

# THE “CONSTITUTION IN EXILE” AS A PROBLEM FOR LEGAL THEORY

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## ABSTRACT

*How does one defend a constitutional theory that’s out of the mainstream? Critics of originalism, for example, have described it as a nefarious “Constitution in Exile,” a plot to impose abandoned rules on the unsuspecting public. This framing is largely mythical, but it raises a serious objection. If a theory asks us to change our legal practices, leaving important questions to academics or historians, how can it be a theory of our law? If law is a matter of social convention, how can there be conventions that hardly anybody knows about? How is a constitution in exile even possible?*

*This objection is overblown. Legal rules don’t always directly reflect common agreement; they can also reflect those agreements indirectly, through conventions that operate at a higher level of abstraction. (We can have social agreement that we’re bound by the Internal Revenue Code, even though we don’t all agree on—let alone remember—everything the Code requires.) So long as we share certain conventions that lead to unconventional conclusions, out-of-the-mainstream theorists can accurately claim to describe our own legal system rather than a foreign or invented one that they hope to impose. The theorists’ job is to identify shared premises and to show that they really are shared, even in the face of widespread disagreement at the level of conclusions.*

*In any case, if this kind of objection did have force, it wouldn’t be a problem just for out-of-the-mainstream theories like originalism. Virtually no modern legal theory accepts every change in constitutional practice as actually changing the Constitution. Because history moves at its own pace, any theory with meaningful conditions for legal change will often be violated in practice. In other words, any Constitution worth its salt will spend a good bit of time in exile.*

## INTRODUCTION

Constitutional practice changes. That much is obvious. Right answers on turn-of-the-century law school exams turned into wrong answers by 1937,

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or 1973, or 2000, or 2014.<sup>1</sup> Vastly different rules and understandings came to be accepted as constitutional law, before each was overthrown and forced to make way for the next. This endless progression of constitutional practices is a “brute fact”—maybe “*the* brute fact”—“of constitutional history and constitutional interpretation.”<sup>2</sup>

What Americans seem to accept in practice, though, they largely reject in theory. Most Americans, including most lawyers, don’t *think* we’ve repeatedly overhauled the Constitution in the last hundred-odd years. We may understand it differently, but we haven’t actually changed it. We don’t live in a Fifth Republic, the way the French do: we still use the same old text, with only twenty-seven short additions, and call that our fundamental law.

What should we make of this gulf between theory and practice? One response is to say, with the practicing lawyer, “so much the worse for theory.” The courts will decide whatever they decide. There’s no use theorizing about it, except to try to predict what they’ll do next; and these “prophecies of what the courts will do in fact . . . are what [we] mean by the law.”<sup>3</sup> A more common response, at least among academics, is to go back to the drawing board, constructing ever more complex legal theories to force the scatterplot of history into a nice constitutional line.

This Article is about a third response: to look at the gulf between theory and practice and say, “so much the worse for practice.” Nowadays this view is commonly attributed to originalists—followers, allegedly, of a nefarious “Constitution in Exile,” waiting in their subterranean lairs to subdue the populace and abolish the New Deal.<sup>4</sup> Though the “Constitution in Exile” movement may be largely mythical,<sup>5</sup> the idea that constitutional practice may have gone seriously wrong is real enough, and can be found on both sides of the political aisle. Mark Graber, a progressive writing in what he called the “dark times” under George W. Bush, pointed out that followers of “politically disfa-

1 David A. Strauss, *Do We Have a Living Constitution?*, 59 *DRAKE L. REV.* 973, 973 (2011).

2 See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 396 (1995) (emphasis added).

3 Oliver Wendell Holmes, Justice, Supreme Judicial Court of Massachusetts, The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 *HARV. L. REV.* 457, 461 (1897); cf. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 5 (Oxford ed. 2008) (1930) (“What these officials do about disputes is, to my mind, the law itself.”).

4 See, e.g., Jeffrey Rosen, *The Unregulated Offensive*, *N.Y. TIMES MAG.*, Apr. 17, 2005, available at <http://www.nytimes.com/2005/04/17/magazine/17CONSTITUTION.html>; Cass R. Sunstein, *The Rehnquist Revolution*, *NEW REPUBLIC*, Dec. 27, 2004, at 32, 36–37 (book review).

5 The phrase was used in Douglas H. Ginsburg, *Delegation Running Riot*, *REGULATION*, Winter 1995, at 83, 83–84 (book review), and it has inspired much subsequent commentary. See William W. Van Alstyne, *Foreword: The Constitution in Exile: Is It Time to Bring It In from the Cold?*, 51 *DUKE L.J.* 1 (2001). But the notion of any organized “movement”—or even widespread agreement on its alleged goals—seems illusory. See Orin Kerr, *Cass Sunstein Responds to “Constitution in Exile” Post*, *VOLOKH CONSPIRACY* (Jan. 3, 2005, 1:26 PM), [http://www.volokh.com/archives/archive\\_2005\\_01\\_02-2005\\_01\\_08.shtml#1104780413](http://www.volokh.com/archives/archive_2005_01_02-2005_01_08.shtml#1104780413).

vored positions” often “produce elaborately detailed and justified constitutions-in-exile”<sup>6</sup>—the “welfare-rights” constitution of Frank Michelman,<sup>7</sup> the “human dignity” constitution of Justice Brennan,<sup>8</sup> and so on. Neither conservatives nor liberals have a monopoly on exile.

Yet the “exile” pejorative can’t be dismissed so easily; it stands for a serious criticism that deserves response. A government-in-exile, forced out by circumstances, doesn’t always represent those it left behind. It might just be a motley collection of pretenders to the throne. In the same way, a constitution in exile might be the “real” or “true” law, obscured by usurping courts and officials; or it might be just a plan for law reform, an attempt to revise the law under the cover of restoring it. If a constitutional theory asks us to substantially change our practice—if it makes important legal questions turn on the esoteric views of academics, historians, or political philosophers—can it really be an accurate statement of *our* law? If law is a matter of social practice, as most seem to agree,<sup>9</sup> can there be social practices that hardly anybody in society knows about? How is a constitution in exile even *possible*?

The question is particularly sharp with regard to originalism, the main target of the “exile” label. Many sophisticated opponents of originalism have claimed (and some of its supporters have accepted) that originalism offers a deeply inaccurate picture of our law. It can’t explain changes to our practice over time; in fact, it doesn’t even try. Without an adequate theory of *our* legal system, originalism becomes merely a political effort—flawed or welcome, depending on your view—to change American law into something else. Call this the “jurisprudential objection.”

This objection isn’t limited to originalism; it can be made against any out-of-the-mainstream theory. If we agree with Justice Brennan that the Eighth Amendment’s “essential meaning” protects human dignity, and so bans the death penalty no matter what anyone else thinks,<sup>10</sup> then we need to be sure that it’s *our* Eighth Amendment we’re talking about. (How, a practicing lawyer might ask, can the death penalty be unconstitutional when it’s practiced in America once every few weeks?)<sup>11</sup> This Article focuses on

6 Mark A. Graber, *Rethinking Equal Protection in Dark Times*, 4 U. PA. J. CONST. L. 314, 314–15, 317 (2002).

7 Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962, 969 (1973).

8 William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, *The Constitution of the United States: Contemporary Ratification*, Address at the Text and Teaching Symposium, in 43 GUILD PRAC. 1, 14 (1986).

9 See, e.g., Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 725–26 (2006) (“[A]ll subsequent serious jurists, even antipositivists such as Ronald Dworkin, have acknowledged . . . that the practices of some canonical group play a fundamental role in generating law within a given legal system.”).

10 Brennan, *supra* note 8, at 15–16.

11 See *Executions by Year Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year> (last updated Apr. 10, 2014) (reporting thirty-nine executions in 2013).

originalism, partly because it's the most prominent challenger to mainstream legal practice; but we should remember that the same objection has to be met by "progressive" and nonoriginalist theories as well.

Where the jurisprudential objection goes wrong, though, is in assuming that a legal theory needs to explain the everyday details of legal practice. Not all legal rules need to correspond directly to social practices. Instead, rules can be justified indirectly, based on shared higher-order practices from which we derive our lower-order ones. There might be a social practice, for example, of taking the enacted titles of the U.S. Code as binding law. Because that social practice exists, we can successfully conclude (say) that it's unlawful to import certain mongooses,<sup>12</sup> that key-duplicating tools can't be sent through the mail,<sup>13</sup> or that it's legal to possess switchblades on guano islands if you have only one arm<sup>14</sup>—even though few people would suspect all this from observing the day-to-day behavior of officials and judges. In fact, so long as we share the right kind of higher-order practices, it's possible that *everyone* in a jurisdiction might be mistaken on some particular question of law.

In the same way, so long as we share certain practices that lead to out-of-the-mainstream conclusions, out-of-the-mainstream theorists can claim to describe our own legal system, rather than a foreign or invented legal system that they hope to impose. To be right, though, the theorists have to identify those shared practices and to show that they really are shared, even in the face of widespread disagreement at the level of conclusions. This Article doesn't try to show that any theory, whether originalism or something else, actually succeeds in that task. Its ambition is purely negative: to rebut a common, but mistaken, jurisprudential objection.

If that objection did have force, moreover, it wouldn't be a problem only for those working outside the mainstream. *No* sensible constitutional theory can actually explain the past, much less predict the future. All such theories distinguish between the law and legal practice, and they require changes in practice to take a certain form—whether as high politics, slow common law evolution, or construction of capacious constitutional text—to effect a valid change in the law. Changes without that form are deemed legally invalid, even if they eventually gain acceptance. Because history proceeds at its own pace, any theory that imposes meaningful conditions like these runs the risk of being routinely violated in practice. In other words, any constitution worth its salt may spend a good bit of time in exile.

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12 18 U.S.C. § 42(a)(1) (2012) (banning imports of "the species *Herpestes auro-punctatus*").

13 *See id.* § 1716A(b); 39 U.S.C. § 3002a(a), (b)(3) (2012).

14 *See* 15 U.S.C. §§ 1243, 1244(4) (2012); 18 U.S.C. § 7(4) (placing guano islands within the special maritime and territorial jurisdiction of the United States). *See generally* KEVIN UNDERHILL, *THE EMERGENCY SASQUATCH ORDINANCE* (2014) (listing numerous unusual statutes).

## I. THE JURISPRUDENTIAL OBJECTION

A. *Explaining Constitutional Change in Practice*

In constitutional scholarship, it's a commonplace that "a *theory* of constitutional interpretation . . . must explain most of the actual *practice* of constitutional interpretation."<sup>15</sup> A good theory should provide "a persuasive account of legitimate constitutional change,"<sup>16</sup> accounting not only for practice as it stands today,<sup>17</sup> but also "as it has existed over the course of American history."<sup>18</sup> A "theory that ignored these changes, or that presumed that constitutional interpretation could go on without these changes," simply could not be "a theory of our Constitution."<sup>19</sup>

Sometimes the practices that matter are the ones we value. According to Jack Balkin, only "some, but not all, of these changes are worthy objects of pride that demonstrate the best features of the American constitutional tradition"; a constitutional theory "should be able to explain why the latter changes are faithful to the Constitution rather than being mistakes or deviations."<sup>20</sup> On his account, "[n]o interpretive theory . . . can be adequate to our history as a people" if it "regards equal constitutional rights for women"—or, for that matter, "greater freedom of speech, federal power to protect the environment, and federal power to pass civil rights laws"—as "unfortunate blunder[s] that we are now simply stuck with."<sup>21</sup>

But the same may be true of practices we abhor. From a modern perspective, the Supreme Court got plenty of things wrong through the course of history—think of the traditional "anticanon"<sup>22</sup> of *Dred Scott v. Sandford*,<sup>23</sup> *Plessy v. Ferguson*,<sup>24</sup> *Lochner v. New York*,<sup>25</sup> or *Korematsu v. United States*.<sup>26</sup> That those decisions all just happened to be wrong on the law, and that the dissenters all just happened to be right, strikes some as too unlikely for belief.

15 Lessig, *supra* note 2, at 450.

16 Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. 931, 937 (2013) (book review); accord JACK M. BALKIN, *LIVING ORIGINALISM* 3 (2011) (seeking to explain "how legitimate constitutional change occurs in the American constitutional system").

17 See, e.g., Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 790 (2010) ("Any acceptable theory of constitutional adjudication should, I believe, have two qualities: (1) It must be normatively acceptable and (2) It must be able to account for most (though not necessarily every last bit) of the current constitutional order.").

18 Siegel, *supra* note 16, at 937.

19 Lessig, *supra* note 2, at 396.

20 BALKIN, *supra* note 16, at 90.

21 *Id.* at 9–10; accord Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2030 (2012) (book review) ("[I]t counts as a serious strike against an interpretive philosophy that it requires courts to overturn precedents that are not only part of our national culture but also celebrated as such.").

22 Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011).

23 60 U.S. (19 How.) 393 (1857).

24 163 U.S. 537 (1896).

25 198 U.S. 45 (1905).

26 323 U.S. 214 (1944).

David Strauss, for example, rejects any view whereby “the true requirements of the Constitution have never changed” over time, and “we were just mistaken about what they were.”<sup>27</sup> Bruce Ackerman makes the point more colorfully:

In [the] now-conventional story, judges lived through a Dark Age early in the twentieth century—lasting roughly through 1937 in the case of *Lochner*, and roughly through 1954 in the case of *Plessy*. During this Dark Age, the Court unaccountably failed to understand the true legal meaning of the Commerce, Equal Protection, and Due Process Clauses. Then came Whiggish moments of Enlightenment: miraculously, the Justices cast away their blinders to reveal the Constitutional Truth That Had Been There The Whole Time—and all has been basically right with the world ever since.<sup>28</sup>

If these claims sound too fanciful or artificial, then we have to conclude that the law didn’t stay the same, but changed over time. And if that’s true, then our legal theories ought to keep up with such changes, rather than sticking with old views and slowly rendering themselves obsolete. To Balkin, for example, “ought implies can”: there’s no point in “adopt[ing] a theory of constitutional interpretation that the actual system of constitutional law could never be faithful to.”<sup>29</sup> Judges are human, and which judges we have depends less on cold reason and abstract doctrine than on “political mobilizations, social movements, and interest group advocacy.”<sup>30</sup> Any theory that fails to account for these features, Balkin concludes, “will be inadequate to the task.”<sup>31</sup>

### B. *Explaining Constitutional Change in Theory*

If that’s right, the picture for out-of-the-mainstream theories looks very bleak. After all, the whole point of an out-of-the-mainstream theory is to critique everyday practice, suggesting that our constitutional commitments actually require something else.

And the picture for originalist theories would look bleaker than most. Originalism, scholars widely agree, can’t explain “a good deal of the contemporary constitutional order,” which is said to include “massive departures from any original understanding of the text.”<sup>32</sup> These range, allegedly, “from paper money, to the rise of the modern national and welfare regulatory state, to the transformation of the presidency, and to the content of much of our civil liberties law.”<sup>33</sup> Maybe some of these changes, in the end, will turn out to be consistent with originalism; serious cases have been made

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27 Strauss, *supra* note 1, at 975.

28 Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1804 (2007) (footnotes omitted).

29 BALKIN, *supra* note 16, at 93.

30 *Id.*

31 *Id.*

32 Monaghan, *supra* note 17, at 788.

33 *Id.*

for desegregation,<sup>34</sup> paper money,<sup>35</sup> and so on. But if every important nonoriginalist practice “serendipitously corresponded with . . . originalist methods,” we’d suspect that something had gone wrong, either with the methods or with the honesty of the person applying them.<sup>36</sup> Put “[p]lainly, originalism is not the status quo.”<sup>37</sup>

If originalism can’t explain where we are, it also can’t explain how we got here. According to Strauss, for example, by failing to “explain the changes that have happened,” originalism leaves out “a central feature of our constitutional system.”<sup>38</sup> Stephen Griffin likewise argues that “originalism is unable to cope with legitimate constitutional change outside the Article V amendment process,”<sup>39</sup> leaving it without any “persuasive explanation . . . [of] how New Deal-era changes in constitutional meaning became legitimate.”<sup>40</sup>

Now, one defense to these charges might be that retelling the history of constitutional change isn’t the theorist’s job. The point of constitutional theory is to identify our constitutional law, not to validate past decisions—much less to predict future ones. Law professors aren’t fortune-tellers: they don’t know what the Court will do twenty years from now, and neither does anyone else. All the professors can do, and all they should have to do, is offer a good account of what the Constitution requires.

The danger with that response is that it can leave a constitutional theory cut off from a society’s actual legal commitments. The Constitution is “law today,” notes Michael Dorf, not just because of events in the 1780s, but “because it continues to be accepted today.”<sup>41</sup> History is littered with constitutions and legal systems that were once accepted but are now obsolete—think of the Articles of Confederation, British rule of the American colonies, or the Byzantine Empire. Rules of law, in Richard Fallon’s words, may be “necessarily rooted in social facts involving the behaviors, expectations, and attitudes of their participants.”<sup>42</sup> Should those behaviors and attitudes display a “general disregard” for a legal system’s rules, we ought to say that the legal system has “ceased to be the legal system of the group,” and that something else has taken its place.<sup>43</sup> The originalists’ refusal to go along with the tide might leave them with the diehards of other *anciens régimes*—Tories

34 E.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 423–24 (1960); Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 949–55, 1140 (1995).

35 E.g., Robert G. Natelson, *Paper Money and the Original Understanding of the Coinage Clause*, 31 HARV. J.L. & PUB. POL’Y 1017, 1018 (2008).

36 Dorf, *supra* note 21, at 2028.

37 See Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1197.

38 Strauss, *supra* note 1, at 976.

39 Griffin, *supra* note 37, at 1205.

40 *Id.* at 1216–17.

41 Dorf, *supra* note 21, at 2015–16.

42 Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1113 (2008).

43 H.L.A. HART, *THE CONCEPT OF LAW* 103 (3d ed. 2012).

pledging allegiance to the Crown, Jacobites toasting the King Over the Water, or White Russians stubbornly claiming properties granted by long-dead Tsars.

The Constitution of 1788 is hardly in general disregard today. But that's not enough to rescue originalism, or for that matter any other out-of-the-mainstream theory. As Stefan Sciaraffa points out, social practices aren't all-or-nothing. Even in a system with a written constitution, that "constitution would be a dead letter absent a custom among the system's legal officials"—or, perhaps, among the public at large—"of conforming to the constitution's requirements."<sup>44</sup> And "whether a written constitution is live or a dead letter comes in degrees"; official or popular customs "may reference some provisions of the constitution and ignore others."<sup>45</sup> What's true of the text is surely true of interpretive methods as well. Even if there were one right way to read the text, our relevant custom might be to follow that method only in part, or just to read it another way altogether. In any case, our law is what we *do*, not what someone else might think we *should* do.

This, in short, is the jurisprudential objection. As Fallon puts it, the Constitution "owes its status as supreme law to contemporary practices of acceptance . . . not to the intentions or understandings of the founding generation or the bare assertions of Article VI."<sup>46</sup> If we look to contemporary practices, we see that "the Constitution that is accepted as the supreme law sometimes permits deviations from the original understanding and even from the superficially plain meaning of its language."<sup>47</sup> Any claim to replace present practice with the "real" law "reflect[s] jurisprudential fallacies"<sup>48</sup> and has "no leg on which to stand."<sup>49</sup> Instead, such attempts are mere "reform program[s],"<sup>50</sup> which might be good or bad for policy reasons but have no real claim on the American lawyer's attention.

## II. ANSWERING THE OBJECTION

On its face, the jurisprudential objection is quite plausible. It has even persuaded some originalists. Michael Rappaport, for example, straightforwardly defends originalism as a "desirable" reform program, rather than as a consequence of "following the law."<sup>51</sup> He notes that "people are in jail in the U.S.—lots of them—for violating laws that are inconsistent with the Constitution's original meaning," and that "nonoriginalist Supreme Court decisions

44 Stefan Sciaraffa, *The Ineliminability of Hartian Social Rules*, 31 OXFORD J. LEGAL STUD. 603, 620 (2011).

45 *Id.*

46 Fallon, *supra* note 42, at 1117.

47 *Id.*

48 *Id.*

49 *Id.* at 1116.

50 Dorf, *supra* note 21, at 2028.

51 Mike Rappaport, *Should We Follow the Original Meaning Because It Is the Law?*, LIBR. L. & LIBERTY (Oct. 22, 2013), <http://www.libertylawsite.org/2013/10/22/should-we-follow-the-original-meaning-because-it-is-the-law/>.



are enforced without a second thought by most people all the time.”<sup>52</sup> In this context, “[w]hat does it mean to say that the Constitution’s original meaning is the law?”<sup>53</sup> More generally, “[w]hat does it mean for something to be the law, if the legal system is not enforcing it?”<sup>54</sup>

Answering these questions involves a brief detour into jurisprudence. This Article assumes a positivist framework in which “[l]aw is a social construction,”<sup>55</sup> determined by facts about the society in which it’s practiced. One of those facts, in our society, is that legal reasoning usually takes a hierarchical form, with the lower-order legal practices we encounter in day-to-day life dependent on more general, higher-order practices that help define their scope and content. We have to understand these practices not only from the “external” perspective, held by the “observer who does not himself accept” a legal system’s rules, but also from the “internal” perspective of “a member of the group which accepts and uses them as guides to conduct.”<sup>56</sup>

This framework helps motivate an argument that outré legal theories can accurately describe our legal system. Because our day-to-day practices and deeper principles can diverge, there’s room for originalists and other out-of-power theorists to use the latter to critique the former. It’s even possible for there to be “global error” on a question of law—for *absolutely everyone* in a jurisdiction, courts, officials, and judges included, to be wrong about a given legal conclusion. And while we might (after realizing our error) revise our principles so as to keep our practices the same, the importance of the internal perspective suggests that, until we do, the principles are what determine the law.

### A. *The Framework*

#### 1. Law as a Social Construction

The law “is in some important sense a social fact or set of social facts.”<sup>57</sup> Different societies have different laws, depending on various features of each society and its various social groups. *What* features these are, of *which* groups—judges, officials, lawyers, citizens, and so on—are matters of deep dispute, on which this Article tries to stay agnostic.<sup>58</sup> (As a result, it uses terms like “social facts,” “customs,” “conventions,” or “practices” broadly and interchangeably, without having any technical distinctions in mind.) The important point is that the kind of normative argument familiar in constitutional scholarship—that a given legal regime is more democratic, respectful

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52 *Id.*

53 *Id.*

54 *Id.*

55 Leslie Green, *Introduction* to HART, *supra* note 43, at xv.

56 HART, *supra* note 43, at 89.

57 Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in THE AUTONOMY OF LAW 1, 19 (Robert P. George ed., 1996).

58 *See generally* Adler, *supra* note 9, at 725 (“What is true, legally speaking, in a given legal system, is determined (at least in part) by the practices of some social group.”).

of liberty or popular sovereignty, likely to produce good consequences, and so on—can't, on its own, establish that regime as actually being the law.

Calling something a “social construction” conveys a certain wishy-washiness or indeterminacy. But saying that law depends on social facts doesn't mean that that's *all* we can say about it. Baseball depends on social facts too, in the sense that the rules of baseball are just whatever everyone says they are. But the Official Baseball Rules don't say “do whatever everyone says baseball's rules are”; they contain more than a hundred pages of detailed instructions.<sup>59</sup> Whether *that document* really sets forth the rules of baseball—or whether, for example, the text is occasionally supplanted by unwritten custom—depends on social practice. But we can discuss the document's requirements without necessarily having to refer back to social practice on every point. (Languages are social constructs too, but that doesn't mean that we have to take an opinion poll before discussing whether “cat” and “brontosaurus” are synonyms.) Because our social conventions are relatively stable, it's possible for individual baseball players (English speakers, etc.) to make mistakes in application or even to get the general practices wrong.

## 2. Lower-Order and Higher-Order Practices

How exactly the law emerges from social facts is far from clear. Some legal philosophers, though, assign a unique role in that process to what H.L.A. Hart calls “secondary rules,”<sup>60</sup> or to what Matthew Kramer calls “higher-order” social facts<sup>61</sup>—practices *about* practices, conventions *about* conventions, and so on. These higher-order facts have a significant impact on our understanding of the law, because they create the possibility of a “gap of misapprehension” between a group's “lower-order beliefs and their higher-order beliefs about those beliefs,” or between officials' “shared beliefs and attitudes” and “the substance and implications of some legal norm(s) which their own shared beliefs and attitudes have brought into being.”<sup>62</sup> When we have practices at multiple levels running at the same time, it's possible that very common lower-order practices will actually diverge from the higher-order practices we share—and thus that “our law” may not be the same thing as the day-to-day functioning of our legal system.

To see the difference more clearly, consider Hart's example of a legal system that only has “primary rules of obligation”—don't steal, don't murder, and so on.<sup>63</sup> Whether a given rule is part of that society's law depends on whether the society accepts and enforces it. But people often disagree on what we, as a society, accept and enforce. To avoid these doubts,<sup>64</sup> many

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59 See MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES (2013), available at [http://mlb.mlb.com/mlb/downloads/y2013/official\\_baseball\\_rules.pdf](http://mlb.mlb.com/mlb/downloads/y2013/official_baseball_rules.pdf).

60 HART, *supra* note 43, at 94.

61 Matthew H. Kramer, *Is Law's Conventionality Consistent with Law's Objectivity?*, 14 RES PUBLICA 241, 247 (2008).

62 *Id.*

63 HART, *supra* note 43, at 91.

64 *Id.* at 92.

legal systems add "secondary rules"<sup>65</sup>—for instance, that the primary rules can all be "found in a written document or carved on some public monument."<sup>66</sup> Modern societies are flush with secondary rules of extraordinary breadth and complexity,<sup>67</sup> all governing "the way in which particular rules are identified, either by courts or other officials or private persons or their advisers."<sup>68</sup>

Adding secondary rules to the system has another important feature, namely that it lets most people be ignorant of the law. As Leslie Green notes, "[m]any people in California have no idea what the scheme of authority in the state and national constitutions amounts to; some are not even aware that there *is* a state constitution."<sup>69</sup> If all we had were primary rules, that kind of ignorance might cause society to break down—the way that a pickup baseball game, without any umpires or trusted authorities, would collapse if the players disagreed too often about the rules. Secondary rules let us replace this kind of detailed agreement with other shared practices. So long as we can reliably identify the "experts of the system"<sup>70</sup>—umpires, officials, judges, lawyers, and so on—we can leave the complex questions to them, and get along with simpler understandings in ordinary life.<sup>71</sup>

Even this "narrow official consensus"<sup>72</sup> may be too broad, because the ordinary official doesn't need to know much about the law either. There are vast realms of law, federal and state, of which nearly every American officer, lawyer, or judge is blissfully unaware. (Think of obscure criminal provisions,<sup>73</sup> complex tax and regulatory regimes, detailed building codes, and so on.) Government officers don't all share an actual knowledge of the law, but rather a broad consensus—like that held by ordinary citizens—about where they should look or whom they should ask. And the experts that *they* consult, too, may have their own agreed-on means of finding out answers from someone else. So long as we avoid widespread disagreement on who the experts are or which sources are authoritative (say, having two competing sets of officials or versions of the Federal Register), we can successfully outsource most of our legal knowledge to others.

This outsourcing distances us from the law in another way, by permitting widespread deviations in practice. Most social customs exist only to the extent that they're actually accepted and followed. (If people stopped baring their heads in church, to use Hart's example,<sup>74</sup> then there'd no longer be a

65 *Id.* at 94.

66 *Id.*

67 *Id.* at 101.

68 *Id.*

69 Green, *supra* note 55, at xxviii (internal quotation marks omitted).

70 HART, *supra* note 43, at 60.

71 *Id.* at 114 (arguing that the ordinary person needs "no general conception of the legal structure or of its criteria of validity," as "[t]he law which he obeys is something which he knows of only as 'the law'").

72 Green, *supra* note 55, at xxix.

73 See, e.g., *supra* notes 12–14 and accompanying text.

74 See HART, *supra* note 43, at 109.

custom of doing so.) Once the rules “are found to exist in the actual practice of a social group,” Hart writes, “there is no separate question of their validity to be discussed”;<sup>75</sup> all that matters is “the *fact* that a certain mode of behaviour [is] generally accepted as a standard in practice.”<sup>76</sup> In a modern legal system, by contrast, whether a given rule “exists” or not is far more complex.<sup>77</sup> The rule’s legal validity depends on our higher-order social practices—in Hart’s terminology, on whether the rule “pass[es] all the tests provided by the rule of recognition,”<sup>78</sup> a “complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.”<sup>79</sup> Whether any one legal rule is actually obeyed in practice is a separate question: there’s “no necessary connection between the validity of any particular rule and *its* efficacy,” unless the legal system should provide (as a secondary rule in its own right) that whatever “has long ceased to be efficacious” should no longer “count as a rule.”<sup>80</sup>

As it happens, the United States has no general doctrine of desuetude,<sup>81</sup> and so a rule of American law “may be valid and in that sense ‘exist’ even if it is generally disregarded.”<sup>82</sup> A rule can even be part of our law if the officials charged with enforcing it violate it routinely (say, jaywalking) or are unaware that it exists. Most policemen, and even most postal inspectors, probably never learned that key-duplicating tools are nonmailable; most Assistant U.S. Attorneys probably don’t know it’s a misdemeanor to reproduce for profit “the character ‘Woodsy Owl’ . . . or the associated slogan, ‘Give a Hoot, Don’t Pollute’”;<sup>83</sup> most Supreme Court Justices had probably forgotten, until a recent case arose, that the Constitution includes special rules for state taxes on ships.<sup>84</sup> Indeed, sometimes we have official customs of *not* enforcing rules that we still understand, on reflection, to be valid law. A cop who repeatedly ticketed ordinary jaywalkers would get a talking-to down at the station for wasting everyone’s time. As Kramer points out, rules like jaywalking bans “can continue to exist as laws even though they are invariably unenforced,”<sup>85</sup> because they’re part of a “functional system” in which “myriad other legal obligations are quite regularly given effect.”<sup>86</sup>

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75 *Id.*

76 *Id.* at 110.

77 *Id.*

78 *Id.* at 103.

79 *Id.* at 110.

80 *Id.* at 103.

81 See Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006) (noting regretfully that desuetude “currently enjoys recognition in the courts of West Virginia and nowhere else”).

82 HART, *supra* note 43, at 110.

83 18 U.S.C. § 711a (2012).

84 See U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, lay any Duty of Tonnage . . . .”); *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 4 (2009).

85 Kramer, *supra* note 61, at 245.

86 *Id.* at 246.

### 3. Internal and External Perspectives

What’s true of ordinary laws is also true of constitutional theories. We can have an originalist constitution (or a progressive one, or . . .) that generally goes unenforced, so long as it’s the product of higher-order practices in a generally functional legal system. This idea of an esoteric constitution, though, may strike most readers as odd. What’s the point of having constitutional law that nobody knows about? Why care about higher-order practices that don’t actually find expression on the ground?

The answer lies in the fact that a legal system looks different to external observers than it does to participants in the system, who regard it from an internal point of view.<sup>87</sup> The Holmesian “bad man,”<sup>88</sup> who’s interested only in “the decisions of courts and the prediction of them”<sup>89</sup> to avoid “disagreeable consequences,”<sup>90</sup> provides a woefully inadequate account of the law—and is in some ways a jurisprudential laughingstock.<sup>91</sup> To use Kent Greenawalt’s example, an outside observer of the American legal system would have to conclude that the military draft is permissible, “because judges have said that it is and no one now expects a contrary conclusion.”<sup>92</sup> Even “[a] Supreme Court justice may say that the law as so far determined, and as likely to be determined in the foreseeable future, is that the draft is not involuntary servitude” prohibited by the Thirteenth Amendment.<sup>93</sup> But that same Justice may still be convinced that “the law as it *should be determined* is that the draft is involuntary servitude,” vote in an appropriate case “that the law *is* that the draft is impermissible,” and believe that the “governing law of the Constitution has continuously required a decision against the draft.”<sup>94</sup> The same person can take one view as an external observer and yet sensibly take the opposite view as an internal participant.

From that internal perspective, it matters what we tell ourselves, not just what we do on the ground. A sociologist could find plenty of features of our legal practices that we don’t like to admit—that judges can be biased by political preferences, that racial minorities and the poor are regularly disadvantaged in criminal trials, and so on. Yet these facts about the system, however true in practice, don’t form any part of *the law*. We’d never include these things when teaching someone how to make legal judgments in our system,

87 HART, *supra* note 43, at 98.

88 Holmes, *supra* note 3, at 459.

89 HART, *supra* note 43, at 136.

90 Holmes, *supra* note 3, at 461.

91 Some of the most active debates involving the “bad man” perspective are over whether any of the legal realists were silly enough to have adopted it. Compare, e.g., Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 279 (2001) (no, they weren’t), with Leslie Green, *Law and the Causes of Judicial Decisions* 11 (Univ. of Oxford, Legal Research Paper No. 14/2009, 2009), available at <http://ssrn.com/id=1374608> (yes, some were).

92 Greenawalt, *supra* note 57, at 20.

93 *Id.* at 23.

94 *Id.* at 23 & 29 n.47.

because we don't actually take them as guides to conduct. (They might even be illegal.) Whether or not we adhere to a particular legal standard *in principle* is crucially important: to use Fallon's phrase, such principles offer participants in the system a "leg on which to stand,"<sup>95</sup> and a ground on which to assess official conduct as consistent or inconsistent with their higher-order customs and beliefs. Like parenting, law involves an instruction to "do what we say, not what we do."<sup>96</sup> And doing what we say, in turn, can require extraordinary changes in day-to-day practice.

Importantly, this distinction between "what we say" and "what we do" can be repeated at the level of legal reasoning. Lawyers in a courtroom might *offer* many different kinds of reasons, and some scholars think that the reasons offered are the ones that matter most.<sup>97</sup> But we might also want to know, not just what kinds of arguments we offer, but what kinds of arguments we *say* we offer. For example, lawyers often try to make their clients seem sympathetic, and sometimes that helps them win. Yet nobody would say that it's a rule of American law, even when the "balance of equities" isn't involved, that "the more sympathetic party should generally win." It matters which reasons are generally accepted, in principle as well as in practice.

Judges have to make decisions, so lawyers will grab at any kind of practical reasoning they can think of—political theory, ordinary morality, common sense, and so on. The fact that lawyers use these reasons doesn't make them legal reasons any more than the fact that they use arithmetic to calculate statutory interest makes mathematics part of the law.<sup>98</sup> That's not to say that these reasons are entirely unrelated to the law, either; as Leslie Green points out, Britons might obey Parliament based "not only on a common practice of treating [it] as supreme, but also on a belief that this practice is democratic or is central to our culture."<sup>99</sup> One interesting feature of *legal* principles, though, is that they're recognized as "the law around here"; there's a "shared common practice to that effect."<sup>100</sup> People who agree on politics or morality might all act similarly, but that's not the same thing as accepting a legal rule as a guide to conduct any more than people standing near a bus stop shelter have a "shared common practice" of trying to stay out of the rain.<sup>101</sup> They all have good reasons, but there's no joint custom involved.

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95 Fallon, *supra* note 42, at 1116.

96 The key feature of a legal fiction, after all, is that it's "not intended to deceive," L.L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 367 (1930)—and, if challenged, someone employing one would admit as much openly.

97 See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* 6 (1982).

98 Leslie Green, *Legal Positivism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2003), <http://plato.stanford.edu/archives/spr2014/entries/legal-positivism/> ("[M]oral standards, logic, mathematics, principles of statistical inference, or English grammar, though all properly applied in cases, are not themselves the law . . .").

99 Green, *supra* note 55, at xxiii.

100 *Id.*

101 RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 48-49 (2012) (citing John R. Searle, *Collective Intentions and Actions*, in *INTENTIONS IN COMMUNICATION* 401, 402-03 (Philip R. Cohen et al. eds., 1990)).

Whether something is part of the law, then, is partly determined by whether we’re willing to *say* that it’s the law, at least when challenged on the point—and on whether part of our explanation for this claim is the fact that others say so as well. So, while law depends on social practice, one particularly important social practice is that of publicly accepting and defending certain kinds of reasons (and not others) as guides to conduct for a faithful participant in the legal system.

To illustrate this distinction, consider an intermediate figure between the “bad man” and the truly faithful participant in the system. A kindly French tourist, for example, might consult an American lawyer not only to avoid being imprisoned during her visit, but also out of a sincere desire to show respect to her hosts and to “do as the Romans do.” She might earnestly want to know how Americans understand their law, and what kinds of legal reasons they typically offer and accept; but she’d have no reason to ask what the law actually *is*. Suppose she traveled to California, where state law permits marijuana possession for medical use but federal law does not. The “bad man” would only want to know his chances of being arrested and sent to prison. The kindly tourist would still care that the Controlled Substances Act bans marijuana possession<sup>102</sup>—as all competent American lawyers agree—even though enforcement of that law seems unlikely.<sup>103</sup> Yet there’s no reason for her to care whether *Gonzales v. Raich*<sup>104</sup> was correctly decided. Trying to second-guess the precedents or our common understandings of American law would come across as pedantic rather than respectful; an American lawyer who raised the subject would simply be wasting her time.

For participants in the American legal system, though, whether the Court was right in *Raich* is still a meaningful question. As Caleb Nelson notes, when American lawyers talk about constitutional law, they sometimes say things “like this: ‘The Constitution plainly establishes Rule X, but the Supreme Court has interpreted it to establish Rule Y instead, and the Court is not going to overrule that interpretation.’”<sup>105</sup> Any competent lawyer “would understand the distinction that this statement draws, and relatively few would consider it completely artificial or incoherent.”<sup>106</sup>

Maybe, depending on one’s views of *stare decisis*, the question of *Raich*’s correctness loses most of its significance once the Court has ruled. But we can make sense of the question itself and can even imagine the right answer someday making a difference. If circumstances one day changed such that *Raich*’s rule were no longer desirable, all things considered, the Court might

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102 Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C. (2012)).

103 See Memorandum from James M. Cole, Deputy Att’y Gen., to All United States Attorneys (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (describing marijuana possession as a low enforcement priority).

104 545 U.S. 1, 9 (2005) (upholding the federal law on commerce grounds).

105 Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 WM. & MARY L. REV. 921, 937 (2013).

106 *Id.*

confront the question of whether to overturn it. But what the Court can't do, no matter what your theory of stare decisis, is overturn a decision that's actually *right*. So whether *Raich* is right or wrong, on whatever theory is proper for deciding such things, is at least a potentially distinct inquiry from how the decision is treated in our everyday legal reasoning. To adopt the internal perspective, to take ownership of what our legal system accepts and defends as a matter of principle, is to recognize that our reasoning might sometimes fall short of what our own publicly accepted principles demand.

### B. *The Possibility of Global Error*

The distinctions discussed above—between higher- and lower-order practices, and between the external and internal perspectives—help shed light on whether it's possible to have what Brian Bix calls “global error” in the law. That is, whether “*all* legal officials or practitioners in a jurisdiction [can be] mistaken . . . about some legal proposition,” not just temporarily but “over a significant period of time.”<sup>107</sup> If the law were nothing but day-to-day practice, “what officials accept and apply as law,” then presumably global error would be impossible; universal agreement on a “wrong” legal answer would make that answer the right one.<sup>108</sup> But, as the arguments above suggest, agreement on the answer isn't all we have. We might also have agreement on our *reasons* for the answer, or on our reasons for those reasons, and so on; and so we might, in light of all those reasons together, conclude that we've all gotten the answer wrong.

#### 1. How to Think About Global Error

To explain why global error seems implausible in law, Bix analogizes it to claims of global error in language, another practice “that has little or no existence outside the actions and intentions of its participants.”<sup>109</sup> Individual English speakers make grammatical errors all the time, but we can't *all* speak our own language incorrectly, because “our own language” is just whatever we all speak. People 500 years ago spoke differently than we do, and people 500 years from now will too, without anyone being in the wrong. As Bix argues, if “the ‘mistake’ is made by a large enough percentage of the relevant language community, consistently over a long enough period of time,” then a claim of error “no longer makes sense. The meaning of a word, and the proper use of a word, cannot be other than what we, the users of the language, collectively ‘decide’ it to be . . . .”<sup>110</sup>

107 Brian H. Bix, *Global Error and Legal Truth*, 29 OXFORD J. LEGAL STUD. 535, 535–36 (2009) (emphasis added).

108 Monaghan, *supra* note 17, at 791; accord Fallon, *supra* note 42, at 1113; Kenneth Einar Himma, *Making Sense of Constitutional Disagreement: Legal Positivism, the Bill of Rights, and the Conventional Rule of Recognition in the United States*, 4 J.L. SOC'Y 149, 156 (2003).

109 Bix, *supra* note 107, at 538.

110 *Id.* at 538–39.



Similarly, the argument goes, to assert that all of a society’s legal officials are getting their own law wrong is like criticizing Shakespeare for using archaic expressions, or accusing Italians of speaking very bad Latin. The governing legal rules, like the governing standards of good writing or proper speech, depend on social practices at the time. In this vein, Andrei Marmor suggests that “if a given concept is constituted by social conventions”—such as “the rules of chess, the current conventions of fashion in Paris, and . . . the legal speed limit in the state of Illinois”—then “it is impossible for the pertinent community to misidentify its reference. There is nothing more we can discover about the content of the rules of chess than what we already know.”<sup>111</sup>

What’s true of a simple game like chess, though, may not be true of a complex system like law. In particular, law has the ability not only to create standards of its own, but also to incorporate external standards from other domains, ones that are less dependent on social convention. As Bix points out, a statute might borrow a term from another discipline in which global error is possible, such as biology.<sup>112</sup> So, if Maine’s animal cruelty ordinance defines “animal” as a “living, sentient creature,”<sup>113</sup> using the ordinary meanings of those terms, then it’s possible for everyone in Maine to be persistently wrong about whether certain creatures (say, lobsters) are sentient or not.<sup>114</sup> More generally, whenever law incorporates an external standard—from science, history, morality, and so on—there’s a possibility of global error, so long as “there is truth of the matter to be found.”<sup>115</sup> Those who favor an “actual innocence” rule under the Eighth Amendment, for example, might

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111 ANDREI MARMOR, *POSITIVE LAW AND OBJECTIVE VALUES* 138 (2001).

112 Bix, *supra* note 107, at 541.

113 ME. REV. STAT. ANN. tit. 17, § 1011(2) (2011).

114 *Compare, e.g., Dennis Hoey, Maine DA: No Charges To Be Filed Over Lobster Processing Method*, PORTLAND PRESS HERALD (Oct. 1, 2013), [http://www.pressherald.com/news/DA\\_Lobsters\\_are\\_not\\_sentient\\_beings\\_.html](http://www.pressherald.com/news/DA_Lobsters_are_not_sentient_beings_.html) (stating that the Maine animal cruelty statute applies only to sentient beings, excluding invertebrates), *with* David Foster Wallace, *Consider the Lobster*, GOURMET (Aug. 2004), [http://www.gourmet.com/magazine/2000s/2004/08/consider\\_the\\_lobster](http://www.gourmet.com/magazine/2000s/2004/08/consider_the_lobster) (categorizing the lobster as “sentient” and analyzing the practice of boiling lobsters alive), *and* Barry Magee & Robert W. Elwood, *Shock Avoidance by Discrimination Learning in the Shore Crab (Carcinus maenas) Is Consistent with a Key Criterion for Pain*, 216 J. EXPERIMENTAL BIOLOGY 353 (2013) (concluding that crustaceans demonstrate discrimination learning in response to noxious stimuli).

115 Bix, *supra* note 107, at 541. Note that this account of global error requires a certain sort of realism about those other fields, but not necessarily a realist theory of *meaning* regarding the interpretation of legal rules referencing those fields. *See* Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 291–301 (1985) (discussing realist and conventionalist theories of meaning). One might, for example, adopt a conventionalist paradigm-case theory of meaning, *see id.* at 295, and yet be surprised to discover that the creatures which are paradigm cases of lobsters frequently display properties that are paradigm cases of sentience.

think the Constitution forbids executing someone who is *actually* innocent, regardless of what anyone else believes.<sup>116</sup>

Often these external standards might end up looking a lot like law. To use Hart's example, a society that accepts as law the rules that have been "carved on some public monument"<sup>117</sup> might well discover, once some dust is cleared away, that there were more rules on the list than they knew about. Likewise, it's always possible to discover that the legislature passed a long-forgotten statute on some particular point;<sup>118</sup> what events count as "passing" legislation is a question for social practice, but the historical fact of whether those events occurred is not. The same thing can happen with judicial precedent: one might always discover a long-forgotten Supreme Court decision addressing a disputed point,<sup>119</sup> which would then be precedent binding on lower courts,<sup>120</sup> whether or not it would carry much weight with the Court itself.<sup>121</sup> Even in ordinary practice, Nelson notes, "many lawyers see some value in speaking precisely enough to distinguish between the law as dictated by the external sources and the law as understood by the courts."<sup>122</sup> So long as that divergence lasts, Bix concludes, "one might say that the court's decision both 'is' and 'is not' a correct expression of the law."<sup>123</sup>

## 2. Global Error and the Constitution

In the constitutional context, claims of global error are hard to assess. Mitchell Berman, for example, cautions against "dismissing as immaterial what members of a socio-legal system . . . take to be the law," as such dismissals may "rest[ ] on a sterile and bizarrely asocial conception of what law is."<sup>124</sup> Berman presents the hypothetical of an ancient civilization called Etrusca, whose laws included an authoritative text written in 800 B.C.<sup>125</sup>

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116 Cf. *In re Davis*, 565 F.3d 810, 830 (11th Cir. 2009) (Barkett, J., dissenting) ("I do not believe that any member of a civilized society could disagree that executing an innocent person would be an atrocious violation of our Constitution . . .").

117 HART, *supra* note 43, at 94.

118 Or has failed to pass a statute. In 1993, the Court considered "the unlikely question" whether a particular provision of banking law had been repealed in 1918, as the compilers of the U.S. Code had for decades assumed. The Court rejected the compilers' interpretation and held that the provision was still good law. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 441–42, 462–63 (1993); *see also* 12 U.S.C. § 92 (1994) (in which the provision is restored).

119 *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1852) (appending to the opinion a summary of the newly discovered decision in *United States v. Todd* (1794)); *see also* Wilfred J. Ritz, *United States v. Yale Todd (U.S. 1794)*, 15 WASH. & LEE L. REV. 220 (1958).

120 *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

121 *See, e.g., Roper v. Simmons*, 543 U.S. 551, 594 (2005) (O'Connor, J., dissenting).

122 Nelson, *supra* note 105, at 937.

123 Bix, *supra* note 107, at 537.

124 Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 56 (2010).

125 *Id.* at 57–58.

Starting about a century later, and "[f]or roughly 500 years," Etruscans and their officials "overwhelmingly understood" a provision of that text to have a particular meaning.<sup>126</sup> Suppose, though, "that a modern-day historian determines, to the satisfaction of all historians of the period, that the original public meaning" of that provision was actually quite different, and had been obscured by changes to the Etruscan language prior to 700 B.C.<sup>127</sup> If all this is true, Berman asks, what should we say was the law in Etrusca during the ensuing 500-year period?<sup>128</sup> Could Etruscan law really have been the modern historian's position all along, and not the views held by actual Etruscans, "even though not a soul alive at the time" shared the historian's understanding, much less "acted in accordance with such a belief?"<sup>129</sup>

Berman's example is a powerful one, because it gets at the absurdity of telling other people that we understand their law better than they do. But the example is also more complicated than it seems, because its force depends on how the Etruscans themselves understood the text's role in their law, and on how that understanding related to their other social and legal practices.

To reuse the example above, suppose that Etruscan dietary laws, inspired by the state religion, forbade the eating of "any creature that feebleth pain." Perhaps the Etruscans thought certain animals, like crustaceans, lacked sentience—and concluded, for that very reason, that such animals could lawfully be eaten. Maybe crabs and lobsters were staples of the Etruscan diet and played a central role in their culinary culture. If you asked a modern social or intellectual historian about the issue, they'd surely respond that lobster-eating was lawful in Etrusca; who are they to tell the Etruscans any different?

But suppose the same question were asked, not of someone who wished to *describe* ancient Etrusca from an outsider's perspective, but of someone who *practiced* the Etruscan religion and wished to participate in its laws as a conscientious citizen. Perhaps the same Etruscan who gaily participated in the annual Lobster Ceremony would be horrified by the implications of a different biological theory—and, having adopted that theory, would conclude that his society's most common practices were violations of its own law. Who are we to deny him that reaction? How can we be sure, *a priori*, that the laws of Etrusca are satisfied with common belief?

The same could be true of the Etruscans' attachment to original meaning, or to any other rule of law. If the Etruscans would explain, accept, and defend a particular legal practice on the basis that "so it was laid down in our authoritative text," then they might care whether that statement is true or false, not just whether it was widely believed. To assume otherwise is to assume, without justification, that the Etruscans weren't really originalists.

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126 *Id.* at 58.

127 *Id.*

128 *Id.*

129 *Id.*

Thus, Bix argues, when an authoritative text is involved, it's always "open to someone to argue" that the right meaning of that text is something other than "the position that everyone believes."<sup>130</sup> On its face, that claim might be vulnerable to Sciaraffa's point that texts can be dead letters as a matter of degree. Maybe some provisions are supposed to be only partially enforced, or maybe society has just come around to a different way of reading the text and using it as law. What matters, though, is the *basis* on which the society would explain, accept, and defend the alleged divergence from the text. Think of the language analogy. In English, some deviations from general rules (like irregular verbs) are seen as *exceptions* to the rules rather than violations; they're different, but not wrong. Other deviations, like typos, are clearly regarded as incorrect, and some deviations (like using "they" as a singular pronoun) fall in a gray area in between. The way we categorize these different kinds of deviations are part and parcel of our linguistic practices.

Similarly, if a society sees a divergence from its higher-order practices as an uncontroversial exception to its rules, then it's hard for anyone else to say that they're wrong. But if, instead, they try to fight the hypothetical, cast the issue as *de minimis*, or justify the divergence on nonlegal grounds, then it should still be open to a faithful Etruscan—and, to the same extent, a modern admirer—to argue that the entire society had gotten it wrong. And if global error is possible in this hypothetical society, where it seems least likely, then surely it's possible in actual legal systems as well.

### C. *Lower-Order Practices and Reflective Equilibrium*

Our lower-order, everyday legal judgments can diverge from the higher-order practices we use to explain and justify them. That divergence makes room for the possibility that our law, in the end, might be something very different from everyday legal practice. This Section asks the further question of why, when the two kinds of practices diverge, we should pay any more attention to higher-order practices than to lower-order ones.

Some lower-order conclusions, after all, seem no less fundamental to our legal system. "Such is the moral authority of *Brown*," Michael McConnell has written, "that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited."<sup>131</sup> If our general theories would tell us—or even *could* tell us—to get rid of results like these, why isn't that a reason to keep the results and jettison the theories? Or, alternatively, why not work out our commitments to both theories and results in tandem, through a process of reflective equilibrium?<sup>132</sup> Why give theory any pride of place?

This Article makes two responses. First, legal judgments in our society typically involve a particular structure of justification. Rule *A* is the law

<sup>130</sup> Bix, *supra* note 107, at 542.

<sup>131</sup> McConnell, *supra* note 34, at 952; *see also id.* at 952 n.16 (citing sources).

<sup>132</sup> *See, e.g.*, Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1778 (2013).

because it follows from Rule *B*, which in turn rests on Rule *C*, and so on. We might use reflective equilibrium and coherence with practice to discover and formulate those justifications, but the justifications themselves still take this linear form—and if it turns out that Rule *C* actually requires something else, then our judgments about *A* are imperiled, at least until we come up with a new theory. Second, while it’s possible for us to justify legal claims specifically as a product of individual results, as a matter of empirical fact we tend to frame our reasoning at higher levels of generality. American law, in the end, might not actually have any individual cases or outcomes so mandatory that they resist explanation in higher-order terms.

## 1. Foundations and Coherence in Legal Reasoning

At first glance, it’s hard to see why either kind of legal practice—lower- or higher-order—should be privileged over the other. The idea behind reflective equilibrium (a concept prominently discussed by John Rawls) is that instead of reasoning along a one-way street from first principles to final conclusions, we might instead reason in both directions, making “adjustments at both ends” to help our case-specific intuitions and our broader commitments cohere with one another.<sup>133</sup> According to Berman and Kevin Toh, this method of reasoning is already one “that judges and lawyers instinctively and commonly resort to in their legal deliberations.”<sup>134</sup> In particular, Berman also sees it as undermining “foundationalist” approaches such as originalism, which try to derive complex conclusions from basic beliefs rather than seeking coherence among all of our legal and jurisprudential beliefs at the same time.<sup>135</sup>

As a way of testing and refining our beliefs about the law, reflective equilibrium has a lot to recommend it. That’s why both law professors and judges are fond of posing hypotheticals, forcing hapless students or attorneys to apply their broader commitments to new cases. But using reflective equilibrium as a tool of discovery doesn’t mean putting our higher- and lower-order practices on the same plane, or treating all of them as having similar weight on a “coherentist” approach.

To see why, consider the Etrusca example again. The Etruscans simultaneously believe:

- (1) that lobster-eating is permissible if and only if lobsters aren’t sentient (a legal rule);
- (2) that lobsters aren’t sentient (a nonlegal fact);
- (3) that lobster-eating is legally permissible (a legal conclusion); and
- (4) that (3) follows directly from (1) as applied to (2) (a chain of legal reasoning).

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133 *Id.*

134 *Id.* at 1782.

135 Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in *THE CHALLENGE OF ORIGINALISM* 246, 260 (Grant Huscroft & Bradley W. Miller eds., 2011).

Everyone agrees that the Etruscans could all be wrong about biology, because that doesn't depend on social convention. The question is what *else* they're wrong about. Should we conclude, in a foundationalist way, that the law in Etrusca really did ban lobster-eating, and that their error was simply in reasoning from a false factual premise to a false conclusion? Or could we conclude, in reflective equilibrium, that their thoroughgoing acceptance of lobster-eating is more important, and that the best account of their practices actually jettisons the general rule about sentience instead? Either way, we're going to have some global error: the Etruscans were all wrong about this particular conclusion, or else they were all wrong about their legal rule and chain of reasoning. One or the other has to go.

Yet there are still reasons for favoring the former, "foundationalist" account. At first glance, it's hard to see how reflective equilibrium could point us in any other direction. If no one in Etrusca ever dreamed that lobsters were sentient, then their social practices would have been at least as consistent with either story. Invocations of the sentience rule having been as widespread as lobster-eating itself, neither practice would have been any more central to the coherentist web of belief. In fact, the one social practice that *wasn't* equally consistent with both views was the Etruscan practice of *justifying* their legal conclusions in a foundationalist way, as involving the application of rule to fact. The Etruscans didn't understand or represent their law as containing "whatever rules best cohere with lobster-eating"; they represented their law as producing a legal conclusion about lobster-eating on the basis of a particular factual premise. Which means, if the factual premise turns out to be false, that the conclusion should fall before the rule does.

In the United States, no less than in Etrusca, our legal conclusions typically come with complex legal justifications already attached. Legal justification isn't some separate activity we engage in, but part and parcel of the law. If one person argues that "the U.S. Code is law because the Statutes at Large say so,"<sup>136</sup> and someone else argues that "the Statutes at Large are law because the U.S. Code says so,"<sup>137</sup> they're disagreeing about the content of our law, not just the best way of explaining it. As it happens, in our system, the first person is right; should the Statutes and the Code ever disagree, the former trumps.<sup>138</sup> But the first person would be just as right even if the Statutes and Code had never disagreed and never would. The proper chain of justification is part of our legal rules, and to change those justifications is to change the law.

Consider another example. A permit from the Fish and Wildlife Service to import an endangered elephant doesn't stand on its own bottom, legally

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136 See Act of July 30, 1947, ch. 388, § 204(a), 61 Stat. 633, 638 (codified at 1 U.S.C. § 204(a) (2012)) (describing the authority of the U.S. Code).

137 See 1 U.S.C. § 112 (describing the authority of the Statutes at Large).

138 Compare *id.* (describing the Statutes at Large as "legal evidence" of the law), with *id.* § 204(a) (describing unenacted U.S. Code titles as only "prima facie" evidence); accord *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993); Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 283–84 (2007).

speaking; it’s understood to be valid only because it was issued according to regulations,<sup>139</sup> which exercised power validly delegated by a statute,<sup>140</sup> which was authorized under some enumerated power of Congress<sup>141</sup>—and because the Service itself has been validly created by an organic statute,<sup>142</sup> which was also authorized by some enumerated power of Congress,<sup>143</sup> and so on. That kind of justificatory pattern is “very familiar,” as Hart notes,<sup>144</sup> and it follows directly from the way our laws are structured.

Now, suppose that all of these justifications were inadequate—that, as a historical matter, Congress never passed *any* statutes about the Fish and Wildlife Service, and that we’ve all been caught up in a global error of thinking that it had. Then we’d have a conflict between our higher- and lower-order practices; we’d have relied on the Fish and Wildlife Service in all sorts of ways, but our abstract legal theories would tell us that the Service doesn’t actually exist.

That would give us at least two options. One would be to conclude that the Service really is legally invalid, because the justifications that we relied on no longer work. The other would be to hold fast to our conclusion that the Service exists, that all its employees still have government jobs, and so on, and instead to revise our higher-order principles (in a reflective-equilibrium way) to come up with some new legal justifications for its existence. Both of these are possible responses, and neither can be ruled out *ex ante*.

But there’s one important difference between the two, namely that the latter seems to involve a *change* to our legal rules. Because the structure of our justification of the Service is a function of the laws that we have, the changes we’d have to make in that structure to keep the Service around would be real changes in the law. By contrast, feeding new and surprising facts about Congress into our existing rules might change our *conclusions* about the Service, but it wouldn’t actually change our rules themselves—any more than discovering that a convicted murderer is factually innocent represents a change to our law of homicide.

Once we identify the conflict, of course, we might decide to keep the Service and revise our justifications. But just as law isn’t the prediction of what courts will do when a case arises, it’s also not the prediction of what *we* will do when push comes to shove, or what we’re disposed to do once we’re given new facts. We can make lots of predictions about how the law might change, should enough people in society adopt new higher-order beliefs. At the moment, though, until we all make up our minds to change things, the

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139 50 C.F.R. §§ 17.21(b), 17.22 (2012).

140 16 U.S.C. § 1539(a) (2012).

141 *E.g.*, U.S. CONST. art. I, § 8, cl. 3 (granting power “[t]o regulate Commerce with foreign Nations”).

142 Act of Apr. 22, 1974, Pub. L. No. 93-271, § 1(3), 88 Stat. 92, 92 (codified as amended at 16 U.S.C. § 742b (2012)).

143 *E.g.*, U.S. CONST. art. I, § 8, cl. 18 (granting power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers”).

144 HART, *supra* note 43, at 107.

law is just what it is—and someone who wants to challenge the Service’s existence clearly has a “leg on which to stand.”<sup>145</sup>

As Jeff McMahan has suggested in the context of ethical theory, we can use reflective equilibrium as an investigative tool—a way to discover our preferred package of ground-level and higher-level beliefs—without making it the basis for justifying the package that we discover.<sup>146</sup> The best justifications for our ground-level beliefs, once we’ve decided on them, might be the higher-level beliefs they came packaged with, and not the coherentist reflective-equilibrium process we used to discover them both. In such cases, McMahan writes, “the order of discovery is the reverse of the order of justification. Although the deeper principles are explanatorily prior, we have to work our way to them via our intuitions in much the way that scientists work towards general principles via perceptual data.”<sup>147</sup> Even though we’d never have discovered the nature of gravity without seeing apples fall from trees, the abstract scientific principles might be the best explanation of falling apples, rather than vice versa; and we can use both kinds of beliefs to discover new facts without referring to them equally in the explanation of why those new facts are true. (Indeed, it’s not clear that those who encourage the use of reflective equilibrium in law actually disagree on this point.)<sup>148</sup>

Yet the upshot for the law is as follows. If we accept certain higher-level principles making legal conclusions depend on certain facts (the way the Service’s existence depends on what Congress has done), and if we then make inferences based on what we know about those facts, it seems likely that those inferences—and not our case-specific intuitions about the ultimate outcomes—offer the best account of what our law currently requires. The usefulness of reflective equilibrium as an investigative tool for refining our principles and intuitions doesn’t change the fact that our higher-order principles “unify, explain, and justify our intuitive judgments,” and not the other way around.<sup>149</sup>

## 2. Case-Specific Judgments and Constitutional Fixed Points

Even if higher-order beliefs get a certain kind of priority, sometimes the distinction between lower- and higher-order practices might collapse. On one reading of McConnell’s statement about *Brown*, for example, the higher-order principle involved is just that “*Brown* is right”—and any claim to the contrary, no matter how it might be grounded, is flatly inconsistent with our social conventions. Examples like this really might land a punch against out-of-the-mainstream theories like originalism. The problem wouldn’t be

145 Fallon, *supra* note 42, at 1116.

146 See Jeff McMahan, *Moral Intuition*, in THE BLACKWELL GUIDE TO ETHICAL THEORY 103 (Hugh LaFollette & Ingmar Persson eds., 2013). I am indebted for this point to Gregg Strauss.

147 *Id.* at 114.

148 See, e.g., Berman, *supra* note 135, at 268 n.49; Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237, 1257–58 (2005).

149 McMahan, *supra* note 146, at 114.



*Brown's* alleged inconsistency with originalism—McConnell argues at length that the two are compatible—but that this consistency would make no difference anyway: the ground for *Brown* being law would be its being *Brown*, and not its relationship to the original Fourteenth Amendment. (The same argument could be made for intermediate principles broader than this one specific case—for example, “racial caste systems are impermissible.”)

This argument doesn't pose a conceptual problem, but an empirical one; it depends on how many “fixed star[s] in our constitutional constellation” we actually have.<sup>150</sup> As it happens, there are good reasons to think the number is very low, if not zero. These fixed-star arguments are often implausible; no one thinks, say, that the Fish and Wildlife Service exists “because Fish and Wildlife” in the way that *Brown* might be said to be right “because *Brown*.” More importantly, lots of people believe that *Brown* is right because the Fourteenth Amendment, properly understood, forbids certain forms of discrimination on the basis of race;<sup>151</sup> that's an argument about a higher-order justification, and not one in which *Brown* stands on its own bottom.

One way to tell the difference is to consider what would happen if we *repealed* the Fourteenth Amendment. To make the hypothetical sharper—and to avoid any complicating considerations of popular will—suppose that the repeal in no way reflected a popular rejection of *Brown*. Suppose that a new amendment provided only that “because we have too many amendments, the President shall spin a roulette wheel numbered from 1 to 27, and whichever space the ball lands on, that Amendment is hereby repealed.” Many Americans, lawyers as well as ordinary citizens, would vociferously oppose that amendment precisely because it threatened to undermine important features of our constitutional order—including, if the ball landed on 14, the rule in *Brown*. But if that's true, then *Brown* doesn't really stand on its own bottom; it stands on the Fourteenth Amendment instead.

On the other hand, maybe a certain *reading* of the Fourteenth Amendment—one that yields *Brown* as a consequence—stands on *its* own bottom. Maybe people are committed to that reading independently, and not as an inference from other sources like the Amendment's text and history. But as in the Etruscan example, that claim is hard to distinguish from an alternative interpretation of our practices, namely that most people today believe (with some justification) that the original Amendment requires equality, and that equality naturally and obviously requires *Brown*.<sup>152</sup>

Moreover, the independent-reading claim is subject to doubt. Everyone seems to agree with Michael Dorf that when linguistic changes are entirely obvious—when “domestic Violence”<sup>153</sup> changes its meaning from rebellion to abuse—that “common sense” will prevent us from “adopting wacky interpretations” based on modern meanings.<sup>154</sup> Yet if we somehow learned that

150 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

151 *See Black*, *supra* note 34, at 423–24.

152 *Cf. id.* at 424, 428 (expressing this view).

153 U.S. CONST. art. IV, § 4.

154 Dorf, *supra* note 21, at 2044.

the original meaning of “equal protection of the laws” was *so* different from its current meaning as to be comparable to “domestic Violence”—rendering any comparison to modern notions no less “wacky”—then the common insistence on a particular interpretation might be less persuasive than we thought.

The general structure of our constitutional practices leans against the idea that *Brown*, or any other accepted constitutional landmark, effectively stands on its own bottom. As a decision of the Supreme Court, *Brown* can in theory—a theory that most everyone accepts—be overturned by another decision of that Court. The Court has never suggested that it lacks the power to overturn *Brown*, or *Marbury*, or any other of its decisions; just that it lacks good reason to. That’s why McConnell described *Brown* as having insuperable *moral* authority, not insuperable *legal* authority. Similarly, everyone understands that Congress can repeal Social Security, or the income tax, or the requirement of single-member House districts. All these things might be entirely safe right now, both in practical terms and on the originalist account. But the very fact that one can even entertain the possibility of repeal shows that the most accepted features of our current practice still might not serve as their own legal justifications.

### III. RECONCILING THEORY WITH PRACTICE

The previous Part outlines a first-cut answer to the jurisprudential objection. A constitutional theory—originalist, progressive, or what have you—that’s routinely violated in day-to-day practice might still be “our law,” if it’s also supported by higher-order practices of accepting and defending legal principles that make the theory true.

Yet that’s a big “if.” Whether originalism, say, is part of our law depends on whether this is actually the case. As mentioned above, this Article doesn’t try to prove, once and for all, whether originalists can successfully make that claim. Instead, this Part merely suggests some reasons why the issue might be closer than many nonoriginalists think.

#### A. *The Case Against*

At first glance, the originalist’s task seems rather daunting. The higher-order practices on which originalism might rely have to be *our* practices: in Hart’s words, they have to be “actually accepted and employed in the general operation of the system,” with respect to the way in which we “identify what is to count as law” and “the general acceptance of or acquiescence in these identifications.”<sup>155</sup> Everyone knows that jaywalking is illegal; the higher-order practices are unambiguous, even if lower-order practice goes the other way. But the objection to originalism, or to any other out-of-power theory, is that we *don’t* have any clear practice of accepting it, and so we can’t claim for it the same kind of higher-order sanction. If, for example, courts openly and

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155 HART, *supra* note 43, at 108.

routinely engage in nonoriginalist reasoning, then it’s hard to argue that originalism is “doing what we say,” especially when it also isn’t “doing what we do.” A game like baseball, no less than a legal system, can survive occasional departures from the rules; but, says Hart, “if these aberrations are frequent, or if the scorer repudiates the scoring rule, there must come a point when either the players no longer accept the scorer’s aberrant rulings or, if they do, the game has changed.”<sup>156</sup>

Many people argue that the game has indeed changed. Fallon suggests that there are simply “too many strands of nonoriginalist decisionmaking [that] are too deeply entrenched in our existing constitutional practice.”<sup>157</sup> A theory that “dismiss[es] them as mere mistakes” is not “an ‘interpretation’ of existing practice,” but rather “a reform proposal.”<sup>158</sup> Likewise, Greenawalt notes that “[i]f judges have engaged in non-originalist decisions” of which “most citizens approve,” then “it can hardly be said that originalism is a central aspect of the constitutionalism that is now agreed upon.”<sup>159</sup> To make a claim to being our law, originalists would have to show that these everyday practices of courts and lawyers are mistaken.

### B. *The Example of Stare Decisis*

Given the above, it seems like originalists have an uphill battle before them. Yet this Article’s analysis of global error suggests that, notwithstanding the breadth of nonoriginalist practice, there are still arguments that originalists can make. This Section considers some of those arguments in the context of stare decisis—one of our more entrenched legal doctrines and one that often leads, in practice, to nonoriginalist results. If originalists can make headway here, then perhaps they can also find a broader foothold in our higher-order legal practices.

Many commentators describe the use of precedent and the doctrine of stare decisis as the most compelling evidence against originalism. Matthew Steilen, for example, describes the American system as having “a shared official practice of regarding judicial precedent as authoritative,” something that’s hard for anyone who reads case reports or legal briefs to deny.<sup>160</sup> Indeed, as Henry Monaghan points out, “[a]rguments from precedent” may actually “play a far more salient role” in official practice than arguments from the text.<sup>161</sup> And Fallon concludes from our “current practices of law and

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156 *Id.* at 144.

157 Fallon, *supra* note 42, at 1144.

158 *Id.*

159 Kent Greenawalt, *Constitutional and Statutory Interpretation*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 268, 301 (Jules Coleman & Scott Shapiro eds., 2002).

160 Matthew Steilen, *Reason, the Common Law, and the Living Constitution*, 17 *LEGAL THEORY* 279, 285 (2011).

161 Monaghan, *supra* note 17, at 793.

adjudication” that “nonoriginalist precedent” is clearly “valid and binding law” in the United States today.<sup>162</sup>

What might an originalist say in response? Without pretending to settle the question, it’s enough to point out that there are a number of arguments on the table. For one thing, it isn’t immediately apparent that the courts’ practice of citing and relying on precedent actually does real work. As Randy Kozel points out, many of those citations may simply be “exercis[e] in stage setting.”<sup>163</sup> Given the rhetorical pressure on judges to conform to the legal status quo, whatever that might be, precedents are often used as window-dressing, “to suggest that the subsequent court’s ruling represents an unremarkable application of established principles.”<sup>164</sup>

Even where the citations make a difference, the invocation of nonoriginalist precedent doesn’t signal a rejection of originalism. Although some have argued otherwise,<sup>165</sup> stare decisis can change how courts decide constitutional cases without trumping the Constitution’s original meaning. Maybe stare decisis is itself commanded by a proper reading of Article III.<sup>166</sup> Maybe it’s supportable on the same grounds that favor originalist approaches.<sup>167</sup> Or maybe it’s just a separate legal rule governing judicial decision making, one that operates on a separate track from the constitutional substance—the way procedural doctrines like laches, waiver, or preclusion bar substantive arguments that would otherwise be clear winners. Certainly the Court has described stare decisis as merely “a principle of policy,” and not as a replacement for the underlying law.<sup>168</sup> Otherwise it’d be impossible to understand familiar claims like the one in *Lawrence v. Texas*<sup>169</sup>—that *Bowers v. Hardwick*<sup>170</sup> “was not correct when it was decided”

162 Fallon, *supra* note 42, at 1122–23.

163 Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1851 (2013).

164 *Id.*

165 See, e.g., Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1077 (2010) (“If the Court’s precedents can sometimes lawfully prevail over what the Constitution would otherwise demand, it must be because practice and precedent have settled that Supreme Court decisions become part of the fabric of constitutional law. In other words, practice and precedent have settled that Supreme Court precedent is a constituent element of constitutional meaning . . . .” (footnote omitted)).

166 See, e.g., *Anastasoff v. United States*, 223 F.3d 898, 900 (8th Cir. 2000), *vacated en banc as moot*, 235 F.3d 1054 (8th Cir. 2000).

167 See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1441–42 (2007) (“A theory of stare decisis that takes into account the majoritarian commitment of popular sovereignty may justify upholding an erroneous precedent, depending on the costs imposed on the majoritarian political process.”).

168 *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

169 539 U.S. 558 (2003).

170 478 U.S. 186 (1986).

and “is not correct today,”<sup>171</sup> even though during that period it was fully “authoritative” as a precedent.<sup>172</sup>

More fundamentally, to see whether precedent can compete at the level of higher-order practices, we might ask *why* courts and lawyers see it as authoritative. Is it *Marbury v. Madison*,<sup>173</sup> or Article III? Is it the various political benefits of stability, as the Court said in *Payne v. Tennessee*?<sup>174</sup> Or is it also a brute fact of conventional acceptance, in the same way that we accept that the Constitution is law? If so, then why does it seem to matter so much that this practice has a pedigree—that “the Justices *long* have viewed it as permissible and sometimes obligatory,”<sup>175</sup> that precedent has featured in “our constitutional practice almost from the beginning,”<sup>176</sup> that “founding-era commentators generally presupposed that constitutional precedents would be treated as authoritative”?<sup>177</sup> If we aren’t deriving it from other, higher-order conventions involving tradition or Founding-era practice—conventions that might, in the end, be entirely consistent with originalism—then why should any of that matter?

Or, to put the same question another way, what kind of information could we discover that would undermine our certainty about *stare decisis*? Would we feel differently about the doctrine if it turned out to be largely a modern invention, and if prior generations used a very different concept of precedent than our own?<sup>178</sup> If we one day found that

[*Stare decisis*] began  
 In nineteen sixty-three  
 (Which was rather late for me)—  
 Between the end of the *Chatterley* ban  
 And the Beatles’ first LP

would that diminish our confidence in applying the doctrine today?<sup>179</sup> If precedent really rests on the brute fact of *current* conventional acceptance, the answer ought to be no. But if the answer is yes (as it may well be), then there might be more layers of higher-order practice to peel back, and more work needed to prove the precedent-based case against originalism.

171 *Lawrence*, 539 U.S. at 578.

172 *Id.* at 563.

173 5 U.S. (1 Cranch) 137 (1803).

174 501 U.S. 808, 827 (1991) (“*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”).

175 Fallon, *supra* note 42, at 1131 (emphasis added).

176 *Id.* at 1129.

177 *Id.* at 1129 n.81.

178 See generally Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

179 PHILIP LARKIN, *Annus Mirabilis*, in *HIGH WINDOWS* 34, 34 (1974).

### C. *The Case in Favor*

The departures from originalism by courts, officials, and lawyers (not to mention ordinary citizens) go far beyond merely respecting nonoriginalist precedent. But the waters are muddier than they might first appear. As Greenawalt recognizes, “[m]atters become somewhat more complicated if one thinks that courts consistently employ an originalist rhetoric that persuades citizens, who do not quite acknowledge that a number of decisions they like fail under originalist standards.”<sup>180</sup>

To know whether our higher-order practices are nonoriginalist, we need to look for legal principles that are publicly accepted and defended on nonoriginalist grounds. To use the language of adverse possession, the reasoning would not only have to be hostile to originalism, but also open and notorious, so as to put everyone on notice of the different justification. Yet even though Rappaport may be right that lots of “people are in jail in the U.S. . . . for violating laws that are inconsistent with the Constitution’s original meaning,”<sup>181</sup> it’s not obvious (to me, at least) that American officials have ever openly described themselves as violating that original meaning, as opposed to the Framers’ expected applications.<sup>182</sup>

In 1937, for example, Roosevelt didn’t argue that the New Deal’s more controversial measures were necessary modifications of an archaic Constitution, as some Progressives might have done a generation earlier.<sup>183</sup> Instead, he argued the precise opposite—that the Framers had “used broad and general language capable of meeting evolution and change,”<sup>184</sup> and that the conservative Court was unjustifiably trying “to *read* into the Constitution language which the framers refused to *write* into the Constitution.”<sup>185</sup> When the supposed advocate of constitutional change calls only for “a Supreme Court that will enforce the Constitution as written—that will refuse to amend the Constitution by the arbitrary exercise of judicial power—amendment by judicial say-so,”<sup>186</sup> it’s hard to claim that supporters of his agenda thereby accepted, in principle and from the internal point of view, a nonoriginalist vision of the law.<sup>187</sup>

180 Greenawalt, *supra* note 159, at 301 n.36.

181 Rappaport, *supra* note 51.

182 See generally Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 560 (2006) (distinguishing meaning and application).

183 See, e.g., WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 193–94 (1908).

184 Franklin Delano Roosevelt, President of the United States, Address on Constitution Day (Sept. 17, 1937), in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 363 (Samuel I. Rosenman ed., 1941).

185 *Id.* at 366.

186 Franklin Delano Roosevelt, President of the United States, A “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), in 1937 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 184, at 122, 126.

187 See BALKIN, *supra* note 16, at 87.

The same goes for the courts. Formally, the Supreme Court doesn't “assert [a] supremacy over the written Constitution,” but rather (and repeatedly) recognizes its “subordination” to the text.<sup>188</sup> Think of the standard examples of allegedly nonoriginalist precedents. When the Court in *Home Building & Loan Ass'n v. Blaisdell* significantly narrowed its understanding of the Contracts Clause,<sup>189</sup> it was careful to note that “grants of power . . . are not altered by emergency,”<sup>190</sup> and it portrayed its decision as merely “fill[ing] in the details” of a “general clause [ ],”<sup>191</sup> whose “prohibition is not an absolute one.”<sup>192</sup> In *Harper v. Virginia Board of Elections*, when the Court held poll taxes unconstitutional in state elections as well as federal ones,<sup>193</sup> it distinguished between the Equal Protection Clause's unchanging requirement of equal treatment, and the “[n]otions of what constitutes equal treatment” that “do change.”<sup>194</sup> Similarly, the Court explained the famous statement in *Brown v. Board of Education*, that “we cannot turn the clock back to 1868,”<sup>195</sup> by saying that “[w]e must consider public education in the light of its full development and its present place in American life”—determining whether these new facts meant that a consistent requirement of equal protection had been violated.<sup>196</sup>

Perhaps the Court has, in particular cases, openly abandoned or dismissed the constraint of fidelity to earlier constitutional understandings. But that certainly isn't a dominant strain in its public decision making. If anything, the Court seems to treat the original Constitution as at least a potentially overriding constraint in every case. And even if these occasional genuflections to the Founders are really just for show, the very fact that they're made may be a more important clue to the content of our law than the supposedly inconsistent results. In Will Baude's hypothetical, if all the judges in America were secretly members of the Illuminati, “ruling entirely for the benefit of their secret overlords and just pretending they were following the U.S. Code,” would the correct positivist story be that “the Illuminati instructions are the law because they describe the secret practice of the judges? Or would we say that the judges were engaged in a widespread conspiracy to subvert the law?”<sup>197</sup>

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188 AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 205 (2012).

189 290 U.S. 398 (1934) (construing U.S. CONST. art. I, § 10, cl. 1).

190 *Id.* at 425.

191 *Id.* at 426.

192 *Id.* at 428.

193 383 U.S. 663, 666 (1966); *cf.* U.S. CONST. amend. XXIV (addressing poll taxes in “any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress”).

194 *Harper*, 383 U.S. at 669.

195 347 U.S. 483, 492 (1954).

196 *Id.*

197 Will Baude, *Originalism, the Bear Principle, and the Reading of Entrails*, VOLOKH CONSPIRACY (Jan. 31, 2013, 1:01 PM) <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/01/31/originalism-the-bear-principle-and-the-reading-of-entrails/>.

The arguments above have been framed in negative ways, positioned against a claim that our higher-order practices are nonoriginalist. But there also are some affirmative indications that originalism has a claim on our legal understandings—if only a simplistic, even naïve, appeal. Fallon suggests, for example, in terms very similar to those used here, that within “our complex, multilayered constitutional practices,” there are “colorable (even if mistaken) arguments” for “second-order rules” supporting originalism.<sup>198</sup> “[E]xisting practice has an indisputable originalist strand, with many cases decided in accordance with the original understanding (or at least with a majority account of the original understanding).”<sup>199</sup> And the arguments for making our practice exclusively originalist “deserve to be taken seriously,” with potential support in “broadly shared tacit understandings” that arguments “for interpreting the Constitution to accord with the teachings of, say, Plato, Hobbes, or Lenin” would clearly lack.<sup>200</sup> This is far from a positive case for originalism; but it may be sufficient evidence that the jurisprudential objection is, at best, not proven.

#### IV. THE CONSTITUTION AND THEORIES OF HISTORY

Many people expect a constitutional theory not only to be a theory of the Constitution—that is, to provide a good account of the Constitution’s legal requirements—but also to include a theory of constitutional history. This latter theory, it’s argued, should not only account for where we are today, but be able to explain past developments and to help us stay consistent with future ones.

The previous Parts explained why accounting for where we are today is overrated. Achieving coherence with current constitutional practice might be nice, but it’s not a necessity; a legal theory can be right even if it finds virtually no application in present day-to-day legal practice.

This Part, in turn, targets the idea that theories should be compatible with the past and future as well. There are good reasons to believe, in general, that theories of constitutional history are doomed to failure. Because constitutional development is affected by so many other historical processes, a theory of constitutional history really requires a general theory of history, of the kind that many historians find implausible. Moreover, because no theory can guarantee its own continued adherence, the possibility of conflict between theory and practice will always be with us. Any particular theory that’s proposed either distorts the experience of the past, fails to impose meaningful requirements on the future, or leaves the gap between theory and practice in place.

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198 Fallon, *supra* note 42, at 1145.

199 *Id.* at 1143.

200 *Id.* at 1144.



A. *The Problem with Historical Theories*

Legal theories are supposed to explain things about *our* legal system. So it sounds plausible to say, as Strauss puts it, that a theory of the Constitution should be able to "explain the changes that have happened" in our constitutional system.<sup>201</sup> On closer examination, though, that requirement is actually impossible to satisfy, and constitutional theorists should stop trying.

In fact, it's hard to understand why anyone would think this kind of explanation possible, much less necessary. The basic problem is that "predictions are hard, especially about the future." It's no good to draw up an ad hoc historical theory that fits the dots of past events to a line. To avoid becoming a just-so story, that theory has to be connected to enduring features of the underlying phenomena. If it is, all else being equal, it ought to keep working into the future, and so offer useful predictions. But anyone who claims the ability to predict constitutional development, over any reasonable period of time, should abandon legal academia and play the stock market instead.

Among historians, for example, no serious scholar would nowadays propose an overarching theory to explain—much less predict—the course of world developments in any substantial detail. Human affairs are simply too complex for that; the regularities that have allowed for progress in the physical sciences are absent or obscured. As Isaiah Berlin put it, past "[a]ttempts to provide history with laws"—especially in the form of "all-embracing schemata"—have uniformly been failures. The "vast edifices of Hegel, Spengler, Toynbee and the like . . . turn out to be either too general, vague, and occasionally tautological to cast new light on anything in particular." And when any "specific findings of the formulae are tested by exact scholars in the relevant fields," they turn out to "yield implausible results."<sup>202</sup>

What's true of the grand sweep of world history also happens to be true, on a smaller scale, of American constitutional history. There are simply too many things going on for any one legal theory to be useful at explaining them. Imagine, as Balkin suggests,

that Fred Vinson had not died of a heart attack in September 1953, leading to Earl Warren's appointment as Chief Justice; that President Johnson had not attempted to make Abe Fortas Chief Justice in 1968, leading to scandal and Fortas's resignation; that President Reagan had nominated Robert Bork in 1986—when the Republicans still controlled the Senate—and Antonin Scalia in 1987; or that President George H.W. Bush had nominated a more conservative jurist than David Souter in 1990.<sup>203</sup>

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201 Strauss, *supra* note 1, at 976.

202 Sir Isaiah Berlin, *The Concept of Scientific History*, in *PHILOSOPHICAL ANALYSIS AND HISTORY* 5, 23 (William H. Dray ed., 1966); see also Daniel Little, *Philosophy of History*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 98, <http://plato.stanford.edu/archives/spr2014/entries/history/> ("[H]uman history, at virtually every scale, appears to embody a large degree of contingency and multiple pathways of development.").

203 Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1149 n.68 (2012).

Any of these contingencies would have produced serious divergences in our path-dependent constitutional development. But none of them can be explained by a legal theory—unless it accounts not only for precedent and original meaning, but also for heart attacks and financial scandals. And this list of contingencies is itself wildly underinclusive. Which political parties are ascendant or on the outs, which Presidents get elected or not, which judicial candidates are friends of which Senators, which fashions in legal education take root—all of these things affect the path of constitutional practice, and none of them could reasonably figure in a constitutional theory with any analytic force. Once we recognize, with Balkin and Sandy Levinson, “how much of constitutional change cannot be predicted in advance,” as well as “how little such change follows law-like regularities,”<sup>204</sup> it should become obvious that “explaining” constitutional development through legal theory is a fool’s game.

That’s not to say that there are no useful regularities in legal development. Prevailing ideas in law routinely respond to changes in American politics, economics, and society, and a good narrative history of American law will take pains to draw those connections. But unless one has a Grand Theory to explain *those* changes too, a legal theory merely identifying the connections between law and other fields just pushes the need for explanation back one step.

Besides the difficulty of explaining the past, there’s a further problem with attempts to build “a theory of constitutional interpretation that the actual system of constitutional law [can] be faithful to.”<sup>205</sup> When we ask for a theory that can “explain” constitutional developments, sometimes what we really want is a theory to *legitimate* those developments—to tell us why changes that are politically popular and durable are legally okay too. Throwing up one’s hands and saying “*que sera, sera*” won’t do, because that won’t confer the legitimation that is the point of the exercise. One of Griffin’s critiques of originalism is that the theory lacks any “persuasive explanation why concepts like the ‘living Constitution’ became conventional wisdom.”<sup>206</sup> Maybe the best theory of constitutional law simply rejects that conclusion, instead of trying to explain it; either way, we shouldn’t write off that possibility without further inquiry.

Whatever a constitutional theory provides, it won’t provide that absolutely *everything* we do is legally okay. And that means that no theory can guarantee its continued adherence in practice. If a constitutional theory says something meaningful—that is, if it contains anything more definite than the tautological “whatever’s currently accepted is the law”—then it has to be possible for day-to-day practice to diverge from the theory, should that meaningful condition turn out to be violated. But then the actual system of

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204 Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 *FORDHAM L. REV.* 489, 494 (2006).

205 BALKIN, *supra* note 16, at 93.

206 Griffin, *supra* note 37, at 1216–17.

constitutional law is no longer faithful to the theory, which was the whole point of building it.

Future generations may well be influenced by our constitutional understandings (think of path dependence, stable institutional interests, etc.). But ultimately they’re free to do whatever they’ll do, our parchment barriers notwithstanding. No matter what we say is constitutional or unconstitutional, they might come to disagree, for reasons and in ways that our theory might not accept as valid. In other words, it’s impossible to safeguard a meaningful constitutional theory against future obsolescence in practice, except on pain of making it vacuous today.

### B. *Three Examples*

To illustrate these general problems, this Section analyzes three of the best-known theories that seek to bridge the gap between constitutional theory and practice—Ackerman’s constitutional moments, Strauss’s common law constitutional interpretation, and Balkin’s living originalism. Although each proposes a framework for understanding American constitutional history, none of the three provides a fully satisfying account. And because none of these theories can control the future, each of them runs the risk that subsequent generations will disagree.

Perhaps your own favorite theory wouldn’t be liable to these problems, and so should have been included on the list. But the general reasoning of the previous Section makes it seem likely that any constitutional theory would encounter the same tragic choices. As a result, it may be more important for a theory to find consistency with our higher-order legal practices today, rather than to worry overmuch about our lower-order ones yesterday or tomorrow.

#### 1. Ackerman’s Constitutional Moments

Bruce Ackerman is one of the great system-builders of constitutional theory. He argues that we need a new constitutional understanding to reconcile theory with practice, and to understand what Americans “did, and did not, accomplish over *all* of our history”<sup>207</sup>—not just at the Founding or after the Civil War. At the same time, he seeks to vindicate a particular conception of self-government, a “dualist democracy” in which ordinary and constitutional politics are distinct.<sup>208</sup> Ackerman seeks to achieve these goals by redefining the “constitutional canon—the body of texts that conventional legal theory places at the very center of the legal culture’s self-understanding”<sup>209</sup>—to encompass “all the great legal texts generated by all the great acts of popular sovereignty in our history.”<sup>210</sup> These include, for example, not only “judicial

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207 Ackerman, *supra* note 28, at 1756.

208 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7 (1991).

209 Ackerman, *supra* note 28, at 1750.

210 *Id.* at 1802.

superprecedents”<sup>211</sup> but also “the landmark statutes of the 1960s,” which he views as “functionally equivalent to the constitutional amendments of the 1860s.”<sup>212</sup>

To identify these texts, Ackerman has outlined a five-phase process, which includes:

- (1) an “institutional signal,” in which a “major institution” such as the President or Supreme Court “adopts a movement-agenda in a way that compels sustained attention across the political spectrum”;<sup>213</sup>
- (2) a “proposal,” whereby “[t]he American people [a]re [put] on notice that their political representatives . . . [a]re proposing specific legal measures that would radically transform the Constitution as it [i]s then understood”;<sup>214</sup>
- (3) a “triggering election,” in which “ordinary voters get their first chance to pass judgment on the brave new initiatives undertaken in their name”;<sup>215</sup>
- (4) a period of “ratification,” in which “the partisans of the old regime” try (and fail) to undo the change;<sup>216</sup> and
- (5) a “consolidation” of those gains, in which “the law on the books . . . becom[es] a powerful reality throughout the land.”<sup>217</sup>

Ackerman argues not only that this process satisfies the demands of democratic theory, identifying texts “that express the will of a decisive majority of ordinary Americans at the polls,”<sup>218</sup> but also that—as a matter of historical fact—all of the “key constitutional transformations in American history have passed through [this] distinctive institutional dynamic.”<sup>219</sup> In other words, Ackerman expands the methods of constitutional change beyond those provided in Article V, but he avoids the charge of vacuity (and advances his political-theory goals) by imposing very specific and substantial requirements on what kind of changes those can be.

As it happens, Ackerman’s historical claim is a matter of substantial dispute.<sup>220</sup> As Strauss argues, “[m]any major constitutional developments did not emerge all at once” through identifiable “decisions by a politically engaged population”; instead, they crystallized “over time, often in fits and starts,”<sup>221</sup> and in a manner that looked very little like this orderly five-phase dynamic. For us to know which developments the five-step method does or

211 *Id.* at 1752.

212 *Id.* at 1761.

213 *Id.* at 1762.

214 *Id.* at 1770.

215 *Id.* at 1770–71.

216 *Id.* at 1778.

217 *Id.* at 1785.

218 *Id.* at 1763.

219 *Id.* at 1762.

220 See, e.g., Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 768–70, 785–92 (1992) (reviewing ACKERMAN, *supra* note 208).

221 David A. Strauss, *We the People, They the People, and the Puzzle of Democratic Constitutionalism*, 91 TEX. L. REV. 1969, 1977 (2013).

doesn't explain, moreover, we have to be able to attribute particularized decisions on specific issues "to a people who were no doubt divided on many issues, had multifarious concerns, and probably did not realize that they were engaged in a form of constitution making."<sup>222</sup> Given all of the historical contingencies discussed above, it would be remarkable if this dynamic were truly capable of explaining every significant shift in American constitutional understandings.

But a more serious problem is that Ackerman's theory is subject to a particularly biting version of the jurisprudential objection. To start with, Ackerman understands that "there is nothing inevitable about this process"; the Court might decide to disregard the law established by his five-phase dynamic, "instead choos[ing] to trivialize the recent past and mystify ancient wisdom."<sup>223</sup> If it did, and if "the People" let it do so, then Ackerman's constitution would go into exile; the five-phase dynamic has no permanent hold on our lower-order practices. However well or poorly a theory explains our *current* lower-order practices (which, again, is a matter of dispute), something designed to fit the existing data points might not be robust enough to explain what's about to happen next. (For example, a "theory" endorsing all and only those constitutional doctrines accepted by the courts in the year 2014 will explain our present practices better than anything else, but it might have some trouble in 2015.)

Even worse, Ackerman's theory has no particular connection to our higher-order practices either. Whether or not it's normatively defensible on political-theory grounds, Ackerman's theory also has to establish that it's consistent with our legal conventions. For instance, he writes that "[a]lmost everybody" in American law makes the mistake of "assuming that the formal text contains the *complete* constitutional canon."<sup>224</sup> That being the case, what is the theory of global error under which "[a]lmost everybody" is wrong about this? Some societies might already treat landmark statutes as having constitutional significance (Ackerman suggests France),<sup>225</sup> but others don't. Showing the five-phase dynamic to be more appropriate for democratic self-governance than other systems doesn't show that it's the law in the United States. And neither does the framework's alleged success at explaining past constitutional development; lots of things might causally explain past legal practice or currently accepted outcomes (economic incentives, political preferences, racial biases, path dependence, etc.) without being part of the law. If Ackerman sees his task as "interpret[ing] the American Constitution as it is, not as it ought to be,"<sup>226</sup> then we may need a far more expansive account of the conventional basis for constitutional moments.

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222 *Id.*

223 Ackerman, *supra* note 28, at 1812.

224 *Id.* at 1754–55.

225 *Id.* at 1761 n.73.

226 *Id.* at 1776.

## 2. Strauss's Common Law Constitutional Interpretation

A second approach to reconciling theory and practice has been attempted by David Strauss. Strauss argues that the United States has “a common law constitution[,] in the sense that the principal mechanism of change is the evolution of the law through the development of precedent.”<sup>227</sup> Rather than looking only to the text, Americans decide constitutional questions “on the basis of precedents, both judicial and non-judicial, combined with judgments of fairness and good policy—just as common law judges decide questions on those bases.”<sup>228</sup> The flexibility of a common law approach means that Strauss's theory can adapt easily to current practice, but the theory may actually explain less as a result.

Strauss suggests that American constitutional practices are now common law ones. While a court hearing a statutory case will “usually focus on the precise words of the statute,” in constitutional cases “the text routinely gets no attention.”<sup>229</sup> Instead, “[t]he issue is decided by reference to ‘doctrine’—an elaborate structure of precedents built up over time by the courts—and to considerations of morality and public policy.”<sup>230</sup> To the extent that text does enter the analysis, its requirements aren't exacting; any “plausible ordinary meaning of the text” will be acceptable in principle, so long as it's consistent with the evolution of the doctrine.<sup>231</sup> Strauss concludes that the common law system “*is* our system,” that it explains most of the development of American constitutional law over time, and that “it is generally accepted” today.<sup>232</sup>

Strauss also defends his theory on normative grounds. He describes the common law approach as “rooted in humility, a distrust of abstractions, and an appreciation for the complexity of constitutional issues.”<sup>233</sup> His model for common law decision making is the judgment of the New York Court of Appeals in *MacPherson v. Buick Motor Co.*<sup>234</sup> There, the court rejected the doctrine of privity of contract in product liability, based primarily on public policy considerations. But it did so only after “several decades' worth of decisions” had “demonstrated that the privity regime was no longer workable”; during that time, even the courts “purporting to apply the [old] regime . . . were, in fact, gravitating toward a new rule.”<sup>235</sup> Strauss emphasizes the slow, deliberate nature of common law evolution, undertaken with “due regard for the limitations of abstract reasoning and for the value of

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227 Strauss, *supra* note 1, at 977.

228 Strauss, *supra* note 221, at 1970.

229 DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 34 (2010).

230 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883 (1996).

231 *Id.* at 920; *see also id.* at 919–21.

232 David A. Strauss, *Legitimacy, “Constitutional Patriotism,” and the Common Law Constitution*, 126 HARV. L. REV. F. 50, 53–54 (2012).

233 STRAUSS, *supra* note 229, at 100.

234 111 N.E. 1050 (N.Y. 1916).

235 David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 854–56 (2007).

experience."<sup>236</sup> He goes on to explore the political benefits of such a Burkean system; but much of his argument is historical, and he explains the development of a variety of areas of law—such as desegregation,<sup>237</sup> free speech,<sup>238</sup> and the jurisprudence of the Warren Court<sup>239</sup>—as generally following this same basic process.

Strauss's theory offers a remarkable synthesis of legal doctrine, historical experience, and political theory. Yet there are reasons to doubt whether it truly succeeds in providing an accurate account of American law. To include the cases Strauss cites, one either has to stretch the boundaries of the theory or smooth over the historical record. In the free speech context, for example, Strauss portrays the Court as slowly coming around to Justice Holmes's dissent in *Abrams v. United States*,<sup>240</sup> after finding that his approach "had broad cultural resonance and, ultimately, . . . seemed to work well."<sup>241</sup> But it's hard to assess whether a policy regime "seemed to work well" when it was primarily articulated in judicial dissents lacking the force of law. As Steilen argues, our modern First Amendment doctrine "was not formed in a Burkean fashion, by making modest adjustment to precedents whose efficacy had been demonstrated over time," but rather in "precisely the opposite" fashion—"based largely on ambitious theoretical arguments about the value of protecting free speech that were repeated in dissent by a handful of judges."<sup>242</sup>

To take another example, Balkin notes that the reapportionment cases seem, from a doctrinal perspective, "to come out of nowhere."<sup>243</sup> Strauss accepts that "[t]here was certainly no development of judicial precedent" prior to those decisions "paralleling the disintegration of the privity of contract rule" in *MacPherson*.<sup>244</sup> He argues, though, that the reapportionment cases do have a "common law-like justification," because "they carried out a development that extended back to the earliest days of the Republic: the inexorable, although not uninterrupted, expansion of the franchise."<sup>245</sup> Malapportionment, though blessed by prior case law, was "inconsistent with the premises of universal suffrage" and with the "repeated judgments of several generations, expressed through legislation and constitutional amendments, that restrictions on the franchise should be discarded in favor of political equality."<sup>246</sup> This explanation has little to do with the common law approach. There's no natural connection between apportionment and the

236 *Id.* at 859–60.

237 STRAUSS, *supra* note 229, at 77–92.

238 *Id.* at 51–76.

239 See generally Strauss, *supra* note 235 (describing the Warren Court's decisions as consistent with common law principles).

240 250 U.S. 616 (1919).

241 See STRAUSS, *supra* note 229, at 64.

242 Steilen, *supra* note 160, at 296.

243 Balkin, *supra* note 203, at 1151.

244 Strauss, *supra* note 235, at 875; see *supra* notes 233–35 and accompanying text.

245 Strauss, *supra* note 235, at 875–76.

246 *Id.* at 876–77 (footnote omitted).

franchise, except in light of abstract principles of democratic theory. And, in any case, extrapolating broad theoretical commitments from the march of history is hard to reconcile with a generally Burkean outlook.

Indeed, there may be plenty of major cases in American history that challenge Strauss's framework. *Erie Railroad Co. v. Tompkins*,<sup>247</sup> for example, worked a revolution in American jurisprudence; it drastically changed the handling of diversity cases and the relationship of federal and state courts, and likely had a greater effect on more litigants than, say, *New York Times Co. v. Sullivan*.<sup>248</sup> Yet rather than growing out of a body of existing case law, it was so much of a surprise to the parties and to the public that the possibility of overruling *Swift v. Tyson*<sup>249</sup> hadn't even been briefed.<sup>250</sup> Maybe *Erie* still qualifies as an example of the common law method, because it responded to general dissatisfaction with the *Swift* regime; but in that case everything qualifies, because the past is always with us. If a decision that contemporaries see as "a bolt from the blue"<sup>251</sup> counts as common law evolution, what would falsify the theory?

This points to a more general concern with Strauss's historical account: certain elements that he highlights in the common law system may be epiphenomenal. If the Court talks more about precedent in constitutional cases than in statutory ones, is that because it views the constitutional text as less important or binding? Or is it because there's no litigation when the text is clear (each state gets two Senators) and because, when the text is unclear (say, as to "discrimination, fundamental rights, and freedom of expression"<sup>252</sup>), frequent litigation means that there's lots of water under the bridge? In thoroughly litigated statutory arenas, like Title VII or the Administrative Procedure Act, the Court might also talk more about precedent than text—not because we have a common law U.S. Code, so to speak, but just because there are plenty of past decisions that are more likely than the text to provide us with specific guidance in the case at hand.

In fact, one could tell a story whereby the entire process of "common law" evolution has nothing to do with the common law. Appellate courts, like corporate boards, are multimember bodies with staggered appointments and long tenures; they're *designed* to prevent rapid change, with the preferences of the crucial median member<sup>253</sup> shifting slowly over time. Add in one-case-at-a-time decision making, written opinions, and rhetorical benefits to preserving the appearance of continuity, and you'll end up with an histori-

247 304 U.S. 64 (1938).

248 376 U.S. 254 (1964).

249 41 U.S. (16 Pet.) 1 (1842).

250 See Suzanna Sherry, *Wrong, Out of Step, and Pernicious: Erie as the Worst Decision of All Time*, 39 PEPP. L. REV. 129, 147–49 (2011).

251 Walter Wheeler Cook, *The Federal Courts and the Conflict of Laws*, 36 U. ILL. L. REV. 493, 493 (1942).

252 David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1726 (2003).

253 See Balkin, *supra* note 203, at 1154.



cal pattern resembling Strauss’s common law model—even if every Justice simply pursues his or her own personal preferences and *none* of them actually engages in common law reasoning. The Court won’t be able to move very quickly, because the median Justice won’t be ready to go that far; there will be plenty of intermediate decisions, creating multiple lines of precedent as the Court’s composition changes over time; and there will be plenty of past cases to cite when making a change, whether as authorities in partial support or as bad examples to be avoided. But this kind of common law evolution is a mirage, because no one actually accepts it from the internal point of view.

Strauss’s claim that the Court slowly learns from experience may also be uncertain. Strauss argues that the Court adopted prophylactic rules in *Miranda v. Arizona*<sup>254</sup> “not just” because “the Court thought they were a good idea,” but primarily because “experience with the old approach” of case-by-case inquiry “showed that that approach was unsound” and that “[t]he Court had to choose something to replace it.”<sup>255</sup> Whether a prior approach is unsound is primarily in the eye of the beholder; there may be no real distinction between regarding the existing regime as unsound and finding a new regime to be a better idea. The phrase “lessons of experience” conveys an impression of objectivity, but that impression is misleading. And as Balkin points out, when an old regime is said to be “unworkable,” that may have been because individual judges deliberately “sought to undermine” the rules, “leading to a self-fulfilling prophecy” of their demise.<sup>256</sup>

The point of these objections isn’t to nitpick, but to identify a divergence between the external features Strauss highlights in his account of common law evolution (slow, deliberate change; numerous intermediate precedents; etc.) and the nature of the internal decision-making structure that may, but need not, go along with it. Because the former can exist without the latter, we could imagine the system retaining the outer trappings of the common law long after its distinctive process of deliberation has disappeared. Nothing guarantees that common law reasoning, applied correctly, will actually find expression in practice. To the extent that the common law method is really a method, in the sense of providing determinate legal constraints on decision making, it could easily find itself in exile. (Maybe, given the Court’s sometimes cavalier treatment of doctrinal analysis, it already is.)

And even if it’s obeyed in practice, Strauss’s theory faces the same jurisprudential objection already leveled at Ackerman.<sup>257</sup> Strauss repeatedly notes that the common law is “an ancient source of law,”<sup>258</sup> that it “antedates the Constitution itself by several centuries,”<sup>259</sup> and that it was “central to the

254 384 U.S. 436 (1966).

255 Strauss, *supra* note 235, at 872.

256 Balkin, *supra* note 203, at 1146.

257 See *supra* subsection IV.B.1.

258 STRAUSS, *supra* note 229, at 3.

259 *Id.*

American legal system from the start.”<sup>260</sup> Perhaps the common law hasn’t always resembled the system we have today.<sup>261</sup> But either way, why insist on the common law’s antiquity? If our constitutional practices today are so clearly based in precedent and common law reasoning, why isn’t current practice enough?

One potential answer, of course, is that current practice isn’t entirely comfortable with the notion of a common law constitution. Strauss accepts, as he must, that the text has a privileged place in American law; it can’t be overruled or set aside the way a precedent can.<sup>262</sup> He justifies this fact with reference to his theory of “focal point[s],” that an agreed-on text helps settle issues that are better settled than settled right.<sup>263</sup> But even if the text can be defended as a “focal point,”<sup>264</sup> that doesn’t mean that our system currently treats it as nothing but a focal point, or that we ourselves conceive of its role in that way. As Balkin points out, “precedents are focal points too.”<sup>265</sup> Strauss argues that our “escape[ ]” from the text happened “unselfconsciously,”<sup>266</sup> and that our system, “without our fully realizing it . . . has become a common law system” instead.<sup>267</sup> This suggests that the common law constitution is a recent development rather than an antique practice, and moreover one that we haven’t yet publicly accepted as part of our own understanding of our law.

Indeed, Strauss recognizes that in our system “[c]onstitutional law is supposed to consist in the interpretation of a written text.”<sup>268</sup> One reason why

260 Strauss, *supra* note 1, at 977; *see also* STRAUSS, *supra* note 229, at 123 (“Madison—a principal author of the text of the Constitution—was also a proponent of the living Constitution.”).

261 *See* Morton J. Horowitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism*, 107 HARV. L. REV. 30, 44 (1993) (“[D]uring most of the constitutional struggles of the seventeenth century, the theory of the common law remained overwhelming[ly] static. Although a movement began to introduce the idea of change into the common law, by the end of the nineteenth century, a static theory has become dominant once more.” (footnote omitted)). *Compare, e.g.*, STRAUSS, *supra* note 229, at 40 (arguing that “[f]or the most part, there are no clear, definitive rules in a common law system”), with 1 WILLIAM BLACKSTONE, COMMENTARIES \*70–71 (describing a particular rule of escheat as “a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath”).

262 *See* Strauss, *supra* note 232, at 50.

263 *See id.* at 51.

264 *Id.*

265 BALKIN, *supra* note 16, at 53; *see also id.* (“[T]he focal-point theory does not really explain why courts cannot change the hard-wired rules of the Constitution through common law adjudication.”); Siegel, *supra* note 16, at 947 (“Precedents may serve the same focal-point function that Strauss attributes to the text. . . . A common law approach seems unable to make sufficient sense of the special importance of the text in constitutional practice.”).

266 *See* STRAUSS, *supra* note 229, at 3.

267 *Id.*

268 *See id.* at 29.

“[t]he common law method has not gained currency” is that “it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind.”<sup>269</sup> Rather, we typically “divide[ ]” “legal reasoning . . . into common law reasoning by precedent on the one hand, and the interpretation of authoritative texts on the other,” with the “latter” category including both “[c]onstitutional and statutory interpretation.”<sup>270</sup> As a result, “[a]n air of illegitimacy surrounds any alleged departure from the text or the original understandings.”<sup>271</sup> In American law, “the terms of debate . . . continue to be set by the view[s] that principles of constitutional law must ultimately be traced to the text . . . and . . . that when the text is unclear the original understandings must control.”<sup>272</sup> The Court has traditionally paid at least lip service to the text; as it worked out principles of free speech, for instance, “those principles were attributed”—even if erroneously—“to the original understandings.”<sup>273</sup>

All this being the case, why should we accept the common law constitution as an accurate depiction of our law? Even if it’s accurate at the level of lower-order practice, so are many things that aren’t the law. And if it’s soundly contrary to our higher-order practices, we have an excellent reason to reject it. If Strauss thinks that the text-focused conventional wisdom is a global error,<sup>274</sup> we need to know how that error came about, and why we should think that the conventional answers are not, in fact, the right ones.

### 3. Balkin’s Living Originalism

Balkin’s *Living Originalism* tries to split the difference between formal rules and ordinary practice, joining together a highly ordered interpretive theory with a highly contingent theory of constitutional change. In the abstract, Balkin advances a largely orthodox version of originalism, emphasizing the way in which “original meaning” can differ from “original expected application.”<sup>275</sup> To Balkin, when the Constitution “states a determinate rule, we [follow] the rule”; when “it states a standard” or principle, we follow the standard or principle, applying each in turn to facts about the world and using the same level of generality as was chosen in the text.<sup>276</sup>

What makes Balkin’s theory unusual is its approach to practice. Balkin denies that original meaning is actually inconsistent with current practice—even lower-order practice—“once we understand . . . [the] distinction between original meaning and original expected application.”<sup>277</sup> For exam-

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269 Strauss, *supra* note 230, at 885.

270 *Id.* at 889.

271 *Id.* at 878.

272 *Id.*

273 See STRAUSS, *supra* note 229, at 62.

274 See *supra* notes 227–42 and accompanying text.

275 BALKIN, *supra* note 16, at 49; see also Green, *supra* note 182 (discussing meaning and application through the lens of the sense-reference distinction).

276 BALKIN, *supra* note 16, at 14.

277 *Id.* at 49.

ple, he argues that the word “commerce” “had a broader meaning in 1787 than it does today,”<sup>278</sup> enabling “Congress to regulate problems or activities that produce spillover effects between states or generate collective action problems that concern more than one state.”<sup>279</sup> The twentieth-century expansion of federal power over the “economy and society” was perfectly constitutional, and so there’s no conflict to be resolved.<sup>280</sup> Balkin also contends that the vague or ambiguous provisions of the Constitution (of which there are many) may be supplemented in practice by constitutional “constructions,” whereby a society effectuates its best readings of these capacious provisions in different ways over time.<sup>281</sup> Because Balkin argues for unusually flexible readings of individual provisions, going against the grain of much previous originalist scholarship, he concludes that actual deviations from the “hardwired features of the constitutional text” are “really quite exceptional, and, I think, quite wrong.”<sup>282</sup>

This flexibility lets Balkin advance a broader theory of how constitutional interpretation responds to social movements. Balkin argues that the main “constraint[s]” on judicial decision making are not the interpretive approaches of judges, but the “institutional factors [that] limit who can become a judge” and that “influence the professional and constitutional culture in which judges” operate.<sup>283</sup> That culture, in turn, is formed by “a variety of competing civil society institutions, organs of public opinion, NGOs, political parties, political and social movements, interest groups, and positions of authority and power staffed by particular individuals and groups,” including “[l]egal professionals” who “want to be thought reasonable.”<sup>284</sup> (Not to mention such contingent factors as “election results, the political demands facing presidents, the composition of the Senate, the qualified and confirmable candidates available to Presidents at the time of appointment,” and so on.)<sup>285</sup> The constitutional law that emerges from these contingencies, though more-or-less responsive to popular opinion over time, is “a crazy quilt of practices and constructions from different eras.”<sup>286</sup> Yet it remains consistent with original meaning, because the original meaning itself happens to be so capacious.

If it succeeded, Balkin’s approach really would eliminate discrepancies between theory and practice, and really would enable a constitutional theory “that the actual system of constitutional law [can] . . . be faithful to.”<sup>287</sup> But its success is far more contingent than Balkin’s work suggests. If the text says

278 *Id.* at 37.

279 *Id.* at 140.

280 *See id.* at 140–41.

281 *Id.* at 327.

282 *Id.*

283 Balkin, *supra* note 203, at 1131.

284 *Id.* at 1143–44.

285 *Id.* at 1149.

286 *Id.* at 1136; *accord id.* at 1134.

287 BALKIN, *supra* note 16, at 93.

anything meaningful, then at least *some* outcomes sought by social movements will be inconsistent with the original meaning.<sup>288</sup> (And the social movements might not know this, or care.)<sup>289</sup> Balkin accepts that "constructions" other than "the most faithful [ones]" might come to be widely supported,<sup>290</sup> and that interpretations which violate original meanings might sometimes become ascendant.<sup>291</sup> He merely thinks that outcome unlikely, given the broad scope of the Constitution's provisions.<sup>292</sup>

Yet there are at least two reasons for doubt. First, Balkin concedes that his flexible readings might be true or false based on the history; "with respect to any particular clause [he] can be proven wrong given sufficient evidence to the contrary."<sup>293</sup> This means that everything hinges on, for example, the accuracy of Balkin's historical claims regarding the meaning of the word "commerce." If he's wrong,<sup>294</sup> then there might really be widespread contradictions between theory and practice, and he'd need to decide whether to abandon originalism in favor of some other theory more "adequate to our history as a people."<sup>295</sup> Second, even if all Balkin's claims about theory and practice are right today, he may be wrong about whether theory and practice diverged in the past. For example, the pre-New Deal reading of "commerce" may not have been, as Balkin claims, just "a *constitutional construction* . . . [designed] to maintain an underlying structural principle" of balance between the states and the federal government.<sup>296</sup> Maybe it was really a constitutional *interpretation* of the word, and one that (on his account) almost everyone happened to be wrong about. Indeed, one could imagine a 1937-era bizarro-world Balkin penning critiques of the New Deal Court on the ground that the *limitation* of federal power was one of "the best features of the American constitutional tradition,"<sup>297</sup> and that no theory treating it as an "unfortunate blunder . . . [could] be adequate to our history as a people."<sup>298</sup>

Either way, Balkin can't simply avoid the tension between theory and practice by denying that it exists. His theory is just as vulnerable to the jurisprudential objection as everyone else's. And if nobody's theory can truly guarantee correspondence between theory and practice, then maybe guaranteeing correspondence between theory and practice isn't all that important a goal.

288 Dorf, *supra* note 21, at 2042–43 (citing Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 392–93 (2007)).

289 See Siegel, *supra* note 16, at 937–38.

290 Jack M. Balkin, *Nine Perspectives on Living Originalism*, 2012 U. ILL. L. REV. 815, 843.

291 Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 JERUSALEM REV. LEGAL STUD. 57, 63 n.19 (2013).

292 See *supra* notes 281–82 and accompanying text.

293 Balkin, *supra* note 291, at 72.

294 See Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce,"* 2012 U. ILL. L. REV. 623, 623–25 (arguing that Balkin's argument is incorrect).

295 BALKIN, *supra* note 16, at 10.

296 *Id.* at 153–54.

297 *Id.* at 90.

298 *Id.* at 10.

## CONCLUSION

Day-to-day constitutional practice changes all the time. Does constitutional theory have to change too? Many scholars answer “yes,” and not without reason. Law is a social construct, and legal theorists are trying to describe a particular kind of social practice. If the practice changes, then the theories ought to keep up, or they aren’t very good theories anymore.

But as this Article hopefully makes clear, there’s also something that this practice-centered view leaves out. Social practices are complicated things, and they can’t just be reduced to what we do “on the ground.” *Why* we engage in particular actions or adopt particular views, or *how* we typically defend those choices as faithful participants in a system of rules, are important aspects of our social practices too. They give us a “leg on which to stand”<sup>299</sup>—a way to hold society accountable to its own legal principles and commitments.

In this context, the “Constitution in Exile” label is a powerful pejorative. It carries an air of make-believe, as if the critics it addresses were busy drafting constitutions for Fairyland or Oz. Yet “exile” is a real—even vital—possibility for constitutions. Imagine, for a moment, what the world would be like if there could be no thoroughgoing criticism of official legal practice. Would *Dred Scott* or *Plessy* have been correct on the day they were decided? Would *Bowers* and *Lawrence* each have been right in their season? Would the dissenters in all of those cases simply have been wrong on the law?

The real point of a constitutional theory isn’t to explain day-to-day practice, but to *evaluate* it, based on standards and justifications that we already share. A theory without any connection to our practices may be useless; but so is a theory that simply rubber-stamps whatever practices come before it. A meaningful theory always runs the risk that we’ll stop adhering to it in practice, even as we continue to respect it in principle. In order to make a real difference—in order to be worthy of our respect—a theory has to be willing to spend a little time in exile.

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299 Fallon, *supra* note 42, at 1116.