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### Grounding Originalism

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## GROUNDING ORIGINALISM

*William Baude & Stephen E. Sachs*

**ABSTRACT**—How should we interpret the Constitution? The “positive turn” in legal scholarship treats constitutional interpretation, like the interpretation of statutes or contracts, as governed by legal rules grounded in actual practice. In our legal system, that practice requires a certain form of originalism: our system’s official story is that we follow the law of the Founding, plus all lawful changes made since.

Or so we’ve argued. Yet this answer produces its own set of questions. How can practice solve our problems, when there are so many theories of law, each giving practice a different role? Why look to an official story, when on-the-ground practice may be confused or divided—or may even make the story ring false? And why take originalism as the official story, when so many scholars and judges seem to reject it?

This Essay offers a response to each. To the extent that legal systems are features of particular societies, a useful theory will have to pay attention to actual social practice, including the aspects of legal practice we describe. This positive focus really can resolve a great many contentious legal disputes, as shared legal premises lead to conclusions that might surprise us or that ultimately establish one side in a dispute as correct. The most serious challenge to our view is the empirical one: whether originalism is or isn’t the official story of our law. Stripped of their jurisprudential confusion, though, the best competing accounts of our law seem to have far less supporting evidence than our own account. Focusing on social practice as it stands today turns out to direct our attention to the Founders and to the changes over time that their law has recognized.

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of Law, Northwestern University Pritzker School of Law, the Surrey Centre for Law & Philosophy, and UCLA School of Law. We are also grateful to Adam F. Griffin for excellent research assistance.

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### INTRODUCTION

“What makes a method of legal interpretation correct?”<sup>1</sup> The question is an urgent one. Americans disagree about their Constitution and about how to interpret it. But perhaps we can make forward progress if we first push the debate back a step or two. If people disagree about interpretation, and if they make earnest arguments on either side, maybe they can still reach agreement on something prior (and thus far neglected)<sup>2</sup>: what might make their

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<sup>1</sup> Mark Greenberg, Response, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 105 (2017).

<sup>2</sup> See Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 WM. & MARY L. REV. 1115, 1136 (2012) (decrying this neglect). One important exception is Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL’Y 497 (2018). For others, see Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325 (2018); Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535 (1999); and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

arguments *good* arguments? What would make an interpretive method correct?

Over the past several years, we've sought to articulate a view of American law that responds to this question, as well as to specific interpretive debates. That view contains three core claims.

1. Theories of legal interpretation ought to give more emphasis to questions of law.<sup>3</sup> Whatever a theory's conceptual elegance or normative attractions, it also matters whether that theory already reflects *our law* or is instead a call for *law reform*. What our law makes of a legal text is a legal question, and it deserves a legal answer. That answer depends in part on principles of abstract jurisprudence, which determine the law in general, and in part on particular rules of our legal system, which determine the effect of particular instruments (whether contracts, statutes, or constitutions). Those particular rules might be legally binding, even if they're not the best possible rules. So our deepest disputes about interpretive theory, just like our disputes about tax rates or drug policy, might turn out to have particular answers in our legal system, even if the best answers remain a matter of dispute.

2. As it turns out, the particular rules of our legal system happen to endorse a form of originalism.<sup>4</sup> Our law today incorporates our original law by reference. Officially, we treat the Constitution as a piece of enacted law that was adopted a long time ago; whatever law it made back then remains the law, subject to various *de jure* alterations or amendments made since.<sup>5</sup> And we identify modern law by way of this past law, the way a *nemo dat* rule identifies today's property holdings by way of yesterday's transfers: explaining how a legal rule enjoys good title today means explaining how it lawfully arose out of the government established at the Founding.<sup>6</sup> This "original-law originalism"<sup>7</sup> is broad and inclusive, in that it serves as a criterion for the rest of our constitutional law, "including of the validity of other methods of interpretation or decision."<sup>8</sup>

To be sure, government officials don't always satisfy this criterion, any more than ordinary citizens always comply with laws against murder or tax

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<sup>3</sup> See William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017). For a related view, see Mark Greenberg, *Principles of Legal Interpretation* 9, 17–20 (2016) (unpublished manuscript), <https://philosophy.ucla.edu/wp-content/uploads/2016/08/Principles-of-Legal-Interpretation-2016.pdf> [<https://perma.cc/LT75-NK4S>].

<sup>4</sup> We've also made analogous arguments about statutory interpretation, which we won't rehearse at length here. See Baude & Sachs, *supra* note 3, at 1097–1118, 1121–28.

<sup>5</sup> Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 849–52 (2015).

<sup>6</sup> *Id.* at 846–47.

<sup>7</sup> *Id.* at 874.

<sup>8</sup> William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2355 (2015).

evasion. But in conceding that—and in calling originalism the “official story” of the legal system<sup>9</sup>—we also don’t mean to portray it as a fable recited at judicial campfires and then ignored when the real work gets done. Rather, we think that our legal system reflects a deep commitment to our original law, publicly displayed in our legal practice. Indeed, originalism could aptly be called the “deep structure” of our constitutional law, present in our frequent practices of identifying, justifying, and debating the content of our law.<sup>10</sup>

3. The binding force of our original law has important consequences for the present day. *In principle*, the Founders’ law might have allowed for just about anything. It might have endorsed many different methods of interpretation or rules of legal change—from hyper-literal strict construction to the “equity of the statute,”<sup>11</sup> from Article V amendments to evolving bodies of customary law. But to claim that, *in fact*, our original law actually permits or requires any of these things is to make an empirical and falsifiable claim, one that has to be supported by historical evidence and not only by modern policy preferences. The original-law approach may be capacious in theory, but it’s “exacting in application.”<sup>12</sup>

If we’re right about these three claims, much else follows. As a theoretical matter, if the interpreter’s job is to ask what our law is (and to leave to others what it should be), then many of our interpretive and normative disputes are reframed. And as a practical matter, this understanding of American constitutional law might turn out to support or to undermine a wide variety of legal doctrines.<sup>13</sup>

But not everybody agrees we’re right. Indeed, not everybody agrees we’re even asking the right questions, or proceeding down the right track. Some scholars worry that we’ve overrun our foundations—arguing that our claims can’t be adjudicated until we first identify the proper theory of law, because “prominent theories of law have extremely different implications for legal interpretation.”<sup>14</sup> To others, our situation is even worse: we “achieve[]

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<sup>9</sup> Sachs, *supra* note 5, at 870.

<sup>10</sup> Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 27, 80 (Apr. 11, 2018) (unpublished manuscript), <http://ssrn.com/id=2940215> [<https://perma.cc/PC2D-TDWD>].

<sup>11</sup> See, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 995–96 (2001).

<sup>12</sup> William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2D 103, 104 (2016).

<sup>13</sup> See, e.g., *id.* at 107–08 (listing decisions whose legal pedigree is doubtful under original law originalism); Stephen E. Sachs, *Pennoyr Was Right*, 95 TEX. L. REV. 1249, 1252 (2017) (arguing, naturally, that *Pennoyr* was right). See generally William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1 (2017) (defending modern doctrines of state sovereign immunity).

<sup>14</sup> Greenberg, *supra* note 1, at 117–18.

an air of novelty and plausibility only because [we're] ambiguous, evasive, or downright inconsistent about some of the deepest questions about the nature of law," and *no* theory of law can save us.<sup>15</sup> Any turn to positive law, this argument goes, "puts judges and legal scholars right back where they have always been,"<sup>16</sup> making no forward progress in resolving our disagreements. And still others simply disagree with our reading of the evidence, finding it unconvincing that originalism is the official story of today's law.<sup>17</sup>

It's true that at least some of our claims involve theoretical assumptions about what law is and how it works. Thus far, we've generally worked from the conventional assumption that "what counts as law in any society is fundamentally a matter of social fact."<sup>18</sup> In our view, this positivist premise fits within an overlapping consensus among American legal scholars, largely centered on the theories of Professor H.L.A. Hart<sup>19</sup>—a consensus that appeals to the broadest possible audience without requiring too many controversial assumptions. (We also think it has the further virtue of being true.) But we haven't yet attempted to defend positivism writ large or to rest our theory on any particular version thereof.

We offer three arguments here that we hope will show that our theory is as grounded as it needs to be.<sup>20</sup> First, we argue that one can make real progress in legal interpretation by looking to legal practice, without first resolving many difficult jurisprudential questions. Second, we argue that this kind of positive focus can in fact resolve a great many contentious legal disputes. Rather than leaving legal disputants "where they have always been,"<sup>21</sup> our shared practice often reveals shared legal premises that lead to surprising results or that ultimately establish one side in a dispute as correct. Third, we argue that the most serious challenge to our view ought to be an empirical one: whether originalism is or isn't the official story of our law. Stripped of their jurisprudential confusions, the challenges to our empirical

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<sup>15</sup> Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1330, 1342 (2017).

<sup>16</sup> *Id.* at 1387.

<sup>17</sup> See *infra* Part III.

<sup>18</sup> Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 355, 356 (Jules Coleman ed., 2001).

<sup>19</sup> See H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012); see also *infra* Section II.A (describing Hart's theory); cf. Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1298 n.23 (2014) (describing "Hart's version of legal positivism" as "the most influential position in contemporary philosophy of law").

<sup>20</sup> We use the term "ground" for its colloquial meaning, rather than in any technical sense. See, e.g., Ricki Bliss & Kelly Trogdon, *Metaphysical Grounding*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2016), <https://plato.stanford.edu/archives/win2016/entries/grounding> [<https://perma.cc/S9DN-CN58>] (discussing the technical notion of grounding).

<sup>21</sup> Barzun, *supra* note 15, at 1387.

claims remain weak. Many lawyers might find themselves surprised to be committed to originalist premises, the way Molière’s M. Jourdain was amazed to discover that he had spent his whole life speaking prose. Yet competing accounts of the law prove to be even harder to swallow.

The result, we hope, is a straightforward grounding of originalism as our law—then and now.

## I. THEORY AND PRACTICE

Interpretive theory doesn’t live in a vacuum. To paraphrase Professor Mark Greenberg, “an account of legal interpretation” ought to be “responsible to a theory of law.”<sup>22</sup> Interpreting a legal text is just one part of how we identify the law in general. And identifying the law, in our view, means looking to actual legal practice.

The legal content of a particular text—its contribution to the legal system, to use Greenberg’s term<sup>23</sup>—can depend not only on its linguistic content but also on existing legal rules.<sup>24</sup> A statute creating a new criminal offense, for example, might be understood and interpreted according to a variety of special-purpose rules, such as the Dictionary Act,<sup>25</sup> the repeal-revival statute,<sup>26</sup> or the mens rea canon.<sup>27</sup> These legal rules can guide the interpretation of a legal text that “outranks” them: old statutes help determine the effect of new ones, and common law doctrines help determine the content of statutes.<sup>28</sup>

The same interpretive issues arise for constitutions, and the same kinds of rules can help solve them. Does an amendment repealing Prohibition abate pending bootlegging prosecutions? Unwritten legal rules tell us that the answer is yes.<sup>29</sup> And similar rules can tell us, for instance, the “burden of proof for constitutional questions,” “the authority of constitutional precedents,” and even which scraps of text form part of our authoritative constitutional document.<sup>30</sup> The *substance* of our interpretive rules may differ

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<sup>22</sup> Greenberg, *supra* note 3, at 9.

<sup>23</sup> Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217, 219 (Andrei Marmor & Scott Soames eds., 2011).

<sup>24</sup> See Baude & Sachs, *supra* note 3, at 1082.

<sup>25</sup> 1 U.S.C. § 1 (2012).

<sup>26</sup> *Id.* § 108.

<sup>27</sup> See, e.g., *Dean v. United States*, 556 U.S. 568, 574–75 (2009).

<sup>28</sup> See Baude & Sachs, *supra* note 3, at 1097–99.

<sup>29</sup> See *id.* at 1118–20 (discussing *United States v. Chambers*, 291 U.S. 217, 221–22 (1934)).

<sup>30</sup> *Id.* at 1120; see also John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375, 429–51 (2001) (arguing that the validity of the Fourteenth Amendment relies, in part, on the de facto government doctrine).

for statutes and for constitutions,<sup>31</sup> but they're the same *kinds* of rules, answering the same kinds of questions. Even if one accepts no other part of our project, we believe these claims are both useful and correct, supported by well-recognized features of modern law.

The most fundamental challenge to our project disputes the usefulness of even these claims. Greenberg, for example, agrees that “what makes a method of legal interpretation correct is that it accurately identifies the law.”<sup>32</sup> But he sees it as a mistake to analogize such methods too closely to particular legal standards like the mens rea canon, because the “answers to questions about legal interpretation depend,” in the final accounting, “on how the content of the law is determined at a more fundamental level than legal standards.”<sup>33</sup> The mens rea canon is only law because something *else* makes it so. Because intermediate standards like these play only “a subsidiary role in the full explanation of how the content of the law is determined,” focusing the interpretive inquiry on them “only pushes back a step the core question of how the more basic facts determine legal standards.”<sup>34</sup>

Yet pushing questions back a step can still be useful. If one wants to know how plants grow, it's often best to defer questions about fundamental determinants (like particle physics or quantum mechanics) and to work at the intermediate level of proteins and enzymes instead. That's because proteins and enzymes are the *means* by which the fundamental determinants go about determining things; learning about them tells us something that's useful to know, even when we're mistaken on the fundamentals. Scientists learned a great deal about macro-scale chemistry while working from incorrect beliefs about “phlogiston” and “dephlogisticated air,” and what they learned still proved relevant after the identification of oxygen.<sup>35</sup>

Likewise, theorists who disagree about deep theory might well make substantial progress in legal interpretation by working at the intermediate level of canons or common law rules. Many arguments over the role of legislative history in interpreting statutes have direct analogues to the use of extrinsic evidence in interpreting contracts.<sup>36</sup> It seems to be common ground

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<sup>31</sup> Cf. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (denying that the Constitution can “partake of the prolixity of a legal code”); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 565–66 (2003) (noting that different Founding-era rules of construction applied to different types of documents).

<sup>32</sup> Greenberg, *supra* note 1, at 106.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> See Leslie V. Woodcock, *Phlogiston Theory and Chemical Revolutions*, 30 BULL. FOR HIST. CHEM. 63, 64–65 (2005).

<sup>36</sup> See Baude & Sachs, *supra* note 3, at 1112–14.



that the latter question can be regulated by law;<sup>37</sup> so why shouldn't we investigate the former as a legal question, too, and see what, if anything, the legal system has to say about it? Without having solved jurisprudence, we can enjoy some degree of confidence that a new criminal statute will require *mens rea*, that it will be subject to defenses like duress or diplomatic immunity, and so on—whether or not individual members of the enacting Congress actually adverted to these issues, and whether or not the statutory text has any linguistic connection to these more detailed rules. The same goes for less obvious but still familiar aspects of our legal experience: say, that Congress is presumed (contrary to fact) to understand the entire *corpus juris*,<sup>38</sup> that legal texts can be meaningful even when their actual authors failed to agree,<sup>39</sup> and so on. We can have confidence that our legal system involves some degree of idealization in assessing communicative intent, without either rejecting strict intentionalism as a theory of meaning or having already established the fundamental determinants of law.<sup>40</sup> And if these aspects of interpretation appear to be law-governed, that gives us reason to ask whether yet broader issues—textualism and purposivism, originalism and common law constitutionalism, and so on—might be law-governed as well.

Now maybe all this confidence is misplaced. Greenberg argues that we can't bracket disagreements over the fundamentals, even temporarily: different theories of law could have "extremely different implications" for interpretation,<sup>41</sup> and one can't assume that "whatever contemporary lawyers do is, for that reason, correct."<sup>42</sup> Yet a good theory of law ought to generate most of the familiar aspects of the existing legal system, or else it ought to be especially plausible in explaining why those familiar aspects are wrong. All else being equal, a theory suggesting that arson is lawful but that sandwiches are felonies would be a dubious theory of American law.

Of course, legal claims often being defeasible, it's possible for these confident assumptions to be wrong. Maybe the arson statute actually lapsed long ago, due to a little-noticed sunset clause hiding someplace else in the code. In that case, the statute book might really declare that arson isn't a felony after all, and a good legal theory might tell us so. But this discovery

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<sup>37</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 213 (AM. LAW INST. 1981); *id.* § 213 cmt. a.

<sup>38</sup> See *Branch v. Smith*, 538 U.S. 254, 281 (2003) (opinion of Scalia, J.).

<sup>39</sup> Compare, e.g., Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 542 (2013) (holding such texts to be "gibberish"), with RESTATEMENT (SECOND) OF CONTRACTS §§ 20, 201 (AM. LAW INST. 1981) (occasionally giving them legal effect).

<sup>40</sup> *Contra* Greenberg, *supra* note 1, at 121.

<sup>41</sup> *Id.* at 117–19 (suggesting differences in "how much law of interpretation there is and [in] what it requires").

<sup>42</sup> *Id.* at 121.

would undermine our surface-level commitments about arson only because we already share a deeper commitment about the statute book, reflecting our legal system's hierarchical structure.<sup>43</sup> Subject to those kinds of qualifications, it seems hard to deny that doctrines like the repeal-revival rule or the mens rea canon are part of American law—and that the burden is on anyone who'd reject the application of similar doctrines to new legal texts. For the same reason, if originalism or common law constitutionalism offers the best account of our legal system's deep structure, that strikes us as a compelling argument in its favor.

Perhaps this is just another way of stating our positivist intuitions. The thing to be explained strikes us as a feature of our society, and so it seems fair to “[l]ook and see” what our society's practices actually are.<sup>44</sup> Indeed, one needn't be a positivist to see social practices as “crucial, even if they are not sufficient,” in determining the law.<sup>45</sup> In any case, if someone wants to argue that positivism is generally false, then they're hunting for bigger game than us. That American law reflects American legal practice, all else being equal, is an assumption we're willing to make. (That's why we see the surprising features of *our own* account as strikes against it, all else being equal, and thus as needing further explanation.)

We're also willing to make certain assumptions regarding the types of positivism that might support the project. In our own work, we've adopted the generally Hartian version of positivism,<sup>46</sup> described further below,<sup>47</sup> that strikes us as the focal point among American law professors (to the extent that they think about such theories at all).<sup>48</sup> It might turn out that the Hartian account is generally wrong and that some contrary positivist theory—say, that of Professor Joseph Raz or of Professor Scott Shapiro—is generally right.<sup>49</sup> That, too, is bigger game; and to the extent that those theories are truly general, capable of representing any positive legal system regardless of its content, then they ought to be no less mindful of the social commitments and interpretive practices we describe. (There could be Razian or Shapiroian versions of original-law originalism, the construction of which

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<sup>43</sup> See *infra* Part II.

<sup>44</sup> Leslie Green, *Introduction to HART*, *supra* note 19, at xlv.

<sup>45</sup> Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* 97, 116 (2016); see also Mikołaj Barczentewicz, *The Limits of Natural Law Originalism*, 93 *NOTRE DAME L. REV. ONLINE* 115, 124–25 (2018) (noting this argument by Pojanowski and Walsh).

<sup>46</sup> See Baude & Sachs, *supra* note 3, at 1116; see also HART, *supra* note 19 (setting forth this view).

<sup>47</sup> See *infra* Section II.A.

<sup>48</sup> See Greenberg, *supra* note 19, at 1298 n.23.

<sup>49</sup> Cf. Barzun, *supra* note 15, at 1361–80 (discussing the theories of Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295 (1985), and SCOTT J. SHAPIRO, *LEGALITY* (2011)).

we leave as an exercise for the reader.<sup>50</sup>) For present purposes, we're satisfied to show that our account of the law is generally consistent with the most-accepted theory of positivism. If we're right about the theory and right about the practice, then originalism is rather well-grounded indeed.

## II. THEORY

To some, using practice to resolve real-life legal disputes is a fool's errand. Positivism grounds law in social practice and consensus, and if people disagree, it seems that consensus has run short. According to Professor Richard Primus, an argument for originalism "cannot simply emerge from pointing to our present practices," for the simple reason that originalism "calls for those practices to change."<sup>51</sup> As he argues, "[i]t is *what the Court has been doing* that is our law, and a big part of what the Court has been doing is deciding cases . . . in ways that are not consistent with original meanings."<sup>52</sup> More emphatically, to Professor Charles Barzun, "no defender of *any* controversial theory of legal interpretation can appeal to Hartian positivism for support," for Hartian positivism requires a "consensus or near-consensus" to ground any claim about law.<sup>53</sup> On this objection, if the official story and official practice are at loggerheads, the story tells us nothing new or useful about the law.

This kind of criticism moves too fast. Positivism might ground law on social practice, but it doesn't *reduce* law to social practice. On Hart's own account, some legal rules might reflect practice directly, but the vast majority do so only indirectly, involving some degree of *inference* from practice-supported premises.<sup>54</sup> Individual results are derived from legal rules, which are derived, in turn, from yet more fundamental legal rules—terminating, on

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<sup>50</sup> For example, Raz's claim that social facts alone identify the "existence and content" of the law, *see* Raz, *supra* note 49, at 296, is in no way inconsistent with those social facts cross-referring us in certain ways to the law of the Founding, itself identified by yet more social facts. Barzun, improbably, denies this, on the ground that the Founders might have wished to incorporate moral principles in their law in a way that Raz's "sources thesis" forbids. *See* Barzun, *supra* note 15, at 1364–66; Raz, *supra* note 49, at 315–16. Yet if Raz were correct, and this incorporation were conceptually impossible, then the Founders necessarily failed in their efforts, and we'd have no difficulty incorporating the wholly source-based law that they did make. Different positivist theories might conceivably draw different legal conclusions from the empirical claims described below, *see infra* Part III, but we're not aware of any detailed argument to this effect. *Cf.* Barzun, *supra* note 15, at 1374 (suggesting that we and Shapiro "make more or less the same kind of argument"). In any case, though we've maintained that legal systems are relatively immune to conceptual arguments about the nature of *interpretation*, *see* Sachs, *supra* note 5, at 834, we don't maintain that they're immune to conceptual arguments about *their own* nature—*contra* Barzun, *supra* note 15, at 1365–66.

<sup>51</sup> Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 51 (2016).

<sup>52</sup> *Id.* at 51–52.

<sup>53</sup> Barzun, *supra* note 15, at 1354, 1357 (citing Greenberg, *supra* note 1, at 115).

<sup>54</sup> *See infra* text accompanying notes 70–73.

Hart's account, in an ultimate rule of recognition, the "complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."<sup>55</sup>

This hierarchical structure makes it possible for the correct ground-level legal rules to surprise us.<sup>56</sup> A legal system can tolerate frequent mistakes and departures from the law, conflicting claims of legal authority, and even universal misunderstandings of what the law happens to require.<sup>57</sup> As these consequences illustrate, so long as we share certain kinds of premises, a positivist approach can still reform our surface-level practices and resolve apparent disagreements. In the same way, originalism can be a correct *descriptive* account of our legal system, even if few people would currently describe our system that way.

#### A. Rules and Inferences

Grounding legal rules on legal practice doesn't rule out surprises. Legal reasoning is an inferential process that can lead us to surprising results. For example, a little time and patience with the statute books will reveal that it's unlawful to send by mail any fruit bats of the genus *Pteropus*;<sup>58</sup> that astronauts launching from Cape Canaveral may not sell each other unlabeled syrup mixtures or unbaled cotton;<sup>59</sup> and that there's a fifty-square-mile swath of Idaho in which one may commit felonies with impunity.<sup>60</sup> These can be valid rules in our legal system although few legal officials (let alone ordinary Americans) know about them or have specific practices along these lines.

At first glance, legal surprises like these might seem impossible. If law is "a set of socially grounded norms,"<sup>61</sup> then there can't be any legal norms of which society isn't aware. But that argument ignores the central importance of legal reasoning, which can take us from familiar premises to very surprising conclusions.

On Hart's view, social rules are more than "regularities" that an external observer might "record and predict."<sup>62</sup> They're things people "use," from the

<sup>55</sup> HART, *supra* note 19, at 110.

<sup>56</sup> See Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2256 (2014).

<sup>57</sup> See *infra* Sections II.B–D.

<sup>58</sup> See 18 U.S.C. § 1716D (2012) (cross-referencing 39 U.S.C. § 3015(a) (2012) (cross-referencing 18 U.S.C. § 42(a)(1) (2012))).

<sup>59</sup> See 18 U.S.C. §§ 7(6), 13(a) (2012); FLA. STAT. §§ 865.07–.08 (2018).

<sup>60</sup> See Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675, 677–78 (2005) (discussing U.S. CONST. amend. VI and 28 U.S.C. § 131 (2000)).

<sup>61</sup> Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 728 (2006).

<sup>62</sup> HART, *supra* note 19, at 89, 98.

“internal point of view,” as “standards for the appraisal of their own and others’ behaviour.”<sup>63</sup> A violation of the rules is not only criticized—using terms like “‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’”<sup>64</sup>—but this “deviation from the standard is generally accepted as a *good reason*” for the criticism.<sup>65</sup> As Barzun describes it, the distinction is between recognizing merely that “*as a rule*, men tend to take off their hats when entering church” and recognizing “*a rule that a man must bare his head in church.*”<sup>66</sup> Those adopting the internal point of view, Hart notes, often employ a “characteristic vocabulary,” the way “the expression ‘Out’ or ‘Goal’” is used in baseball or soccer: “the language of one assessing a situation by reference to rules which he in common with others acknowledges as appropriate for this purpose.”<sup>67</sup>

Some of these social rules also give rise to legal ones. Modern societies don’t limit themselves to primary rules of conduct, like “don’t steal” or “don’t murder.” They also have “secondary rules”—rules *about* rules, which set out how we recognize certain rules, change their contents, or authoritatively identify violations.<sup>68</sup> For example, a society might hold that any rule “found in a written document or carved on some public monument” is “a rule of the group[,] to be supported by the social pressure it exerts.”<sup>69</sup> Or we might recognize certain people as lawmakers or judges, with various powers to change or apply the law by enacting statutes or hearing cases. By combining primary and secondary rules, a society can generate the enormously complex hierarchy of norms found in any modern legal system.

So Hart’s legal rules depend on social practice, but in a complicated and indirect way. Legal rules ultimately derive from society’s ultimate “criteria for identifying the law”—a “complex, but normally concordant, practice of the courts, officials, and private persons.”<sup>70</sup> This rule-based practice is not only something external observers can see and predict; it’s also something people can accept and use from the internal perspective, along with the “characteristic vocabulary” that goes with it (e.g., “it is the law that . . .”).<sup>71</sup> While the “ultimate rule of recognition” is an ordinary social rule, existing

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<sup>63</sup> *Id.* at 98.

<sup>64</sup> *Id.* at 57.

<sup>65</sup> *Id.* at 55.

<sup>66</sup> Barzun, *supra* note 15, at 1344 (emphasis added and omitted) (citing HART, *supra* note 19, at 10, 56). *But cf.* Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015) (criticizing the internal/external distinction, on grounds we do not share).

<sup>67</sup> HART, *supra* note 19, at 102.

<sup>68</sup> *Id.* at 91–99.

<sup>69</sup> *Id.* at 94.

<sup>70</sup> *Id.* at 101, 110.

<sup>71</sup> *Id.* at 102.

only to the extent that it's actually accepted by actual people,<sup>72</sup> the legal rules it generates are not. These follow-on rules can exist so long as they are “valid given the system's criteria of validity,” whether or not they're generally accepted as standards in practice.<sup>73</sup>

To take a stark historical example, when Congress provided civil law for the Territory of Alaska, it did so through a massive feat of incorporation by reference, enacting “[t]hat the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States.”<sup>74</sup> Oregon law was apparently selected without regard to its substance; the relevant committee picked Oregon over Washington without making “any careful study of the laws [of] either,” but simply because Oregon's law seemed “in a more mature and satisfactory shape.”<sup>75</sup>

As a result, Alaska's law was clear in principle—it simply derived from Oregon law—but largely mysterious in application. The Attorney General soon reported to Congress that he had been unable to distribute statute books to territorial officials because of the “[d]ifficulty . . . in obtaining some of the necessary copies of these laws.”<sup>76</sup> Alaska's governor complained that the Attorney General wouldn't provide advice about which laws were “applicable” and “not in conflict” with federal law.<sup>77</sup> One of Alaska's new judges called the Organic Act “a stupendous piece of stupidity.”<sup>78</sup> And some lawyers even argued that juries had accidentally been made illegal, because Oregon law required jurors to be taxpayers, but Congress had not imposed taxes in Alaska.<sup>79</sup>

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<sup>72</sup> *Id.* at 110.

<sup>73</sup> *Id.*

<sup>74</sup> Alaska Organic Act, ch. 53, § 7, 23 Stat. 24, 25–26 (1884).

<sup>75</sup> The chairman of the relevant committee admitted that it had picked Oregon over Washington “[n]ot because the committee had made any careful study of the laws either of the state of Oregon or of the territory of Washington, but because it was supposed that the Oregon code was in a more mature and satisfactory shape.” ERNEST GRUENING, *THE STATE OF ALASKA* 52 (1954) (quoting 15 CONG. REC. 529 (1884) (statement of Sen. Benjamin Harrison)); *see also* 15 CONG. REC. 529 (1884) (noting that “Alaska has . . . already been attached to Oregon for some judicial purposes”).

<sup>76</sup> DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY-GENERAL OF THE UNITED STATES FOR THE YEAR 1884, at 15 (1884).

<sup>77</sup> § 7, 23 Stat. at 26; *see also* A.P. SWINEFORD, REPORT OF THE GOVERNOR OF ALASKA TO THE SECRETARY OF THE INTERIOR 16 (1885) (“[T]he compilation issued by the late Attorney-General shows the fact that that official is not empowered to decide upon the applicability of any law, and at the same time makes more manifest the difficulty of such decision. Indeed, it intensifies that difficulty by announcing the doubtful applicability even of some of the United States laws collated in the manual.”).

<sup>78</sup> *Myers v. Swineford*, 1 Alaska 10, 12 (1888).

<sup>79</sup> 32 CONG. REC. 1937–38 (1899) (statement of Sen. Thomas Henry Carter) (noting that “[t]he difficulty arises in a manner that Senators, without reflection, would not realize”); GRUENING, *supra* note 75, at 58. *But see* *Kie v. United States*, 27 F. 351, 357 (C.C.D. Or. 1886) (adapting Oregon's jury-

Of course, most law isn't made so haphazardly (thank goodness). Yet there's nothing unique about Alaska that makes these things possible. The simplest of secondary rules can generate unusual conclusions. If "whatever's carved on this public monument is law," we might discover new law whenever we dust off a previously overlooked carving. Or if "what the Queen in Parliament enacts is law,"<sup>80</sup> we might find out that it's illegal to attend Parliament in a suit of armor, because a statute to that effect was duly enacted and never repealed.<sup>81</sup> Law's emphasis on legal structure, on the official story of legal justification, means that its contents might often surprise us. That's why law can surprise one of two parties to a legal dispute, both of whom are represented by well-trained lawyers, by telling them that their conduct is not supported by deeper practice.

### B. Mistakes and Departures

By distinguishing secondary rules from primary rules, Hart's account can also tolerate a certain amount of de facto deviation from the law. Hart doesn't take law to be a mere summary of whatever members of the legal community do. Instead, the content of the law depends crucially on the *reasons* they cite for doing it. So it's perfectly coherent to say (as we have) that while originalism is the official story of our legal system, many individual cases may turn out to be wrongly decided under that standard.<sup>82</sup> The cases make claims to legal authority that sound in originalism, which is what matters for the official story—but "the fact that [they] invoke originalism doesn't show that their specific claims are right, any more than a man's waving a yardstick shows that he is tall."<sup>83</sup>

Some are tempted to say that if the individual cases "are inconsistent with the original meaning," then "[t]o that extent, originalism is not our

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qualification rules to Alaska); *see also* Endleman v. United States, 86 F. 456, 458 (9th Cir. 1898) (describing an apparent jury trial in Alaska).

<sup>80</sup> HART, *supra* note 19, at 120.

<sup>81</sup> A Statute Forbidding Bearing of Armour 1313, 7 Edw. 2 (Eng.), <http://www.legislation.gov.uk/aep/Edw2/7/0/section/wrapper1> [<https://perma.cc/NJ6W-AUHN>]; *see also* Louise Scrivens, *Changing the Flaws in London's Laws*, BBC NEWS (May 10, 2005, 05:24:05 GMT), [http://news.bbc.co.uk/2/hi/uk\\_news/england/london/4527223.stm](http://news.bbc.co.uk/2/hi/uk_news/england/london/4527223.stm) [<https://perma.cc/N2XN-H8UK>] ("A spokeswoman from the Crown Prosecution Service said she did not know of any of these archaic laws coming to court lately. . . . 'If anyone was caught in the Houses of Parliament wearing armour it would first be a matter for the police,' she added.").

<sup>82</sup> Baude & Sachs, *supra* note 12, at 108 (listing eleven possibilities, and suggesting that "more, or more controversial, cases [might] belong on that list").

<sup>83</sup> *Id.* at 104–05.

law.”<sup>84</sup> Hart’s account is different. While the “ultimate rule of recognition” is a social rule, existing only to the extent that it’s recognized in practice, intermediate legal rules—including those entailed by originalism—can be said to exist when they are “valid given the system’s criteria of validity,” even if they aren’t themselves generally accepted in practice.<sup>85</sup> The official story persists, though the officials charged with carrying it out are sometimes mistaken, bribed, or responding to extralegal pressures. Such cases don’t threaten the conventional Hartian framework, for all the reasons that Hart argued for privileging the internal acceptance of rules over the purely predictive account of the Holmesian “bad man.”<sup>86</sup> So long as the rule of recognition is generally accepted and its outputs generally obeyed, the absence of attention to *particular* rules does nothing to undermine *their* validity.<sup>87</sup>

To take a rather extreme example, suppose that, during the height of Al Capone’s reign, his nephew had been sued in another state for a prior traffic accident in Cook County, Illinois. The state court, attempting to apply Illinois law as *lex loci delicti*, might have no doubt of how the Illinois courts would rule: being afraid of Capone, they’d gin up some way to let the nephew off (hopefully without affecting other cases). But *Illinois law* doesn’t provide that the nephew wins, much less establish any general principle that “close relatives of Al Capone can do no wrong.” To so maintain would be to confuse the external and internal points of view, mistaking the practices that correspond to individual legal rules for those that give rise to the ultimate rule of recognition. We might recognize that, *as a rule*, Illinois’s legal institutions let Capone relatives off easy, without anyone recognizing *a rule that* they must do so. If no one in Illinois would use the “characteristic vocabulary” of the internal perspective (“it is the law that . . .”) to describe the immunities of Capone’s friends and family—if those immunities are solely matters of empirical description and prediction—then they’re not legal immunities according to Hart.

Contra Primus, then, a legal critic of the Illinois courts could very well argue for different results by “pointing to [their] present practices.”<sup>88</sup> That’s

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<sup>84</sup> Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1679 n.30 (2018). *But see id.* (“To be sure, it is possible for originalism to be our law even if some particular decisions are hard to defend on originalist principles.”).

<sup>85</sup> HART, *supra* note 19, at 110.

<sup>86</sup> *See, e.g., id.* at 40; *see also* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (describing the “bad man, who cares only for the material consequences which [legal] knowledge enables him to predict”).

<sup>87</sup> *See* HART, *supra* note 19, at 108–10.

<sup>88</sup> Primus, *supra* note 51, at 51.



because the critic’s “calls for those practices to change”<sup>89</sup> are calls, not for law reform, but for greater conformity to what Illinois *already* takes to be its law. By contrast, in some societies, it *is* the law that high-status and low-status groups are subject to different pains and penalties. (Say, in the Salic law’s differential treatment of Franks and Romans or in the notorious Black Codes of the defeated Confederacy.<sup>90</sup>) In other societies, sometimes including our own, the law draws no such distinction, even if individual officials might. We ought to be able to distinguish these cases accurately. Likewise, we ought to be able to understand how the Fifteenth Amendment was nullified in practice for decades,<sup>91</sup> even while its right against racial discrimination in voting was consistently acknowledged as law.<sup>92</sup> Even for a positivist, it’s far more natural to say that the right was poorly enforced—the way that laws against sexual assault often are<sup>93</sup>—rather than that it silently ceased to be law for several decades, before regaining its legal validity sometime in the twentieth century. The essence of the internal/external distinction is not simply to accept that “[i]t is what the Court has been doing that is our law”<sup>94</sup>—for it matters greatly *why* a court is doing what it’s doing, and what kind of grounds it can cite in support.

### C. Conflicts of Legal Rules

Hart’s account easily handles occasional mistakes or departures from the law. A more complicated case is presented by conflicts *among* different purported legal rules, each of which is generally recognized as having legal force. If a D.C. citizen wishes to sue in diversity, for example, most American lawyers would say that she may: Congress has legislated in her

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<sup>89</sup> *Id.*

<sup>90</sup> See, e.g., Oscar Ross Ewing, *The New Legal Justice*, 24 YALE L.J. 441, 442 (1915) (Franks and Romans); CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, pt. 1, at 110–17 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, vol. 6, 1971) (Black Codes).

<sup>91</sup> See, e.g., ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 105–16 (2000); Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295, 308–10 (2000); see also Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1939 (1995) (noting that the Amendment was “wildly unpopular” (among whites) when it was adopted).

<sup>92</sup> E.g., REV. STAT. at 32 (2d ed. 1878) (listing the Amendment as part of the Constitution); Giles v. Teasley, 193 U.S. 146, 166 (1904). While there were occasional arguments that the Amendment itself was not law, they were decidedly on the fringe, even during this period. Compare Arthur W. Machen, Jr., *Is the Fifteenth Amendment Void?*, 23 HARV. L. REV. 169 (1910) (describing the Amendment as invalid), with Leser v. Garnett, 258 U.S. 130, 136 (1922) (“That the Fifteenth is valid . . . has been recognized and acted on for half a century.”).

<sup>93</sup> Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1292–99 (2016).

<sup>94</sup> Primus, *supra* note 51, at 51–52 (emphasis omitted).

favor,<sup>95</sup> the Supreme Court has upheld its action,<sup>96</sup> and she has every reason to expect future courts to agree. At the same time, there's a clear sense in which diversity jurisdiction is lacking: Article III provides diversity jurisdiction for "Controversies . . . between Citizens of different States,"<sup>97</sup> and ancient precedent correctly recognizes that the District isn't a state.<sup>98</sup> So which of these positions is actually the law? How could an approach that's grounded in practice ever prefer one to the other?

These kinds of conflicts can be resolved on perfectly ordinary legal grounds—indeed, much the same grounds that, in the previous Section, handled the case of mistakes. In modern societies, law is a *hierarchical* and *structured* normative practice. The lower order, on-the-ground legal rules are valid only because the higher order, abstract ones say they are. So if there's a flaw in this process of inference, it's the lower order conclusion, not the higher order premise, that falls.

In a complex legal system, valid legal rules are usually *entailed* by what's accepted as a matter of practice, rather than being so accepted themselves. A Fish and Wildlife Service permit to import an endangered elephant, for example,<sup>99</sup> doesn't carry legal force as a pure matter of social practice; it's only valid (if at all) in light of a series of other legal rules—published regulations,<sup>100</sup> duly enacted statutes,<sup>101</sup> the enumerated powers of Congress,<sup>102</sup> and so on. On Hart's account, this chain of authority eventually terminates in an ultimate rule of recognition, one that requires no further legal validation and that's grounded directly on social facts.<sup>103</sup> Properly identifying a society's ultimate rule of recognition means identifying which parts of its legal system are *not* ultimate, which then lets us identify the various intermediate rules on which those parts depend. A rule like "arson is unlawful" needn't be accepted as standing "on its own bottom," so to speak;<sup>104</sup> it might instead be accepted as a consequence of other, intermediate legal rules, such as those concerning the authority of criminal statutes. In other words, *how* rules are taken as law matters at least as much as the fact

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<sup>95</sup> 28 U.S.C. § 1332(e) (2012).

<sup>96</sup> Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 603–04 (1949).

<sup>97</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>98</sup> Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805).

<sup>99</sup> See Sachs, *supra* note 56, at 2274–75 (offering this example).

<sup>100</sup> 50 C.F.R. §§ 17.11(a), (h), 17.21(b), 17.22 (2018).

<sup>101</sup> 16 U.S.C. §§ 742b, 1533, 1538(a)(1)(A), 1539(a) (2012).

<sup>102</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>103</sup> See HART, *supra* note 19, at 109.

<sup>104</sup> See Sachs, *supra* note 56, at 2274; see also Matthew Kramer, *Of Final Things: Morality as One of the Ultimate Determinants of Legal Validity*, 24 LAW & PHIL. 47, 57 (2005) (noting that standards of legal validity are routinely "derivative of the criteria which make up th[e] overarching rule").

that they're so taken: dumping everything into an undifferentiated category of "acceptance," or claiming that every legal rule rests directly on social practice, would get the social practices wrong.

This is why the legal system's structure of justification is so important—not because abstract rules are somehow more special than pedestrian ones, but because this structure is built into the rule of recognition, which addresses some topics directly and leaves others to be determined only by inference. Societies that have different structures of legal justification have different laws: a legal world in which elephant import permits require no authorization from Congress is a different legal world from one in which they do. (Or perhaps more to the point, a legal world in which constitutional arguments are expected to have a basis in the original Constitution is different from one in which they aren't.)

So to return to the D.C. citizen, it's common in our system for a statute to say one thing while the Constitution says another. But another rule of our system provides that the Constitution controls. And it's also common in our system for a Supreme Court decision to say one thing while the best reading of the legal materials suggests that the decision is wrong. Indeed, "[a]ll modern lawyers would understand the distinction that this statement draws."<sup>105</sup>

Under our system's rules of precedent, legal actors are sometimes commanded to follow a Supreme Court decision "as if" it were the law—even as the underlying legal materials, which command ultimate authority, prescribe a different result.<sup>106</sup> Just as parties to a case can be bound to an erroneous judgment by principles of preclusion, requiring them to act in future cases "as if" the judgment were accurate, lower courts can be bound to an erroneous Supreme Court decision by principles of stare decisis, requiring them to treat the decision "as if" it properly stated the law. This "as if" law can be binding on particular actors without thereby *becoming* the law<sup>107</sup>—much the way a runner can be called "out" by an umpire and treated as if he were "out" for the remainder of the game, though in truth he actually touched the plate first and was safe.<sup>108</sup>

So we can say—and indeed we ought to say—that in truth there's no diversity jurisdiction in a case between a citizen of the District and a citizen of Virginia. Nor is there diversity jurisdiction in a case between two citizens

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

<sup>106</sup> See Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. (forthcoming Apr. 2019) (manuscript at 38–40), <http://ssrn.com/id=3064443> [<https://perma.cc/7VWD-KNYP>].

<sup>107</sup> *Id.*

<sup>108</sup> See HART, *supra* note 19, at 142–46.

of Virginia, though one of them may have persuaded an appellate panel that he's really a citizen of New York. In either case, under our law of vertical precedent, a district judge is nonetheless bound to act "as if" the appellate court's determination were correct, understanding that any error in that determination is to be corrected only on appeal. And when the error is one day corrected—and the existing decision revised in favor of the correct understanding of the law or facts—then the error will lack even "as if" legal force. All of these rules coexist, in a way that most lawyers can understand, as part of the structured practice that ultimately defines our law.

#### D. Global Error

On this account of legal structure, we can be surprised by, mistaken about, or disobedient toward the law without it ceasing to *be* law.<sup>109</sup> And we can sometimes face conflicts between two seemingly valid legal rules, with the law itself telling us which rule has the stronger claim.<sup>110</sup> As one of us has argued at greater length elsewhere, it's even possible for an entire society to be mistaken—to experience "global error" about its law<sup>111</sup>—if its members have thus far overlooked some fact of agreed-on legal significance. This possibility may sound odd for a positivist, as ultimately the law is supposed to rest on social practice, about which it's impossible for everyone to be wrong. But that social practice includes a process of reasoning and inference about which everyone *can* be wrong—and which actually gets us from social rules to legal ones.

This last step strikes some folks as the thirteenth chime. Not everyone agrees that global error is possible for positivists. Nor does everyone agree that legal rules can remain in existence despite being overlooked, even explicitly rejected, by society and its officials. As Barzun writes, if the rule of recognition is a practice of courts and others in identifying the law by reference to certain criteria, "[i]t follows . . . that a rule [that] no court applies cannot be law."<sup>112</sup> Barzun recognizes that "compliance with a rule is a distinct conceptual question from its validity,"<sup>113</sup> but he contends that this distinction applies only with respect to the compliance "of those people to whom this rule has been applied—assuming that judges do apply the rule."<sup>114</sup> On his reading, jaywalking can still be illegal even though many people jaywalk, as courts confronted with a jaywalking case will easily recognize

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<sup>109</sup> See *supra* Section II.B.

<sup>110</sup> See *supra* Section II.C.

<sup>111</sup> See Sachs, *supra* note 56, at 2268–72.

<sup>112</sup> Barzun, *supra* note 15, at 1360 n.228.

<sup>113</sup> *Id.* at 1360–61 n.228.

<sup>114</sup> *Id.* at 1361 n.228.

the prohibition. But, he argues, Hart “was not talking about a rule that is ineffective because no *courts* apply it.”<sup>115</sup>

We think this is wrong as a matter of exegesis, as well as of jurisprudence. Hart is at pains to distinguish “the validity and the ‘efficacy’ of law.”<sup>116</sup> As he describes it, efficacy is a function of actual obedience, a matter of “fact” to be observed or predicted.<sup>117</sup> Validity, though, is a matter of logical relationships with other rules: “[t]o say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system.”<sup>118</sup> Hart found it “plain that there is no necessary connection between the validity of any particular rule and *its* efficacy”—unless the rule of recognition just happens so to provide, as in legal systems containing rules of desuetude or obsolescence.<sup>119</sup> Contra Barzun, a legal rule is valid if and only if it passes the tests; a pattern of enforcement is unnecessary, judicial or otherwise.

Our reading of Hart’s distinction between efficacy and validity is supported by his similar distinction between the ultimate rule of recognition and the subordinate legal rules it recognizes. The rule of recognition is a social rule; “[i]ts existence is a matter of fact,”<sup>120</sup> to be determined by “whether it is the practice of courts, legislatures, officials, or private citizens . . . actually to use this rule as an ultimate rule of recognition.”<sup>121</sup> As in a “simple system of primary rules of obligation,” the “assertion that a given rule exist[s]” can only be determined by whether, “as a matter of fact, a given mode of behaviour [i]s generally accepted as a standard.”<sup>122</sup> But subordinate legal rules in a complex system are different: we determine whether they exist, not by assessing actual practice, but by *applying* the rule of recognition in a process of legal reasoning.<sup>123</sup> “We only need the word ‘validity’ . . . to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition.”<sup>124</sup> With a rule of recognition added to the system, a rule “exists” when it’s “valid given the system’s criteria of validity.”<sup>125</sup> If the legal community shares an official story of its law, which

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<sup>115</sup> *Id.*

<sup>116</sup> HART, *supra* note 19, at 103.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 110.

<sup>121</sup> *Id.* at 107.

<sup>122</sup> *Id.* at 109.

<sup>123</sup> *Id.* at 110.

<sup>124</sup> *Id.* at 108–09.

<sup>125</sup> *Id.* at 110.

sets out criteria of validity and a structure of legal justification, then ordinarily we can just go ahead and apply those criteria to determine what the law is.

When judges and officials appear to depart from this official story, that doesn't refute its status as law. Rather, these departures are often merely evidence of a more complex consensus, in which the acknowledged criteria have various implicit or unstated exceptions. For Hart, there's nothing odd about accepted rules being defeasible in this way: "[a] rule that ends with the word 'unless . . . ' is still a rule."<sup>126</sup> But whatever the criteria of validity may be, those criteria are to be applied from the internal point of view, using the "characteristic vocabulary" of "it is the law that . . . ," and so on. So it matters greatly whether any purported departures or limitations are actually understood and defended as permissible exceptions—as bona fide features of the official story, the way "canceled" and "cancelled" are both accepted spellings—or whether they're just ordinary errors or "deviation[s] from the standard,"<sup>127</sup> in which case the valid legal rule lives on despite them. In the latter case, as Greenberg puts it, a rule that lacks consensus in practice may still be "validated by a criterion that is itself grounded in such a consensus"<sup>128</sup>—or, in Hart's words, the rule "may be valid and in that sense 'exist' even if it is generally disregarded."<sup>129</sup>

In Barzun's favor, Hart does recognize efficacy, in some sense, as a precondition of a legal system. If the "rules of the system" as a whole fall into "general disregard," then that system may have "ceased to be the legal system of the group."<sup>130</sup> But, Hart cautions, it would "be wrong to say that statements of validity 'mean' that the system is generally efficacious."<sup>131</sup> Those who assert a rule's validity may *presuppose* a rule of recognition that's "actually accepted and employed in the general operation of the system,"<sup>132</sup> without necessarily *asserting* this kind of efficacy, much less predicting it—and especially without predicting the courts' enforcement of each individual rule.

Indeed, Hart explicitly rejects the view that "to assert the validity of a rule is to predict that it will be enforced by courts or some other official

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<sup>126</sup> *Id.* at 139.

<sup>127</sup> *Id.* at 55.

<sup>128</sup> Greenberg, *supra* note 1, at 115.

<sup>129</sup> HART, *supra* note 19, at 110.

<sup>130</sup> *Id.* at 103.

<sup>131</sup> *Id.* at 104.

<sup>132</sup> *Id.* at 108.

action taken.”<sup>133</sup> Valid rules usually are enforced in that way, but that’s not what makes them valid; such a claim “neglect[s] the special character of the internal statement and treat[s] it as an external statement about official action.”<sup>134</sup> A judge’s statement that a legal rule is valid “is an internal statement recognizing that the rule satisfies the tests for identifying what is to count as law in his court, and constitutes not a prophecy of but part of the *reason* for his decision.”<sup>135</sup> That’s why Hart’s *Postscript* rejects the idea that legal rules are “in effect . . . only if [they are] accepted and practised in the law-identifying and law-applying operations of the courts”; instead, they’re “identifiable as valid legal rules by the criteria provided by the rule of recognition,” and they can “exist as legal rules from the moment of their enactment before any occasion for their practice has arisen.”<sup>136</sup>

So it isn’t really decisive, as the question is sometimes phrased, what a judge would really do if presented with a knock-down originalist argument for some outlandish legal conclusion. The deep structure of our legal system is a question of present law, not a prediction of future behavior. Maybe if someone discovered irrefutable evidence that, say, *Brown v. Board of Education*<sup>137</sup> couldn’t be justified under the original Fourteenth Amendment,<sup>138</sup> we’d all decide to deem *Brown* such a “fixed star in our constitutional constellation”<sup>139</sup> that it’d remain valid even without any roots in the law of 1868. But that would require departing from our currently operative legal rules, rather than simply applying their terms.<sup>140</sup> Just as law isn’t “the prediction of what courts will do when a case arises,” it also isn’t “the prediction of what *we* will do when push comes to shove.”<sup>141</sup>

Perhaps Hart is wrong about all this. As noted above,<sup>142</sup> he’s a bigger target than we are, and he has many abler defenders. But if originalism is

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<sup>133</sup> *Id.* at 104; cf. Leslie Green, *Law and Obligations*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 514, 517 (Jules Coleman & Scott Shapiro eds., 2002) (describing the broader universe of “sanction theories” as “nearly friendless”).

<sup>134</sup> HART, *supra* note 19, at 105.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 256.

<sup>137</sup> 347 U.S. 483 (1954).

<sup>138</sup> *But see* McConnell, *supra* note 91.

<sup>139</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (Jackson, J.).

<sup>140</sup> *See* Baude, *supra* note 8, at 2380–81 (discussing *Brown*); Sachs, *supra* note 56, at 2276–78 (same). For another example, see William Baude, *The Court, or the Constitution?*, in MORAL PUZZLES AND LEGAL PERPLEXITIES: ESSAYS ON THE INFLUENCE OF LARRY ALEXANDER 260, 270 (Heidi M. Hurd ed., 2019) (“There will likely come a time when the conflict between judicial supremacy and the original Constitution becomes open and notorious. . . . And if we do pick [judicial supremacy], that will mark a fundamental revolution in our constitutional order.”).

<sup>141</sup> *See* Sachs, *supra* note 56, at 2275.

<sup>142</sup> *See supra* text accompanying notes 49–50.

consistent with the most commonly accepted theory of jurisprudence in the American academy, that's a significant finding on its own. An originalist rule can still be a legal rule, even if no court applies it—so long as the legal system still recognizes an official story with that result. And so there's nothing impossible or paradoxical about saying that legal practice shows originalism to be our law—even if some widely accepted legal practices might turn out to be inconsistent with the original Constitution.

### III. PRACTICE

The critiques of original-law originalism discussed above have raised deep issues of legal theory, which we have tried our best to address. But in our view, the more enduring dispute between us and many of our critics is far more banal: it's a simple empirical disagreement. Maybe our beliefs seem odd, not because there's anything wrong with our legal theory, but simply because other readers don't see how our existing legal practice grounds a form of originalism.

We've previously identified this commitment to original law in many aspects of our practice. Among other things:

- (1) We treat the Constitution as a legal text, originally enacted in the late eighteenth century.<sup>143</sup>
- (2) This constitutional text regulates the selection of legal officials, even when such regulations are unpopular or contrary to tradition.<sup>144</sup>
- (3) Actors in our legal system don't acknowledge, and indeed reject, any official legal breaks or discontinuities from the Founding.<sup>145</sup>
- (4) We rely on technical domesticating doctrines, themselves rooted in preexisting law, to blunt the practical force of novel originalist arguments.<sup>146</sup>
- (5) Original meaning sometimes explicitly prevails over policy arguments in constitutional adjudication, but the reverse doesn't seem to be true.<sup>147</sup>
- (6) Our treatment of precedent makes sense if original sources determine the Constitution's content but not if precedent does.<sup>148</sup>

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<sup>143</sup> Baude, *supra* note 8, at 2366–67; Sachs, *supra* note 5, at 872.

<sup>144</sup> Baude, *supra* note 8, at 2367–68.

<sup>145</sup> Sachs, *supra* note 5, at 864–71.

<sup>146</sup> *Id.* at 873–74, 838.

<sup>147</sup> Baude, *supra* note 8, at 2374–75.

<sup>148</sup> *Id.* at 2375–76; Sachs, *supra* note 5, at 860–64; *see also* Green, *supra* note 2, at 499, 519–23.



- (7) More generally, there are no clear repudiations of originalism as our law in the current canon of Supreme Court cases, even in situations where the Justices must have been sorely tempted.<sup>149</sup>

We don't claim that any one of these points is dispositive. But taken together, they help guide us toward the "complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria," which Hart dubbed our rule of recognition.<sup>150</sup> That practice, we've argued, is one that supports original-law originalism.

### A. Pedigree

Those who've seriously addressed this evidence have expressed different reasons for doubt. Barzun, for instance, denies that there's any social practice requiring permissible interpretation of the Constitution to find a pedigree back to the Founding.<sup>151</sup> "The problem with this view," he writes, "is that judicial practice does *not* require interpretive rules to be validated in this way."<sup>152</sup> Instead, Barzun argues:

[T]here is an obvious alternative explanation for how courts treat interpretive rules. What the Court requires is *some* historical support for its interpretive approach in order to prove that it is not making [it] up out of whole cloth. The fact that a rule has been around for a long time suggests that it may be considered custom. And customary law is authoritative not because its pedigree is traceable to a particular validating event but rather because its age and endurance over time suggest that it works well or has been broadly accepted. Under this quite conventional common law understanding, the Court's "methodological hierarchy" is not just not "explicit." It is nonexistent.<sup>153</sup>

This kind of empirical disagreement is more productive than the theoretical ones. But it still proceeds much too quickly, both in weighing the evidence and in describing the substance of our law.

#### 1. Evidence

In assessing the evidence, Barzun places too much weight on the lack of an *explicit and complete* pedigree in individual judicial opinions, in a way that's disconnected from ordinary norms of citation and opinion-writing. The fact that courts don't always trace their reasoning all the way back to the rule

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<sup>149</sup> Baude, *supra* note 8, at 2376–86; *see also* William Baude, Adam S. Chilton & Anup Malani, *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37, 54–57 (2017) (describing the empirical methodology behind this claim).

<sup>150</sup> HART, *supra* note 19, at 110.

<sup>151</sup> Barzun, *supra* note 15, at 1347–48.

<sup>152</sup> *Id.* at 1348.

<sup>153</sup> *Id.* at 1349–50 (footnote omitted).

of recognition doesn't mean that there *is no* rule of recognition animating that reasoning; it simply means that we have to look harder and more carefully to see if there is one.

Consider, by analogy, how courts deal with statutes in the American legal system. Federal statutes can be found in several different collections of books, most importantly in both the Statutes at Large and the United States Code. Of these two, the Statutes at Large, and not the U.S. Code, is the more legally authoritative source.<sup>154</sup> The reason for this is that the Statutes at Large contains nearly everything enacted by Congress pursuant to the process laid out in Article I.<sup>155</sup> The U.S. Code is assembled outside of the lawmaking process by the Office of the Law Revision Counsel, a group of unelected officials appointed by the Speaker of the House to recompile and reorganize the enacted text.<sup>156</sup> (Some volumes of the Code are sometimes then enacted by Congress and thereby turned into positive law,<sup>157</sup> at least until those volumes are again amended by new statutes.<sup>158</sup>)

If you looked only at the citation practices of the Supreme Court, you might well be ignorant of all this. Many opinions addressing federal statutes provide citations to the U.S. Code, without in turn tracing those provisions back to their exact pedigree in the Statutes at Large, let alone to the provisions that empower Congress to enact laws.<sup>159</sup> Sometimes, U.S. Code citations are even required by rules of court.<sup>160</sup> But it would be a mistake to conclude from this citation practice that there *is no* legal hierarchy between the Code and the Statutes at Large—or that this citation practice reflects any abandonment of the requirements of Article I.

Rather, one has to look a little harder to discover the true official story of federal statutory law. For one thing, the Code and the Statutes themselves

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<sup>154</sup> See *infra* notes 161–166 and accompanying text.

<sup>155</sup> See U.S. CONST. art. I, § 7; Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1010 (1938).

<sup>156</sup> 2 U.S.C. §§ 285b–285c (2012). See generally Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283 (2007) (distinguishing the Statutes from the Code).

<sup>157</sup> See OFFICE OF THE LAW REVISION COUNSEL, POSITIVE LAW CODIFICATION IN THE UNITED STATES CODE, [http://uscode.house.gov/codification/positive\\_law\\_codification.pdf](http://uscode.house.gov/codification/positive_law_codification.pdf) [<https://perma.cc/SYA6-M26U>].

<sup>158</sup> See Will Baude, *Reminder: The United States Code Is Not the Law*, WASH. POST: VOLOKH CONSPIRACY (May 15, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/05/15/reminder-the-united-states-code-is-not-the-law> [<https://perma.cc/Y42U-TFL9>].

<sup>159</sup> See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624, 1627 (2018) (citing 29 U.S.C. §§ 102, 103, 157).

<sup>160</sup> See, e.g., SUP. CT. R. 34.5 (“All references to a provision of federal statutory law should ordinarily be cited to the United States Code, if the provision has been codified therein. In the event the provision has not been classified to the United States Code, citation should be to the Statutes at Large.”).

agree on their relative authority.<sup>161</sup> And in the rare cases in which the question becomes relevant, legal experts do indeed remember the true hierarchy. In *U.S. National Bank of Oregon v. Independent Insurance Agents of America*,<sup>162</sup> the Supreme Court considered the validity of the Act of Sept. 7, 1916, 39 Stat. 753, part of which had been omitted from the U.S. Code for over forty years “with a note indicating that Congress had repealed it in 1918.”<sup>163</sup> Nonetheless, the Court concluded that the omitted statute was still legally operative, construing the repealing act more narrowly than the codifiers had—and applying the oft-forgotten rule that the U.S. Code is merely “‘prima facie’ evidence that the provision has the force of law,” while the Statutes at Large are “legal evidence.”<sup>164</sup> Indeed, even the “enacted” titles of the U.S. Code, which do enjoy the status of “legal evidence,”<sup>165</sup> are displaced by subsequent uncodified provisions of the Statutes at Large—for example, the provisions governing the appointment of the FBI director.<sup>166</sup>

Much of our legal system lacks the formality of the U.S. Code. But this example confirms that the first layer of legal citations doesn’t always reflect the deep structure of the law. Lawyers and judges use the U.S. Code on a daily basis, and often they might forget to double-check the law that lies beneath it.<sup>167</sup> For the same reasons, lawyers and judges might write extensively about the income tax without first reciting the portions of the Sixteenth Amendment that authorized it (or the portions of Article V that authorize amendments, of Article VII that discuss ratification, etc.).<sup>168</sup> The hierarchy matters when a relevant question is raised.

That’s also why lawyers and judges might also cite judicial precedents, reason from prevailing doctrine, and so on, instead of beginning every brief or opinion with materials that date to the Founding.<sup>169</sup> It’s only to be

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<sup>161</sup> Compare Act of July 30, 1947, ch. 388, § 112, 61 Stat. 633, 636 (codified at 1 U.S.C. § 112) (“legal evidence”), with *id.* § 204(a), 61 Stat. at 638 (codified at 1 U.S.C. § 204(a)) (“prima facie” evidence).

<sup>162</sup> 508 U.S. 439 (1993).

<sup>163</sup> *Id.* at 441–42.

<sup>164</sup> *Id.* at 448 (citations omitted); *cf. id.* at 453–63 (addressing a substantive question, irrelevant here, of how to read the 1916 Act and 1918 repeal together).

<sup>165</sup> 1 U.S.C. § 204(a).

<sup>166</sup> See 28 U.S.C. § 532 (2012) (“The Attorney General may appoint a Director of the Federal Bureau of Investigation.”), *abrogated* by Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1101, 82 Stat. 197, 236 (codified as amended at 28 U.S.C. § 532 note) (providing that, starting in the 1970s, “the Director of the Federal Bureau of Investigation shall be appointed by the President, by and with the advice and consent of the Senate”).

<sup>167</sup> See Dorsey, *supra* note 156.

<sup>168</sup> See *United States v. Quality Stores, Inc.*, 572 U.S. 141, 145 (2014); Daniel Hemel & Kyle Rozema, *Inequality and the Mortgage Interest Deduction*, 70 TAX L. REV. 667 (2017).

<sup>169</sup> *Cf.* Eric Segall, *Originalist Judicial Activism*, DORF ON LAW (July 12, 2018, 3:30 PM), <http://www.dorfonlaw.org/2018/07/originalist-judicial-activism.html> [<https://perma.cc/R8KS-N6AV>]

expected, after two centuries of constitutional litigation, that there'd be past decisions on adjacent questions that speak in more granular terms than does the constitutional text.<sup>170</sup> Originalism doesn't declare all these other sources inadmissible; it simply makes their authority contingent on certain factors<sup>171</sup>—or, to put it another way, it makes them vulnerable to originalist refutation.<sup>172</sup> What we're after here is a criterion of validity, not a drafting guide. The legal system has rules about which sources of law trump others in case of conflict, and both lawyers and judges will recognize as much when the question is straightforwardly posed.<sup>173</sup> Surface-level citation practices don't tell us all (or even most) of what we want to know about the deep structure of law.

Of course, looking to deep structure carries evidentiary problems of its own. Greenberg, for example, finds it simply implausible that there's a sufficiently convergent practice of interpretation to count as law in Hart's sense.<sup>174</sup> He correctly recognizes that it is possible for there to be “a consensus criterion that points to a legal answer, yet the participants in the consensus have failed to notice that their criterion yields that legal answer,” for instance because it is “a criterion the application of which is controversial.”<sup>175</sup> But he argues that it is “harder to see how the relevant legal standards could have remained unrecognized.”<sup>176</sup> There would have to be “a consensus that pointed to a source of law,” yet at the same time some “empirical mistake about what that source of law specified, perhaps because the source had somehow been lost.”<sup>177</sup> Instead, the “most promising type of candidate would be a normative one—what democracy requires, for example,” and not the kind of legal and historical pedigree to which we point.<sup>178</sup>

Alas, legal history is hard. It's hard enough to trace the title of a single parcel of land back to legal grants a few centuries old.<sup>179</sup> It isn't surprising

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(criticizing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1740–48 (2018) (Thomas, J., concurring), in part because “no originalist evidence was presented”).

<sup>170</sup> See Sachs, *supra* note 56, at 2292.

<sup>171</sup> Baude, *supra* note 8, at 2375–76; Sachs, *supra* note 5, at 860–64; see Green, *supra* note 2, at 519–23.

<sup>172</sup> See Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 158, 167 (2017).

<sup>173</sup> See SUP. CT. R. 34.5 (“Additional or alternative citations should be provided only if there is a particular reason why those citations are relevant or necessary to the argument.”).

<sup>174</sup> Greenberg, *supra* note 1, at 114–18.

<sup>175</sup> *Id.* at 117.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *E.g.*, *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1041 (D.C. Cir. 2011) (tracing a social club's property back to King Charles I).

that tracing the title of every relevant interpretive method might be much harder, given that the relevant materials are much vaster and the consequences more sweeping. And it also isn't surprising that disagreement might be rampant where the claims of pedigree are often implicit, the historical assumptions often unspoken, and, frankly, legal scholarship only beginning to offer serious help. In this world, the problem is not so much that the Founding-era *Codex of Legal Methods of Interpretation* has been temporarily mislaid but rather that we need to reorient our minds toward doing carefully and explicitly what's often done casually or implicitly. That the criteria are imperfectly applied doesn't mean that they're absent or even imprecise.

## 2. Substance

The relationship of the Code to the Statutes is illuminating in another way. It illustrates how the substance of modern law reflects an accumulation of certain materials from the past.

Consider what would be necessary to compile the text of a fully complete and correct U.S. Code. It would include everything Congress has lawfully enacted since the Founding, with edits to reflect every lawful repeal or amendment. Actually setting out that text might involve some hideously complex legal judgments—determining the scope of ambiguous repeals,<sup>180</sup> applying the enrolled bill rule,<sup>181</sup> and so on. But we'd have no trouble articulating what it would look like in principle; nor would we be surprised that its present content might depend on the past.

The same goes for compiling a fully complete and correct text of the Constitution. The official story would start with Ratification and go from there. We might need to answer some complicated questions about subsequent amendments—say, involving Article V's tacit domain restrictions,<sup>182</sup> the de facto government doctrine,<sup>183</sup> or the doctrine of scrivener's error.<sup>184</sup> But the basic idea that we're supposed to trace developments from the Founding isn't very controversial, even if any actual attack on a particular amendment would be. Subsequent amendments are officially held to be valid only because they were adopted at a particular time and in a particular way.<sup>185</sup>

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<sup>180</sup> See *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am.*, 508 U.S. 439 (1993).

<sup>181</sup> See *Field v. Clark*, 143 U.S. 649 (1892).

<sup>182</sup> See Christopher R. Green, *Loyal Denominatorism and the Fourteenth Amendment: Normative Defense and Implications*, 13 *DUKE J. CONST. L. & PUB. POL'Y*, no. 1, 2017, at 167, 175–76.

<sup>183</sup> See Harrison, *supra* note 30, at 429–51.

<sup>184</sup> See *United States v. House*, 617 F. Supp. 237, 239 (W.D. Mich. 1985) (disregarding typographical errors in state resolutions ratifying the Sixteenth Amendment).

<sup>185</sup> See Sachs, *supra* note 5, at 868–71.

Indeed, if we wanted to compile a fully complete and correct account of the entire corpus juris of U.S. law, it might similarly include all the law as it stood at the time of the Founding, with adjustments for all the lawful alterations and amendments made since. Not all of our law is written, and that’s okay; originalism can tolerate a partially unwritten original law. But our system does require a certain kind of pedigree, commonly associated with written law—as is appropriate for a system with a written Constitution. We might argue over the legality of particular alterations or amendments, but it’s not hard to see why the project would proceed in chronological order, resting today’s law on that of the past.

This means that much of Barzun’s alternative explanation of our practices, that interpretive rules may also derive from a “quite conventional common law understanding” of “customary law,”<sup>186</sup> is perfectly consistent with our view of the original law. Customary law was itself a well-recognized kind of law at the Founding, and the Founders’ law likely included the possibility, within certain fields, of legal “evol[ution] by slow accretion.”<sup>187</sup> (If the law of the Founding included a customary law of admiralty—or indeed a customary general common law—then these fields of law remain customary today, unless something was lawfully done to change them.) We see such customary fields, together with any limits on their potential evolution, as possible *contingent implications* of our legal system’s official story.<sup>188</sup>

By contrast, Barzun proposes customary law as an *alternative* to our view, requiring confidence that it would still be compatible with American legal norms regardless of whether there had been such law at the Founding—apparently, even if the modern use of customary law in a given field were entirely the product of some mid-century judicial power grab.<sup>189</sup> That, we think, is a much taller order, at least as judged by our existing legal culture.<sup>190</sup>

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<sup>186</sup> See Barzun, *supra* note 15, at 1349–50.

<sup>187</sup> Baude & Sachs, *supra* note 3, at 1138.

<sup>188</sup> Cf. *id.* at 1132–36, 1139 (noting that, in our system, certain types of interpretive rules do their work upon a text’s enactment, and that they wouldn’t continue to revise its legal content as they evolve over time).

<sup>189</sup> See Sachs, *supra* note 56, at 2281 (considering a hypothetical example in which stare decisis “turned out to be largely a modern invention”).

<sup>190</sup> Cf. Lyle Denniston, *Argument Recap: An Uneasy Day for Presidential Power*, SCOTUSBLOG (Jan. 13, 2014, 1:35 PM), <http://www.scotusblog.com/2014/01/argument-recap-an-uneasy-day-for-presidential-power> [<https://perma.cc/VCK6-5UDM>] (describing oral argument in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and noting that the Solicitor General “seemed to startle even some of the more liberal judges when he said that, if it was a contest between historical practice and the words of the Constitution, practice should count the most”).

*B. Pretense*

A different form of skepticism about our empirical account argues that we have described not practice but pretense. Professor Mikołaj Barczentewicz discusses the prospect of a systematic divergence between what our officials say and what they do. Our officials might recite originalism while acting in nonoriginalist ways—“publicly avow[ing]” rules that “their actions appear to violate”<sup>191</sup>—resulting in a “systematic practice of officials, guided by general rules, which is inconsistent with the ‘official story’ of the law that officials sell to the public.”<sup>192</sup> As Professor Eric Posner once put it, “our political culture . . . happens to require ritual obeisance to the founders,” in much the same way that Roman culture required priests to examine bird entrails, and with no greater consequences for actual decision-making.<sup>193</sup> If so, originalism might be an empty ritual or noble lie,<sup>194</sup> with no resemblance to actual legal practice—like the vaunted freedoms of speech and press promised by the Soviet Constitution,<sup>195</sup> which served only as traps for the unwary.<sup>196</sup>

We think this scenario would raise deep questions of jurisprudence, which one of us has posed before under the moniker of “the Illuminati Problem.”<sup>197</sup> We intend to answer them in a separate work for the jurisprudentially inclined,<sup>198</sup> where we will argue that the official public story, not the subterranean official practice, would nonetheless control. But that’s a topic for another day. We don’t need high theory to answer the charge because the hypothetical isn’t posed by our practice.

Looking at our legal system, the participants don’t seem to treat Founding-era law as if it were simply an empty promise like the Soviet Constitution, or even a vaunted symbol like the American flag that hangs in

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<sup>191</sup> Mikołaj Barczentewicz, *The Illuminati Problem and Rules of Recognition*, 38 OXFORD J. LEGAL STUD. 500, 504 (2018).

<sup>192</sup> *Id.* at 503; see also Greenberg, *supra* note 1, at 117 (“Being disposed to accede to a form of words—to give lip service—does not even amount to genuine belief, let alone a convergence of practice.”).

<sup>193</sup> Eric Posner, *Originalism Class 4: Brown*, ERIC POSNER (Jan. 30, 2014), <http://ericposner.com/originalism-class-4-brown> [https://perma.cc/B3HR-L7D5].

<sup>194</sup> Cf. Jason Iuliano, *The Supreme Court’s Noble Lie*, 51 U.C. DAVIS L. REV. 911 (2018) (arguing that the Court’s formalism is such a lie).

<sup>195</sup> See KONSTITUTSIJA SSSR (1936) [KONST. SSSR] [USSR CONSTITUTION] art. 125, <http://www.departments.bucknell.edu/russian/const/1936toc.html> [https://perma.cc/3335-WPCJ].

<sup>196</sup> See SAMANTHA LOMB, *STALIN’S CONSTITUTION: SOVIET PARTICIPATORY POLITICS AND THE DISCUSSION OF THE 1936 DRAFT CONSTITUTION* 135 (2018) (noting that “[t]he ratification of the 1936 Constitution contributed to repression in 1937,” as early attempts to exercise new rights persuaded the NKVD “to unleash mass arrests of ‘anti-Soviet’ elements”).

<sup>197</sup> See Barczentewicz, *supra* note 191, at 502 (citing Baude, *supra* note 8, at 2388).

<sup>198</sup> See William Baude & Stephen Sachs, *The Official Story* (work in progress) (on file with authors).

each courtroom. Rather, they formulate originalist claims as actual *arguments*: as if they cared about convincing others and not as mere ceremony.

Consider, for instance, the many briefs spent discussing history and original meaning in the recent litigation over the Emoluments Clause.<sup>199</sup> Indeed, at one point, an ally of the plaintiffs believed that she had uncovered documents in the National Archives refuting the work of a leading originalist scholar of the Clause.<sup>200</sup> The perceived discovery was widely and excitedly discussed because it was thought to address an important argument.<sup>201</sup> And when the originalist scholar produced extensive documentary evidence and expert opinion undermining the discovery's significance,<sup>202</sup> it worked: most of those who had challenged him on that particular point reconsidered and confessed error,<sup>203</sup> even as they continued to press originalist arguments on other points.

This looks to us like a process that takes originalist arguments seriously. Clients spend good money hiring lawyers to dig up originalist evidence—the stronger the evidence, the better—which is then treated as meaningful even by those who rarely describe themselves as originalists.<sup>204</sup> This suggests that originalism isn't merely something at which to genuflect before moving on to the real grounds of decision, for then the quality of originalist argument

<sup>199</sup> See Seth Barrett Tillman, *A Work in Progress: Select Bibliography of Court Filings and Other Sources Regarding the Foreign and Domestic Emoluments Clauses Cases*, THE NEW REFORM CLUB (Feb. 28, 2018, 8:59 AM), <https://reformclub.blogspot.com/2018/02/a-work-in-progress-select-bibliography.html> [<https://perma.cc/8HBC-L7P8>] (citing sources).

<sup>200</sup> See Brienne J. Gorod, *What Alexander Hamilton Really Said*, TAKE CARE BLOG (July 6, 2017), <https://takecareblog.com/blog/what-alexander-hamilton-really-said> [<https://perma.cc/D5TS-NR9F>]; Brienne J. Gorod, *A Little More on Alexander Hamilton and the Foreign Emoluments Clause*, TAKE CARE BLOG (Aug. 1, 2017), <https://takecareblog.com/blog/a-little-more-on-alexander-hamilton-and-the-foreign-emoluments-clause> [<https://perma.cc/ZC9Q-9MM2>].

<sup>201</sup> Gautham Rao & Jed Shugerman, *Presidential Revisionism*, SLATE (July 17, 2017, 5:42 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/07/the\\_new\\_york\\_times\\_published\\_the\\_flimsiest\\_defense\\_of\\_trump\\_s\\_apparent\\_emoluments.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/07/the_new_york_times_published_the_flimsiest_defense_of_trump_s_apparent_emoluments.html) [<https://perma.cc/N6X8-M8TF>]; Jed Shugerman, *Questions About the Emoluments Amicus Brief on Behalf of Trump*, SHUGERBLOG (Aug. 31, 2017), <https://shugerblog.com/2017/08/31/questions-about-the-emoluments-amicus-brief-on-behalf-of-trump-and-its-use-and-misuse-of-historical-sources> [<https://perma.cc/ENN8-T8QF>].

<sup>202</sup> Declaration of Seth Barrett Tillman, Response to Amici Curiae by Certain Legal Historians, Citizens for Responsibility & Ethics in Wash. v. Trump, No. 17-cv-00458-GBD (S.D.N.Y. Sept. 19, 2017), 2017 WL 7795997.

<sup>203</sup> Jed Shugerman, *An Apology to Tillman and Blackman*, SHUGERBLOG (Sep. 23, 2017), <https://shugerblog.com/2017/09/23/an-apology-to-tillman-and-blackman> [<https://perma.cc/3NC8-NX4Q>]; Jed Shugerman et al., *Our Correction and Apology to Professor Tillman*, SHUGERBLOG (Oct. 3, 2017), <https://shugerblog.com/2017/10/03/our-correction-and-apology-to-professor-tillman> [<https://perma.cc/3N8Y-4ZTR>].

<sup>204</sup> See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 640–70 (2008) (Stevens, J., dissenting) (discussing the early history of the Second Amendment).



wouldn't matter so much. If originalism is a ritual, it's a ritual that obeys the full form of legal argument. If originalism is a pretense, the pretense runs deep.

Nor does it seem to us a coincidence that both textualist and purposivist scholars have attempted to ground their proposed methods in Founding-era evidence<sup>205</sup> or in the text and structure of the Constitution more generally.<sup>206</sup> Rather, we think the more natural explanation is that our system requires legal norms to bear a certain kind of pedigree—often implicit, to be sure,<sup>207</sup> but traceable back to the system's origins.

### C. *Motivated Reasoning*

Alternatively, originalism might be more than a noble lie without fully determining official behavior. Primus, for example, argues that “originalist argumentation suffers from motivated reasoning more than it suffers from purposeful duplicity.”<sup>208</sup> On Primus's account, judges “are liable to misread originalist source material in ways congenial to their own preferred dispositions of cases,” though they do so “sincerely believ[ing] that their actions accord with original meanings.”<sup>209</sup> They “feel[] an obligation to show fidelity to original meanings—or at least to avoid showing infidelity to them—but not an obligation passively to follow original meanings wherever they might lead.”<sup>210</sup>

In our view, this kind of account (if true) would do more to support originalism than to undermine it. Again, originalism is a criterion of validity, not a drafting guide or decision procedure. Judges who follow the Founders' law are obliged to make decisions consistent with it. But that doesn't dictate exactly how they go about their decision-making—whether through consulting the parties' arguments, plumbing their own intuitions, pursuing a broad reflective equilibrium, reading massive amounts of historical materials, or something else. And if social rules really do require conformity to a particular official story, then officials' engaging in sincere but “motivated reasoning” when that story conflicts with their other preferences is exactly what we should expect.

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<sup>205</sup> See, e.g., Eskridge, *supra* note 11, at 1030–57; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 79–102 (2001).

<sup>206</sup> William N. Eskridge & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 527 (1992); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706–25 (1997).

<sup>207</sup> See *supra* text accompanying notes 153–173 (discussing Barzun).

<sup>208</sup> Primus, *supra* note 51, at 57.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 56 (emphasis omitted).

After all, officials routinely engage in motivated reasoning as to whether their plans are “legal,” full stop—accepting a lower quality of legal argument in their favor than they demand of arguments against them.<sup>211</sup> We shouldn’t expect any greater commitment to originalism than we do to the law in general. Primus repeats Professor Karl Llewellyn’s warning that “[w]hat satisfies the conscience lulls the mind”;<sup>212</sup> but this motivated reasoning is still reasoning, and it still admits the force of originalist arguments that might wake us from our dogmatic slumbers.<sup>213</sup> So long as originalist arguments still carry that force, originalism is still the law.

#### D. Alternatives

We believe we’ve put forward the best account of the official story of our constitutional law. But many remain skeptical of our empirical claims, so let us regroup. As we noted at the outset, our first core claim is that theories of legal interpretation ought to give more emphasis to questions of what the law actually is. That claim is independent of our empirical case. So even if one rejects our own originalist views, the question remains: What, then, is our law? If not originalism, what?

Positive law provides a lens to judge not only originalism but its alternatives. We can’t describe all of those alternatives in this short space, let alone presume to refute them. But in examining some of the stronger ones, we can see that none of them has made a better claim to be our positive law. If a reader has the sense that we haven’t quite bridged the gap between our theories and observed constitutional practice, we hope we can at least show that our competition must cross comparable gaps.

For instance, Professor David Strauss has famously proposed that we have a common law constitution, one in which “now-established principles” achieved canonical status by escaping most people’s notice, avoiding any “single decisive moment at which the conflict between the text and the principles became too stark to ignore.”<sup>214</sup> But as Strauss admits, on his theory there’s much that’s puzzling about Americans’ persistent claims to adhere to

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<sup>211</sup> See Frederick Schauer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689, 1709–10 (2017); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 318–19 (2013).

<sup>212</sup> Primus, *supra* note 51, at 57 (quoting Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 10 (1934)).

<sup>213</sup> See IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 10 (Gary Hatfield trans. & ed., rev. ed. 2004) (1783).

<sup>214</sup> David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 14–15 (2015).

the original Constitution.<sup>215</sup> The persistence of these claims is part of what motivates our belief in original-law originalism.

We also worry that, judged in Hartian terms, Strauss's claims have more plausibility from the external perspective than they do from the internal one. For example, Strauss may turn out to be right, as an external and historical matter, that "people gradually got accustomed to the idea that there should be no established churches in the states and to the steady expansion of the franchise," and that they eventually "read[] those principles back into the Constitution."<sup>216</sup> But as an internal account of our system's legal rules, even Strauss recognizes that this whatever-we-get-used-to amendment process is rather alien; the common law method is "not [one] we usually associate with a written constitution, or indeed with codified law of any kind."<sup>217</sup>

Similarly, Strauss argues that courts are *sometimes* bound by original content, as it'd be "lawless" to disregard rules that a recent amendment was understood to adopt (though such disregard, he argues, is "routinely accepted" for older amendments).<sup>218</sup> But the idea that rules added by amendment carry a built-in expiration date, after which it'll be legal to fudge things a little, is something no one in our system would describe as a rule of constitutional law. (It does not, for example, seem to have affected the Emoluments Clause.) We might all *notice* the relaxed treatment of older rules, but we notice it from an external perspective, as a claim *about* our legal practice rather than *of* it. That is not how participants in our legal practice *justify* constitutional drift. Indeed, what differentiates original-law originalism from pure textualism or strict constructionism is the ability to easily account for doctrines of precedent and practice in legal terms.

A different practice-based theory of "principled positivism" has recently been proposed by Professor Mitchell Berman.<sup>219</sup> Berman argues that our tradition of legal argument rests constitutional claims on certain principles, such as "[w]hat the text meant to those who ratified it has great force,"<sup>220</sup> "[w]hat the Supreme Court has held possesses great legal force,"<sup>221</sup> "[g]overnment must respect the inherent equal dignity of each person within its jurisdiction, and must not demean or stigmatize people,"<sup>222</sup> "[p]olicy

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<sup>215</sup> See, e.g., *id.* at 4–5, 12, 19; Strauss, *supra* note 2, at 899, 914–16; see also Sachs, *supra* note 56, at 2291–95.

<sup>216</sup> Strauss, *supra* note 214, at 15.

<sup>217</sup> Strauss, *supra* note 2, at 885; accord Sachs, *supra* note 56, at 2293–95.

<sup>218</sup> Strauss, *supra* note 214, at 58.

<sup>219</sup> Berman, *supra* note 2, at 1331.

<sup>220</sup> *Id.* at 1386.

<sup>221</sup> *Id.* at 1387.

<sup>222</sup> *Id.* at 1389.

preferences of a majority of the people are to be respected,”<sup>223</sup> and many more. This makes Berman’s theory a particularly advanced form of constitutional pluralism. And unlike most forms of pluralism, Berman’s theory is of special interest because it recognizes the need for a legal framework, itself supported by practice, for weighing these principles against one another. This is necessary to yielding a constitutional law that can actually decide cases rather than merely make soup.<sup>224</sup>

But the very framework that ascribes particular weights to these principles (and that would give “principled positivism” its coherence) makes us doubt that this is the most natural account of our official story. We are not convinced that our legal practitioners engage in a process that looks like weighing, and even if they do, we are not convinced that any particular assignment of weights can be derived from our practice. Indeed, such a theory would likely require “reject[ing] . . . the Hartian account of law” in favor of a novel account of positivist jurisprudence.<sup>225</sup> Further treatment of Berman’s theory may have to await his and our future work, but these empirical and jurisprudential gaps seem large to us.

Still, we are no more convinced by other forms of constitutional pluralism, whether they involve many modalities or even just two (such as “originalism, but also precedent, even when the two conflict”). What these theories have in common is their claim that originalism is at most only part of our law. They therefore raise the question: which part?

A pluralist theory needs some method of resolving conflicts among its various modalities, or else it lacks any coherent “truthmaker.”<sup>226</sup> We find either option hard to swallow as an account of our legal practice. On the one hand, the difficulties in establishing Berman’s principled positivism would also apply to any competing pluralist formula. On the other, the claim that we simply have no law on the topic seems implausible as well.

One might be tempted to double down on the latter by simply denying that our system actually has any constitutional law, at least as to contested Supreme Court cases and the like.<sup>227</sup> With no law to govern those decisions, as Professor Brian Leiter has suggested, the Court would be more of a “super-legislature” of limited jurisdiction—restricted to “issues that are

<sup>223</sup> *Id.* at 1388.

<sup>224</sup> *See, e.g., id.* at 1370–76.

<sup>225</sup> *Id.* at 1350; *see also id.* at 1365–68.

<sup>226</sup> *See Green, supra* note 2, at 514–16 (discussing PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982)).

<sup>227</sup> *See, e.g.,* Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 *HASTINGS L.J.* 1601, 1601 (2015) (“[T]here is very little actual ‘law’ in federal constitutional law . . . , especially with respect to cases that end up at the Supreme Court.”).

brought before it” and nonetheless “constrained, to some extent, by its past decisions and by constitutional and legislative texts.”<sup>228</sup>

But if the Supreme Court really is a super-legislature, its members have some odd preferences regarding their policy agenda.<sup>229</sup> The Justices largely control their own docket and calendar. Yet instead of acting like normal legislators and addressing salient topics like tax rates or gas prices,<sup>230</sup> the Justices instead possess an extensive desire to meddle around in federal sentencing,<sup>231</sup> an outsized and politically unpredictable interest in the details of criminal procedure,<sup>232</sup> and an abiding fascination with Internet pornography.<sup>233</sup> (The eminent biologist J.B.S. Haldane, when asked what he’d learned through his career of the mind of the Creator, suggested “[a]n inordinate fondness for beetles.”<sup>234</sup>)

We think there are other reasons why these topics, and not others, are thought appropriate for Supreme Court intervention—and that those reasons have a great deal to do with the official story of our legal system. And within these topics, it’s at least as plausible that our system is one in which the Court is legally supposed to do its best to determine the law, and its determinations merely *seem* legislative in hard cases because those are the ones in which no knock-down legal arguments can be mounted against either view.<sup>235</sup> The no-law view is not simply the null hypothesis, but another positivist claim that must be proved, and that we think has yet to be proven.

#### CONCLUSION

We believe we’ve put forward the best account of the official story of constitutional law. But if our case isn’t yet proven, the same positivist

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<sup>228</sup> *Id.*

<sup>229</sup> See Frederick Schauer, *The Supreme Court 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4 (2006).

<sup>230</sup> See *id.* at 8–9.

<sup>231</sup> See, e.g., *Alleyne v. United States*, 570 U.S. 99 (2013); *Oregon v. Ice*, 555 U.S. 160 (2009); *Rita v. United States*, 551 U.S. 338 (2007); *Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

<sup>232</sup> See, e.g., *Kaley v. United States*, 571 U.S. 320 (2014); *Maryland v. King*, 569 U.S. 435 (2013); *Williams v. Illinois*, 567 U.S. 50 (2012); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Dolan v. United States*, 560 U.S. 605 (2010); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Arizona v. Gant*, 556 U.S. 332 (2009).

<sup>233</sup> See, e.g., *United States v. Williams*, 553 U.S. 285 (2008); *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003); *Ashcroft v. ACLU*, 535 U.S. 564 (2002); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002).

<sup>234</sup> See G.E. Hutchinson, *Homage to Santa Rosalia or Why Are There So Many Kinds of Animals?*, 93 AM. NATURALIST 145, 146 n.1 (1959).

<sup>235</sup> See Sachs, *supra* note 106 (manuscript at 42).

premises can be used to judge other competing accounts of constitutional law. It takes a theory to beat a theory, in the following sense: either originalism is our law, or something else is, or nothing is. To be sure, each of the authors discussed above is aware of the possible points, and each has his answers. But our point here is just to remind readers that one shouldn't judge positivist originalism in a vacuum. Even if our account requires one to make some inferences from the evidence we see to the bigger picture we present, we submit that those leaps are smaller than the leaps over text and conventional jurisprudence required by our best rivals.

What makes a method of legal interpretation correct, in our legal system, is a multilevel question—one that ultimately depends, at different levels, on both modern practice and original law. As we see it, the relationship between past and present is this:

- As a theoretical matter, positivists like us figure out today's law based on today's social facts.
- As a contingent, empirical matter, today's social facts happen to incorporate the Founders' law by reference.
- As a historical, legal matter, the Founders' law allowed for various kinds of changes, including both formal enactments and the incorporation by reference of various kinds of customary law.

As a result, it's possible and even common for the law to require one or two levels of recursion. A given rule of law may be a function of whatever the custom is today, because that's what the Founders' law prescribed back then, which is what our law tells us to care about today. We believe that this system, though occasionally complex, in fact gives the best available account of how the law of the modern United States relates to the law of the past.

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