My first contention is that positivist originalism, as a matter of its methodology, contradicts core features of legal positivism. Specifically, it has a narrow focus on case results, judicial opinion language, and superficial judicial behavior, ignoring other important facts like judges’ theoretical and political commitments that explain their actions. This results in a myopic view that fails to truly appreciate the legal positivist social facts thesis.

The project of positivist originalism and original-law originalism focuses on the core thesis of positivism that the law is a product of social facts. As discussed, Baude and Sachs contend that we should be attending to how law is practiced. The idea is that if we focus on our legal practice—that is, the right kinds of social facts—then, heeding the positivist thesis, we will obtain what the law is. This, they contend, should be our focus rather than on other theoretical questions, such as normative, interpretive, and linguistic questions.<sup>111</sup>

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111. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1458 (“As a theoretical matter, if the interpreter’s job is to ask what our law is (and to leave to others what it

This last point is critical: the positive turn's primary value is in avoiding theoretical debates and supplanting them with positive questions—that are objectively answerable with reference to historical, empirical questions. If, in the course of the positive analysis, we have to answer theoretical questions, then the positive turn has failed in its mission. That is because we were already mired in difficult theoretical questions—and the positive turn was supposed to allow us to bypass those with objectively answerable questions about our legal practice.

Now a critical initial question for the positivist originalist is what it means to focus on how law is practiced. Baude and Sachs seem to focus on the results of cases, the language in judicial opinions, and the ostensible behavior of litigating lawyers—usually in light of judicial behavior—as instructive of our actual legal practices.<sup>112</sup> Thus, the promise of positivist originalism and original-law originalism is that by focusing on these social facts, we can avoid the aforementioned theoretical jurisprudential questions.

We should be skeptical. To understand why, it helps to begin with an understanding of legal positivism's focus on social facts in determining the law. As discussed above, the key observation of legal positivism, especially of the Hartian variety, is that law is a product of the convergent practices of a consensus of the legal officials in the system, with the appropriate attitude.<sup>113</sup> And we use

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should be), then many of our interpretive and normative disputes are reframed."); Baude, *Is Originalism Our Law?*, *supra* note 7, at 2352 ("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."); Barzun, *supra* note 9, at 1325 ("The core idea of the positive turn is that debates about how to properly interpret statutes and the Constitution ought to be settled neither by analyzing concepts of meaning, interpretation, or authority nor by engaging in normative debates sounding in political or moral philosophy.").

112. See *supra* Section II.B.

113. Other scholars have questioned Baude and Sachs's contention that they can avoid determining the answers to the jurisprudential debates about the nature of our law, such as between Hartian positivism, other varieties of positivism, and the Dworkinian model. See generally Greenberg, *supra* note 9; Barzun, *supra* note 9. In particular, Greenberg and Barzun both observe that the choice of Hartian positivism might be a bad one for Baude and Sachs, because according to the Hartian model, there is no law on controversial questions because the controversy undercuts the consensus needed for law. Baude and Sachs contend that this misunderstands Hart, because there may be consensus on theoretical questions that leads to surprising and perhaps controversial results about what the law is.

social facts to determine what that consensus is using inference, taking into account the norms of (legal) reasoning.

Consider Hart's famous example of "No Vehicles in the Park."<sup>114</sup> It goes like this: "A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or not?"<sup>115</sup> There are easy cases and difficult ones. But, even in the simplest case, in the Hartian framework, a person considering and applying the law utilizes inference and the norms of reasoning.

For example, consider a park-goer who thinks about whether they may drive their Fiat 300 into the park. They see the sign with the prohibition, "No Vehicles in the Park." They might think, "Well, my Fiat 300 is a 'vehicle' and so it is not allowed in the Park, ergo I should not drive it into the Park." This involves a fairly simple rule of substitution, based on a particular lexicon. But it is inferential. As Hart says, the officials are not there to weigh in on whether the Fiat 300 counts as a "vehicle" and there may be no exhaustive list. Even this simple application of a rule requires the person applying the law to utilize inference and the norms of reasoning to make a decision about the law.

Importantly, one could make an inference about the law, even if legal officials do not have a present view on the legal matter or have not considered it. With the example of vehicles in the park, it was not necessary for anyone to have considered whether a Fiat 300

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I think Baude and Sachs are wrong about controversy in the law on the Hartian model. It is true that theoretical commitments may lead to surprising results, but if a consensus of officials remain unconvinced and still do not accept those results, then it is still not the law. See Guha Krishnamurthi, *A Hartian Account of Genuine Theoretical Disagreement* (Harvard Public Law Working Paper No. 20-06), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3562495](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3562495).

114. Hart, *supra* note 97, at 607. Hart uses this example to explain indeterminacy in valid legal rules, whereas I use it to explain features of the legal positivist views of rules.

I must acknowledge here that some may consider this example as obfuscating the distinction between determining how to apply valid legal rules and determining the content of rules and the rule of recognition. In my view, we should be skeptical of the distinction, or at least its sharpness. Individual applications of the law are made in light of some criteria, which in turn may illuminate what the rules are. But this example is just meant to be schematic, to illustrate how other social facts can inform the law. I thank Brian Leiter for calling my attention to this point.

115. *Id.*



(or a blue Fiat 300 or a blue Fiat 300 with a “Michigan Go Blue” sticker) is a vehicle for the driver to determine that it is a vehicle that is legally forbidden in the park. We can use our powers of inference, based on the norms of legal reasoning, to determine that these novelties of the case—like the color of the car or the college sticker—are superfluous to the result. Every particular case is novel in some way and it requires the legal thinker confronted with a question to determine what legal effect those novelties will have.<sup>116</sup>

But, in so doing, we have to consider all the relevant social facts that may impact the officials’ behavior. Imagine a society that is highly stratified by caste. And suppose at the top rests a small but distinct set of people who belong to an ‘elite,’ who for some reason are subject to special treatment by officials. Specifically, the elite may often engage in conduct prohibited by the laws on the books with impunity, especially if the law-breaking conduct is not considered serious or grave. But otherwise, the society and the legal officials are vigilant about sanctioning and punishing law breaking, even for minor offenses.

Then an elite’s automobile—adorned with an elite sticker—enters and parks in the park for the first time. When the car enters and parks, the officials realize that the automobile is one owned by an elite. So, what will the officials do? It is unclear, because there are two strong opposing inferences we can draw—that the car will be prohibited because it violates the proscription or the car will be allowed because it is elite. What is clear is that, in trying to assess the law, you cannot confine yourself to the social facts about the enforcement of the vehicles-in-the-park regulation. You must look at the broader social facts about how elites are treated. And indeed, it could be that the law is actually: “No vehicles in the park; but if visibly adorned with elite symbols, then a vehicle will be allowed in the park.” Indeed, it might be built into the rule of recognition that any law about conduct that is not serious or grave has exemptions for the elite.<sup>117</sup>

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116. Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 269, 277–80 (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

117. There also may be no consensus, in which case there is no law. And more generally, there may not always be an answer to a legal question about how a consensus of officials will act. In such cases, the law is indeterminate, on the legal positivist picture.

In sum, to determine what the law is, we must look to all of the social facts that would help us infer what the consensus of legal officials is. Baude and Sachs's methodology seems to suggest that the social facts that matter are results in cases, judicial opinion language, and perhaps lawyer behavior (in light of judicial behavior).<sup>118</sup> Those are important data points, but there are plainly other relevant social facts.

Consider Legal Realism, which sought to show that "the act of judging was not impersonal or mechanistic, but rather was necessarily infected by the judges' personal values."<sup>119</sup> The Legal Realists gave at least three reasons for this claim: the vagueness and ambiguity in the legal rules, the indeterminacy of the holdings in cases, and the fact that there were often contradictory rules applicable.<sup>120</sup> From these insights we have seen a New Legal Realism, characterized by empirical studies of officials' behavior that show the variety of factors—beyond the recognized legal sources—that may impact officials' behavior and, consequently, the law.<sup>121</sup>

Importantly, these Legal Realists are engaged in a descriptive practice. They are, at a first level, trying to explain what judges and officials actually do. That is, Legal Realists observe that, if we were to simply take all the recognized sources of law, we would find indeterminacy, incompleteness, and incoherence, so there must be more to the story. And then they consider other social facts to complete the story, to make inferences about what is the consensus of legal officials on certain questions. In my view, the Legal Realists were on to something.<sup>122</sup> But the important point is that the

118. Sachs, *Legal Change*, *supra* note 7, at 856 (discussing *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)); Baude, *Is Originalism Our Law?*, *supra* note 7, at 2372–74 (same); *id.* at 2364–75 (discussing other cases); *see also id.* at 2351 n.5 (referencing "lawyers' assumptions"); Sachs, *Legal Change*, *supra* note 7, at 836 (referencing the ability of "ordinary lawyers" to make legal judgments based on the law).

119. WILLIAM M. WIECEK, *LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE* 187 (1988); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1243 (1931) ("All that has become clear is that our government is not a government of laws, but one of laws through men.").

120. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 470 (1988).

121. Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 834–35 (2008).

122. *See generally id.*; Frederick Schauer, *Legal Realism Untamed*, 91 TEX. L. REV. 749 (2013); Brian Leiter, *In Praise of Realism (and Against "Nonsense" Jurisprudence)*, 100 GEO. L.J. 865 (2012).

Legal Realists are looking at social facts – i.e., the actual practice of law – to determine what the consensus of officials is on legal questions and, consequently, what the law is.

Thus, positivist originalism's, and original-law originalism's, focus on actual legal practice and the social facts of judicial results and opinions are not new. *That is what everybody has been focusing on.* The purported novelty of positivist originalism is that we can understand the law by only looking at a limited set of data – namely judicial results and opinions. But that too is not new; that is just Legal Formalism, which holds that the traditionally recognized sources of law – the constitution, statutes, regulations, judicial precedent, etc. – provide “logical, mechanical, and deliberative” results and that the vast majority of legal officials abide by and apply these results.<sup>123</sup> Yet the debate between Legal Realists and Legal Formalists has been raging for generations. It clearly cannot be settled by just looking at our practice of law. It is our very practice of law that is the genesis of the debate.

Indeed, there is good evidence that positivist originalism and original-law originalism are simply wrong about what are the relevant social facts to decide how our judges decide cases.<sup>124</sup> We know that our officials have certain core commitments, such as to democracy and efficiency. And we know that our officials are generally erudite and reflective about how to best accomplish these goals.<sup>125</sup> Moreover, beyond what judges tell us they use to decide cases, there is strong evidence that judges employ these considerations in actual cases.<sup>126</sup>

The question for the legal positivist in determining the law is understanding the official consensus. If we know that a consensus of legal officials has certain core commitments, and we can

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123. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 2 (2007) (“For the formalists, the judicial system is a ‘giant syllogism machine,’ and the judge acts like a ‘highly skilled mechanic.’”).

124. See, e.g., Segall, *supra* note 11, at 326 (raising the Realist critique of original-law originalism).

125. See, e.g., STEPHEN G. BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* (2010); STEPHEN G. BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997); LOUIS D. BRANDEIS, *BRANDEIS ON DEMOCRACY* (Philippa Strum ed., 1995); RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

126. See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 71 (2009); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) (describing and providing examples of the prudential modality of argument, which often sound in efficiency).

convincingly show that one particular interpretive methodology better furthers or fulfills these core commitments, then in certain cases, especially where there is indeterminacy, we could sensibly infer that a consensus of legal officials will follow that particular interpretive methodology. Thus, if such social facts obtain, then theoretical debates about interpretation will also be important in our consideration of what the law is.

Indeed, Baude and Sachs seemingly endorse this picture:

Positivism might ground law on social practice, but it doesn't reduce law to social practice. On Hart's own account, some legal rules might reflect practice directly, but the vast majority do so only indirectly, involving some degree of inference from practice-supported premises. Individual results are derived from legal rules, which are derived, in turn, from yet more fundamental legal rules—terminating, on Hart's account, in an ultimate rule of recognition, the “complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.” . . . As these consequences illustrate, so long as we share certain kinds of premises, a positivist approach can still reform our surface-level practices and resolve apparent disagreements. In the same way, originalism can be a correct descriptive account of our legal system, even if few people would currently describe our system that way.<sup>127</sup>

Baude and Sachs correctly recognize that legal positivism utilizes inference, from social facts, to determine what the law is and that those inferences may be indirect and complex. It is surprising then that Baude and Sachs think that we can limit the universe of relevant social facts to judicial results and opinion language. There is clearly more relevant data to what judges actually do, even if the relationships are not obvious at first glance. And once we open up the inquiry to the other data— which sound in moral commitments, the nature of democracy and authority, the nature of interpretation—we have no hope of resolving what our law is without consideration of the theoretical debates.<sup>128</sup>

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127. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1464–65 (emphasis omitted).

128. There is a sense in which Baude and Sachs can claim to avoid these debates: they can observe that they need not resolve these questions on the merits. Rather, they can simply address the debates at the level of what judges' and other officials' views on these debates are. That is true. But that seems to be a significant concession for the positivist originalist.

The upshot is that the *positivist nature* of positivist originalism and original-law originalism *does not* dictate that these theories only look to particular features of our legal practice, like judicial behavior in prior results and opinion language. The key question is what legal officials, informed by their internal perspectives, will do when confronted with a particular situation. That is part of the definition of the law, according to the legal positivist, in light of the social facts thesis. And so, according to the legal positivist, you must consider the social facts that will help determine what a consensus of legal officials will do. In determining what the law is, you ignore potentially relevant social facts at your peril.

Baude and Sachs's method of only looking to judicial results, opinion language, resulting lawyer behavior, and the like to determine our law does not arise from legal positivism. It is a separate and distinct claim that, to determine what a consensus of legal officials will do and thus what the law is, it is enough to look at judicial results, opinion language, and lawyer behavior. It amounts to a type of bespoke Legal Formalism.<sup>129</sup>

And, in our legal practice, it is likely false. There is compelling evidence, anecdotal and data-based, that other considerations are highly useful in determining what a consensus of legal officials will do. Some of those considerations are rooted in theoretical questions of morality, interpretation, and linguistics. Thus, the positive turn for originalism cannot avoid those theoretical debates because those theoretical debates are interwoven in key social facts about our legal practice.<sup>130</sup>

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For one, it seems that most involved in these debates would acknowledge that one motivation is to persuade others, including judges and officials, to adopt their view. Second, there is a close connection between debating theoretical questions on their merits and debating whether judges—who are able and qualified—should adopt a particular view on those theoretical questions. Such a concession by the positivist originalist would reveal that not much would change in the practice of law and legal discourse, adopting the positivist originalist lens. Third, it would fall short of the promised empirical and historical conditions of validation of the law, as I discuss *infra* Section IV.B. I thank Mitch Berman for raising this point.

129. Eric J. Segall, *Originalism as Faith*, 102 CORNELL L. REV. ONLINE 37, 51–52 (2016) (“This new turn to originalism as ‘our law’ is really nothing more than taking the Court’s decisions as ‘law’ as a matter of faith because logic, precedent, legal reasoning, and certainly original meaning, simply can’t get the job done.”).

130. See, e.g., Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 112 (2016) (arguing that social facts about the purpose of constitutional

## IV. ORIGINAL-LAW ORIGINALISM IS FACTUALLY NOT OUR LAW

The next question is whether positivist originalism, and specifically original-law originalism, are in fact our law. On this point, we can return to our schematization of Baude and Sachs's core argument: *Premise 2* states that original-law originalism is supported by the right kind of social facts. Thus, in combination with *Premise 1* that the law is whatever is supported by the right kind of social fact, we could conclude that original-law originalism is our law. Here, I claim that original-law originalism is either (1) not supported by the right kind of social facts, or (2) is supported by the right kind of social facts but is an uncontroversially true theory that is meaningless and thereby fails to be originalist.

Before we assess the claim, we must set forth some parameters for the analysis. The first point to recognize is that we are seeking a description of the positive law, i.e., what our law actually is. Original-law originalism, and any competing theory, are

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interpretation are important to the operation of constitutional interpretation and therefore arguing for a natural law grounding of constitutional originalism).

Baude and Sachs may riposte that they are simply taking their cues from Hart, who focused on judicial results and opinion language. But such a response would confuse Hart's point. In the toughest cases, like those at the apex appellate level, Hart recognized that there would be no consensus – and thus no law. In such cases, Hart maintained that judges would have to appeal to extralegal considerations to decide the case, such as those sounding in morality and other theoretical debates. HART, *supra* note 101, at 124–36. But that is precisely what positivist originalism and original-law originalism are concocted to avoid. So, they cannot take shelter in Hart's view, if there is to be law at all in the tough cases.

Baude and Sachs may also say that whatever the law is, that is to be resolved by the internal point of view of officials, and our officials—that is, judges—license the narrow universe of sources. This misunderstands the internal point of view and its relation to the rule of recognition. The internal point of view is a practical attitude of rule acceptance taken by officials. But understanding the internal point of view does not mean we must accept what judges believe, or claim to believe, is the rule of recognition, if that is gainsaid by their actual practices. It is possible that judges mistakenly believe the rule of recognition is X, but their convergent practices reveal that it is Y. In such a case, the rule of recognition is fixed by the actual practices – and thus it is Y. For example, suppose a society's judges believe that in cases involving individuals against corporations, they are faithfully employing textualist/originalist interpretation—but, in fact, nearly every case turns out in favor of corporations. One may understand that the rule of recognition includes a criterion to favor corporate interests. Even if the judges do not realize that criterion, it is still part of the rule of recognition. And that is not contradicted by the requirement of the internal point of view, because judges can actually have a *practical attitude of acceptance* to such a rule, even if they would not describe the governing rule that way. But to be clear, I think this kind of situation is mostly food for theory. In practice, judges—as individuals and on the whole—are perceptive and self-reflective enough to understand the apparent and underlying criteria by which they decide cases. I thank Charles Barzun for bringing my attention to this argument.

explanations of what our law actually is.<sup>131</sup> And thus, in determining whether our law is original-law originalism, we are asking whether original-law originalism accounts for the data of how our law is actually practiced.

Also, there is a critical distinction to observe between validating a decision as employing a particular interpretive methodology and validating a decision as correct. For example, an opinion can be normative originalist, in that it lexically prioritizes original meaning in the determination of the meaning of the constitutional provision and consequently the law. But it could also be factually wrong because it incorrectly assumes that the opinion of one idiosyncratic framer was dispositive of the contrary contemporary public opinion. And an opinion can also be incompatible with normative originalism in that it prioritizes, say, contemporary societal morality or practicalities over the original meaning of a constitutional provision in deciding the case.<sup>132</sup>

Next, in seeking such an explanation for the law, and an accounting of the data of our legal practice, it is acceptable, and perhaps inevitable, that there will be data that cannot be accounted for. It may be the case that original-law originalism cannot explain particular one-off decisions, where an official departs from the interpretive methodology. We cannot expect complete compliance of all legal officials. And in such cases, we can say that such decisions were not in conformity of the law.<sup>133</sup> But if original-law originalism cannot account for core features of our law, that reveals a serious problem. Taking our prior example, if original-law originalism cannot account for *Brown*, and requires that *Brown* is contrary to the law, that is contrary to the social facts because *Brown* is a fixed star of our current legal practice, and thus original-law originalism would have failed as an explanation of our law.<sup>134</sup>

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131. E.g., Sachs, *Legal Change*, *supra* note 7, at 818; Baude, *Is Originalism Our Law?*, *supra* note 7, at 2351.

132. Baude & Sachs, *Originalism's Bite*, *supra* note 7, at 104–05 (discussing this distinction and falsifiability). I leave open the question whether a decision employing the wrong methodology can be correct. One could reasonably take the view that the methodology is critical to the result, but one could also be focused only on the result, or potentially some hybrid positions.

133. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1468–70.

134. In the context of Barzun's schematization of the argument, original-law originalism would not be supported by the right social facts, because of the critical social fact that there is a strong consensus of officials that regards *Brown* as binding on official action.

Additionally, our focus must be on what legal officials – most importantly judges – actually do or would do. As discussed above, judicial opinions are surely important data points, but they may not be the only data points. Moreover, if what judges say in their opinions is not the basis for sound inference about what judges actually do or would do, then they are not good data points to determine what the law is. For example, suppose it is the case that, in the most cases, judges employ the following methodology: They first start with the plain meaning of the text. If that does not resolve the case, then judges consider societal morality. And whatever result they determine, they attempt to justify that result with something grounded in the original meaning of the text or by original methods employed at the time of the text. In this simplified example, original-law originalism is not the law because it is not what the judges are actually utilizing to determine the answers to legal questions. The judges are actually using this societal-morality methodology to determine the answers to legal questions. This is the interpretive methodology that is the law. Indeed, if attorneys knew all of this, their briefs would devote their most serious attention to the society-morality arguments – not the original-law originalist arguments (though they might include original-law originalist arguments to tell judges how they can dress the opinion). As discussed above, positivism tells us that the law critically depends on what judges and other officials do. And we have to be vigilant for the social facts that tell us what those convergent practices *actually* are.

Relatedly, it is not enough that a data set show that judges employ a particular methodology, if there is sufficiently convincing information that they would depart from that methodology in hypothetical or novel cases. For example, suppose that at a particular point in time, a number of cases arising under the Fourth Amendment appear to utilize originalist methodology. But suppose we believe that is chiefly because most of the Fourth Amendment cases were fairly straightforward. And suppose we anticipate that, with respect to claims relating to new technologies like thermal imaging, facial recognition, GPS tracking, and the like, judges will likely engage in pluralist, nonoriginalist jurisprudence.



That, then, may provide compelling evidence that our jurisprudence is *not* originalist.<sup>135</sup>

Finally, consider arguments that proceed to show that the results of nonoriginalist decisions could be achieved through originalist jurisprudence—that is, decisions that employ originalist methodology. Those arguments *do not* show that our law is originalist. Indeed, by their own terms, they cannot. They recognize, and therefore concede, that those decisions are nonoriginalist. What they do, however, is show that originalism is not such a bitter pill—it would not require giving up those important results, narrowly construed.<sup>136</sup>

With those points in mind, I contend that original-law originalism is either not our law or is trivially so, in light of the following three observations: (A) there are foundational aspects of our legal reasoning that have evolved greatly since the founding such that they are not original methods; (B) if viewed expansively, original-law originalist methodology describes every reasonable approach to interpretation and fails to provide historical, empirical validation and falsification criteria; and (C) the putative evidence for original-law originalism is inconclusive and there is strong contrary evidence.

#### *A. The Evolution of Purported Original Methods*

Recall that the structure of original-law originalism allows within its ambit of decision the rules that were valid at the time of the founding and lawful changes of those rules, either through formal amendment or accepted doctrines of change.<sup>137</sup> One method of change—recognized by Baude and Sachs—is that of *stare decisis* and precedent. And, indeed, it has come a long way since the founding.

Consider, for example, the textualization of precedent that has occurred in American law over the last two centuries.<sup>138</sup>

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135. Such evidence may be hard to come by, but do not fight the hypothetical.

136. In that sense, what these arguments do is sound in the explanatory desideratum of *conservatism* because they show that embracing originalism would not require giving up important background beliefs and theories. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1239 (2009).

137. See *supra* Section II.A.

138. Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1222 (2007) (discussing the evolution of precedent to focus on the text of judicial opinions).

Peter M. Tiersma's scholarship explains that "[a] hundred years ago judges tended to express their opinions in conceptual terms . . . . Recently, they have become inclined to lay down fixed rules and principles . . . ." <sup>139</sup> Early opinions of the U.S. Supreme Court did not often reduce the holding (or ratio decidendi) to writing that was easily quotable. <sup>140</sup> Rather, the opinions would set forth the various reasons for the judgment, and perhaps those opposing the judgment as well, and simply set forth the ruling of the court. <sup>141</sup> Indeed, until the early 1800s, Supreme Court opinions were delivered seriatim, with each sitting Justice delivering their own opinion, one after another. <sup>142</sup> As a consequence, whether in seriatim form or as a collective opinion, determining the ratio decidendi or holding of a case required sophisticated legal reasoning. Doing so would require analyzing the relationship of the facts to the outcome of the case, in light of the various reasons set forth by the Court. And in cases of seriatim decisions, that might also require reconciling multiple opinions that were not necessarily concordant. <sup>143</sup>

Of course, today, our practice is very different. Now, courts tend to simply and explicitly state the instant case's holding in the opinion. <sup>144</sup> And while there is always room to distinguish cases based on specific factual circumstances, the text of the opinion, and the textual articulation of the court's holding, has a distinct weight compared to prior history. As Robert F. Nagel has observed, the Court has increasingly made use of elaborate and detailed tests and standards in "an obvious effort to achieve control and consistency" – in essence to be more statute-like. <sup>145</sup> "In modern decisions [and unlike in the earlier era], judges are bound not merely by simple and undefined maxims nor by the mysterious

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139. *Id.* at 1190.

140. *Id.* at 1248 ("Courts certainly did not lay [the ratio decidendi] out on a platter for easy consumption.").

141. *Id.* at 1248–49; *id.* at 1223–24 (providing the example of *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792)).

142. *Id.* at 1223; *id.* at 1230 (stating that Chief Justice Marshall eliminated the practice when he was appointed to the Court in 1801).

143. *Id.* at 1248–49.

144. *Id.* at 1248; Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455, 1455 (1995) ("It is a routine charge against contemporary judicial opinions that they read more like statutes than like opinions of a court.").

145. Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 178 (1985).

flux of prior cases, but by rules that are specific and multiple.”<sup>146</sup> Nevertheless, it is important for us to recognize that this was not always the case, and not even fairly recently.<sup>147</sup>

Practically, the difference in the operation of precedent and stare decisis is striking. One way to see this is by considering the current operation of the *Marks* rule. That rule, coming from *Marks v. United States*, states that when there is a fragmented Court such that no single opinion garners the votes of a majority of the Court, the holding is the narrowest grounds on which the concurring Justices agree.<sup>148</sup> In such fractured decisions, determining what the holding is—by piecing together the narrowest grounds from the various opinions—has proven to be confusing and contentious.<sup>149</sup> It is usually not straightforward, and generally requires discursive, particularized reasoning not governed solely by the text. And, indeed, the method of the *Marks* rule is similar to that of determining holdings from seriatim opinions or from various opinions employing discursive, particularized, fact-sensitive reasoning. The substantial frustration with the *Marks* rule shows that it is unlike the common application of precedent and stare decisis of our current practice.<sup>150</sup> Our current practice features opinions that generally set forth clear, textual holdings, which are then utilized by lawyers and judges. To be sure, our current practice includes discursive, particularized, and fact-sensitive reading of cases, but that is in addition to, and less favored than, the more textualized method of reading cases.<sup>151</sup>

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146. *Id.* at 197; Tiersma, *supra* note 138, at 1254.

147. Tiersma, *supra* note 138, at 1248–49 (detailing scholars’ views in the mid-1900s that the text of the opinion does not control the result); see also Jim Evans, *Change in the Doctrine of Precedent During the Nineteenth Century*, in PRECEDENT IN LAW 35, 57–63 (Laurence Goldstein ed., 1987) (observing that the development of stare decisis as a firm doctrine only began in the late 1800s).

148. *Marks v. United States*, 430 U.S. 188, 193 (1977).

149. Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1944 (2019) (“Unfortunately, the *Marks* rule has generated considerable confusion.”); *id.* at 1952–54 (discussing instances of conflicting readings). Indeed, very recently, the application of the *Marks* rule has created significant confusion in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), regarding determining the precedential status of *Apodaca v. Oregon*, 406 U.S. 404 (1972).

150. Re, *supra* note 149, at 1944–47.

151. Baude and Sachs may contend that this is too restrictive an understanding of the founding, and that they are really pointing to the more fully realized judicial tradition after *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). By that point, under Chief Justice John

Thus, based on the history, this means that core features of our current practice of law—namely, the way opinions encapsulating the judgment are written, the way precedent is established by courts, and the way precedent is interpreted and understood by future courts—are significantly different from how those core features of the practice of law were during the founding era (and, also, during Reconstruction). The creation and interpretation of precedent and *stare decisis* are important pathways to change the law from the supposed original meaning. We use these methods now, and our use of them is highly textualized. And, though *stare decisis* was a part of the original law and the original methods, that incarnation was not so textualized. Judges did not fashion tests of necessary or sufficient conditions. Instead, judges considered the facts, and provided reasons for judgment that were specific to those facts. Those reasons were primarily for the case at hand, and whether they would transpose to the next case was a problem for the next case. It was a particularist jurisprudence. And there may have been good reasons for such a methodology.<sup>152</sup> But, whatever that case, our form of precedent and *stare decisis*—which is highly textualized—was *not* part of our founding-era law—and yet it is now.

The import for original-law originalism is substantial. As we saw, original-law originalism's core thesis depends on *Premise 2* in our schematization, namely that the right kind of social facts support original-law originalism. And that point can be understood as original-law originalism being a sufficiently good explanation of our law. But here is strong evidence that the very core of our practice of law—the precedent of the common law system—is not part of original-law originalism. That means original-law originalism *cannot* account for our current practice of law. Thus, original-law originalism is not a good explanation of our current

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Marshall, there were far fewer seriatim decisions. Tiersma, *supra* note 138, at 1230. Even removing seriatim decisions from the picture, there was still a strong tradition of utilizing discursive opinions that did not textualize the holdings of the case, which extended well beyond the founding era. That is enough to sustain the point that *stare decisis* itself has greatly changed since the founding era. I thank Joshua Braver for pressing this point.

152. It could be that judges thought fashioning tests was all too much a legislative role and thus considered it beyond their institutional authority or institutional competence. Or it could be that judges thought that it was an inferior way of decision making. Or perhaps it was merely adherence to tradition.

legal practice and, consequently, the right kind of social facts *do not* support the practice of law.

To be clear, *stare decisis* and precedent are certainly not the only features of our current legal practice that are inexplicable by reference to original-law originalism.<sup>153</sup> For example, in recent scholarship, Baude himself has argued that the doctrine of qualified immunity is not justifiably part of our law, as it is “unlawful and inconsistent with conventional principles of statutory interpretation.”<sup>154</sup> And we could extrapolate that qualified immunity is not consistent with original-law originalism. Thus, original-law originalism will have an apparent deficit in explaining our legal practice because qualified immunity is part of our law. And similarly, in *Originalism’s Bite*, Baude and Sachs list a number of cases that they suspect cannot be validated by original-law originalism.<sup>155</sup> Those are deficits in original-law originalism because they are actual features of our law that cannot be explained

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153. Also consider inference. By “inference” I mean to include logic, the forms of reasoning, and our various analytical tools to draw out conclusions from data. Inference in the law allows us to draw conclusions from particular propositions of law to others. It is a way of expounding upon the law, and thus it expands – and changes – the law.

What is also clear is that the founding era’s understanding of inference is less developed than ours today. In particular, there have been great developments in statistics, with a great many sophisticated tools to isolate the impact of particular variables in a multivariable system. And these tools can be particularly useful in determining racial and gender bias in various official actions – relevant to *inter alia* claims made under the Fourteenth Amendment. But, because these would not be available methods of inference at the founding or the passage of the Reconstruction Amendments, they seemingly would not be available under original-law originalism.

However, that is not what the courts say. *See, e.g.,* *McCleskey v. Kemp*, 481 U.S. 279, 293–94 (1987) (stating that “[t]he Court has accepted statistics as proof of intent to discriminate in certain limited contexts”; establishing the high standards that must be met; and giving examples when they have been met, including with modern techniques like “multiple-regression analysis”); *Chavez v. Ill. State Police*, 251 F.3d 612, 637–38 (7th Cir. 2001) (“The Supreme Court has long noted the importance of statistical analysis ‘in cases in which the existence of discrimination is a disputed issue.’ While few opinions directly acknowledge that statistics may be used to prove discriminatory effect, the Court has repeatedly relied on statistics to do just that.” (citations omitted)).

As of yet, there are few cases that have had evidence sufficient to meet the statistical standard. But one would expect that to change with time, as *inter alia* our data collection capabilities become stronger. The question is whether our officials would actually use those statistical inferential techniques to expand the scope of, for example, Equal Protection, or not. If they would, then that does indicate that our law – what our officials would do and thus our officials’ convergent practices – are not original-law originalist.

154. William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 45 (2018).

155. Baude & Sachs, *Originalism’s Bite*, *supra* note 7, at 108.

by original-law originalism. However, if limited in number, such deviations may be acceptable to Baude and Sachs because there can be mistaken cases.<sup>156</sup> Their theory could simply say that those doctrines and cases are not in conformity with our law, or that they were not in conformity with our law when decided but have become part of our law through original-law originalist processes.

But notice that is not possible with *stare decisis* and precedent. Those are fixed-star features of our legal practice. So, Baude and Sachs cannot credibly suggest that they are not in conformity with our law. And seemingly neither can they suggest that they have become part of our law through original-law originalist processes, due to construction of original-law originalism that focuses on methods available at the founding. I say “seemingly,” because Baude and Sachs have not had a chance to address it, and I am not sure what they would say. Thinking as charitably as I can, perhaps they may claim that *stare decisis* and precedent are included in original-law originalism because (1) their present forms are close enough to the earlier forms or (2) even if far apart, their present forms’ evolution is easily traceable. In principle, neither of these responses is out of bounds, but I think they both exacerbate the problem I consider next: such an original-law originalism is so capacious that it is meaningless.

#### *B. Original-Law Originalism’s Lack of Meaning*

The next question is whether original-law originalism proffers meaningful claims about our interpretive methodology. Here, my claims are dual: *First*, under the necessarily expansive view, nearly all cases employ an original-law originalist methodology. *Second*, original-law originalism does not have historical, empirical criteria of legal validation or falsification that do not appeal to theoretical debates.

##### *1. Original-law originalism is an expansive method of interpretation*

To begin, consider how Baude and Sachs operationalize original-law originalism. Per their definitions, they suggest that any methodology that uses any mode of argumentation common in the founding era law is original-law originalist. This is already rather

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156. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1468–70.

expansive, given the robust and discursive quality of legal argumentation at the founding.

As an initial observation, on this understanding, any opinion that uses doctrinal, precedent-based argument is one attempting to employ an original-law originalist methodology.<sup>157</sup> But most every opinion cites prior precedent, hence they would all employ original-law originalism.

Indeed, this is bolstered by Baude and Sachs's response to Barzun. Barzun observes that we simply do not require that interpretive rules be tracked back to the founding. Barzun argues that historical grounding of rules is not to trace the pedigree to the founding, but rather to argue that the law's endurance is indicative of its acceptance and feasibility.<sup>158</sup> Consequently, according to Barzun, our practice of law does not actually trace the pedigree of putative legal propositions to the original primary rules through their lawful changes—and thus that our law is not original-law originalism.<sup>159</sup>

Baude and Sachs contend that this criticism requires too much, ignoring the "ordinary norms of citation and opinion-writing."<sup>160</sup> They acknowledge that opinions do not often have an explicit and complete tracing of the founding pedigree.<sup>161</sup> But that is because a complete tracing is not always necessary. Opinions may cite the U.S. Code, without looking at the underlying statutes, because they are almost always the same. And, similarly, opinions may cite prior opinions in good repute, assuming that they operated under a

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157. This is of course subject to the caveats of the prior section, *supra* Section IV.A.

At this juncture, one question is how Baude and Sachs reconcile the fact that some of these argumentative moves that are part of our practice may not enjoy consensus judicial support as required by Hartian positivism. Baude and Sachs have two options: First, they can disclaim that these argumentative moves are part of the law, because they do not seem to enjoy consensus judicial support. But their resulting theory would need to admit that there is not law in many appellate cases, which would contravene their claim that they can provide empirical, historical criteria to recognize the law. Second, they can contend that there is indirect or oblique consensus support, from which we can obtain empirical, historical criteria to recognize the law. For the rest of this section, I assume that Baude and Sachs opt for the second road.

158. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1478 (citing Barzun, *supra* note 9, at 1349–50).

159. *Id.*

160. *Id.*

161. *Id.* at 1478–82.

similarly proper methodology.<sup>162</sup> Moreover, Baude and Sachs are eager to embrace “customary law” as part of original-law originalism because that was part of the law at the founding.<sup>163</sup> So, according to Baude and Sachs, even if as Barzun suggests, the reasons for application of prior precedent are not due to the authority of the original law, but rather because of the worth of law that has managed to survive, that is still employing the methodology original-law originalism.<sup>164</sup>

Then consider Philip C. Bobbitt’s six modalities of constitutional argument.<sup>165</sup> They are:

[H]istorical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary ‘man on the street’); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule).<sup>166</sup>

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162. *Id.*

163. *Id.* at 1483.

164. Earlier, Baude seemed to have a narrower view of what would count as original-law originalist. He suggested that, to be in accord with original-law originalism, arguments must in fact track “originalist pedigree,” not merely coincide with original-law originalism, arguments cannot be consequentialist, and arguments cannot “affirmatively reject[] the primary authority of the Framers or the constitutional text.” Baude, *Is Originalism Our Law?*, *supra* note 7, at 2397–98. Nor can they be forms of strong originalism that would reject founding-era methods, like *stare decisis*. *Id.* at 2398.

But this poses a trouble, because, for example, it is not at all obvious that judges are actually tracking originalist pedigree. Perhaps they are employing a pluralist methodology that relies on different types of arguments to support their conclusion – without a concern for pedigree, but rather a focus on acceptance and feasibility. Indeed, this was the heart of Barzun’s challenge. And if they are not tracking pedigree, then original-law originalism fails in describing our law.

In a similar vein, there are numerous examples of consequentialist arguments that, in Baude’s words, “rest on [their] own bottom” and are part of our law. BOBBITT, *supra* note 126, at 12–13 (describing and providing examples of prudential arguments, which employ consequentialist thinking). So, if original-law originalism excludes those, then it has a major deficit in describing our law.

165. BOBBITT, *supra* note 126, at 12–13.

166. *Id.*



Though Bobbitt is careful to inform that he is not suggesting a taxonomy that covers all constitutional argument—there may be others—he is making the claim that most constitutional argument fits in at least one of these six buckets. And indeed, Bobbitt provides convincing evidence that each of these forms of constitutional argument is pedigreed.<sup>167</sup> But if that is right, then really every opinion employing one of Bobbitt’s modalities—and we should think that is most every one—would also be employing the original-law originalist methodology.

This is further exacerbated by the issue we considered earlier. I proffered reason to think that critical forms of argumentation—like from *stare decisis* and precedent—are significantly different than at the founding, such that they should not be considered within the ambit of original-law originalism. But if the original-law originalist ripostes that they are included because they are close cousins or reasonable evolutions of the prior founding-era forms, then it is hard to see what kind of methodology used by a rational court would fail to employ original-law originalism. Original-law originalism was defined to include the original meaning of rules, supplemented (or supplanted) by the rules formed from the original methods of changing those rules; this would add to that the supplemented (or supplanting) rules formed from methods of changing those rules that have in turn evolved from the original rules. That would again seem to cover most every reasonably written opinion.

Of course, if it is not right that the modalities of argument are sufficiently pedigreed or that original-law originalism is meant to include evolutions of methods of change, then that poses another problem for the original-law originalist: That would reveal a form of constitutional argumentation that is commonly used but *not* part of original-law originalism. And that in itself would be compelling evidence that our law is *actually* not original-law originalist.

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167. Historical, textual, and doctrinal arguments are all arguably modes of argumentation from the founding era. *See generally id.* (discussing these modes of argumentation).

And in a similar vein, we could consider Fallon’s typology of constitutional argument into textual, framers’ intent, constitutional theory, precedent, and value arguments. Each of these has sufficient pedigree and thus would be part of the original-law originalist methodology. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–1210 (1987).

\* \* \*

The arguable capaciousness seems concerning. It strikes me as curious to say that a particular methodology dominates nearly every opinion written in our current legal practice. Consider other methodologies, say, original-public-meaning originalism (a variety of a normative originalism), pragmatism, or some variety of pluralism. To each of these theories, there are real examples that do not conform. As discussed above, *Brown* is a good example of an opinion that is unlikely to fit the original-public-meaning originalist mold. And an originalist opinion – for example, *District of Columbia v. Heller*<sup>168</sup> – is unlikely to fit a pragmatist mode. But to the original-law originalist theory, it is hard to imagine a duly written opinion that would fail to conform. Perhaps, an opinion that used a coin-flip to decide a case would fail, but that is the kind of extreme example it would take.

Of course, that it is so ubiquitous is no death knell for the theory. Indeed, Baude and Sachs may embrace this result. After all, they do claim that original-law originalism is our practice of law, that it is supported by the right type of social facts in that the convergent practices of officials conforms to that methodology.<sup>169</sup> So, they might say that it should be no surprise that nearly every opinion follows suit.

What I fear, however, is that the import of original-law originalism is anodyne. Given all the forms of argumentation it encompasses, to say that original-law originalism is our law seems like nothing more than the claim that our law is a common-law tradition, which was fairly mature at the time of the founding.

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168. *District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the Supreme Court held that the Second Amendment covers a right to keep and carry a personal firearm in the home. *Id.* at 629. The Supreme Court reasoned, in an opinion authored by Justice Scalia, that the public meaning of the Second Amendment entailed such a right. *Id.* at 576–77. Though one might be able to fish out prudential arguments out of the opinion, the opinion’s primary focus is a lengthy discussion of history and text.

Some may contend that *Heller* was not in fact an originalist opinion. I take no position on the originalist bona fides of *Heller*. Another stand-in originalist opinion may be *Crawford v. Washington*, 541 U.S. 36 (2004), where the Court, in an opinion authored by Justice Scalia, looked to the text and history of the Confrontation Clause to reverse a criminal conviction sustained in part by an incriminating statement from a witness who could not be confronted at trial. Regardless, my point is just to observe that a truly originalist opinion – whatever it is – is unlikely to fit a pragmatist mode of interpretation.

169. This is just a restatement of *Premise 2* in the schematization of the argument. See *supra* Section II.D.

Recall that Baude and Sachs insist that “[t]he original-law approach may be capacious in theory, but it’s ‘exacting in application.’”<sup>170</sup> What we have seen, however, is that exactingness is not borne out in determining whether an opinion is employing original-law originalist methodology.

2. *Original-law originalism lacks criteria for legal validation and falsification*

Nor do I think that exactingness is shown in original-law originalism’s validation and falsification conditions. Indeed, I contend original-law originalism lacks any meaningful conditions.

The first step is to identify the putative falsification (or, on the flip side, the validation) conditions. My understanding is that the falsification conditions can be obtained from what original-law originalism tells us is the law. As we saw previously with the recursive definition, original-law originalism is made up of the original meaning of the primary rules, presumably extracted from the constitutional text, unless lawfully changed by an original method of lawful change.

Thus, the test for validation proceeds as follows:

Is the putative proposition of law in accord with the original meaning of the constitutional rules/text?

(a) If so, has that relevant original meaning of the constitution rules/text been lawfully changed at a prior time?

(1) If so, is the putative proposition of law in accord with the constitutional rules/text as it has been lawfully changed?

(i) If yes, then the putative rule is validated by original-law originalism.

(ii) If not, the putative rule is *invalidated*.

(2) If the relevant meaning has not been lawfully changed, then the putative rule is validated by original-law originalism.

(b) If the putative proposition is not in accord with the relevant original meaning, has that relevant original

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170. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1458 (citing Baude & Sachs, *Originalism’s Bite*, *supra* note 7, at 104).

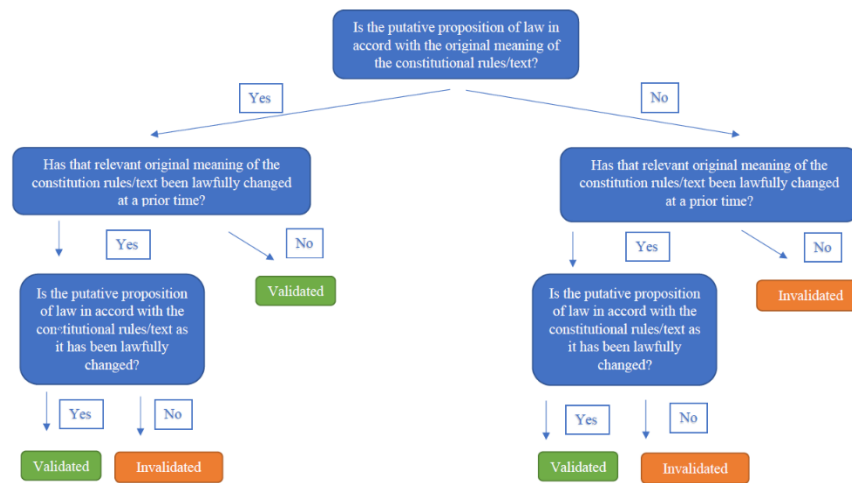
meaning of the constitution rules/text been lawfully changed at a prior time?

(1) If so, is the putative proposition of law in accord with the constitutional rules/text as it has been lawfully changed?

(i) If yes, then the putative rule is validated by original-law originalism.

(ii) If not, the putative rule is invalidated.

(2) If the relevant original meaning has not been lawfully changed, the putative rule is invalidated.



Thus, we can observe that there are three conditions under which a putative proposition of law is invalidated by original-law originalism: (a)(1)(ii), (b)(1)(ii), and (b)(2):

(a)(1)(ii) – So it could be that a putative rule is in line with the original meaning of the constitutional rules, but that the constitutional rules had been lawfully changed and so the putative rule is invalid on the basis of not keeping up with the changes. An important caveat here is that it may be the case that reversion to original meaning is always an appropriate way of lawfully changing (back) the law.<sup>171</sup> If that is the case, then there is no way

171. Or it may not. That is not clear from Baude and Sachs's exposition of original-law originalism. I think this remains an important question for Baude and Sachs to answer about their interpretive theory.

to invalidate a putative proposition of law in accord with the original meaning of the constitutional rules.

(b)(1)(ii) – It could also be that the putative rule is not in line with the original meaning of the constitutional rules, but they had been lawfully changed, and yet still the putative rule is not in accord with the lawfully changed constitutional rule.

(b)(2) – Finally, it could be that the putative rule is not in line with the original meaning of the constitutional rules, and the constitutional rules had not been lawfully changed.

Importantly, note that, in most all cases, these putative rules will be justified in an opinion setting forth conventional arguments.

So, first consider condition (a)(1)(ii). If the putative proposition of law were invalidated under condition (a)(1)(ii), it would be invalidated because it adhered to the original meaning of the law, which had subsequently been lawfully changed. This invalidation condition is actually decidedly nonoriginalist.<sup>172</sup> And, as mentioned, if reversion to original meaning is an acceptable way of lawfully changing back, and it seemingly should be, then this condition will not invalidate any putative rules.

Now focusing on the latter two criteria, condition (b)(1)(ii) invalidates a putative rule when it does not agree with the original meaning of the constitutional rules or the constitutional rules as lawfully changed and condition (b)(2) invalidates a putative rule when it does not agree with the original meaning of the constitutional rules, which remains in force. Thus, to be clear, in either case, if the opinion sets forth a lawful change that validates the putative rule, the putative rule is validated.

How do we assess then the validity of the arguments in the opinion that purportedly substantiate that there has been a lawful change that validates the putative rule? Preliminarily, there may be opinions that set forth a lawful change of the constitutional rules, but that changed constitutional rule does not actually sustain the putative rule on offer. We can call these incoherent opinions, because the reasoning doesn't support the conclusion. They can be invalidated by the original-law originalist test, but that is not special—they will be invalidated by any rational interpretive methodology. On to nontrivial cases: Using Bobbitt's typology,

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172. However, Baude and Sachs may suggest that it is original-law originalist. But if original-law originalism can only invalidate laws when they actually appeal to original meaning, that may be coherent, but it will likely be unsatisfying.

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some textual, historical, and structural arguments will often sound in normative originalism, and so to assess those kinds of arguments we may be able to import the validation standards from normative originalism. But those arguments also target original meaning, and so they do not address the prototypical forms of lawful change of the original meaning.<sup>173</sup> Most of the arguments that there has been a relevant lawful change are going to appear as precedential, prudential, ethical, and perhaps structural arguments. And for these arguments, Baude and Sachs have not set meaningful standards of validation and falsification.

For example, if an argument is made on the basis of precedent, what is the yardstick to decide whether that argument is correct or not? Certainly, there are examples in the extreme. In comparing two automobile accidents, the color of the driver's hair and automobile may not be relevant distinguishing characteristics.<sup>174</sup> But there are certainly closer cases when applying precedent. And, generally, we would answer whether a case is distinguishable based on external standards and principles, to determine whether differences between the cases are relevant and important enough to dictate a different result.<sup>175</sup>

For example, *Obergefell v. Hodges* considered whether legislation prohibiting same-sex marriage violated the Equal Protection and Due Process Clauses.<sup>176</sup> In holding that such a prohibition was unconstitutional, the Supreme Court held that the right to marry was protected by the Constitution.<sup>177</sup> In so doing, the Court analogized to *Loving v. Virginia*, which held that a ban on interracial marriage constituted discrimination based on race, for purposes of Equal Protection.<sup>178</sup> Of course, there is an obvious distinction that *Obergefell* dealt with sex and same sex-relationships, while *Loving* dealt with race and interracial relationships. But the Court did not

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173. Put another way, if original-law originalism assesses all questions of lawful change simply by appeal to normative originalist criteria, it reduces to a variety of normative originalism, and it is an unlikely candidate to model our law.

174. KARL N. LLEWELLYN, *THE BRAMBLE BUSH* 68 (11th prt. 2008) (providing a comically narrow reading of a case as holding that "[t]his rule holds only of redheaded Walpoles in pale magenta Buick cars").

175. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 746 (1993) (explaining the process of analogical reasoning in the law and its appeal to external principles).

176. *Obergefell v. Hodges*, 576 U.S. 644, 644 (2015).

177. *Id.* at 664.

178. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

find that distinction relevant in light of some principles, such as that sex and race are both immutable characteristics of our identity, the importance of loving relationships to human life, the lack of necessity for the state to interfere in such consensual relationships, and the like.<sup>179</sup>

On this front, some interpretive methodologies give us standards by which we can evaluate precedential arguments. For example, a Posnerian pragmatism may weigh the importance of notice interests, the feasibility of rules, and other consequentialist interests in deciding whether to apply a particular precedent.<sup>180</sup> Such a theory may not provide definitive answers to the question, but it at least provides the criteria on which to judge an argument – which we can then argue about. Indeed, normative originalist theories of interpretation provide us with standards relating to conformance and consistency with the original meaning of the Constitution, however defined. Of course, that might mean the normative originalist theory simply dispenses with all these arguments that trespass beyond the bounds of original meaning, but that at least provides tangible validation criteria. In contrast, however, original-law originalism does not provide us with any particular standards to assess different precedential arguments. The touchstone for original-law originalism, as a form of *positivist* originalism, is what our practice of law is. But how would that help us in this inquiry? In order to get headway, we would have to be able to extract some grounding principles of our practice of law. But that obviously brings to the forefront theoretical questions of law, that relate to inter alia our normative commitments about political morality. And on a very similar basis, original-law originalism provides no bases to evaluate prudential arguments – because in deciding what the “good” is, those too explicitly appeal to normative commitments.<sup>181</sup>

Moreover, original-law originalism gives us no standards to weigh the different *types* of arguments against each other. Any such

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179. See, e.g., *id.* at 664–70.

180. See generally POSNER, *supra* note 125 (setting forth Judge Posner’s pragmatic theory of adjudication); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996) (same).

181. Baude and Sachs may retort that they do not need to consider these theoretical questions on the merits—they simply must address how judges view these theoretical debates. But this falls short of providing empirical and historical conditions for validating the law.

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standards would have to be determined from our practice, per the positivist focus. But there is simply no consensus on any hierarchy of arguments in our practice. Indeed, Bobbitt recognized this in observing that conflict between different modalities of argument can only be settled by individual conscience, with no hierarchy obvious from our practice.<sup>182</sup> Baude and Sachs may parrot Bobbitt in saying that there simply is no way within original-law originalism to decide between such arguments. However, that gives away the game because nearly every case at an appellate and apex level has some plausible argument in favor of each side of the v. Such an admission by Baude and Sachs would mean there are no meaningful validation conditions in the majority of Supreme Court cases.<sup>183</sup> In a Hartian spirit, Baude and Sachs might embrace this conclusion. But then it is unclear how positivist originalism and original-law originalism could provide empirical and historical conditions for determining the law. How would original-law originalism be “exacting in application[?]”<sup>184</sup>

Consider two of Baude and Sachs’s examples of cases that fail the test of original-law originalism: *Home Building & Loan Ass’n v. Blaisdell*<sup>185</sup>, and *Wickard v. Filburn*.<sup>186</sup> It is not clear to me why these cases fail the validation conditions of original-law originalism.

At issue in *Blaisdell* was the Minnesota Mortgage Moratorium Law, which provided that, during the Great Depression and the consequent housing crisis, state courts could equitably postpone foreclosures.<sup>187</sup> After the mortgagor foreclosed on their home, the Blaisdells brought suit to take advantage of the Law.<sup>188</sup> The trial judge dismissed the case, on the basis that it violated the Contract

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182. BOBBITT, *supra* note 126, at 184; J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1795 (1994) (“In Bobbitt’s view, the equal status of the modalities means, by definition, that there is no way, within the modal structure itself, to resolve conflicting interpretations across modalities. Instead, Bobbitt argues that only the interpreter’s conscience can resolve conflicts between the modalities.”).

183. Baude and Sachs could also argue that there is simply no need for consensus at that level of specificity. But then the question arises on what basis we decide between the different kinds of arguments. If there is no basis, we have no validation criteria, and if there is some other basis not found in consensus, it must implicate theoretical questions that Baude and Sachs claim their theory can bypass.

184. Baude & Sachs, *Grounding Originalism*, *supra* note 7, at 1458 (citing Baude & Sachs, *Originalism’s Bite*, *supra* note 7, at 104).

185. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 444 (1934).

186. *Wickard v. Fillburn*, 317 U.S. 111 (1942).

187. *Blaisdell*, 290 U.S. at 415–16.

188. *Id.* at 418–19.



Clause and the case wended its way to the U.S. Supreme Court.<sup>189</sup> The Court held that the Law did not violate the Contract Clause.<sup>190</sup> In so doing, the Court affirmed the limitations of the Constitution, writing “[e]mergency does not create power.”<sup>191</sup> But the Court marshaled inter alia structural arguments about the nature of the state police power in relation to the Contract Clause,<sup>192</sup> textual arguments about the specificity of the Contract Clause,<sup>193</sup> and precedential arguments all in favor of upholding the legislation.<sup>194</sup> All of these forms of argument are familiar to our practice of law and would have been familiar at the founding. Apart from the textual arguments, which *may* be false under an examination of the original meaning, original-law originalism does not give us any standards to assess the other structural and precedential arguments, and certainly none to weigh them against each other. Even if *Blaisdell* is wrong about the text, it could very well be right about the other arguments and thus be correct. It is hard to see how the standards of original-law originalism could render the decision in *Blaisdell* false.

*Wickard v. Filburn* concerned whether amendments to the Agricultural Adjustment Act of 1938 could apply to the production and consumption of homegrown wheat.<sup>195</sup> Roscoe Filburn grew wheat on his farm to feed to his livestock. However, he grew more wheat than was allotted to his acreage of farmland by the Act, and was penalized accordingly.<sup>196</sup> He challenged the application of the Act to his overproduction on the basis that he did not sell the wheat, and therefore was not subject to federal regulation under the Commerce Clause.<sup>197</sup> The district court enjoined the penalty.<sup>198</sup> The Supreme Court then took up the case, holding inter alia that the Act was a constitutional exercise of the Commerce Clause power.<sup>199</sup> In

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189. *Id.* at 420-22.

190. *Id.* at 447-48.

191. *Id.* at 425.

192. *Id.* at 426 (stating that the Contract Clause is written in general terms, with “construction . . . essential to fill in the details”).

193. *Id.* at 435-36 (holding that the state police power is primary compared to the Contract Clause and thus state powers must be harmonized with the Contract Clause).

194. *Id.* at 436-37 (analyzing cases).

195. *Wickard v. Filburn*, 317 U.S. 111, 114-15 (1942).

196. *Id.*

197. *Id.* at 116-17.

198. *Id.* at 116.

199. *Id.* at 133.

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so doing, the opinion made a textual argument appealing to the “necessary and proper” Clause,<sup>200</sup> drew upon precedent,<sup>201</sup> referenced the prudential outcomes of the case,<sup>202</sup> and set forth a structural argument about judicial role.<sup>203</sup> Again, all of these forms of argument are familiar to our practice of law and would have been familiar at the founding. And, as before, there are no discernible standards from original-law originalism to evaluate the arguments themselves or against each other and thus to determine that *Wickard* is false.

Taking stock, original-law originalism is a thesis that offers very little meaningful content. As a thesis about interpretive methodology, any opinion that uses any modern conventional arguments—including textual, historical, precedential, doctrinal, prudential, structural, or ethical arguments—falls under the umbrella of original-law originalism. It seems to cover almost all opinions that would be reasonably written in a common-law jurisdiction. As a thesis about the validation and falsification conditions, it is nearly as empty. Insofar as the arguments proffered are of normative originalist vintage, then original-law originalism can import those standards for their validation or falsification. However, if there are any other arguments employed that do not aim at original meaning, employing other original methods, original-law originalism has very little to offer. Moreover, original-law originalism has no further standards on how to compare arguments of different type against each other. The only validation or falsification standards that are on offer are ones that must appeal to the standard theoretical questions, including those which concern our moral, linguistic, and interpretive commitments—precisely what the positivist originalist enterprise was designed to avoid.

### *C. There Is No Good Evidence for Original-Law Originalism*

Finally, the evidence for original-law originalism is inconclusive and, indeed, there is strong evidence against original-law originalism. As discussed, Baude and Sachs appeal to both

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200. *Id.* at 119.

201. *See, e.g., id.* at 122–23.

202. *Id.* at 124–28.

203. *Id.* at 129.

higher-order practices and lower-order practices.<sup>204</sup> As higher-order practices, they reference 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.<sup>205</sup> And as lower-order practices, Baude and Sachs appeal to the fact that in Supreme Court decisions originalism takes decision-making priority and that there is an absence of anti-originalist cases.<sup>206</sup>

As they recognize, the higher-order practices do not solidly point to anything.<sup>207</sup> Indeed, all of these higher-order facts are obviously consistent with even pluralist interpretation. You could be a pluralist and have reverence for the framers as thinkers – and indeed you might have thought that they were pluralists or amenable to pluralist interpretation.<sup>208</sup> You need not think the move to pluralism necessitates any “rupture” in the legal order, as the evolution could have been and could continue to be smooth. And you could value many of the continuing institutions, while gently changing them to the extent necessary.

The lower-order practices do not do much to help. First, consider whether Supreme Court opinions actually show the priority of originalism. As an initial point, we have to be clear on what “originalism” means: Does it mean normative originalism (with all the myriad old and new variants) or original-law originalism?<sup>209</sup> If it is the former, then it seems false. As we

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204. The nature of the distinction between higher-order and lower-order practices is underspecified in Baude and Sachs’s account. It is unclear whether the distinction itself is important, or whether it is simply a way of organizing different data that supposedly support positivist originalism. See Baude, *Is Originalism Our Law?*, *supra* note 7, at 2354, 2365, 2391.

205. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2366–70; Sachs, *Legal Change*, *supra* note 7, at 844–45.

206. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2372–86; Sachs, *Legal Change*, *supra* note 7, at 837–38 (citing Baude’s manuscript approvingly for this proposition).

207. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2365; Primus, *supra* note 10, at 49 (questioning the higher-order evidence).

208. See, e.g., Stephen M. Feldman, *Constitutional Interpretation and History: New Originalism or Eclecticism?*, 28 *BYU J. PUB. L.* 283, 283 (2014) (“In the early decades, numerous Americans—including framers, Supreme Court justices, and constitutional scholars—used an eclectic or pluralist approach to constitutional interpretation.”).

209. Baude is unclear on this point. When discussing evidence for original-law originalism, Baude focuses on inter alia the priority of original meaning in various opinions, suggesting that he is referencing normative originalism. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2372–76. But then he concludes, “inclusive originalism appears to have the highest priority.” *Id.* at 2376.

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have seen, *Brown* and *Bolling*, among others, provide strong evidence that the Court did not *in fact* use an interpretive methodology that strongly prioritized original meaning. These are indeed examples of anti-originalist cases. Here, the response that both opinions were supportable with normative originalist thinking is not enough, because the question is what the Court actually did.<sup>210</sup> Moreover, it is unclear how this helps Baude and Sachs because they are arguing that our law is original-law originalism, *not* normative originalism.

If the point is that Supreme Court opinions show the priority of original-law originalism—as broadly defined as it is—then as shown above, it is unsubstantiated<sup>211</sup> or vacuous.<sup>212</sup> Baude seems to contend that any reference to original meaning or text evinces an original-law originalist methodology.<sup>213</sup> But this commits the mistake of ambiguity: pluralist methodologies can, and often do, take advantage of arguments from text and original meaning.<sup>214</sup>

This then leads to the fundamental point: How do we know that judges are employing original-law originalism as a methodology rather than something else, such as a pluralism that holistically weighs disparate goals? For example, it could be that judges are not tracking original-law pedigree, but are simply offering different ways of supporting their conclusions. They offer varieties of arguments, including those appealing to text and original meaning, but also prudence and structure, in their pluralism. And it could be that when they appeal to prior cases, they are trying to appeal to methods that have withstood the test of time and are thus accepted and practicable.

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210. Baude also points to the fact that in explicit conflict, normative originalist arguments on text and original meaning usually trump other forms of argumentation. But that is not dispositive evidence of normative originalism. Rather, that is consistent with pluralism that has a strong presumption for text and original meaning—which is the prototypical variety of pluralist interpretation.

211. Primus, *supra* note 10, at 49 (challenging the lower-order evidence).

212. Segall, *supra* note 129, at 51.

213. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2376–86 (arguing cases were not nonoriginalist based on references to original meaning in the cases).

214. Berman, *Originalism is Bunk*, *supra* note 2, at 24. Indeed, pluralists will likely appeal to text in some fashion, as there will generally always be some plausible argument at a high enough level of abstraction, especially given the inclusion in the text of general concepts like “liberty” and “due process.” See, e.g., Peter J. Smith, *How Different Are Originalism and Non-Originalism?*, 62 HASTINGS L.J. 707, 709 (2011) (suggesting that at a high enough level of abstraction the newest forms of originalism and nonoriginalism converge); Colby, *New Originalism*, *supra* note 2, at 740 (same).

But if that is possible, then Baude and Sachs must admit that their lower-order evidence for original-law originalism is inert. Baude and Sachs might respond that such a pluralist method is embraced by original-law originalism, but then original-law originalism is just a stand-in term for legal reasoning and again proves to be a vacuous thesis.<sup>215</sup>

Another issue is the treatment of aberrant data that counsels against original-law originalism. Specifically, Baude and Sachs speak of constitutional interregna, wherein our law was not original-law originalist.<sup>216</sup> But they contend that, regardless, today our law is original-law originalist.<sup>217</sup>

This circumvention is suspect. Baude and Sachs bracket off important periods of jurisprudential development under the term “interregnum” – such as the New Deal, Warren, and parts of the Burger Courts. But these periods, and their resulting decisions, are very much part of our law today. *Blaisdell*, *Wickard v. Filburn*, *Brown*, *Miranda*,<sup>218</sup> *Gideon v. Wainwright*,<sup>219</sup> and *Roe v. Wade* (the “nonconforming cases”), for example, are benchmarks of our law, both in adjudicatory disputes and the way our society operates. It might be true that now that we have these benchmarks, we can use original-law originalist methodology, including stare decisis and precedent, to continue deciding cases. But then our law is *not* original-law originalism. Our law is original-law originalism *plus* the nonconforming cases – because that is actually what best describes our practice of law.<sup>220</sup> And if that is the case, it is this law – call it exceptional original-law originalism – that is our law and deserves our dutiful obedience. However, that conclusion should be concerning for Baude and Sachs, because such a law would seem to allow for future exceptions in difficult cases.

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215. Baude and Sachs might also respond that this is an empirical question that requires more data. But that too is unpromising, because it is hard to see how original-law originalism and pluralism would come apart. Given how capacious original-law originalism is defined, it would seem to embrace any variety of accepted good reasoning that a pluralist would be apt to utilize.

216. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2389; Sachs, *Legal Change*, *supra* note 7, at 848–49.

217. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2389; Sachs, *Legal Change*, *supra* note 7, at 848–49.

218. *Miranda v. Arizona*, 384 U.S. 436 (1966).

219. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

220. Primus, *supra* note 10, at 60 (“The only form of originalism that our practices clearly embody is a form riddled with ‘errors’ [that is, non-conforming cases] of this kind.”).

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Determining whether a case is exceptional in this way may appeal to lots of different nonconforming considerations – as it did in the New Deal, Warren, and Burger Courts. This, in turn, opens the door to question whether this law is not simply the law of the interregna, at least in difficult cases.

In sum, the evidence that Baude and Sachs proffer does not support that original-law originalism is our law. Both the higher-order and lower-order evidence is completely compatible with other interpretive methodologies, like pluralism or pragmatism. And insofar as original-law originalism embraces these other interpretive methodologies, it is a vacuous thesis. Finally, the recognition of constitutional interregna, in which important benchmark cases were decided pursuant to nonconforming interpretive methodologies, completely undercuts the proposition that our law is original-law originalist.

#### V. THE OBLIGATION TO FOLLOW THE LAW CANNOT SUSTAIN POSITIVIST ORIGINALISM

The projects of positivist originalism and original-law originalism have serious problems in their use of positive observations to generate a meaningful theory of law. I focus on two: *First*, at best, the theory's conclusion is too weak to ground a meaningful theory of law that does not appeal to other theoretical questions. This point embraces *Conclusions 1* and *2*,<sup>221</sup> but suggests that they are not sufficient to establish a distinctively originalist theory. *Second*, their justification is highly indeterminate, such that other competing explanations better explain our law, and deciding between them will require appeal to theoretical questions. This point challenges *Conclusion 1*, showing that positivist originalism is unsupported.

##### A. Too Weak a Conclusion

Revisiting the schematization of Baude and Sachs's argument, recall that the ultimate conclusion is that officials have a prima facie duty to apply original-law originalism. To this point, Baude states, "It is generally agreed that judges have some kind of prima facie obligation to remain within the bounds of the law – whatever those

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221. See text accompanying *supra* notes 107–108.

bounds may be.”<sup>222</sup> But he adds, “This duty is not at all absolute. [I]t is possible that a judge’s duty to follow the law can be outweighed in some cases by more pressing moral concerns.”<sup>223</sup>

It seems that, when viewed as a theory of adjudication, original-law originalism does little to uphold originalist commitments. The structure of Baude and Sachs’s argument does not tell us very much about how much weight the prima facie duty to follow original-law originalism is. That may be beyond their project, but notice the arising difficulty. In theory, prima facie duties might be outweighed by rather minimal contrary duties. And as recognized, if original-law originalism can be trumped by other arguments that sound in the broad sphere of morality, then that means some prudential arguments, some structural arguments, or some ethical arguments may carry the day in a particular case.<sup>224</sup> However, this sounds a lot like many plausible pluralist interpretive theories of adjudication.<sup>225</sup> They give weight to the text and original meaning, but are open to them being outweighed by other arguments that may sound in other considerations, such as welfare and contemporary moral norms. Thus, the original-law originalist judge cannot bypass theoretical questions, including about political morality and our normative commitments, in determining whether to apply the original meaning of the law in a particular case. The judge must probe the theoretical questions for answers to determine whether their obligation to apply the law requires applying original meaning.

Baude argues that this still shifts a significant burden to non-originalists. He writes,

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222. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2392.

223. *Id.* at 2395.

224. Even if we understood the obligation as pro tanto and not merely prima facie, the same analysis would hold true. *See supra* note 108. The problem for Baude and Sachs’s theory is that the obligation to apply original meaning can be outweighed by other considerations—and that is true of both pro tanto and prima facie obligations.

225. *See, e.g.,* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018); Fallon, *supra* note 167.

David Strauss’s living constitutionalism arguably offers less weight to text and original meaning. Strauss observes that text and original meaning rarely dictate the result in constitutional cases. But that is seemingly because issues before the Court often do not squarely implicate the text of the Constitution. Strauss seems to recognize that if the text was on point, then arguments from text would have weight. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 7 (2010) (discussing precise constitutional provisions that “leave no room for quarreling”).

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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. . . . 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.<sup>226</sup>

This misunderstands the dialectic. Suppose the opponent proposes a *good* replacement theory – such as a pluralist theory that gives original meaning and text weight but allows for prudential and ethical arguments to trump after a holistic weighing. The opponent contends that any *prima facie* duty is outweighed, in particular instances or perhaps whole, by the possibility of getting to, say, better results in terms of political morality. The burden remains on (original-law) originalists to show that any *prima facie* duty to apply the original meaning of the law is not outweighed by the potentiality of better results. That is precisely the burden that originalists had prior to the entry of positivist originalism and original-law originalism. And to carry that burden, the positivist originalist must confront and answer the same theoretical questions as before. In Baude’s words, we are still asking, among other things, “whether originalism is the best way to constrain judges, or whether it will maximize human welfare in the long run.”

#### *B. Better Theories of Our Law*

A final serious concern arises even if we agree with the positivist originalist project generally in generating a theory of our law from our practices and assuming that the *prima facie* moral duty to comply with our law is somehow meaningful. That problem is that original-law originalism does not have a monopoly on explicating what our law is. There are obvious competitors that are just as good, if not better.

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226. Baude, *Is Originalism Our Law?*, *supra* note 7, at 2396.



Of course, I could observe that original-law originalism makes no serious attempt to explain the data that Legal Realism is correct.<sup>227</sup> But that might devolve into exchanges about contingent matters of our law, like what some opinions actually held and whether such distinctions are meritorious. Rather, I examine a claim that Baude and Sachs contend to be true: that original-law originalism sets some falsification conditions.<sup>228</sup> As discussed, Baude and Sachs set forth a number of cases that are (potentially) incorrectly decided under original-law originalism. That is not to say they do not employ the original-law originalist methodology, but if they do, they get it wrong. I have provided reason above to doubt these falsification conditions, but let us grant Baude and Sachs that they are meaningful. So, for example, let us agree that *Blaisdell* is incorrectly decided under original-law originalism. But what is undeniable is that *Blaisdell* is actually part of our law. It is a Supreme Court case that has not been overruled. The social facts of our law validate *Blaisdell* as part of the law; for example, when relevant, judges decided cases in accordance with *Blaisdell*.

Now, consider the interpretive theory of original-law originalism + *Blaisdell*. That theory arguably does a better job of explaining our law, because not only does it account for everything original-law originalism does, it accounts for *Blaisdell* too. Ergo, it may be *this* theory to which officials are prima facie obligated to apply and follow. And, indeed, we could string the nonconforming cases with +-signs to get better theories, which may lead to a fairly exceptional original-law originalism. As I argue above, that result is problematic for the original-law originalist, because that resulting theory generates questions about whether future exceptions are warranted, and that may result in what is functionally a form of pluralist (or otherwise nonoriginalist) adjudication.<sup>229</sup>

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227. Segall, *supra* note 11, at 313–14; see also, e.g., Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (applying empirical analysis to conclude that judicial political ideology affects the application of *Chevron* deference); Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 847 (2009) (finding “ideology is a significant determinant of whether an individual justice will vote for or against an IP owner”).

228. Of course, I have painstakingly argued that this is not the case, but for this argument, I take Baude and Sachs on their own terms. If they concede that there are no falsification conditions, I think that is damning in itself.

229. See *supra* Section IV.C.

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Baude and Sachs could resist this conclusion, by arguing that original-law originalism is still a better explanation of our law than my proposed ad hoc chicanery. They cannot appeal to explanations of the ground data (i.e., results of cases) – their theory will lose on explanations of the data, because the +-sign theories better explain the ground data. They could, however, question the explanatory value of the +-sign theories. In so doing, they could appeal to other desiderata of explanations: that an explanation should be simple and not ad hoc; that it provide coherent and consistent answers; or that it should preserve some other background commitments, such as moral, linguistic, or interpretive commitments.<sup>230</sup> But appeals to these considerations raise a serious problem for Baude and Sachs: Appeal to these desiderata of explanations sound in theoretical questions about the law, and are *not* empirical, historical questions about the law. Consider determining simplicity and ad hoc-ness. Deciding whether original-law originalism's simplicity is worth failing to preserve purportedly aberrant decisions, like *Blaisdell*, is not a matter of empirical, historical question. It's a question about how important the result in *Blaisdell* is, what kind of impact it has on our society, and what our world would be like without it. To see this, imagine the query, but instead of *Blaisdell*, it is *Brown*. Confronting that query, we would likely opt for the +-sign theory – that preserves *Brown* at the expense of explanatory simplicity and lack of ad hoc-ness – because preservation of *Brown* is a critical test of the moral worth of a theory. The same is true of *Blaisdell*, though the stakes might be lower and the answer different. Nevertheless, the theoretical questions have to be answered. Similarly, when deciding whether original-law originalism preserves important background commitments better than the +-sign theory, we are explicitly referencing the background commitments – which generally sound in the theoretical questions, like moral, linguistic, or interpretive ones.<sup>231</sup>

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230. Leiter, *supra* note 136, at 1239.

231. See Primus, *supra* note 10, at 60 (observing that deciding between original-law originalism and error-riddled originalism “would require other kinds of arguments” dealing with theoretical questions).

I note that there is no obvious reason why simplicity is better, in the face of poorer performance in accounting for the data. Simplicity may be used in this context as a tool to persuade a consensus to give up the aberrational results, like *Blaisdell* and the other nonconforming cases. But that is *not* a positivist enterprise; that is law reform.

## VI. THE SAME OLD PROBLEMS REMAIN

Thus, positivist originalism and original-law originalism have not fulfilled the promise of a new way forward in thinking about the law. They do not bring to bear any novel insights arising from legal positivism and indeed fail to fully embrace legal positivist commitments. Original-law originalism does not meaningfully describe our legal practice, failing to provide any historical or empirical conditions to legitimate what is our law without appeal to theoretical questions. Moreover, positivist originalism and original-law originalism, as theories of adjudication, are not substantially distinct from forms of interpretive pluralism and cannot be sustained without appeal to the theoretical questions they were designed to avoid.

But perhaps, positivist originalism and original-law originalism still offer improvements over normative originalism. Here too, however, the case is unconvincing. The main concerns are that the justifications for originalism—that it results in greater notice, predictability, and stability and that it cabins judicial discretion—are illusory, and that the costs of originalism are great in that it fails to preserve our law. Positivist originalism and original-law originalism do little to solve these problems.<sup>232</sup>

*A. No Good Consequences*

Consider the consequentialist aims of normative originalism: increased notice, predictability, and stability; and cabined judicial discretion. None of these are furthered by original-law originalism. The capacious variant of original-law originalism—the only one that has hope in describing our law—allows all sorts of arguments, and it has no meaningful way to decide between them. Thus, the public has no better notice, no better ability to predict the law, and no greater confidence that the law will remain stable than with any

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232. Of course, Baude and Sachs may rightly complain that these were never their stated aims. To this, I cannot object, but I think it is still worthwhile to complete the circle and show that there are no such benefits to positivist originalism and original-law originalism.

As discussed above, *supra* Part I, there are conceptual arguments for originalism as well. Those arguments are not strengthened by positivist originalism—which eschews consideration of such theoretical conceptual questions. Insofar as positivist originalism proffers a conceptual case—that, say, relates to our prima facie obligation to follow the law as it is—such a case fails for the familiar reason that such an obligation does not support a meaningful positivist originalism or is meaningless.

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nonoriginalist theory, such as pluralism. Indeed, the lack of validation and falsification conditions means that there is no way to rein in judicial discretion beyond nonoriginalist interpretive methodologies.<sup>233</sup> In sum, original-law originalism is no better than any nonoriginalist theory, in terms of the consequentialist aims that motivated normative originalism.

*B. The Lack of Preservation of Our Law*

Finally, and perhaps most devastating, positivist originalism and original-law originalism do not convincingly preserve our law. As seen, under the more stringent version of original-law originalism, it is too narrow to capture even *stare decisis* and precedent, and thus utterly fails to preserve our practice of law. Under the expansive version, it does not provide meaningful validation or falsification criteria. So, in one sense, that means original-law originalism does not invalidate any of our fixed stars: *Brown*, *Bolling*, *Miranda*, *Roe*, and the like.

On the flip side, however, this lack of meaningful validation and falsification criteria also means that original-law originalism does not clearly falsify blatantly incorrect decisions. For example, consider a new decision that invalidates *Brown*, *Bolling*, *Miranda*, or *Roe*. If the opinion were to use conventional arguments in justifying these results, it is unclear how the original-law originalist criteria—which are supposedly empirical and historical—could invalidate the decision. And of course, we can imagine such a decision, because each of these decisions were watershed moments, that changed the nature of the constitutional landscape. So, a decision that would return to a prior time would certainly have a legitimate, plausible claim to being more in accord with original meaning. Thus, the only way to adjudge the new decision, that invalidates our fixed stars, as incorrect would be by appeal to the theoretical questions that original-law originalists aim to avoid. In a similar vein, consider a decision that reaffirms the terrible decisions of

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233. The restrictive variant fares better, but still poorly. Even under the restrictive variant, we have no good way to determine how to judge between arguments from different modalities—say, between original meaning and the discursive form of *stare decisis*. Sharp lawyers can craft opposing arguments that will still leave us scratching our heads about how to validate the law.

*Korematsu*,<sup>234</sup> *Plessy v. Ferguson*,<sup>235</sup> or *Lochner*.<sup>236</sup> Again, if the opinion made use of the right types of argumentation, it is unclear how original-law originalism could falsify it. And here, such an argument is clearly in the offing, for the opinion could appeal to the Supreme Court's prior precedent. However, a theory of interpretation that cannot tell us that these cases are false simply does not describe our law.<sup>237</sup> As a result, the problem of preservation still plagues positivist originalism and original-law originalism.

#### CONCLUSION

This Article has shown that positivist originalism and original-law originalism fail in their main aims of describing our practice of law with empirical, historical validation conditions for the law and providing a meaningful theory of adjudication. Positivist originalism and original-law originalism depart from legal positivism in ignoring key social facts, that sound in theoretical normative, moral, and interpretive questions. Thus, positivist originalism is left with a choice: grapple with theoretical questions, or formalistically ignore them at the expense of accuracy. Moreover, as factual matter, original-law originalism fails to describe our law, as key features of our law have greatly evolved since the founding. Thus, either original-law originalism does not preserve key features of our law or it is a capacious interpretive methodology, that fails to provide meaningful validation or falsification conditions of what is our law. Furthermore, as a theory of adjudication, positivist originalism and original-law originalism are not substantially different from forms of interpretive pluralism, and thus do not merit the originalist label. Moreover, insofar as they stake a claim to being a better theory of our law, that claim cannot be sustained without appeal to the theoretical questions they were designed to avoid.

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234. *Korematsu v. United States*, 323 U.S. 214 (1944).

235. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

236. *Lochner v. New York*, 198 U.S. 45 (1905).

237. Even if original-law originalism did have some meaningful validation or falsification criteria, it is still important to recognize that the original methods of stare decisis and precedent do not do much work to preserve the law. While stare decisis and precedent allow us to keep *Blaisdell* and *Wickard* and other such cases that were wrongly decided under original-law originalism, they would not allow us to decide them in the first place. And that really does not preserve *our actual* practice of law. This again tells us that our law is not original-law originalism, but rather at best original-law originalism with significant exceptions, from some *interregna* periods.

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The famous refrain often heard from originalists is that “[i]t takes a theory to beat a theory.”<sup>238</sup> Thus, the positivist originalist might ask: Aren’t these problems for positivist originalism and original-law originalism ones for all theories of interpretation? What’s your theory to beat this theory?

Apart from observing that this is a variety of *tu quoque*,<sup>239</sup> the nonoriginalist opponent has further ripostes. As a descriptive theory of our law, theories that embrace the reality that theoretical debates are part of our law, such as Legal Realism, will provide a better explanatory account of our law. And insofar as positivist originalism is capacious and embraces these theoretical debates as relevant to the content of the law, the nonoriginalist’s best response is perhaps silence, recognizing that positivist originalism is no theory *to defeat*. It is not a distinctively originalist theory that privileges original meaning in fixing the law. Rather it resembles a theory that the nonoriginalist might have championed.

In a similar vein, as an adjudicative theory, the nonoriginalist again can freely assent. If positivist originalism recognizes that the obligation to apply the original meaning as the law is defeasible, with the possibility that arguments of different modalities, some sounding in political morality, might trump, the nonoriginalist has perhaps ceded the name game, but triumphed on the merits.

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238. Lawrence B. Solum, *Legal Theory Lexicon: It Takes a Theory to Beat a Theory*, LEGAL THEORY BLOG (Oct. 21, 2012), <https://lsolum.typepad.com/legaltheory/2012/10/introduction-it-takes-a-theory-to-beat-a-theory-this-is-surely-one-of-the-top-ten-all-time-comments-uttered-by-law-professo.html> (last modified Oct. 12, 2012); Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L. J. 1435, 1435 (1983); Scalia, *supra* note 33, at 855.

239. Some think that the “it takes a theory” retort is an instantiation of the *tu quoque* fallacy. Hans Hansen, *Fallacies*, STAN. ENCYCLOPEDIA OF PHIL. (Apr. 2, 2020), <https://plato.stanford.edu/entries/fallacies/> (discussing the *tu quoque* as a species of the *ad hominem* fallacy).

