

ORIGINALISM AS A THEORY OF LEGAL CHANGE

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INTRODUCTION

Originalism is usually called a theory of interpretation, a particular way to read a text. Best understood, though, originalism is much more than that. It's a theory of our law: a particular way to understand where our law comes from, what it requires, and how it can be changed.

This view starts with a common assumption of legal systems, that the law stays the same until it's lawfully changed. A statute that's hundreds of years old can still be good law today, simply because it was properly enacted at some earlier time and has never been amended or repealed. If you start with an old statute book and add everything enacted since, you should end up with the code as it stands today.

To an originalist, what's true of old statutes is also true of our old Constitution, and indeed of our old law generally.

Whatever rules of law we had at the Founding, we still have today, unless something legally relevant happened to change them. *Our* law happens to consist of *their* law, the Founders' law, including lawful changes made along the way. Preserving the meaning of the Founders' words is important, but it's not an end in itself. It's just a means to preserving the content of the Founders' law.

Not everyone agrees with this picture, of course; not even all "originalists." People use the word "originalism" in lots of different ways. But treating originalism as a claim about law, not just interpretation, gets us past some of the debates that have occupied the field—and it helps us see the way to more fruitful areas for agreement.

At the moment, most defenses of originalism fall into two camps, which we can call "normative" and "conceptual." Normative defenses portray certain interpretive methods as good ideas (because they constrain judges, promote democracy, and so on). These defenses might be right or wrong; more importantly, the good ideas they defend might not be reflected in our law. Maybe American law, as it currently exists, doesn't constrain judges or promote democracy as much as it ought to. If originalism is just a law reform project, it loses much of its rhetorical force. Conceptual defenses, by contrast, start from incontestable legal assumptions (say, that the Constitution is law). They then argue, on philosophical grounds, that the Constitution's meaning just *is* its original meaning (intention, understanding, public meaning, etc.). But the law doesn't have to reflect good philosophy any more than good policy. So it might be that our legal system, like Canada's or France's, reads our constitutional text some other way or incorporates some other sources of law.

In other words, to know what to make of these defenses, we need to know whether (and to what extent) originalism is already part of American law. This inquiry points the way toward what we could call "positive" defenses—claims that originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law. In academic circles, positive defenses are relatively rare; indeed, they're almost unheard of. One prominent originalist recently argued that "[n]o one, as of yet, has

made a strong case for concluding the original meaning is the law” —or has “even tried [to do so] in an extended article.”¹

This Article tries to fill that gap. Modern originalism may have gotten its start by critiquing, not affirming, everyday legal practice. But these critiques were founded on deeper features of American constitutional law—which is why they accused judges and other officials of departing from the law rather than following it. What matters for our understanding of the law isn’t just everyday practice, but the premises that are implicit in our legal arguments, the claims about the structure of our law that we’re willing publicly to accept and defend. At that level, there’s a clear originalist strain in our legal thought, one best captured by viewing originalism as a theory of legal change.

American constitutional law cares about genealogy. One useful way of getting at the nature of a constitutional challenge is to ask about the challenged practice, “When do *you* think it became unconstitutional?”²—with the range of acceptable answers stretching from the Founding through yesterday. If the law was *X* at the Founding but is supposed to be *Y* today, the natural follow-up question is what happened in between—and *why* whatever happened (an amendment, a statute, a shift in custom or usage) was legally capable of making that change. Almost every legal system distinguishes authorized changes like these from the unauthorized changes that happen when society simply abandons or departs from some preexisting rule of law. But a distinctive feature of the American legal system is that it fixes a particular starting date—an *origin*, a Founding—separating the changes that don’t need legal authorization from those that do. Americans don’t think that we’re living in a Fifth Republic, the way the French do, but rather in the same Republic we started with.

This intuition is the core of originalism, viewed as a theory of legal change. What originalism requires of legal change is that it

1. Mike Rappaport, *Is Originalism the Law?: The Law Reform Criticism*, LIBR. L. & LIBERTY (May 30, 2014), <http://www.libertylawsite.org/2014/05/30/is-originalism-the-law-the-law-reform-criticism/> [<http://perma.cc/S9VA-B7SH>]. For a few steps in this direction, see Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253 (2014); William Baude, *Is Originalism Our Law?*, 116 COLUM. L. REV. (forthcoming 2015); see also Lawrence B. Solum, *Semantic Originalism* 134–49 (Ill. Pub. Law & Legal Theory Research Papers Series No. 07-24, 2008), <http://ssrn.com/id=1120244> [<http://perma.cc/9ZAZ-PFVE>].

2. Transcript of Oral Argument at 39, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (emphasis added).

be, well, *legal*; that it be lawful, that it be done according to law. This is a requirement of procedure, not substance. It makes originalism a “big tent,” potentially allowing a wide variety of legal changes (judicial precedents, liquidation by practice, and so on) depending on how the law stood at the time. The originalist claim is that each change in our law since the Founding needs a justification framed in legal terms, and not just social or political ones. To put it another way, originalists believe that the American legal system hasn’t yet departed (even a little bit) from the Founders’ law in the way that the colonies threw off the British yoke or the states got rid of the Articles of Confederation. If this sounds implausible to you, then that may be a perfectly good reason not to be an originalist. But this Article suggests that it may be more plausible than you think.

This theory also produces a version of originalism that might be particularly attractive to those who already consider themselves originalists. What’s important about the Constitution of 1788 isn’t what it *said*, but what it *did*: the legal rules it added to the American corpus juris, the contribution (to use Mark Greenberg’s phrase) it made to the preexisting body of law.³ Whatever the Constitution added to the law, it added at the time of its enactment. To find out the law that the Constitution made, the relevant way to read the document’s text would be according to the rules of the time, legal and otherwise, for turning enacted text into law. If that version needs a label, we could call it “original-law originalism”: the view that the Constitution should be read according to its *original legal content*, whatever that might have been. (Why else look to the text, if not to find the law that it produced? Why be more “originalist” than the Founders, or more Catholic than the Pope?) Viewed in these terms, debates between originalists and nonoriginalists are really positive debates about the sources of our current law; disputes among different schools of originalists are really historical disputes about the content of the law at the Founding.

Thinking about originalism this way helps redefine the relationship between law and history. If originalism is based on our rules for legal change, then it isn’t just about recovering the meaning of ancient texts, a project for philologists and histori-

3. 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).

ans. Instead, it's about determining the content of our law, *today*, in part by recovering Founding-era doctrine. That means learning some history, but it also means exercising legal judgment, the kind we hire lawyers for. (In the same way, if we want to learn the law of some foreign country, we ask lawyers with relevant expertise, not just ethnographers or sociologists.) Doing originalist research requires some specialized techniques, but so does chasing down an old chain of title. As a theory of legal change, originalism is just ordinary lawyer's work.

This Article isn't intended as a once-and-for-all defense of originalism, much less this original-law version thereof. Instead, the goal is simply to clear away some theoretical underbrush, sketching out the different positions, and hopefully pushing scholars toward more productive areas of debate. Both originalists and nonoriginalists need to show their jurisprudential cards. Is our law really the Founders' law? If not, how is it different? When did the two diverge, and do we accept that divergence all the way down? To be a nonoriginalist, on this Article's view, is to say of some new rule: "Maybe Rule X *wasn't* lawfully adopted; maybe it *can't* be defended under preexisting law; but I'm okay with that, and so is America." Originalists can say that about the Constitution itself, but not of anything invented since. What do *you* say it about, and why do you think it's true?

American law might be originalist in nature, but then again it might not. Which view is right depends on facts about society today, not two hundred years ago. This Article merely argues that, if *it is* true, the claim that we adhere to the Founders' law is the best reason to be an originalist—and, if it's false, the best reason not to.

I. ORIGINALISM AND POSITIVE LAW

"Originalism" means lots of things to lots of people.⁴ To most people, though, originalism is a theory about how to interpret the Constitution's text,⁵ which they defend in one of two ways. Some

4. See Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 12, 32 (Grant Huscroft & Bradley W. Miller eds., 2011).

5. See, e.g., Keith E. Whittington, *On Pluralism Within Originalism*, in *THE CHALLENGE OF ORIGINALISM*, *supra* note 4, at 70, 71.

originalists rely on broad normative arguments, citing values like popular sovereignty,⁶ liberty,⁷ or public welfare.⁸ If we can better serve these values by enforcing the Constitution's original meaning, as opposed to some other meaning, then we should do so. Others think originalism follows from conceptual truths about the right way to read legal documents—or even all written texts in general. If, for example, written texts always mean whatever their authors intended them to mean, then the same is true of the Constitution; any other reading is simply mistaken.⁹

Neither defense, though, is fully persuasive. Each depends on assumptions that aren't really about values or meanings, but about the content of our law. Whatever interpretive method we might prefer as a matter of policy, we still need to know whether judges and officials can act on that preference, or whether their legal obligations point the other way. And whatever our philosophical commitments about interpretation, we still need to know whether (and to what extent) the document we're interpreting is legally authoritative.

In other words, we have to deal with the content of the law anyway. If so, maybe we should make that *all* we have to deal with—treating originalism not as a normative or conceptual matter, but as a legal one.

A. *Normative Defenses of Originalism*

One common way to defend originalism is to argue that it achieves some normative goal. The first modern originalists

6. See, e.g., KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 154 (1999); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1444–46 (2007).

7. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 89–119 (rev. ed. 2014). Barnett also advances a conceptual defense of public-meaning originalism, see *id.* at 391–94, which runs alongside his theory of legitimacy, see *id.* at 119.

8. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2 (2013).

9. See, e.g., Larry Alexander & Saikrishna Prakash, "Is that English You're Speaking?": *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004); Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 539–40 (2013); Larry Alexander, *Simple-Minded Originalism*, in THE CHALLENGE OF ORIGINALISM, *supra* note 4, at 87; Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 139–40 (2010); Paul F. Campos, *A Text Is Just A Text*, 19 HARV. J.L. & PUB. POL'Y 327, 327 (1996); Stanley Fish, *The Intentionalist Thesis Once More*, in THE CHALLENGE OF ORIGINALISM, *supra* note 4, at 99, 101.

often presented their theory as the only way to reconcile judicial review with democracy.¹⁰ Some modern originalists do the same,¹¹ while others focus on popular sovereignty,¹² individual liberty,¹³ or public welfare generally.¹⁴ If they're right, then to the extent we value these things, we ought to be originalists, too. Put much too simply, we could state the normative defense as follows:

(N1) If something would be a good idea, we should do it.

(N2) Following the Constitution's original meaning would be a good idea.

∴ (N3) We should follow the Constitution's original meaning.

Many nonoriginalists reject this argument at step two. Maybe the original meaning isn't a good idea; maybe it's actually lousy.¹⁵ Or maybe it's better on some counts and worse on others, which means we'll have to decide among various normative goals.

The real problem for originalists, though, is at step one. There are lots of good ideas in the world, like reforming health care or fixing the tax code. But the fact that they're good ideas doesn't make them part of the law—or make it another good idea for judges and officials to go ahead and implement them on their own. The same goes for originalism. If these normative arguments are really calls to *change* the law, that'd undercut many of the intuitions on which originalists commonly rely. Originalists don't usually describe themselves as doing law reform, or as members of one more interest group trying to implement its agenda through the courts. (If anything, it's a staple of originalist rhetoric to condemn "legislating from the bench.") Originalism as a policy program, even a really good one, isn't what many originalists are looking for.

10. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 4 (1971); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 705 (1976); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849, 854 (1989).

11. See, e.g., Steven D. Smith, *That Old-Time Originalism*, in THE CHALLENGE OF ORIGINALISM, *supra* note 4, at 223, 232–33.

12. See WHITTINGTON, *supra* note 6; Lash, *supra* note 6.

13. See BARNETT, *supra* note 7.

14. See MCGINNIS & RAPPAPORT, *supra* note 8.

15. See generally Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990) (critiquing originalist arguments).

1. *Originalism as a Good Idea*

Suppose there were a knock-down argument, on your favorite normative theory, that originalism is the best way of reading the Constitution's text. The payoff of an argument like that, of identifying a "best way" of reading the text, is that it might lead you to particular legal outcomes: whether the President has a removal power,¹⁶ whether there's an individual right to bear arms,¹⁷ and so on. But in real life, you can't get there from here. The fact that one method is normatively better than others doesn't mean that the rules produced by that method are actually part of our law.¹⁸

As Brian Leiter notes, one thing most legal theorists agree on—especially those known as "legal positivists"—is that "what the law *is* and what the law *ought* to be are separate questions."¹⁹ If we want to know what the law is, whether in a foreign country or the United States, we have to see how that society operates; "what counts as law in any society is fundamentally a matter of social fact."²⁰ Experts disagree about which facts actually matter—which people in a society have to hold which customs, conventions, beliefs, norms, and so on, for something to be the law.²¹ (Does law depend on the practices of officials, the understandings of bench and bar, the conventions of ordinary people, . . . ?)

If social facts are what matter, one thing that likely doesn't matter is the goodness of a proposed rule (or method of discovering the rules)—unless perhaps the social facts say it

16. See *Myers v. United States*, 272 U.S. 52 (1926).

17. See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

18. This Article uses "rules" in a very capacious sense, referring to any considerations that might "screen[] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account." Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 510 (1988). That includes precise commands, flexible standards, value-based principles, forgiving guidelines, orders, norms, plans, and any other kind of instructions the law might potentially convey.

19. 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).

20. *Id.* at 356; accord Leslie Green, *Introduction* to H.L.A. HART, *THE CONCEPT OF LAW*, at xv (3d ed. 2012); Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 *NW. U. L. REV.* 719, 726 (2006).

21. Compare, e.g., HART, *supra* note 20 (taking one particular view), and SCOTT J. SHAPIRO, *LEGALITY* (2011) (taking another). See generally Adler, *supra* note 20 (describing the debate).

should.²² Maybe our law, as an empirical matter, is just less democracy-promoting, liberty-protecting, or welfare-enhancing than we'd like. Canada and many other countries are said to be nonoriginalist, after all.²³ How do we know we're not like them?

Originalism usually comes across as a restorative project, one that rescues the true law from subsequent developments that have obscured it. That might mean reversing an occasional mistaken precedent, but only to apply the actual law in its place. This picture assumes that the rules that originalism generates (about removal powers, rights to bear arms, and so on) are in some sense already the law—that, despite appearances, there's still something here to vindicate. Normative arguments might show why the issue matters, but the legal case is already won.²⁴

Yet if American law, like Canadian law, *really is* nonoriginalist, then the normative arguments for originalism are actually arguments for law reform—calls to depart from today's law, not to apply it. That the departure might resemble some past state of affairs doesn't make it any less of a departure. (No matter how good his normative arguments, a latter-day Tory hoping to restore British rule would be planning to change U.S. law, not to enforce it.)

These issues aren't just for legal sticklers; they're problems that normative defenders of originalism can't ignore. If American law today isn't originalist (or as fully originalist as you'd like), then knowing that originalism is a good idea in the abstract doesn't tell us very much. It's like knowing that tax rates ought to be different than they are; that doesn't mean the Supreme

22. See Green, *supra* note 20, at xxxix (describing the dispute on this question, on which this Article takes no view).

23. See Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 3 (2009) (suggesting that originalism “is pooh-poohed by most leading jurists in Canada, South Africa, India, Israel, and throughout most of Europe”); see also Bradley W. Miller, *Origin Myth: The Persons Case, the Living Tree, and the New Originalism*, in THE CHALLENGE OF ORIGINALISM, *supra* note 4, at 120, 121 (Canada); Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, 2 INT'L J. CONST. L. 633, 656 & n.83 (2004) (Europe). But see Yvonne Tew, *Originalism at Home and Abroad*, 52 COLUM. J. TRANSNAT'L L. 780 (2014) (identifying originalist practices in Malaysia and Singapore). See generally David Fontana, *Comparative Originalism*, 88 TEX. L. REV. 189 (2010); see also Baude, *supra* note 1 (manuscript at 43–45).

24. See, e.g., Solum, *supra* note 4, at 12 (“Originalists agree that our constitutional practice both *is* (albeit imperfectly) and *should be* committed to the principle that the original meaning of the Constitution constrains judicial practice.”).

Court should impose new rates by fiat. Whatever the best rules might be, individual officials may have separate moral reasons to enforce the law as it exists, whether as special role-obligations or just as a means of avoiding bad consequences.

This is why it may be dangerous for originalists to tie their theories too closely to theories of political legitimacy.²⁵ When the law deserves our obedience is a question of ethics and politics that's been debated since long before the Constitution was written.²⁶ If we can't resolve our disagreements about the Commerce Clause without first solving the problem of political obligation, our situation hasn't improved. And even if originalism were the only legitimate way to read the Constitution, our legal system might turn out to be only partially legitimate—just as it might turn out to be only partially originalist. What our duties would be in that case is yet another difficult ethical and political question. We might still need to know the law before we can say, definitively, what each of us ought to do.

2. *Originalism as Law Reform*

None of this shows that the normative arguments are *wrong*. If originalism is a good idea, then it's a good idea; that's something worth knowing.

But it's not everything worth knowing. If originalism is really a law reform project, then the normative arguments may prove too much. We could encourage judges and officials to depart from current law for lots of reasons, none of which have anything to do with originalism: modernizing government administration, protecting the environment or human rights, preventing war, and so on. If the Supreme Court could successfully realize your favorite normative end by nonoriginalist means—declaring nuclear weapons unconstitutional, creating a libertarian paradise by decree—why should originalism stand in its way?

Most originalists tend to object to such arguments regardless of the cause in question, and without stooping to argue over which causes are more worthwhile than others. Originalists don't want to fit the stereotype described by their critics, of a

25. See, e.g., BARNETT, *supra* note 7, at 2; Lash, *supra* note 6, at 1442–43.

26. See Andrei Marmor, *Legal Conventionalism*, in HART'S POSTSCRIPT, *supra* note 19, at 193, 215.

political interest group trying to push its policies in the courts.²⁷ They want to argue, from a neutral standpoint, that their views correspond to legal rules that judges and officials are *already* bound to apply.²⁸ When originalists write amicus briefs opposing the Affordable Care Act's individual mandate,²⁹ for example, they tend to say things like "the mandate is unconstitutional,"³⁰ not "the mandate ought to be unconstitutional," or "the Supreme Court could make the world a better place by reading the Constitution so as to forbid the mandate."³¹

This kind of phrasing isn't just lawyer's talk, or bad faith, or even confusion about the nature of the originalist project. As Matt Adler notes, originalists and nonoriginalists both make these kinds of claims—and seem to believe them—without much attention to the underlying legal theories.³² That's not surprising, because while relatively few people have thought much about jurisprudence, lots of people (officials, judges, lawyers, conscientious citizens) want to know what the law is, not just what it ought to be. If normative justifications for originalism have nothing to say to such people, then that's a problem with the justifications, and we should look for something better.

B. Conceptual Defenses of Originalism

If a defense of originalism has to be rooted in American law, what might that defense look like? Conceptual defenses start down that road by combining legal arguments with philosophical claims about meaning and interpretation. For example, everyone seems to think that the Constitution's meaning is relevant to our law. And if the meaning of a text always and eve-

27. See, e.g., Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 *FORDHAM L. REV.* 546, 560 (2006).

28. Cf. *About Us*, FEDERALIST SOC'Y FOR L. & PUB. POL'Y STUD., <http://www.fed-soc.org/aboutus/> [<http://perma.cc/9Q8T-5FD7>] (last visited Aug. 14, 2014) ("[I]t is emphatically the province and duty of the judiciary to say what the law is, not what it should be").

29. See 26 U.S.C. § 5000A(a)–(b) (2012).

30. Brief of Authors of *The Origins of the Necessary and Proper Clause* and the Independence Institute as *Amici Curiae* in Support of Respondents at 4, *Dep't of Health & Human Servs. v. Florida* (No. 11–398), *decided sub nom.* *NFIB v. Sebelius*, 132 S. Ct. 2566 (2012).

31. Cf. Rappaport, *supra* note 1 (arguing that normative arguments can be appropriate if the law doesn't yet resolve the question).

32. See generally Matthew D. Adler, *Interpretive Contestation and Legal Correctness*, 53 *WM. & MARY L. REV.* 1115 (2012).

rywhere depends on “original” facts—what its author originally intended it to mean,³³ what a reasonable reader in its historical context would have taken it to mean,³⁴ and so on—then the Constitution’s meaning depends on those “original” facts too. We could sketch out the conceptual defense, again too simplistically, as something like this:

- (C1) Our constitutional law is determined by the meaning of the document’s text.
- (C2) The meaning of a text is its original meaning.
- ∴ (C3) Our constitutional law is determined by the original meaning of the document’s text.

Here, too, most of the controversy has focused on the second step. There are plenty of contradictory candidates for the One True Meaning of a text (speaker’s intentions, readers’ understandings, and so on); even originalists disagree about which to use.³⁵ But, as before, the real problem with the argument is at step one. Even assuming that, after all our philosophizing, one type of meaning will emerge triumphant, that still leaves us with a problem. Our constitutional law might include more than just the meaning of the document’s text. The real disputes over “interpretation” aren’t actually interpretive at all; they’re about the sources and content of our law, which depend on facts about our society today and not at the Founding. No matter what interpretive method we use, that method could be rendered irrelevant or obsolete depending on what else is in the law.

1. *What Interpretation Can’t Do*

Part of what makes debates over “constitutional interpretation” so frustrating is that the participants often seem to have different concepts in mind. Suppose that, according to your favorite interpretive method, you read the original Constitution to say *X*. Someone like Bruce Ackerman might still say, “Sure, the Constitution’s text originally said *X*, but we amended it to *Y*

33. See *supra* note 9.

34. See Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 (2006); see also Jeffrey Goldsworthy, *The Case for Originalism*, in THE CHALLENGE OF ORIGINALISM, *supra* note 4, at 42, 48.

35. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 43–47, 53–55 (2009).

during Reconstruction, the New Deal, and/or the Civil Rights Era.”³⁶ True, those “amendments” didn’t follow the (original) constraints of Article V. But that’s not a problem for Ackerman, who can just say that our legal system happens to permit certain informal or extraconstitutional amendments: Article V is one way of making amendments, but there are other ways too.³⁷

Similarly, someone like Philip Bobbitt (or David Strauss, Richard Fallon, or Mitch Berman and Kevin Toh) might say, “Sure, the Constitution’s text originally said X, but the text isn’t the exclusive source of constitutional law. Constitutional law also comes from judicial precedents, important statutes, common-law understandings, longstanding traditions and practices, the ethos of America, norms of prudence, and maybe some other things too.”³⁸ Canada’s constitution, for example, is said to include not only certain written instruments “but also ‘usage and convention,’” as well as “constitutional doctrine—the principles and rules derived from the written constitution.”³⁹ How do we know that ours is any different?

We normally talk about disputes like these as being about “constitutional interpretation”: Some people think that precedent matters for interpretation, say, and others don’t. But talking that way just causes confusion. As Timothy Endicott points out, “interpretation”—in the sense that conceptual defenses use the word—is about the proper way to read something; it “comes into play when there is a possibility of argument as to [a text’s] meaning.”⁴⁰ Once we know the communicative content well enough, once “there is no question as to how a person is to be understood,”⁴¹ then we’re done interpreting. But we might still not be done figuring out the law; there might be ex-

36. See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 8–9 (2014) (Civil Rights Era); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 7–13 (1998) (Reconstruction and New Deal).

37. See ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 36, at 329; ACKERMAN, *TRANSFORMATIONS*, *supra* note 36, at 15–17.

38. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE* 7–8, 93 (1982); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 3 (2010); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 *TEX. L. REV.* 1739, 1751 (2013); Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 *N.C. L. REV.* 1107, 1122–23 (2008).

39. Miller, *supra* note 23, at 132.

40. Timothy Endicott, *Legal Interpretation*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 109, 112 (Andrei Marmor ed., 2012).

41. *Id.* at 121.

tratextual sources of legal authority to consider (precedent, longstanding tradition, the American ethos, and so on). We can't rule them out by doing a better job of interpreting text; the point is that they're *extratextual*, and so have to be defended or rejected on other grounds.

As an example, think of constitutional disputes in the United Kingdom, which doesn't have a written constitution. Whether the U.K. has really become part of the European Union, such that E.U. law trumps U.K. law regardless of what Parliament says, can't be settled simply by interpreting various acts of Parliament. The U.K. Parliament could always declare that it's supreme, but then again the European Parliament could always disagree. Likewise, whether the current Parliament can bind a future Parliament—the traditional answer is no⁴²—isn't a question that statutes can settle; new ones could be written taking either side, and we'd still need to decide which is right.

The same arguments apply to the United States. Even if part of the Constitution's text called for a particular interpretive method,⁴³ that provision could have been superseded by practice as much as any other. Whether practice has overtaken text is something text alone can't settle.⁴⁴ One could say that these fights are still about "interpretation" of our legal practices writ large, but that's a nonstandard use of the term. What's clear is that these aren't fights about how to *read* a particular text, but rather about the legal authority that this text wields.

In fact, most of the time, no one actually disagrees about interpretation anyway. Most everyone accepts that some kind of original meaning is legally relevant sometimes; the only live disputes are what kind of original meaning, how much it contributes, and whether and when other sources can validly sup-

42. See 1 WILLIAM BLACKSTONE, COMMENTARIES *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not.").

43. See, e.g., Christopher R. Green, "This Constitution": *Constitutional Indexicals as the Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607 (2009) (arguing that it does); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation*, 103 NW. U. L. REV. 857 (2009) (same).

44. Cf. Stefan Sciaraffa, *The Ineliminability of Hartian Social Rules*, 31 OXFORD J. LEGAL STUD. 603, 620 (2011) (noting that "whether a written constitution is live or a dead letter comes in degrees," as official or popular customs "may reference some provisions of the constitution and ignore others"); Baude, *supra* note 1 (manuscript at 13) ("[E]ven those who would not go so far as to say that document itself has been superseded might say that our *legal rules for understanding that document* have been superseded.").

plement or supplant that meaning.⁴⁵ Only a small group of scholars really argue (whether for theoretical reasons or practical ones) that we're bound by the current meaning of the Constitution's words, whatever their original meaning might have been.⁴⁶ Arguments that we should sometimes use judicial precedent, traditions, or the American ethos in place of original meaning are only rarely intended as serious claims about the meaning of *language*. (How could a judicial decision or shifting normative concerns change the communicative content of a written document? Why don't other legal documents, like draft constitutions that were never enacted, also change over time in this way?)⁴⁷ Instead, these claims about precedent and tradition are usually intended as claims about different sources of law, or different factors that official decisionmakers ought to consider; or, if they aren't so intended, they could be redescribed that way without much loss.

To put it more generally, knowing how to read the Constitution's text doesn't tell us why we care what it says.⁴⁸ Whatever the right interpretive method might be, we can apply it to all sorts of documents—an old newspaper article,⁴⁹ a restaurant order,⁵⁰ a recipe for fried chicken⁵¹—without any of them being part of our law. One of the attractions of conceptual arguments is that they reference everyday methods for interpreting many different types of documents.⁵² But that broad application is

45. See Berman, *supra* note 35, at 10 & n.21 (arguing that few scholars deny that originalism "should count among the data that interpreters treat as relevant"); see also H. Jefferson Powell, *On Not Being "Not an Originalist,"* 7 U. ST. THOMAS L.J. 259, 265 (2010) (describing "original-meaning arguments" as "simply one mode of argument among many").

46. See, e.g., ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* 6–7 (1960); Tom W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269, 271 (2013); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism" Alternative*, 64 FLA. L. REV. 1485 (2012); cf. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 49 (1988) (making a similar suggestion for statutes).

47. See Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL'Y 485, 488–89 (2008).

48. See generally Andrew B. Coan, *The Irrelevance of Writeness in Constitutional Interpretation*, 158 U. PENN. L. REV. 1025 (2010).

49. See Prakash, *supra* note 47, at 487.

50. See Alexander & Prakash, *supra* note 9, at 975.

51. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825 (1997).

52. See Prakash, *supra* note 47, at 487–89.

also why the conceptual defense really needs its first premise—that the document’s text is authoritative for us, that it serves as the ultimate source of our supreme law.⁵³ And in defense of this premise, the philosophy of language has nothing to say.

2. *Interpretation and Theories of Jurisprudence*

The first step in the conceptual defense isn’t an interpretive claim, but what we might call a “jurisprudential” one—a claim about the sources and content of our law. Stating the problem this way gives us a rough understanding of the dispute: The originalist and the pluralist simply disagree on which sources matter.⁵⁴ To date, this disagreement has been mostly implicit, which has made it harder to resolve.⁵⁵ But it’s still possible that social facts ultimately provide the answer, and that this answer supports the originalist view. (For example, maybe society really does give preeminent authority to the Constitution’s text, which is why those other sources—purpose, precedent, tradition, etc.—have sought the cachet of “interpretation” for so long.)

Sophisticated conceptual originalists have long defended their views based not only on theories of meaning, but also on theories of legal authority. To commission some people to enact a Constitution, the argument goes, is to take their instructions as authoritative. So, when we interpret their work, we should look for the instructions they were trying to convey. Why else would we consult what they wrote, if not for the instructions that we asked them to write?⁵⁶

Phrasing the argument in these terms, though, also raises new problems. If the conceptual defenses themselves depend on contingent features of U.S. law—if they aren’t just the product of the philosophy of language—then they can be undone by those same contingent features. Even putting to one side separate sources of law like precedent, the correct method of interpreting a constitutional text might itself be determined by social facts.

53. See Alexander, *Simple-Minded Originalism*, *supra* note 9, at 94.

54. See Berman & Toh, *supra* note 38; see also Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 *FORDHAM L. REV.* 545 (2013).

55. See Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 193, 193 (Matthew D. Adler & Kenneth Einar Himma eds., 2009); Adler, *supra* note 32.

56. See Alexander, *Originalism, the Why and the What*, *supra* note 9, at 539–41.

Suppose, for example, that interpretive method *A* is the only one that's philosophically correct, but the French legal system actually interprets their constitution using method *B* (which might be nonoriginalist, or the wrong *kind* of originalist, or . . .). French lawyers know about the philosophical debates, but they're committed to their own traditional method; committed all the way down, in principle as well as in practice. An originalist might criticize this choice on policy grounds, or maybe on conceptual grounds (they're "reading it wrong")—but not on legal grounds, at least not without renouncing positivism. How could the entire society be getting its own law wrong, all the way down? It'd be one thing if French law explicitly required philosophical correctness, and the lawyers mistakenly thought they were complying. In that case, the collective error would be easy to explain.⁵⁷ But if the French practice is to ignore the philosophers and to derive legal rules by reading their own constitution in their own specific way, how can we say that this social practice is legally "incorrect"?

In other words, the right method of interpretation isn't always a philosophical question; there might be law on the subject, too. All sorts of laws are based on mistaken reasoning of one kind or another—tobacco subsidies, rent control, etc.—but that doesn't stop them from being laws. Similarly, a legal system can use philosophically defective rules of evidence or proximate causation if it wants; what the law is and what it ought to be are different things. As Judge Frank Easterbrook once put it, believing in nonoriginalist interpretation is like believing in infant baptism: "Hell yes, I've seen it done!"⁵⁸

Given that a great many legal systems read their written constitutions in nonoriginalist ways,⁵⁹ the claim that originalism is necessarily or conceptually required by a written constitution is hard to credit.⁶⁰ And if originalism depends on social facts in other countries, then presumably it depends on social facts here too. How do we know that America isn't actually like France? That's an empirical question, one that can't be settled by conceptual ruminations about interpreting texts. And even

57. See Sachs, *supra* note 1, at 2268–72 (discussing "global error" in law).

58. Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479, 479 (1996).

59. See *supra* note 23.

60. See generally Coan, *supra* note 48.

if American law is originalist, it might be the wrong kind of originalist: it might focus on the reader's understanding rather than the speaker's intent, or vice versa. In the end, discovering the One True Meaning won't get us very far; any actual defense of originalism has to rest on other grounds.

C. *Positive Arguments for Originalism*

Is our law originalist or not? Originalists ought to confront the question head-on. On the surface, the law might not look very originalist; but it has deeper features that might well support another view. This Article offers only a rough sketch of what a positive defense of originalism might look like; but this sketch, if it seems promising, can be filled in over time.

To greatly oversimplify (again), a positive defense of originalism might look something like this:

- (P1) Whatever is supported by the right kind of social facts is part of our law.
- (P2) Originalism is supported by the right kind of social facts.

∴ (P3) Originalism is part of our law.

At first glance, this argument looks pretty weak. The first step is broadly accepted by positivists, but only because it leaves out key details: which social facts are "the right kind," how they "support" legal claims, what counts as being "part of our law," or even what "originalism" is supposed to mean. Some of these details are left out by necessity. For example, even experts disagree about exactly which social conditions make something the law.⁶¹ Everyone accepts the broad outlines: Americans look to the U.S. Code in a way that Swedes don't, and so on. But on contested issues, the details matter. Before we can evaluate a positive defense, we need to know if those details support originalism.

Even worse, there's a lot of nonoriginalism in our everyday practice. Whichever social facts actually determine the law, a reasonable theory might well look to the actions of judges and officials, the doctrines we make students learn in con law class or for the bar exam, and so on. As Fallon argues, this everyday practice of constitutional law "sometimes permits deviations from the

61. See generally Adler, *supra* note 20.

original understanding and even from the superficially plain meaning of [the text].”⁶² Modern originalism began as a *criticism* of what courts were doing, not as a summary of their behavior.⁶³ Several decades later, self-identified originalists are still a minority among judges, officials, and law professors.⁶⁴ How can our law be originalist, if our practices and personnel aren’t?

That said, there are also reasons for the originalist to hope. Without having solved all of jurisprudence, we can make some plausible guesses about which social facts matter—plausible enough for ordinary lawyers to make accurate legal judgments on a routine basis. And without conducting sociological studies or opinion polls,⁶⁵ plenty of legal practices are familiar enough to be seen from the armchair, some of which may support originalist claims. (By way of example, language emerges from social practice in complicated ways, too—but you don’t usually need opinion polls to tell you how to speak.)

And everyday practice isn’t the only kind of practice we care about. As I’ve contended at length in other work—and what follows is necessarily in abbreviated form—the law depends more on the shared foundations of our legal reasoning than on the particular conclusions we reach or actions we take. Like parenting, law involves a good deal of “do what we say, not what we do.”⁶⁶ A clear-eyed sociologist might describe lawyers and judges as following a very different set of day-to-day rules than what we all think the law actually prescribes: “distort prior cases, advance political agendas, serve elite opinion or *amour-propre*, discount the claims of ethnic or religious minorities,” etc. This external observer, like the Holmesian “bad man,” might care only about rules that predict how officials

62. Fallon, *supra* note 38, at 1117.

63. *See supra* note 10.

64. *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 667 (2009).

65. Some have tried. *See, e.g.,* Donald L. Drakeman, *What’s the Point of Originalism?*, 37 HARV. J.L. & PUB. POL’Y 1123, 1133 & n.42, 1134–35 (2014) (noting that a small majority of Americans prefer that the Supreme Court base rulings “on its understanding of what the U.S. Constitution meant as it was originally written,” rather than “its understanding of what the U.S. Constitution means in current times,” and that even those in the latter camp think original meaning is “one of various factors that should be considered”). *But cf.* HART, *supra* note 20, at 117 (arguing that the practice of officials determines the law, not the beliefs of the public they serve).

66. Sachs, *supra* note 1, at 2266.

will act—but that’s a misleading picture of the law as a whole.⁶⁷ Fully understanding the law means trying on the “internal” perspective of a faithful participant in the system.⁶⁸ We need to know the social facts of how these participants conventionally justify their legal positions, the arguments they’re willing to accept and defend in public, and which legal rules they profess to derive from other rules or to hold on their own.⁶⁹

Sometimes our accepted arguments and our accepted conclusions might point in different directions. That is, there might be conflict between our general legal principles and our supposedly derivative beliefs about particular rules. Imagine that a statute on which we’ve long relied turns out to have been repealed many decades ago;⁷⁰ imagine that it was a criminal statute, and that recognizing the long-past repeal would mean letting lots of people out of prison. Maybe this statute would be so important, or the crime it addresses so awful, that we wouldn’t let it go after the repeal became known. Maybe we’d keep the prisoners behind bars anyway, inventing new legal justifications to preserve our everyday legal practices intact. If that happened, though, it’d clearly be a *change* to our law, not a reflection of its current rules as applied to some unexpected facts. Our law isn’t a prediction of what we’ll do when push comes to shove, any more than it’s a prediction of what courts will do in ordinary circumstances. Our law is what’s currently required by the higher-order principles that we currently accept and defend.⁷¹

When we look to these higher-order principles, the case for originalism is far stronger. Originalist claims are standard features of our legal practice—something nonoriginalists have occasionally recognized (to their dismay).⁷² As William Baude has

67. Compare O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459–61 (1897), with HART, *supra* note 20, at 88–91, 136–38.

68. HART, *supra* note 20, at 89.

69. See Sachs, *supra* note 1, at 2265–68.

70. Cf. *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439 (1993) (presenting the opposite scenario, in which a statute *hadn’t* been repealed even though, for many decades, the U.S. Code’s compilers thought it had).

71. For an extended argument on this point, see Sachs, *supra* note 1, at 2273–76.

72. See, e.g., ACKERMAN, *CIVIL RIGHTS REVOLUTION*, *supra* note 36, at 32–33 (“In America today, the official canon is composed of the 1787 Constitution and its subsequent formal amendments.”); STRAUSS, *supra* note 38, at 29 (complaining

persuasively argued, courts and officials labor mightily to avoid anything that smacks of open rebellion against the text or its original meaning, however understood.⁷³ Instead, they downplay potential conflicts by pointing to historical ambiguities,⁷⁴ applying old rules to new facts,⁷⁵ and so on. Maybe that kind of practice—taking original meaning as a constraint on other sources of law, without necessarily explaining where those other sources came from—is enough to support a positive defense. Yet this Article tries to go further, moving beyond a negative vision of originalism-as-constraint to an affirmative vision that synthesizes our reliance on original history with our other legal commitments. If this picture of our practices seems familiar enough, then it might support a belief that—despite appearances—originalism is actually our law.

II. ORIGINALISM AS THE FOUNDERS' LAW

If originalism is really a theory of our law, what theory is it? This Article presents originalism as a theory of legal change: Our law is still the Founders' law, as it's been lawfully changed.

The motivation here is simple. One problem with the conceptual defense was that, even if we knew what the text meant at the Founding, this meaning might have been superseded since. This theory takes that basic problem and generalizes it. Even if we knew *what the law was* at the Founding, based on the meaning of text or whatever else, this law might have been superseded since. The basic, most essential claim of originalism is that the Founders' law *has not* been superseded—that the “orig-

that, in our system, “[c]onstitutional law is supposed to consist in the interpretation of a written text,” as opposed to common-law reasoning from precedents).

73. See Baude, *supra* note 1 (manuscript at 20–32); see also, e.g., Goldsworthy, *supra* note 34, at 56 (“Even when judges purport to enforce unenumerated, supposedly implied principles, they invariably claim to have discovered those principles in the constitution, not added them to it.”); Kent Greenawalt, *Constitutional and Statutory Interpretation*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 268, 301 n.36 (Jules Coleman & Scott Shapiro eds., 2002) (“Matters become somewhat more complicated if one thinks that courts consistently employ an originalist rhetoric that persuades citizens, who do not quite acknowledge that a number of decisions they like fail under originalist standards.”); Sachs, *supra* note 1, at 2282–84.

74. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2561, 2567–68 (2014).

75. See, e.g., *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); see also Sachs, *supra* note 1, at 2283 (discussing these cases).

inal" law, whatever it was, is still law for us today. We may have changed it over time, but only because the law itself provided for means of change.

Everyone knows that legal systems change over time. Sometimes those changes comply with the system's own rules for lawmaking; sometimes they don't. At any particular time, though, a legal system combines a practical acceptance of certain past changes with restrictions on how the law is supposed to change in the future. The American legal system, for example, accepts all sorts of changes made before the Constitution was adopted. Alleged changes made since the Founding, by contrast, aren't accepted as brute historical facts; they need some kind of legal justification. Even after two hundred years, we share what some scholars have called "constitutional continuity" with the Founding.⁷⁶

Like everything else in law, this claim has to be based on contingent social facts. Not every legal system has to work this way, and many don't. But in our system, explaining *when* something became the law is an important part of establishing *how* it became the law, and in turn to showing *that* it became the law. This practice, and our choice of the Founding as a unique starting point, makes it plausible that originalism is part of our law.

A. *Two Kinds of Legal Change*

1. *Authorized Change*

Legal systems typically contain rules of two different kinds. Some we could call "substantive rules," like "don't steal" or "don't murder." But others are "rules of change," which authorize alterations or amendments to the system's existing rules. Article V amendments are classic examples; so are statutes, treaties, shifts in recognized custom and usage, and so on.⁷⁷

76. See Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART'S POSTSCRIPT, *supra* note 19, at 1, 11 nn.21-22 (discussing the work of Hans Kelsen). See generally B.J. Spagnolo, Kelsen and Raz on the *Continuity of Legal Systems: Applying the Accounts in an Australian Context* (2013) (unpublished D Phil dissertation, University of Oxford) (on file with author).

77. Cf. J.M. Finnis, *Revolutions and Continuity of Law*, in OXFORD ESSAYS IN JURISPRUDENCE (2d ser.) 44, 48 (A.W.B. Simpson ed., 1973) (discussing "rules of succession of rules").

One important consequence of having rules of change is that, until something happens to trigger those rules, everything that's already in the system is supposed to stay the same. That's what it *means* to have rules of change: if the rules aren't satisfied, there's no change. We regularly treat unrepealed statutes as law, for example, whether they were passed a century ago or in the last legislative session.⁷⁸ They might be superseded by a constitution or a treaty; they might be undone by sunset clauses or doctrines like desuetude;⁷⁹ but unless something *else* in the law acts to get rid of them, they quietly stick around. (In H.L.A. Hart's "picturesque example," a woman "was prosecuted in England and convicted" in 1944 "for telling fortunes in violation of the Witchcraft Act, 1735."⁸⁰) When we pass new statutes, we use traditional canons of construction—such as that implied repeals are disfavored, or that statutes in derogation of the common law are narrowly construed⁸¹—to fit them in with their unrepealed fellows on the books.⁸² The last-in-time rule, that new law trumps old law, wouldn't even occur to us but for a presumption that old law otherwise remains in place.⁸³ To paraphrase Newton's First Law of Motion, a statute at rest tends to remain at rest, unless acted upon by an outside force.

The same is true of every other legal object. Someone who owned Blackacre a year ago presumably owns it today, unless something legally interesting happened in the meantime (a sale, a bequest, eminent domain, and so on). Contracts stay contracts and torts stay torts, absent some rule to tell us otherwise. As John Finnis describes, this kind of stability is "a work-

78. See 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 34.1, at 31–32 (7th ed. 2009) (describing the "basic principle of law . . . that, unless explicitly provided to the contrary, statutes continue in force until abrogated by subsequent action of the legislature."); Jack M. Balkin, *Must We Be Faithful to Original Meaning?*, 7 JERUSALEM REV. LEGAL STUD. 57, 59 (2013) (noting that "laws, even ancient laws, continue in force . . . until they are modified or repealed").

79. Cf. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2209 (2006) (noting regretfully that, within the United States, desuetude "currently enjoys recognition in the courts of West Virginia and nowhere else").

80. HART, *supra* note 20, at 61 (citing *R v. Duncan*, (1944) 1 K.B. 713).

81. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 936–37 (1992); see also Sachs, *supra* note 110, at 1840–41.

82. Cf. HART, *supra* note 20, at 64 (noting that "Victorian statutes and those passed by the Queen in Parliament today surely have precisely the same legal status in present-day England").

83. I owe this point to Jessica Bulman-Pozen.

ing postulate of legal thought," one "so fundamental that it is scarcely ever identified and discussed."⁸⁴

Perhaps societies and legal systems don't have to operate this way, but there are some excellent reasons why they do. We make laws to govern things to come, not things as they are. "At least until we devise time machines," the D.C. Circuit once noted, "a change can have its effects only in the future."⁸⁵ This prospective lawmaking doesn't work, as Judge Easterbrook points out, unless the "[d]ecisions of yesterday's legislatures" have continuing legal force: "[A]ffirming the force of old laws is essential if sitting legislatures are to enjoy the power to make new ones."⁸⁶ Rather than have Congress reinvent the wheel in every new session, we treat our existing law as valid until something invokes our rules of change. Leaving the law in place in this way lets people find out what it is, and it avoids presenting legislators with a moving target.

Keeping legal rules in place until they're lawfully changed also goes a long way toward maintaining the rule of law. The rules of change we have, like other legal rules, might be general or specific, vague or precise; there might be legitimately hard questions about whether a particular change is authorized or not. But in any legal system worthy of the name, the rules of change have to have a certain amount of exclusivity or closure. They can't be generally agnostic as to other methods of changing the law, at least not without casting everything else in the system into doubt. (Did that gentle breeze or passing cloud just repeal the tax code? How would you know, absent a rule one way or the other?) We can imagine a legal system with rules that permit *no changes*, but a legal system that has *no rules of change* looks more like Calvinball.⁸⁷

In other words, everyone who actually wants some law also wants some rules of change, rules that mostly act by keeping things the same. (Anyone who says otherwise is lying about

84. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 268 (1980).

85. *Bergerco Canada v. OFAC*, 129 F.3d 189, 192 (D.C. Cir. 1997) (Williams, J.); accord JED RUBENFELD, *FREEDOM AND TIME* 26 (2001).

86. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 *GEO. WASH. L. REV.* 1119, 1120 (1998).

87. See *Calvinball*, THE CALVIN & HOBBS WIKI, <http://calvinandhobbes.wikia.com/wiki/Calvinball> (last visited Aug. 17, 2014) [<http://perma.cc/PE35-GMVX>] ("Calvinball is a game invented by Calvin in which one makes the rules up as one goes along.").

wanting some law.) Complaints about the “dead hand,” to be taken seriously, can’t just be complaints that we’re still governed by older law—that’s a basic feature of legal systems, and something no sensible person would wish to live without. The real complaint is that the rules of change we have aren’t as democratic or easy-to-use as they ought to be. But what the law is and what it ought to be are different things, and the law we have includes its own rules for legal change.

2. *Unauthorized Change*

If the law is supposed to stay the same until it’s lawfully changed, then we can use that feature as a test of current rules. If a rule is said to be part of the law today, we can ask how it got there, and we can expect a certain kind of story in return. Think of chains of title: if you want to claim Blackacre, you have to show how you got it (e.g., from *C*, who got it from *B*, who got it from *A*, . . .), and only certain explanations are good ones. So we could imagine the following story being told about legal rules: Something is part of the law if and only if it was lawfully added (at t_3 , which altered the law from t_2 , . . .), with each step representing a valid, authorized, constitutionally continuous change to the law.

The problem with this story, though, is that authorized changes aren’t the only kind. Chains of title don’t go *all* the way back, and neither do chains of legal justification. (Otherwise, we’d have an infinite regress: Where did the rules of change come from? Under what rules were *they* added to the law? Etc.) Law being dependent on social facts, it evolves as society does; but societies don’t *have* to evolve according to any particular rules, and usually they don’t. Nations get invaded, governments get overthrown, perfectly valid rules get abandoned or forgotten, and so on. It’d be absurd to insist on legal compliance all the way back—concluding, say, that our law today is invalid because the Constitution disobeyed the Articles of Confederation, the Revolution disobeyed British law, the colonists disobeyed Native American law, and so on, back to the Norman Conquest and beyond. In other words, just because things are legally *supposed* to change only in certain ways doesn’t mean that they actually do. The alterations in legal rules that actually occur as a matter of social fact, and that don’t obey the preexisting rules, we can refer to as unauthorized changes to the law.

3. *Combining the Two*

In any real-world legal system, the law is a product of both authorized and unauthorized changes. The two kinds might seem to sit uneasily with each other. Some scholars have even suggested that they're incompatible, that each unauthorized change kills off the existing legal system (like a tiny coup d'état) and replaces it with another.⁸⁸ To others, that seems a little drastic. According to Joseph Raz, English law underwent an unauthorized change in 1966, when the House of Lords asserted a power to overrule precedents;⁸⁹ it'd be odd to say that 1966 marked the destruction of the English legal system as we knew it.⁹⁰ But how can a legal system really combine both kinds of changes at once? How can it have *rules* of change if it doesn't actually have to follow them in practice?

In fact, we manage to recognize and comply with both authorized and unauthorized changes all the time. To take a concrete example, suppose the President announced tomorrow that "all state and local jaywalking laws are hereby repealed." This isn't something that, under our current rules of change, the President can actually do. So a competent American lawyer should say that the decree is legally ineffective—in the same way that, per *Marbury v. Madison*, "an act of the legislature, repugnant to the constitution, is void."⁹¹

But it's always possible, notwithstanding this legal conclusion, that the President's gambit would *work*. Suppose that officials started acting as if the jaywalking laws had been repealed, that codifiers started removing them from the statute books, and so on. If enough people—and the right people—started accepting the decree as valid, all the way down, then at some

88. See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 219–20 (Anders Wedberg trans., 1945); *id.* at 368–69 ("[T]he State and its legal order remain the same only so long as the constitution is intact or changed according to its own provisions."); cf. Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 332–33 (2005) (describing any "break in the continuity of the legal order," no matter how small, as "a legal revolution").

89. See Raz, *supra* note 76, at 11 n.22 (discussing Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234 (H.L.)).

90. See HART, *supra* note 20, at 123 ("[T]he expression 'the same legal system' is too broad and elastic to permit unified official consensus on *all* the original criteria of legal validity to be a necessary condition of the legal system remaining 'the same.'"); Raz, *supra* note 76, at 11 (criticizing Kelsen's view); see also Finnis, *supra* note 77 (same).

91. 5 U.S. (1 Cranch) 137, 177 (1803).

point a positivist would have to say that American law had undergone an unauthorized change, and that the jaywalking laws really had been repealed.⁹²

Everyone implicitly accepts some of these unauthorized changes already. Our legal system doesn't worry about whether the Constitution was authorized by the Articles, just like we don't worry about the legality of the Revolution, colonization, or the Norman Conquest. That doesn't mean that we give up on the idea of rules of change—that we throw up our hands and say, “the law is whatever it is today,” or “the law is whatever society currently accepts.” Those responses are tautologies, at least for a positivist; they don't tell us anything we didn't know already. At any given time, the law *as it stands* has some contentful substantive rules and some meaningful constraints on how those rules may change. (Without those constraints, the substantive rules would lose their content; that's the problem with Calvinball.) Our law requires us, at one and the same time, to overlook past violations and to commit to being rule-governed in the future; to go, and sin no more.

To put it another way: to adhere to our current law, from the internal perspective of a faithful participant, means accepting the past changes that it accepts, wherever they came from. But it also means recognizing, *from now on*, only the future changes that are authorized by our rules of change. Of course we know, from reading history, that our law didn't emerge in pure fashion like Venus rising from the sea—and that it might be altered unlawfully in the future, if society rejects its constraints. At that point, like a Jacobite after the Glorious Revolution, we might have to revise our internal commitments, at least if we choose to be faithful to society's new rules. But *until* that happens, we have sound legal reasons to reject any attempts at unauthorized change.

B. Originalism and Legal Change

We can now see how to state originalism as a theory of legal change. When a given set of laws is in force, those laws are supposed to change only in law-governed ways, with a legal

92. In fact, presidents have actually tried something like this by purporting to terminate treaties—a power once thought to reside exclusively with Congress, or perhaps with the President-and-Senate, but that the Executive has repeatedly claimed with little effective opposition. See generally Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773 (2014).

justification for each new step. But we've still got to start somewhere. Originalism starts by assigning the legal system an *origin*, namely the Founding. That means it accepts the law as it stood at the Founding, regardless of how it got that way. But from the Founding on, it requires that changes be lawful—that is, that they be made under rules of change that were already law at the time, whether those rules were there at the Founding or were lawfully added since.

If this picture is right, then we could roughly (and recursively) define originalism as making the following three claims about the law of the United States:

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

This recursive definition might sound strange, but it's how we commonly think about the Constitution's text.⁹³ We typically recognize something as part of "the text" if it was in the original Constitution or was added by an Article V amendment. But if we used an Article V amendment to create a new amendment procedure (say, ratification by referendum), we could then add to the text through that procedure too. So another way of describing the text is to define it recursively, as whatever was in the original Constitution plus whatever's been added through an amendment procedure that was already in place at the time.

This approach also makes sense as to the Founders' law as a whole. In our system, we take the Founders' legal rules as having a certain sort of *prima facie* validity; in particular, we don't look behind them to determine whether *they* were lawfully created, under the standards of some earlier time. We also accept a wide variety of deviations from the substance of the Founders' rules, when we can give plausible accounts about how those deviations were actually lawful when they occurred. The key claim—and the most controversial—is the last one: that, at least at the level of our higher-order commitments, we accept claims of change only if they're ultimately rooted in the Founders' law.

93. I owe this point to John McGinnis.

1. *The Rules at the Founding*

Whether we adhere to the Founders' law is a claim about our contemporary law, one that has to be based on contemporary social facts. But this contemporary law can still incorporate, in certain ways, the law of an earlier time. As it happens, our practice is to incorporate the Founders' law as it stood, without worrying about how it got that way.

a. *Incorporating Past Law*

Incorporating other legal rules by reference is remarkably common in legal systems. Choice-of-law doctrines, for example, routinely direct us to incorporate the law of some other society. As Alexander Hamilton reminded his fellow New Yorkers in *The Federalist*, the laws "of Japan not less than of New-York may furnish the objects of legal discussion to our courts."⁹⁴ To determine Japanese law, our legal system usually just tells us (or incorporates rules of private international law that tell us) to find out what law actually applies in Japan, using our standard positivist toolbox.⁹⁵ From our perspective, Japanese law is something found, not made; to borrow a distinction made by Leslie Green, U.S. officials "can decide whether or not to apply" Japanese law, but "they can neither change it nor repeal it, and [the] best explanation for its existence and content makes no reference to [American] society or its political system."⁹⁶ Our law handles Japanese law the way it handles "logic, mathematics, principles of statistical inference, or English grammar," all of which can be "properly applied in cases" even though we didn't make them.⁹⁷

We use the same approach for the law of the past. (After all, "[t]he past is a foreign country: They do things differently there."⁹⁸) Think of a property case involving a complex chain of title. Under the traditional maxim *nemo dat quod non habet*—one

94. THE FEDERALIST NO. 82, at 555 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

95. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 201, 205(3) (1986); accord RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW §§ 101, 113 (1962).

96. Leslie Green, *Legal Positivism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Spring 2015), <http://plato.stanford.edu/archives/spr2015/entries/legal-positivism/> [<http://perma.cc/R584-HZ2R>] (discussing Canadian application of Mexican law).

97. *Id.*

98. L.P. HARTLEY, THE GO-BETWEEN 17 (N.Y. Review Books 2002) (1953).

cannot give what he does not have⁹⁹—a present interest in property might depend on the validity of an old conveyance, which in turn could depend on the law as it stood at that earlier time.¹⁰⁰ So we might need to know the law of a previous era to know who owns Blackacre today. We don't use this rule because we're forced to do so (in some dead-hand sense) or out of slavish devotion to our ancestors. Instead, *nemo dat* is part of our current law, which we know to be law because of current social facts, and which we've currently chosen to suspend in some cases and not others.¹⁰¹ The content of the rule just happens to involve a cross-reference to the law of an earlier time; our law *tells* us to look up past law, so we do.

Adherence to the Founders' law works in much the same way. Our modern legal rules are determined by modern social facts, but they still instruct us to use the law of an earlier time.¹⁰² That doesn't make it easy. To find that law, we have to make a number of difficult historical judgments—even after we've decided, based on positivist theory, what kind of historical evidence ought to matter. But we could face exactly the same difficulties in figuring out the law of a foreign country, or determining the validity of some old conveyance. Maybe that's just what our law requires; maybe incorporating past rules of law is what we, today, conventionally do.

In fact, we can adhere to the Founders' law today even if we haven't always done so, and even if there've been occasional interruptions along the way. In the choice-of-law context, diplomatic recognition can override positivist theory: when the United States refused to recognize the People's Republic of China, our courts were obliged to assume (with some exceptions) that

99. See Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2120 (2012).

100. See, e.g., *Mitchell v. Hawley*, 83 U.S. (16 Wall.) 544, 547 (1872) (determining the rights of a downstream licensee "under the prior Patent Act").

101. See, e.g., U.C.C. § 2-403 (1951) (revised 1972) (protecting certain good-faith purchasers); *id.* § 3-305 (setting out the holder-in-due-course rule for negotiable instruments); see generally Alan Schwartz & Robert E. Scott, *Rethinking the Laws of Good Faith Purchase*, 111 COLUM. L. REV. 1332, 1335 (2011).

102. *But see* MEIKLEJOHN, *supra* note 46, at 3-4, 6-7 (arguing that present acceptance requires present-centered modes of interpretation); STRAUSS, *supra* note 38, at 36-38 (suggesting that originalism is inconsistent with a conventional Hartian theory).

mainland China was actually being governed from Taiwan.¹⁰³ The same thing can happen with the past: Our law might require us to ignore what past law actually was, in favor of what we now say it was. An honest positivist in mid-1650s England would say that the monarchy had been abolished; but when the Restoration came in 1660, the official position of English law was that Charles II had been king for the last twelve years.¹⁰⁴ Similarly, in *Texas v. White*, the Supreme Court recognized the “historical fact” that the Confederate government of Texas, when it was “in full control of the State, was its only actual government.”¹⁰⁵ But because that government was “established in hostility to the Constitution of the United States,” American courts were duty-bound not to regard “its acts as lawful acts,”¹⁰⁶ except as permitted by the de facto government doctrine.¹⁰⁷

In other words, many U.S. states have already gone through periods of revolution and interregnum, which we understand through the lens of post-restoration law. If they can do it, so can the nation as a whole.¹⁰⁸ Whatever our law might have been before—during the New Deal, say, or the heady days of the Warren Court—what we’re currently obliged to maintain as a matter of law and social practice isn’t necessarily what we’ve

103. See, e.g., *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59, 66 & n.11 (N.D. Cal. 1952); cf. HART, *supra* note 20, at 119–20 (discussing a hypothetical British statute that declares Tsarist law still in force in Russia).

104. See Declaration of Breda (Apr. 4, 1660), in 11 H.L. JOUR. (1660) 7–8 (U.K.).

105. 74 U.S. (7 Wall.) 700, 733 (1869).

106. *Id.* at 732–33.

107. *Id.* at 733.

108. In fact, the United States can be originalist even if particular states are not. As used in this Article, “American law” or “the law of the United States” means the law applicable to the whole country, not just to any one state. Individual states, like foreign countries, might have different legal practices, and some have definitely broken from their preexisting law. See AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 296 & n.19, 297 & n.21 (2005); Baude, *supra* note 1 (manuscript at 42–43). This doesn’t undermine originalism in general, because U.S. law largely incorporates state law by reference. See, e.g., Rules of Decision Act, 28 U.S.C. § 1652 (2012). From a federal perspective, if we want to know the law of North Carolina, we have to look and see, using the same positivist toolbox that we’d use for Mexico or Japan. Federal officials can override state law or choose “not to apply it,” but “they can neither change it nor repeal it”; U.S. law isn’t the *source* of North Carolina’s law, though it may superimpose some constraints like equal protection or a republican form of government. Green, *supra* note 96; accord Kent Greenawalt, *The Rule of Recognition and the Constitution*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 55, at 1, 23–25. As a result, the law of individual states can change in nonoriginalist ways and be applied in federal court without U.S. law becoming nonoriginalist too.

maintained in the past. Just as current practice could easily discard the law of the Founding, choosing to adopt some other law instead, it can also *adopt* the law of the Founding, notwithstanding earlier departures therefrom. The best reading of our legal practices may be that we adhere to the law of the Founding *today*, whatever the unusual course of history might show.

b. Incorporating the Founders' Law

Relying on past law is hardly unusual. What's distinctive about American practice, though, is that it relies on the law *of the Founding*. We date our legal system, and our requirements for legal change, from the adoption of the Constitution. If that's right, then the Constitution occupies an extremely special place in American law, more so than we usually think. The key claim isn't that the Constitution trumps any law of lesser stature—though that may also be true, and very important. The salient claim, for present purposes, is that the Constitution represents a boundary in time, separating our present legal system from older systems that we've discarded.

When our courts discuss the law of the Founding era, they often accord it a certain kind of *prima facie* validity, subject to being altered later on. This isn't just limited to historical arguments about the constitutional text. The Supreme Court describes state sovereign immunity, not as a creature of the constitutional text, but as "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments."¹⁰⁹ In other words, the Founders had law on the subject, and their law stays good until we do something about it. Not everyone agrees with the Court on sovereign immunity; but agree or not, the picture only makes sense if Founding-era law—whether or not it shows up in the text—can still continue in force.¹¹⁰

Law that predated the Founding, though, doesn't always get the same treatment. When the Court directly applies traditional rules of unwritten law, as in admiralty cases or state border disputes, it might trace the rules as far back as Blackstone, but rarely

109. *Alden v. Maine*, 527 U.S. 706, 713 (1999).

110. See Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1868–75 (2012).

much further.¹¹¹ What matters is how the doctrine stood when it crossed the Atlantic, and then how it developed on this side of the pond. Whether the colonial-era legal rules displaced older rules of even longer standing just doesn't matter for their status today.¹¹²

To the extent that the Founding broke from preexisting law, we don't let that stand in our way. The nine state conventions that adopted the Constitution in 1788 complied with Article VII,¹¹³ but they violated the Articles of Confederation, which couldn't be amended or overridden without thirteen legislatures' consent.¹¹⁴ In fact, by accepting a new "supreme Law of the Land,"¹¹⁵ the conventions may also have violated their own state constitutions, which didn't necessarily permit amendments by that means.¹¹⁶

In other words, if our system had to be judged by the standards of the Articles (or before), then we'd reject the Constitution itself as invalid.¹¹⁷ But in *our* legal system, trying to vali-

111. *See, e.g.*, *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 409–10 (2009) (noting, in a maritime case, English practice "[j]ust before the ratification of the Constitution," as well as American practice "since at least 1784"); *New York v. New Jersey*, 523 U.S. 767, 784 (1998) (discussing the effect of accretion and avulsion on state borders).

112. *See, e.g.*, *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 277 (2008) ("[B]y the time Blackstone published volume II of his Commentaries in 1766, he could dismiss the 'ancient common law' prohibition on assigning choses in action as a 'nicety . . . now disregarded.'" (omission in original) (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *442)); *Phillips Petrol. Co. v. Mississippi*, 484 U.S. 469, 478 (1988) (describing the common law as determining what "lands beneath waters under tidal influence were given States upon their admission into the Union"); *id.* at 486 (O'Connor, J., dissenting) (attempting "to ascertain the extent of the King's rights under English common law," and bemoaning the lack of "English cases of the late 18th and early 19th centuries" in particular).

113. *Cf.* Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 5–31 (2001) (discussing why the Constitution became law in 1788, rather than 1787, 1789, or some other year).

114. *See* ARTICLES OF CONFEDERATION of 1781, art. XIII; *see also* ACKERMAN, TRANSFORMATIONS, *supra* note 36, at 34–36.

115. U.S. CONST. art. VI, § 2.

116. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 36, at 36–39; AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 58–60 (2012).

117. Some academics have tried to explain this away. One recasting of Ackerman's theory, for example, describes ratification as legally authorized because it was an act of true popular sovereignty, and such acts—usually found in five-phase constitutional moments—have always been permitted by our rules of change. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 36, at 66–68. Akhil Amar has argued that Articles' widespread violation rendered them nonbinding under international law, *see* AMAR, *supra* note 108, at 29–33; *see also* THE FEDERALIST NO. 43, *supra* note 94, at 297–98 (James Madison), and that the state conventions were exemplars of popular sovereignty for the time, *see* AMAR, *supra* note 108, at 10–18, 308–11; AMAR, *supra* note 116, at 60–63.

date the Constitution in terms of preexisting law is both unhelpful and unnecessary. Even if you succeeded, that'd just push the problem further back, requiring us to decide the legal status of the Revolution, colonization, the Norman Conquest, and so on. For contemporary legal purposes, we simply don't care. By contrast, it *is* legally relevant today whether a particular act of Congress, state statute, or judicial decision is consistent with the Constitution of 1788—even if we might have some other legal reasons, discussed below, to leave a few inconsistencies in place. To the extent that law is a matter of social convention, our thoroughgoing agreement on the Founders' law (regardless of what might have happened earlier) makes the Founding the starting point of our law.

This reliance on the Founding isn't just a matter of American culture or filial piety, the way many nonoriginalists describe it.¹¹⁸ Many Americans do revere the Founders, but societies' deep legal practices usually have more than one reason supporting them. Parliamentary supremacy in the United Kingdom, as Leslie Green notes, might "rest, not only on a common practice of treating [statutes] as supreme, but also on a belief that this practice is democratic or is central to our culture."¹¹⁹ Those cultural beliefs supplement rather than supplant the particular conventions that constitute our legal practices. American society doesn't accept the Telecommunications Act of 1996¹²⁰ out of filial piety toward Newt Gingrich and his fellows in the 104th Congress, let alone toward a Founding generation that never heard of the Internet. We accept it because it was passed by Congress and has never been repealed. In the same way, it's our practice to adhere to the Founders' law, as lawfully changed. Whether or not we share the moral and po-

But the new Constitution may have been democratically legitimate, deserving of obedience, and so on, without actually being legal under preexisting rules. See Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1825–28 (discussing this possibility); see also THE FEDERALIST NO. 40, *supra* note 94, at 264–67 (James Madison); THE FEDERALIST NO. 43, *supra* note 94, at 297.

118. See, e.g., Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1697 (2012); Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1920 & nn.10–15 (2012) (collecting sources); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 790 n.289 (2010); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1719 (2003).

119. Green, *supra* note 20, at xxiii.

120. Pub. L. No. 104-104, 110 Stat. 56.

litical traditions of the Founders, we continue a *legal* tradition that started at the Founding and that we haven't abandoned since.¹²¹

2. *Changes Since the Founding*

The Founders' rules weren't fixed in amber. We've altered them in innumerable ways, even on foundational matters. In our legal practices, though, one reliable way to defend those changes is to present them as authorized, rather than unauthorized—as continuations of the Founders' law rather than departures. In other words, it's part of our higher-order legal rules to accept what's lawfully done under the Founders' rules as law.

Often we explain important developments in our law by describing them as applications of unchanging rules to changing facts. When we can't do that, because it's impossible to deny that the law has changed, we defend the changes under lawful *rules* of change, whether rooted in the Founding era or added since. And when that won't work either, because the law has clearly been violated, we rely on various doctrines found elsewhere in the law to cure the violations or to prevent them from causing more mischief. Even *stare decisis*, the most prominent arrow in the nonoriginalist quiver, commonly functions as one of these "domesticating doctrines"—and is commonly rooted in Founding-era sources. The point is not, or at least not yet, that these are the only kinds of arguments we can make. The point is that these arguments are thought to be successful, partly because of their connection to the Founders' law.

a. *Rules and Outcomes*

One familiar feature of legal rules is that the same rule can produce changing outcomes over time. Rules usually take account of various facts about the world; when the facts change, the outcomes change too.¹²² As a result, when we try to explain

121. Cf. Balkin, *supra* note 78, at 68 ("Americans do not understand themselves as having abandoned their constitution, either in whole or in part."); David Couzens Hoy, *A Hermeneutical Critique of the Originalism/Nonoriginalism Distinction*, 15 N. KY. L. REV. 479, 497 (1988) ("That we feel that the constitutional provisions are still very much *present* law suggests that we understand ourselves as having a single tradition (however complex and polysemous), stretching back and including the context in which the provisions were first written down and ratified.").

122. See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006); see also JACK M. BALKIN, *LIVING ORIGINALISM* 6 (2011).

a legal development that differs from the Founding era, arguing that it's simply a change in application is usually taken as a *good* argument, even if the outcome diverges from the Founding generation's specific plans or intentions.

Legal rules can take as their inputs (or incorporate by reference) a variety of different things: empirical facts about the world, mathematics, social customs, other legal systems' rules, perhaps moral judgments, and so on.¹²³ At risk of belaboring the obvious—though it's led a few scholars into confusion¹²⁴—if these things evolve over time, so does the law. In states that have adopted the Uniform Commercial Code, for example, implied warranties arise from the “usage of trade”;¹²⁵ as trade usage develops, so will the legal obligations of buyers and sellers. The Constitution forbids habeas suspensions “unless when in Cases of Rebellion or Invasion the public Safety may require it”;¹²⁶ public safety might require a suspension at time t_1 but not t_2 , and then again at t_3 . And when the amount of trade across state lines expands beyond the dreams of the Founders, so will the significance of the power conferred by the Commerce Clause,¹²⁷ even leaving the scope or nature of that power entirely the same. These trends may stray very far from the Founding, but that's only because of the particular inputs that the Founders chose to make significant. To paraphrase Christopher Green, the choice of one legal rule over another “is a choice about what sorts of changes should make a difference.”¹²⁸

More importantly, when this distinction is offered in constitutional arguments, it goes a long way toward providing a legally acceptable account of change. In defending the New Deal, for example, Franklin Roosevelt argued that the Framers “used specific language” for some purposes and “generality, implication and statement of mere objectives” for others—allowing the law, “within the Constitution, [to] adapt to time and circum-

123. See *supra* notes 96–97 and accompanying text; see also Green, *supra* note 20, at xxxix (describing the dispute over moral judgments).

124. See, e.g., Green, *supra* note 122, at 579–90 (discussing Raoul Berger and Jed Rubenfeld).

125. U.C.C. § 2-314(3).

126. U.S. CONST. art. I, § 9, cl. 2.

127. U.S. CONST. art. I, § 8, cl. 3.

128. Green, *supra* note 122, at 583; cf. SHAPIRO, *supra* note 21, at 335 (describing a particular plan's “economy of trust”).

stance.”¹²⁹ On commerce, taxes, and spending, Roosevelt said, the Framers intentionally chose “broad and general language” that was “capable of meeting evolution and change.”¹³⁰ Roosevelt didn’t have to make this argument; he could have said, as many Progressives did, that the preexisting law was constraining and outdated and might need to be cast aside.¹³¹ But that would have been visibly contrary to existing legal norms, in a way that applying existing law to new facts was not.

For another prominent example, consider *Brown v. Board of Education*.¹³² Some people treat *Brown*’s statement that “[i]n approaching this problem, we cannot turn the clock back to 1868”¹³³ as an official rejection of prior law by the Court.¹³⁴ But that statement merely describes current facts about education as inputs to a rule about equality. “[T]his problem” is “the effect of segregation itself on public education,”¹³⁵ and in solving it, the Court quite obviously “must consider public education in the light of its full development and its present place in American life.”¹³⁶

This kind of explanation is a standard feature of controversial decisions. When the Court upheld a state debt-relief law under the Contracts Clause, it didn’t assert any new emergency power to respond to the Great Depression. Instead, it claimed to be applying implicit limitations already found within the

129. Franklin Delano Roosevelt, President of the United States, Address on Constitution Day (Sept. 17, 1937), The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=15459> [<http://perma.cc/HR8S-6RS8>].

130. *Id.*

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

132. 347 U.S. 483 (1954).

133. *Id.* at 492.

134. See, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1–2 (1955); Miguel Schor, *Foreword: Contextualizing the Debate Between Originalism and the Living Constitution*, 59 DRAKE L. REV. 961, 967 (2011); Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 88 (2010); cf. Pamela S. Karlan, *What Can Brown® Do for You? Neutral Principles and the Struggle over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1052 (2009) (“[W]hatever originalism means with respect to other constitutional issues, when it comes to the Equal Protection Clause and its application to questions of race-conscious government action, the Court seldom looks back beyond *Brown*.”).

135. *Brown*, 347 U.S. at 492.

136. *Id.* On the relation between *Brown* and originalist theory, see Sachs, *supra* note 1, at 2276–77; Baude, *supra* note 1 (manuscript at 27–28).

Clause, whose “prohibition is not an absolute one.”¹³⁷ When the Court expanded the ban on poll taxes to state elections, it claimed to be applying an unchanging requirement of equal protection in light of the “[n]otions of what constitutes equal treatment” that “do change.”¹³⁸ For present purposes, whether the claims in these two cases were true—or even sincere—is less significant than the fact that they were made. In fact, from a positivist standpoint, they might be even more relevant if they were *insincere*, because they display the felt pressure of a conventional norm not to depart from preexisting rules.¹³⁹

b. *The Founders’ Rules of Change*

When it’s clear that the law really has changed, over and above a change in applications, it’s part of our practice to accept and defend those changes based on lawful rules of change. The Founders might not have planned on slavery’s abolition, income taxes, or women’s suffrage,¹⁴⁰ but they included an Article V that made those things possible. They might have been repulsed by the idea of a standing army, but so long as the budget is reapproved every two years, nothing in the Constitution stands in its way.¹⁴¹ These are entirely conventional means of legal change, but an awful lot has been accomplished through them.

The range of potentially lawful changes since the Founding may be even broader than most originalists are used to. To find out the Founders’ law, we have to apply our positivist toolbox to facts about the past. To find out their rules of change, and what changes have actually been made under them, we have to look and see. This means that the rules of change—and the sorts of lawful changes that have been made—depend on history, not constitutional theory, and could upend some conventional views of originalism.

Some people argue, for example, that under the Founders’ law, “a regular course of practice” could (as James Madison put it) eventually “liquidate & settle the meaning” of obscure pro-

137. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 428 (1934) (construing U.S. CONST. art. I, § 10, cl. 1); see also Sachs, *supra* note 1, at 2283.

138. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966).

139. See Sachs, *supra* note 1, at 2283; Baude, *supra* note 1 (manuscript at 32–34).

140. U.S. CONST. amends. XIII, XVI, XIX.

141. See U.S. CONST. art. I, § 8, cl. 12.

visions in the Constitution's text.¹⁴² If, according to our positivist toolbox, the right people shared this belief in the right way, then it could have reflected an actual Founding-era legal rule, and it could allow certain post-Founding conduct to determine the Constitution's legal content. That might seem antithetical to originalism, which is often portrayed as having laser-like focus on the Founding moment.¹⁴³ Yet this analysis *is* focused on the Founding moment; the question is *what the law was then*. The only reason why liquidation might be lawful, on this picture, is that it was already part of Founding-era law, or was lawfully added by something that was.

This kind of originalism was on display in *NLRB v. Noel Canning*,¹⁴⁴ when the Court faced a potential conflict between constitutional text and post-Founding practice. At oral argument, the Solicitor General suggested that practice could trump clear constitutional text.¹⁴⁵ Not one Justice took that view. In fact, though the Court majority found the text ambiguous,¹⁴⁶ it didn't simply declare that tradition, as an independent source of law, could govern in its stead. Rather, the Court took pains to emphasize the Founding-era support for letting tradition play this subsidiary role—citing Madison on liquidation, John Marshall on government practice, and related precedents back to *Stuart v. Laird*.¹⁴⁷ In other words, it was willing to treat post-Founding tradition as a source of law because doing so had already been authorized at the Founding.

142. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (quoting James Madison, Letter to Spencer Roane (Sept. 2, 1819), in 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908)); see also THE FEDERALIST NO. 37, *supra* note 94, at 183 (James Madison). For more on liquidation, see Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527–29 (2003); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910–11 (1985); see also William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811–12 (2013); Sachs, *supra* note 110, at 1806–08.

143. See, e.g., Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473, 502 (1988) (criticizing as “artificial” any “search for some pristine moment of original understanding”).

144. 134 S. Ct. 2550 (2014).

145. Transcript of Oral Argument at 6–8, *Noel Canning*, 134 S. Ct. 2550 (No. 12–1281); cf. Baude, *supra* note 1 (manuscript at 21–22) (discussing this exchange).

146. 134 S. Ct. at 2561, 2568.

147. *Id.* at 2559–60 (citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803); Madison, *supra* note 143).

This openness to Founding-era rules of change is an important aspect of our legal practices, because it allows people with many different methodological commitments to seek shelter in the Founding. Stephen Griffin, for example, takes a rather dim view of modern originalism, but he also argues that “each contemporary method of interpretation is the result of a tradition that extends back at least to the adoption of the Constitution”; he describes his preferred “pluralistic theories” as justifying a menagerie of interpretive methods on the basis of “source[s] of law that preexisted the Constitution, such as statutes and the common law,” which are “understood to be legitimate” in our legal system.¹⁴⁸ Other people sometimes argue, relying on similar intuitions, that the Founders recognized an amendment process outside of Article V,¹⁴⁹ that they had a common-law constitution,¹⁵⁰ that they accepted “active liberty” as a constitutional principle,¹⁵¹ and so on.

From this Article’s perspective, all of these can be originalist arguments.¹⁵² If you want to argue that some novel method of legal change was part of the Founders’ law, go ahead; originalism is a big tent. But your argument only makes a difference if it’s *true*. Someone trying to assert an unusual Founding-era rule has to be ready to show that it was actually *law* back then, not just political theory or social custom,¹⁵³ in a way that’d satisfy a positivist’s demands. The Founders might have really liked active liberty, but they also might have liked raindrops on roses and whiskers on kittens; we need to know what was part of their law. And one reason why modern originalists tend to be skeptical of these novel methods is that, as a historical matter, the positive case is usually hard to win.

This ecumenical approach might seem strange. Maybe it’d even persuade modern originalists to reject the Founders’ law—making the tent so big as to drive them *out*, lest they have to share it with all the active-liberty types. In their defense, our

148. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1195–96.

149. See AMAR, *supra* note 108, at 295–99.

150. See STRAUSS, *supra* note 38, at 123.

151. See STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 21, 27–28, 33 (2005).

152. See John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1131 (2011).

153. See HART, *supra* note 20, at 109 (providing the example of removing one’s hat in church); SACHS, *supra* note 117, at 1825–26 (distinguishing law and political theory).

social conventions don't have to be the same as the Founders' were; it's conceivable that we, today, have a different legal system than they did, and that *we* only care about Framers' expectations, determinate rules, and so on. But if that wasn't what the law actually provided at the Founding, then it'd be rather odd for us to give the pronouncements of the Framers and Ratifiers even more legal effect than their contemporaries did.¹⁵⁴ That would mean attributing to modern America—in the name of originalism, no less—a number of legal rules that were *never* the law at the Founding and have only been invented since.

Picking and choosing among the Founders' rules, obeying some of their doctrines and replacing others, might in the end produce an arrangement that's normatively superior to what they had. But in an important sense, it wouldn't be very originalist. The Constitution, and the Founders' legal system as a whole, was only as crisp and determinate as it actually was.¹⁵⁵ As noted above, why should we try to be more originalist than the Founders, or more Catholic than the Pope? In the absence of a clear modern consensus for this view, it seems more consistent with our current conventions to look to our original law, and to the rules of change—precise or flexible—that it actually contained.

c. Domesticating Doctrines

No matter how flexible the Founders' rules were, though, they haven't been inviolably observed. Legislatures have passed unconstitutional laws, courts have made mistaken rulings, ordinary people have committed crimes, and so on. If we adhere to the Founders' law, then the natural response is to say that those unlawful, erroneous, or invalid actions didn't cause our legal rules to change. This, too, is reflected in our practice; that's why we describe an unconstitutional statute, a judgment without jurisdiction, or a fraudulent conveyance as "void."

But that response might seem much too extreme. Of course our legal rules aren't pure all the way back;¹⁵⁶ but it's not even clear that they go back as far as the Founding. Is every non-originalist precedent headed to the chopping block, the better

154. Cf. Powell, *supra* note 142, at 887–88 (making a similar argument).

155. See Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014).

156. See *supra* Part II.A.2.

to restore the purity of the Founders' law? And if so, how do we reconcile the Founders' law with our present practices?

To answer these questions, it's important to recognize that we already deal with similar problems every day, in numerous areas of private and public law. Like every sophisticated legal system, we have a plethora of doctrinal tools to ratify unlawful actions, making them effectively valid even if they weren't valid *ab initio*. Adverse possession is an easy example: what starts as a trespass can, after enough time and under the right conditions, eventually turn into good title.¹⁵⁷ The doctrine avoids any need to tear up old arrangements to preserve yet older ones intact; although the initial dispossession was unlawful, we accept the subsequent change in ownership as a *lawful* change because of a rule that was already part of our law when title passed.

Some domesticating doctrines, like adverse possession, actually cure legal errors by changing the underlying entitlements. Other doctrines don't so much cure the errors as cauterize them, preventing any infection from spreading through the system. When a court, for example, mistakenly finds that *A* has better title to Blackacre than *B*, preclusion doctrines require us to act *as if* the court got it right.¹⁵⁸ At the same time, the judgment between *A* and *B* doesn't bind third parties,¹⁵⁹ it can be set aside for fraud,¹⁶⁰ it's reversible on appeal, and so on—none of which would make sense if *A really had* better title to Blackacre once judgment issued. The court's ruling establishes the law of the case, but not *the law*.

Our law is full of doctrines that operate in this "as if" way. A statute of limitations doesn't eliminate the underlying right; it just deprives the plaintiff of a remedy in this particular jurisdiction.¹⁶¹ The de facto officer doctrine doesn't give officers power they don't possess; it just prevents subsequent collateral attacks on their actions.¹⁶² And so on.

157. See, e.g., N.C. GEN. STAT. § 1–40 (2014) (granting title after 20 years of adverse possession "under known and visible lines and boundaries"). See generally Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667 (1986).

158. See William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1826–27 (2008).

159. See *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (collecting cases).

160. Fed. R. Civ. P. 60(b)(3), (d)(3).

161. See, e.g., *Ferens v. John Deere Co.*, 494 U.S. 516, 518–21, 531–33 (1990).

162. See *Ryder v. United States*, 515 U.S. 177, 182–83 (1995).

To the unfamiliar, these doctrines may seem like lawyer's tricks. How can our practices require lawful change, if they accept so many changes we *know* to have been unlawful? But these aren't tricks, any more than preclusion or adverse possession. There are good reasons for not looking behind a jury's verdict or an undisturbed occupancy, and in fact our law tells us not to. These doctrines are features of our continuing legal practices, not exceptions. And we allow them to domesticate things we'd otherwise see as legal errors precisely because we understand the doctrines themselves, not only to be good ideas, but to have their own good titles to legal validity in our system.

Moreover, the fact that we *need* such doctrines shows something important about our practices. When we confront past legal errors (trespasses, mistaken judgments, officers acting without authority) we don't just shrug our shoulders and ignore them, or point out the policy reasons for and against correcting the law. Societies develop domesticating doctrines precisely because their laws demand legal explanations, and not just policy arguments, for overlooking past violations—even violations that occurred long ago. Our domesticating doctrines are themselves powerful evidence of a legal system committed to lawful change.

d. Stare Decisis

This analysis gives us a useful way to think about stare decisis in an originalist system. It's surely true that there are many nonoriginalist precedents on the books, that precedent is a prominent part of our current legal practice,¹⁶³ and that this state of affairs is widely thought to conflict with originalism.¹⁶⁴ Reconciling originalism with precedent has become something of a cottage industry.¹⁶⁵

163. See, e.g., Fallon, *supra* note 38, at 1122–23; Monaghan, *supra* note 118, at 793; Matthew Steilen, *Reason, the Common Law, and the Living Constitution*, 17 LEGAL THEORY 279, 285 (2011).

164. See, e.g., Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1 (2007); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

165. See, e.g., Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437 (2007); Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843 (2013); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

Viewed as a domesticating doctrine, though, *stare decisis* doesn't seem very threatening to the Founders' law. In fact, it seems like evidence in favor. It's hardly unusual that a good claim, even a good constitutional claim, might be barred by rules like laches, waiver, or estoppel; in those cases, we might act *as if* the substantive law went against the claimant, even though we really know otherwise. In the same way, our present practices of *stare decisis* might require us to act *as if* a prior court decision were correct, even if we suspect that it isn't. What matters for present purposes is whether we accept and defend that doctrine in terms of its own historical roots—and, as it happens, we do.

This picture of *stare decisis* is easiest to explain in the lower courts. When a three-judge appellate panel issues a ruling, it establishes the law of the circuit, requiring district courts (and maybe also future panels) to decide cases *as if* the panel's opinion were well-reasoned.¹⁶⁶ None of this, of course, means that the panel's decision is *right on the law*: Other circuit judges can call for review en banc, the parties can seek overruling by the Supreme Court, and so on. We might talk about a particular search-and-seizure ruling as "the law of the Fourth Circuit," but we don't actually think that the Fourth Amendment requires different things in Maryland than it does in Delaware. We just mean that if we make a certain kind of argument in the District of Maryland, we're likely to lose before the trial court and the court of appeals, and we'll have to take our chances on certiorari. This is all highly relevant to our legal planning (and, perhaps, to qualified immunity¹⁶⁷), but not to the ultimate substance of the law.

This is an extremely common way to handle legal uncertainty in a hierarchical system. In many areas of government, as Kent Greenawalt notes, lesser officials "follow what their bosses tell them about the law"; the "police on the beat" don't "try to figure out the law for themselves," but instead rely on "what their supervisors tell them is legally permitted and legally required."¹⁶⁸ Some officers may even have a legal duty to accept, in most cases,

166. See John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 508, 511 & n.23, 530 & n.88 (2000).

167. See *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2086 (2011) (Kennedy, J., concurring).

168. Kent Greenawalt, *How to Understand the Rule of Recognition and the American Constitution*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 55, at 145, 153.

their superiors' legal judgment in place of their own—the way the U.S. Marshals are legally required to “execute all lawful writs,” whether or not the underlying court decisions were correct.¹⁶⁹

The same analysis applies to the Supreme Court. Lower courts may be required to act *as if* the Court's opinion correctly states the law—something that, again, is immensely relevant to our legal planning (and has real legal impact in habeas cases).¹⁷⁰ So for practical purposes, we speak of the Supreme Court determining “the law,” just like we talk about “the law of the Fourth Circuit.”¹⁷¹ But while inferior tribunals have to obey the Court, they don't have to agree with it, and neither does anyone else. As Caleb Nelson notes, any modern lawyer would understand what it means to say that “[t]he Constitution plainly establishes Rule X, but the Supreme Court has interpreted it to establish Rule Y instead, and the Court is not going to overrule that interpretation.”¹⁷²

Indeed, not even the Justices see precedent as wholly replacing the underlying law. That's why, for example, it's possible for them to describe *stare decisis* as “a principle of policy” and “not an inexorable command.”¹⁷³ That's also why, within the language of American law, we can sensibly talk of the Court “overruling” even foundational cases like *Marbury*¹⁷⁴ or *M'Culloch v. Maryland*¹⁷⁵—cases that can be judged “correct” or “incorrect” according to some external standard—in a way that we can't talk about the Court “overruling,” say, the Natural Born Citizen Clause.¹⁷⁶ The point isn't that the constitutional text takes primacy, but that external rules of law do—rules that courts are charged to apply correctly, even if they sometimes fall

169. 28 U.S.C. § 566(c) (2012).

170. See 28 U.S.C. §§ 2244(b)(2)(A), (d)(1)(C), 2254(d)(1), (e)(2)(A)(i), 2255(f)(3), (h)(2) (2012).

171. See Greenawalt, *supra* note 168, at 153–57.

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

173. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)); see also *Lawrence v. Texas*, 539 U.S. 558, 563, 578 (2003) (stating that *Bowers v. Hardwick*, 478 U.S. 186 (1986), “was not correct when it was decided, and it is not correct today,” though in the interim it was fully “authoritative” as precedent).

174. 5 U.S. (1 Cranch) 137 (1803).

175. 17 U.S. (4 Wheat.) 159 (1819).

176. U.S. CONST. art. II, § 1, cl. 5; see David A. Strauss, *Legitimacy, “Constitutional Patriotism,” and the Common Law Constitution*, 125 HARV. L. REV. F. 50, 50 (2012).

short. (The Court often invokes relatively low-status sources of law—international law to decide border disputes,¹⁷⁷ say—but that doesn't mean it can "reinterpret" those rules however it wants, or redraw all our maps for policy reasons.)

The real originalist question about *stare decisis*, then, isn't whether its results sometimes depart from otherwise-correct answers (of course they do) or replace those answers with new ones (of course they don't). The real question is whether this doctrine, as a domesticating doctrine, has its own good title to being part of our law—whether it was part of the law at the Founding or has been lawfully added since. And as it turns out, arguments to this effect are legion. People say that the "judicial power" necessarily requires a doctrine of precedent,¹⁷⁸ that the Constitution makes federal judges its supreme expositors,¹⁷⁹ that *stare decisis* was a common-law heuristic for cases of judicial uncertainty,¹⁸⁰ that common-law decision-making has, as Strauss argues, "been central to the American legal system from the start,"¹⁸¹ and so on. Whether any of these arguments are *right* is a historical matter; but the fact that they're offered is consistent with our conventional practice of demanding adherence to the Founders' law.

If this analysis is right, then the same historical approach ought to determine what *kind* of *stare decisis* we have. To overturn a precedent, is it enough that the precedent be "demonstrably erroneous,"¹⁸² or do we need "some special reason over and above the belief that a prior case was wrongly decided"?¹⁸³ Does a precedent bind other government actors in the exercise of their own constitutional functions, or are they free to disagree?¹⁸⁴ Can Congress abrogate or alter *stare decisis*, or is it

177. See, e.g., *New York v. New Jersey*, 523 U.S. 767, 784 (1998).

178. U.S. Const. art. III, § 1; see *Anastasoff v. United States*, 223 F.3d 898, 899–900, *vacated as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

179. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

180. See Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001); cf. Sachs, *supra* note 110, at 1863–66 (describing this account).

181. David A. Strauss, *Do We Have a Living Constitution?*, 59 DRAKE L. REV. 973, 977 (2011).

182. Nelson, *supra* note 180, at 1.

183. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992).

184. Compare, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (stating that "the federal judiciary is supreme in the exposition of the law of the Constitution"), with Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003) (criticizing this view).

wholly the domain of the judiciary?¹⁸⁵ We often look to the Court to answer these questions, but that's just regular *stare decisis* in action; we still need an account of where the Court should be getting the answers. If the Founders' law answered these questions in a particular way, then the same answers govern today—unless something happened in between.

Again, this conclusion may seem contrary to most modern originalism. But in one sense it's hard to see why an originalist should come out any differently. If the Founders' law really did make the Court the supreme expositor of the Constitution, when did they lose that power? And if they *weren't* given that power under the law of the Founding, when did they get it, and how? Before concluding that originalism automatically unsettles decades of precedent, we first have to take a view on what our original law actually provides.

3. *Originalism as Exclusive Law*

All this suggests that the Founders' law, together with lawful changes, is at least one part of our law today—that we accord it some kind of *prima facie* validity. We might call that mild claim a weak form of originalism, though one so watered-down as barely to deserve the name.¹⁸⁶ On this Article's view, the best understanding of originalism is the far stronger position in the definition above: that no rule is valid unless it can be rooted in the Founders' law. The claim isn't just that the Founders' law (when we can determine what it is) has priority over other law that's developed independently. The claim is that there *is* no other law—that no other legal rules are actually part of our legal system.¹⁸⁷

This Article won't present anything like a full defense of this claim. To be complete, that defense would need a much more detailed positivist theory—which social conventions determine the law, who has to hold them, how we identify them, and so on. Instead, this Article merely suggests, via armchair sociology, some reasons to find the claim plausible.

185. See generally John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); McGinnis & Rappaport, *supra* note 165; Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

186. See Berman, *supra* note 35, at 10, 17–23.

187. Cf. Baude, *supra* note 1 (manuscript at 6, 10–12, 45–50) (contrasting “exclusive” and “inclusive” originalism with more moderate positions).

More importantly, the goal of this Article isn't really to convince you that we still adhere to the Founders' law. In fact, if you come away from reading it convinced that we *don't*, then it'll have been a success. The goal is to show why this is the right question to be asking, if we really want to know whether (or to what extent) originalism is the law.

a. Premises of Legal Argument

Our legal practices care about history. Whether a rule has the right historical pedigree does a great deal to show that it's part of our law. Indeed, this is often where originalist arguments derive their rhetorical force. In the oral arguments in *Hollingsworth v. Perry*, Justice Scalia repeatedly asked respondents' counsel to identify when the law had changed on same-sex marriage: "When do you think it became unconstitutional?"¹⁸⁸ If we can't say *when* things have changed, that makes it harder to explain *how* they changed, which makes us less confident *that* they've changed. We don't always need a specific month or year; counsel's answer, that the issue turns on "when we . . . as a culture determine[] that sexual orientation is a characteristic of individuals that they cannot control,"¹⁸⁹ is a claim of changing outcomes due to changing facts. But we do need a reason, and this reason usually has a rough location in time. If we can't identify the time, then something seems wrong, and our argument seems to be more about law reform than law.

Many scholars who may not call themselves originalists recognize this feature of our practice. According to Lawrence Lessig, for example, when Americans confront the change in constitutional understandings before and after the New Deal, they typically conclude either that the pre-New Deal understanding was wrong, that the post-New Deal understanding is wrong, or "that some political act sufficed to authorize this judicial transformation."¹⁹⁰ In other words, in the American legal system, it matters how you got from there to here. This search for a historical pedigree only makes sense if we have reason to find one; that is, if our legal rules are expected to be rooted in prior law.

188. Transcript of Oral Argument, *supra* note 2, at 39.

189. *Id.* at 40.

190. See Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 400 (1995) (noting this response, but criticizing it as a false choice).

That requirement limits the kinds of legal arguments that we accept. Consider, for example, the holding of *Reynolds v. Sims*, under which the Constitution requires state legislative districts to have roughly equal numbers of people.¹⁹¹ Originalism, as this Article defines it, conceivably offers a number of ways to argue for that conclusion. Maybe equal apportionment was part of U.S. law at the Founding (a hard argument to win). Maybe it became part of our law in 1868, when the Fourteenth Amendment's equal protection clause was validly adopted.¹⁹² Maybe it became part of our law at some later point, as the abstract requirement of equal protection was applied to changing facts, or when the population differences across districts became *so* stark as to trigger some latent constitutional rule. Maybe it only became part of our law when the Supreme Court decided *Reynolds* in 1964, under some theory on which the Court has power to do things like that (and this power itself has the right kind of historical pedigree, and so on).¹⁹³ Or maybe the Court simply got it wrong in *Reynolds* or in the cases that it cited,¹⁹⁴ but we're now obliged to act *as if* those cases were correct, under some doctrine of stare decisis that really is part of our law. And so on.

On this Article's view, all of those arguments are theoretically possible, and only history can decide among them. But now consider what rejecting this view might entail. Suppose someone wanted to argue for the *Reynolds* rule while systematically *denying* each of the claims above. Suppose they conceded that equal apportionment was *not* the law at the Founding, that it was *not* validly adopted in 1868, that it does *not* follow from applying rules to changing facts, that the Court had *not* been authorized to impose the rule on its own, that its decision does *not* deserve respect as a matter of stare decisis (or any other doctrine finding its roots in the Founding era), and so on. They just think, notwithstanding all this, that *Reynolds* is still the law.

191. 377 U.S. 533, 579 (1964).

192. This seems to have been the Court's reasoning. *See id.* at 568.

193. For instance, a power to create implementing doctrines to enforce other constitutional requirements, *see, e.g.*, Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220 (2006); *see also* AMAR, *supra* note 116, at 192–94, 223–30, 261 n.* (defending *Reynolds* as enforcing the Republican Government Clause).

194. *See* 377 U.S. at 557–61 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963)).

Whatever else you might say about that position, it isn't originalist. In fact, it's the distillation of nonoriginalism: a claim that something that has *no* roots in the Founders' law is nonetheless our law today. More importantly, it's very different from the way we usually speak and argue in legal contexts—so much so that it almost doesn't sound like a *legal* argument. Sure, there are plenty of arguments out there for the *Reynolds* rule, whether based on political theory,¹⁹⁵ pure morality, prudence, or something else; sometimes lawyers make such arguments and win. But at the same time, everyone recognizes that what the law is and what it ought to be are different things—and the same goes for what lawyers say and what they ought to say. Lawyers often win cases by playing on our prejudices, and yet we don't call those sources of law.¹⁹⁶

A nonoriginalist claim like this might still be *true* as a positivist matter. No legal system can insulate itself from social facts. But at any given time, the law imposes some rules of change, over and above the tautological surrender of "the law is whatever it is." And it's plausible to think that the higher-order principles we currently accept, the ones that do the important work in defining the content of our law, require some kind of reference to the Founding.

If this is right, then we can understand why original-law originalism would claim to be exclusive—rather than just taking priority over other sources that might operate in cases of ambiguity or uncertainty. Lots of things in today's law are uncertain, and yesterday's law was no different. Even if we were sure about the Founders' substantive law, we might still be unsure about their rules of change, the historical events that might have occasioned changes, how much change those historical events produced, or how the new rules (thus modified) should apply to current facts. As it happens, we have plenty of legal techniques for reducing uncertainty, which can be applied here too.¹⁹⁷ But even *irreducible* uncertainty doesn't always give

195. Cf. *id.* at 565 ("Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators.").

196. See Sachs, *supra* note 1, at 2266.

197. E.g., closure rules such as "everything not forbidden is permitted" or "the plaintiff bears the burden of persuasion." The Ninth and Tenth Amendments arguably serve as closure rules like this; every constitutional power is either granted or reserved. See, e.g., Kurt T. Lash, *A Textual-Historical Theory of the Ninth*

us a permission slip to bring in new sources of law; often it just leaves us uncertain. A statute punishing “neglect” of a child might be irreducibly vague in many situations;¹⁹⁸ a judge trying to apply it might feel utterly at sea; but a judge who started applying Japanese law in its place, on the claim that American law had simply run out, would be acting without authority. Whatever is used to fill those gaps—even the judge’s own discretion—needs its own legal justification under the rules of our legal system. And that justification, if the above argument is right, has to be rooted in the Founders’ law.

b. Addressing the Alternatives

Whether we adhere to the Founders’ law isn’t a question we can answer in isolation. What we really want to know is whether this account of our law is better than its competitors. Maybe we *mostly* adhere to the Founders’ law, but also accept a few unauthorized changes that came after, such as during Reconstruction or the New Deal. Or maybe we don’t adhere to the law of *any* particular time; maybe we just have commitments to individual sources of law, without worrying about when those sources emerged.

i. Multiple Foundings

One way of rejecting the Founders’ law is to accept particular changes that their law didn’t authorize. On one retelling of Bruce Ackerman’s theory, for example, the United States has had a series of legal regimes, like the numbered French Republics. Each regime started with an unauthorized change, a “constitutional moment” in which the sovereign people altered their law. Ackerman claims, for example, that the Fourteenth Amendment wasn’t validly adopted under Article V;¹⁹⁹ as we’ve accepted it

Amendment, 60 STAN. L. REV. 895 (2008). On originalism and uncertainty generally, see Gary Lawson, *No History, No Certainty, No Legitimacy . . . No Problem: Originalism and the Limits of Legal Theory*, 64 FLA. L. REV. 1551 (2012); Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859 (1992).

198. See Timothy Endicott, *The Value of Vagueness*, in PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW, *supra* note 3, at 14, 24–28.

199. See ACKERMAN, TRANSFORMATIONS, *supra* note 36, at 99–119. But see AMAR, *supra* note 108, at 364–80; John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001); Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 709–12 (1993); Christopher R. Green, *Loyal Denominatorism and the North-*

anyway, this shows that we don't take the Founders' law as a criterion for our own. Instead, each new moment (Reconstruction, the New Deal, the Civil Rights Era) has served as a new mini-Founding, requiring ironclad adherence to the law of the current regime but not necessarily to anything further back.²⁰⁰

What should we make of this account? Ackerman's moments were clearly watersheds in American history. But as a positive matter, looking to the higher-order legal principles that we commonly accept and defend, we don't really regard them as remaking our law, or as marking the start of Second, Third, and Fourth Republics. To the armchair sociologist, it seems like most people—not just ordinary people, but also lawyers and officials—categorize these events as lawful changes within a continuing legal system. Indeed, Ackerman recognizes as much, worrying that “[a]lmost everybody” mistakenly “assum[es] that the formal text contains the complete constitutional canon.”²⁰¹

Maybe Americans only feel this way because they're ignorant of any historical controversy.²⁰² But maybe it's also because our dominant legal explanations of these events, consistent with the explanations given at the time, are based on continuity rather than disruption. The authors of the Federalist were willing, with a little hemming and hawing, to admit that the Articles were being violated and to defend the violation as justi-

ern Authored Fourteenth Amendment: Reconstruction History (Aug. 28, 2013), <http://ssrn.com/id=2317471> [<http://perma.cc/V6TZ-GHRG>].

200. See ACKERMAN, CIVIL RIGHTS REVOLUTION, *supra* note 36, at 218 (describing the 1968 elections as popular ratification of constitutional change); *id.* at 317 (arguing that judges “do not have the constitutional authority to erase the considered judgments of We the People” (emphasis omitted)); ACKERMAN, TRANSFORMATIONS, *supra* note 36, at 409; 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 139 (1991) (describing a judge's duty as “preserv[ing] the achievements of popular sovereignty during the long periods of our public existence when the citizenry is not mobilized for great constitutional achievements”).

201. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1754–55 (2007); accord ACKERMAN, THE CIVIL RIGHTS REVOLUTION, *supra* note 36, at 32–33.

202. Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 55, at 175, 186–87 (suggesting that Americans assume “that the Supreme Court Justices and other officials are adhering in good faith to the rules of the game, whatever those rules might be,” and rely on “other bodies—the legal profession, elected officials, the press, and so on—to inform them of any constitutional coup d'état”).

fied.²⁰³ By contrast, the Fourteenth Amendment's proponents had detailed and well-grounded legal theories as to why the ratification process was proper under existing rules.²⁰⁴ The New Dealers didn't claim to be replacing the original understanding with something better, but vindicating the Constitution from the mistaken readings of the conservative Court.²⁰⁵ And the Warren Court's desegregation decisions have long been defended as vindicating the actual Fourteenth Amendment from the errors of *Plessy v. Ferguson*.²⁰⁶ The official story of American law, in other words, rejects the idea of more than one Founding. The fact that this *is* the official story, the one from which other legal conclusions are usually derived, makes it strong evidence of what our law actually requires.²⁰⁷

Looking beyond the official stories, we can also see these conventions reflected in the attitudes of lawyers and academics. For example, there remains a lingering discomfort, and a fair deal of scholarship, around any suggestions that the Fourteenth Amendment,²⁰⁸ the New Deal,²⁰⁹ or the Civil Rights Era²¹⁰ departed from prior rules. These kinds of worries may be unnecessary, but they're almost entirely *absent* when it comes to, say, our de-

203. See, e.g., THE FEDERALIST NO. 43, *supra* note 94, at 279 (noting that "institutions must be sacrificed" to "the safety and happiness of society," based on "the absolute necessity of the case"—and adding only as an afterthought that "PERHAPS" the states' previous breaches of the Articles had rendered the treaty void).

204. See, e.g., AMAR, *supra* note 108, at 364–80; Harrison, *supra* note 199; Green, *supra* note 199.

205. See, e.g., Franklin Delano Roosevelt, A "Fireside Chat" Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), in PUBLIC PAPERS AND ADDRESSES, *supra* note 129, at 122, 126 (criticizing the Court for "amend[ing] the Constitution by the arbitrary exercise of judicial power—by judicial say-so," and calling for it to uphold New Deal measures by "enforc[ing] the Constitution as written").

206. 163 U.S. 537 (1896); see, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 422–24 (1960).

207. See *supra* notes 65–75 and accompanying text.

208. Compare, e.g., ACKERMAN, *supra* note 199, at 99–119, with AMAR, *supra* note 108, at 364–80; Harrison, *supra* note 199, Paulsen, *supra* note 199, and Green, *supra* note 199.

209. Compare, e.g., Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1 (2010), with Randy E. Barnett, *Jack Balkin's Interaction Theory of "Commerce"*, 2012 U. ILL. L. REV. 623.

210. Compare, e.g., Michael J. Klarman, Response, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881 (1995), with Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457 (1996), Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995), and David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 HASTINGS CONST. L.Q. 213 (2015).

partures from British law or from the Articles of Confederation. And most importantly, if you go into court in a constitutional case and say, “well, Judge, the original Constitution is against us, but we superseded it through an informal amendment in 1937,” *you will lose*. That’s an important feature of the American legal system, and no serious analysis of our legal practices should ignore it.

ii. Multiple Sources

Not every legal system incorporates the law of a particular time. Some people reject originalism, not because they prefer some later date to the Founding, but because they don’t see our legal rules as depending on any date at all. As a matter of social fact, we might have assorted commitments to various sources of law, without any special regard to when or how those commitments emerged.²¹¹ (To borrow a distinction from Robert Nozick, these might be called “end-state principles” of law, as opposed to “historical principles” that focus on how each rule came to be.)²¹²

As an example of this kind of source-based theory, suppose that U.K. law really did undergo an unauthorized change in 1966, when the House of Lords claimed a power to overrule precedent.²¹³ Maybe, in actual fact, all the changes since then have been authorized changes—so that U.K. law today really is what it was in 1966, plus lawful changes. But calling the British “1966-originalists” would be misleading if no one there cares, as a general matter, about 1966 in particular. What U.K. law does care about are particular sources of law (statutes, constitutional conventions, common law, etc.), the particular way they are right now, which might by happenstance line up with the way they were in 1966.

In the same way, maybe American law relies on certain sources (text, precedent, tradition, and so on), the way we accept them now, without caring whether they came from the Founding or took shape later on. This kind of theory doesn’t *have* to be nonoriginalist; by coincidence, it might list precisely the same sources of law that the Founders recognized. But it’s particularly well suited to nonoriginalism, because nonoriginalist theories are more plausible if they’re based on a series of familiar sources

211. See, e.g., Berman & Toh, *supra* note 38, at 1751, 1754–55.

212. ROBERT NOZICK, *ANARCHY, STATE & UTOPIA* 155 (2d ed. 2013).

213. See Raz, *supra* note 76, at 11 n.22.

than on arbitrary commitments to dates like 1966. Maybe *we* treat the Constitution (or longstanding tradition, or *stare decisis*) in a certain way, and we're more committed to having it our way than to whatever the Founders did.

This is an empirical debate about complex social facts. If we accept, all the way down, sources of law that aren't rooted in the Founding, then that'd be a real blow against originalism, at least in the form that this Article presents it. But it's not clear that we do accept any doctrines like that, at least not *all* the way down.

Consider the way in which we accept the Constitution itself. As nonoriginalists have correctly pointed out, it's possible to accept a constitutional text in different ways. We could, if we chose, use it "as a focal point for legal coordination . . . ; as a flexible framework for common law elaboration; as a locus of normative discourse in a flourishing constitutional culture; or as one of many legitimate ingredients in a pluralist practice of constitutional adjudication."²¹⁴ Someone taking one of these views can still venerate the text, or share Jack Balkin's intention to "be faithful to the written Constitution as law" and to "accept it as our framework for governance";²¹⁵ they'd just treat these laws and frameworks differently.²¹⁶

The originalist response isn't that these things are impossible or absurd (they aren't), but rather that they're not what we conventionally do. Our standard way of relying on the Constitution's text is as a binding enactment, not as a locus of discourse; we take as our own the legal rules it established until those rules are lawfully changed. More importantly, one official *reason* we do this is that it's what we understand the Constitution to have been designed for: To quote the celebrated line from *Marbury*, "[t]he powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."²¹⁷ It's because the Constitution was adopted as law, and not just as a set of guidelines or inspiring phrases, that we retain it as law today.

That's also why, in our practices, those who invoke external sources like precedent and tradition typically stress their Found-

214. Coan, *supra* note 48, at 1047.

215. BALKIN, *supra* note 122, at 38.

216. See Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2040–43 (2012).

217. 5 U.S. (1 Cranch) 137, 176 (1803).

ing-era roots. If all we really cared about were “contemporary practices of acceptance,”²¹⁸ in Fallon’s words, then the Court in *Noel Canning* would have had no reason to waste ink on Founding-era theories of liquidation;²¹⁹ nor would scholars of stare decisis spend time discussing whether the doctrine was “a central, widely accepted feature of our constitutional practice almost from the beginning,”²²⁰ whether “founding-era commentators generally presupposed that constitutional precedents would be treated as authoritative,”²²¹ and so on. But these things do matter, because our legal rules need good chains of title. If we found out tomorrow that stare decisis didn’t exist at the Founding, and that it had been invented out of whole cloth by Chief Justice Burger,²²² that’d surely be concerning to many American lawyers and academics—in a way that the 1966 practice statement’s origins might not matter to British legal culture.

It’s also important to recognize why a conflict between our history and our familiar sources would actually *be* a conflict in the first place. Depending on the history, originalism might produce some conclusions that are simply too outlandish for the American people to accept. In theory, whether West Virginia is unconstitutional ultimately comes down to whether the Constitution permitted Virginia to be divided in two, which in turn depends on the relevance of a particular semicolon in Article IV.²²³ Maybe it’s true, as a prediction about American society, that we’d never get rid of West Virginia—even in the face of a knock-down historical argument about semicolons. Instead, we’d search *very* hard for a domesticating doctrine that let us keep the state around; and, if all else failed, we’d ignore the semicolon and preserve the arrangements we’re used to. But the reason why there’s any conflict here, the reason why

218. Fallon, *supra* note 38, at 1117.

219. See text accompanying note 147.

220. Fallon, *supra* note 38, at 1129.

221. *Id.* at 1129 n.81.

222. Cf. Sachs, *supra* note 1, at 2281 (discussing a similar hypothetical).

223. See U.S. CONST. art. IV, § 3, cl. 1 (“New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”); *Virginia v. West Virginia*, 78 U.S. 39 (1870) (upholding the state’s existence); Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291 (2002).

we'd even need to *think* about workarounds, is that we already and intuitively accept the original rule (whatever it was) as valid for us—which is why we might need to alter it to avoid an unpleasant consequence. And even if we *would* depart from the Founders' law if push really came to shove, the fact remains that *we haven't done so yet*. Our higher-order commitments are still tied to the Founding; we haven't given up on the Founders' law, even in favor of our familiar legal sources.

This account of our current law, as reflected in familiar legal practices, may or may not sound convincing to you. If it's wrong, then it's wrong, and our system isn't fully originalist. But even so, our law might still be almost-all-originalist, or mostly-originalist, and our dependence on the Founders' law will help show how much and why. Again, the goal of this Article isn't to prove, once and for all, that our law is originalist. Rather, it's to suggest that our law may well be originalist if—*and precisely to the extent that*—we take as our own the Founders' law, as it's been lawfully changed.

III. ORIGINAL-LAW ORIGINALISM

This Article presents a version of originalism—adherence to the Founders' law—that's plausibly true as a description of our law. One significant side benefit of this version, though, is that it may be appealing to those who already consider themselves originalists. By moving the focus from interpretation to legal change, it helps explain some common originalist intuitions, and it may help resolve some of originalism's intractable intramural debates.

On this theory, our law today is the Founders' law, as lawfully changed. If that's right, then the legal rules that the Constitution establishes today are the ones it established at the Founding, plus any lawful changes. What we're looking for from the Constitution isn't really what its text originally *said*, on our favorite theory of interpretation, but what its enactment originally *did*, as a matter of Founding-era law. And to the extent that this legal effect depended on what the text meant at the time, then that search may well direct us to the text's original meaning.

Preserving meaning to preserve the law is a standard move among originalists. But a commitment to the Founders' law has much broader implications. Every legal system that uses written

texts has some legal rules—let’s call them “interpretive rules”—for converting those texts into law.²²⁴ If we want to know what law was established when the original Constitution was adopted, then we’ll need to use the interpretive rules that were used at the time, the ones that were part of the Founders’ law. And we’ll need to do the same for each amendment, accounting for any lawful changes to the interpretive rules that might have occurred to date. The rules in force at any of these times might have been very different from the ones that modern originalists support today, or they might not. This is a historical question, not one that can be answered with pure theory.

As a result, this “original-law originalism”—a variant on what’s known as “original methods originalism”²²⁵—offers resources for recasting, and hopefully resolving, some of the longstanding debates among originalists. There are many schools of originalists, each emphasizing a different feature of texts: authors’ intentions, expected applications, public meaning, and so on. To the extent that they’re making legal claims, rather than just normative or conceptual ones, what the different schools ought to agree about is contemporary law: the current authority of the Founders’ law, the thing that sets them apart from the nonoriginalists. By contrast, what originalists ought to disagree about is history: which interpretive rules were included in the Founders’ law and which (if any) have been added since. Those historical questions might be very difficult, but at least they provide a real subject for disagreement, and one on which we might eventually make some progress.

A. *Original Law and Original Meaning*

Suppose that American law today is whatever it was at the Founding, plus lawful changes. Some of that Founding-era law was the product of the Constitution of 1788, which added a number of important rules to the American legal system. Those rules remain law today, except as they’ve been lawfully changed. So the legal content of the original Constitution today—its contribution to the corpus juris, the difference it makes to the general stock of American legal rules—is still the

224. See generally Nelson, *supra* note 142.

225. MCGINNIS & RAPPAPORT, *supra* note 8, at 116–38; John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

contribution it made at the Founding, plus lawful changes since then. And to the extent that this original contribution depended on the original meaning of the text, preserving the law will usually involve preserving that meaning too.

To illustrate, imagine that Article I gave Congress power “to regulate the growing of corn.” And assume that in eighteenth-century America, “corn” was a general term for all cereals (think of Britain’s “Corn Laws”), not just maize. Anyone trying to establish the Founding-era content of U.S. law would conclude, absent some special reason not to, that the First Congress had power to regulate cereals like wheat and barley. Denying that power to the 114th Congress today, just because our linguistic practices regarding “corn” have changed over time, would be a change to our legal rules. And if we want to preserve the Founders’ legal rules, we’ll ordinarily need to preserve the meaning of their language.

This is an intuitive feature of originalism, and one that many other scholars have recognized.²²⁶ As *Marbury* asked, “To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?”²²⁷ Preserving the limits is the important part; the writing is there only to help ensure that the limits aren’t “mistaken, or forgotten,” over time.²²⁸

But relatively few scholars have considered the full implications of this approach—preferring to support their interpretive theories on normative or conceptual grounds. As noted above, what the law is and what it ought to be are different; whatever might be the normatively best or philosophically correct way of doing things, a legal system might, as a matter of social fact, have a practice of doing something else. The intuition behind original-law originalism is that *the law* may have taken a position on which interpretive rules apply—and, if it did, those rules ought to control.

226. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 429–30 (arguing that it’s important “to preserve meaning over time” because the “law continues in force over time until it is amended or repealed,” unless there’s a “conscious act of lawmaking” in between); accord. e.g., BALKIN, *supra* note 122, at 36–37; Randy E. Barnett, *Welcome to the New Originalism: A Comment on Jack Balkin’s Living Originalism*, 7 JERUSALEM REV. LEGAL STUD. 42, 46 (2013); Goldsworthy, *supra* note 34, at 42; Grégoire C.N. Webber, *Originalism’s Constitution*, in THE CHALLENGE OF ORIGINALISM, *supra* note 4, at 147, 151; Whittington, *supra* note 5, at 73–74.

227. 5 U.S. (1 Cranch) 137, 176 (1803).

228. *Id.*

1. *Interpretation and Legal Rules*

The idea of legal rules that govern interpretation may sound strange at first. Don't we just figure out the right way to read a legal text, and then do whatever it says? The problem is that what an enactment says (its communicative content) and what it legally obliges us to do (its legal content) aren't really the same thing. There's a great deal to be said on this topic,²²⁹ but a brief discussion should suffice.

When we talk about the "meaning" of a legal instrument (a contract, will, statute, etc.), we're often referring instead to its legal content: the particular assignment of rights, liabilities, responsibilities, and so on, that it endorses or makes part of the law.²³⁰ As Raz notes, legal instruments needn't be written in these Hohfeldian terms.²³¹ We just need to be able to understand, after some analysis, the rules that they endorse.²³² (Think of the complex legal implications of a will reading, "All to wife."²³³)

Often this analysis depends on other legal rules. As Endicott writes, "the law itself has techniques for determining the effect of [a] normative text."²³⁴ Standard examples include the Dictionary Act, the repeal-revival rule, or the general savings statute.²³⁵ People might disagree about the role of these statutes in our legal system,²³⁶ but it's surely possible for a legal system to have legal rules that determine the effect of texts. Consider the familiar canon that the specific controls the general.²³⁷ The only role of this canon is to change the outcome in cases that already

229. See, e.g., Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479 (2014); see also William Baude & Stephen E. Sachs, *The Law of Interpretation* (work in progress).

230. See Raz, *supra* note 76, at 29 n.41.

231. See generally Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (providing a taxonomy of legal rights).

232. *Id.*

233. See Diane J. Klein, *How To Do Things with Wills*, 32 WHITTIER L. REV. 455, 462 n.42 (2011) (describing the world's shortest will).

234. Endicott, *supra* note 198, at 15.

235. 1 U.S.C. §§ 1, 108, 109 (2012).

236. See Larry Alexander & Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97 (2003) (arguing that such statutes cannot bind on future Congresses).

237. See, e.g., *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton v. Mancari*, 417 U.S. 535, 550–51 (1974); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 186 (2012).

fall within the meaning of a newer, more general statute. For instance, Title VII gives a cause of action to anyone who meets certain criteria, but a person meeting all those criteria can still be barred from suit by a 200-year-old statute about claim preclusion.²³⁸ The problem here isn't that the plaintiff falls outside the meaning of *Title VII*; he doesn't, or else he'd have lost on some other ground already. The problem is that he falls *inside* the meaning of some other statute too, and we need a *legal rule*—not just knowledge of the meaning of texts—to tell us what to do when the two conflict.

If we're interested in the Constitution's original legal content, and not just its original meaning, then we have to determine that content by processing the text through whatever legal rules were operative at the time. By way of analogy, consider what happens when we create a legal text today. As a text, as marks on paper, it could have a variety of meanings; we could read it as a proposal, parody, or prose poem, as a statement of our civic identity or a personal source of inspiration, and so on.²³⁹ But when determining its legal content—the change it works in the law, its contribution to the general stock of American legal rules—we look to our legal rules of interpretation, our process of taking texts and turning them into law.

Those rules might take any of a number of strategies. They might incorporate by reference the best philosophical theory of meaning and leave it at that. They might incorporate the linguistic conventions of English, or legalese, or medieval law French. They might incorporate the nonlegal customs of officials, things that are useful guides to official practice but that we don't regard as part of the law. (Such as writing exclusive lists, a custom that justifies a presumption of *expressio unius* but that doesn't carry the force of law.) Or they might include specifically legal rules, such as governing statutes, specific common-law doctrines,²⁴⁰ or unwritten interpretive principles (such

238. See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 470–72, 476 (1982) (applying Title VII as well as 28 U.S.C. § 1738).

239. See Sachs, *supra* note 110, at 1825–28.

240. See Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657 (2013); Sachs, *supra* note 110.

as the relative authority of text and purpose²⁴¹ or the validity of liquidating meaning over time²⁴²).

The idea of determining an enactment's legal effect by "rules" might suggest too neat a picture. This Article uses "rule" in a very broad sense,²⁴³ and it's silly to think that American law ever offered—at the Founding or today—an off-the-shelf algorithm for mechanically converting language into law. But there are still better and worse ways to get legal content out of particular written instruments. Delegates at Philadelphia got into plenty of fights, and lobbyists today spend plenty of money, to influence the language of legal instruments; that'd all be pointless without some reliable means of converting those texts into legal rules. The point here is merely that whatever methods are prescribed in the law, *those* are the ones we are supposed to use. Failing to use them would be a legal error, and it might produce mistaken judgments about what an enactment does to the law.

One easy way to use the wrong rules is to pick them from the wrong time period. If we want to know how a new enactment affects today's law, we have to consult today's interpretive rules. If we want to know how the enactment of the Constitution's text affected the law at the Founding, we have to consult the interpretive rules that were around back then. Using anachronistic rules designed for modern enactments would mislead us as to the state of the law at the time, just like using anachronistic rules of language to read the word "corn." And if we want to know what, say, the Sixteenth Amendment did to the law, we need to consult the interpretive rules that were around when *it* was adopted in 1913—including the external standards, like the English usage of the time, that those interpretive rules may have incorporated by reference. We look to the original interpretive rules, because those are what generated the original law.

2. *The Substance of Interpretive Rules*

Original-law originalism is all about procedure, not substance. On its own, the theory doesn't say anything about what

241. See Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 371–72 (1992).

242. See Sachs, *supra* note 110, at 1806–08; *supra* note 142 and accompanying text.

243. See *supra* note 18.

the content of the original interpretive rules might have been. That's an empirical question; we have to look and see.

Once we've done our historical inquiries, the answers might well surprise us. Maybe the Founders really did choose "language capable of growth,"²⁴⁴ or the Constitution's legal content really was supposed to evolve along with changes in our language (giving "corn" a new meaning in every new era). Many ostensible nonoriginalists—including, for instance, Justice Breyer—base their claims about legal sources or interpretive methods on Founding-era evidence.²⁴⁵ To the extent that they accept that history controls, but think that it points in a different direction than modern originalists do, we have an ordinary historical disagreement, which we ought to solve on empirical grounds. Originalists should be happy to fight on those grounds and to welcome such claims into the "originalist" tent. Again, if someone's basis for taking a "nonoriginalist" view (that America has a common-law constitution,²⁴⁶ that we experience occasional moments of higher lawmaking,²⁴⁷ that a variety of traditional sources and interpretive approaches should apply²⁴⁸) is that so it was laid down in 1788, why *shouldn't* we call these views "originalist" instead? Everything still depends on the history: If it turns out that the Founders *didn't* have a common-law constitution, or *didn't* choose language capable of growth, and so on, then these views would have to be revised.

Currently, when people describe the commitments necessary to be an originalist, they often make unstated assumptions about the history. On Lawrence Solum's famous formulation of originalism, with which "most or almost all originalists agree," the original meaning of a constitutional provision "was fixed or determined at the time" it was adopted (the "fixation thesis"),²⁴⁹ and this original

244. Bickel, *supra* note 134, at 63.

245. See, e.g., BREYER, *supra* note 151, at 33.

246. See generally STRAUSS, *supra* note 38.

247. See generally ACKERMAN, TRANSFORMATIONS, *supra* note 36.

248. See generally Powell, *supra* note 45; H. Jefferson Powell, *Further Reflections on Not Being "Not an Originalist,"* 7 U. ST. THOMAS L.J. 288, 292 (2010) (describing pluralistic interpretive practice as "in fact what constitutional law has been, as a descriptive matter, since Americans first began dealing with the existence of written constitutions").

249. Solum, *supra* note 4, at 33 (emphasis omitted); see also Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning* (Feb. 3, 2015), <http://ssrn.com/id=2559701> [<http://perma.cc/2YVD-9VDH>].

meaning “should make a substantial contribution to the content of constitutional doctrine” (the “contribution thesis”).²⁵⁰ To an original-law originalist, these claims are contingent, not essential to the project. If the Founders’ interpretive rules *did* require the law to update along with every change in language, then it’s just not true that the *original* meaning of the original Constitution has any substantial contribution to make.

Of course, while some academics approve that kind of updating,²⁵¹ it’s doubtful that any actual society ever has. Changes in language usually happen for reasons having nothing to do with the law (e.g., “corn”), and they might upset all the reasons the enactors had for choosing some words over others. In particular, there’s little evidence that the Founders’ law functioned this way. Madison, for example, dismissed the idea outright:

If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense!²⁵²

3. *What Originalists Can Disagree About*

At this point, we can see the way to common ground for originalists of different schools. Originalists can agree—or ought to—that we adhere to the Founders’ law, as lawfully changed. What they might disagree about is the historical content of that law (including its interpretive rules) or how we’ve changed it since.

In fact, each school might benefit from recasting its arguments in terms of the original law. Original-intentions scholars have already started doing this, arguing that if we endow a particular group with authority to make law for us (Framers, Ratifiers, etc.), we should look for the law that *they* wanted to make.²⁵³ If the Constitution trumps all other sources of law, why let interpretive rules trump the people who get to *write* the Constitution,

250. Solum, *supra* note 4, at 35 (emphasis omitted).

251. See sources cited *supra* note 46.

252. Letter from James Madison to Henry Lee (June 25, 1824), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 441, 442 (Phila., J.B. Lippincott & Co. 1867).

253. See *supra* text accompanying note 56.

and so to make any rules they want? The reason, on the original-law approach, is that the Framers or Ratifiers might not have had this kind of untrammelled authority at the Founding. Maybe their commission wasn't *to make the law* so much as *to produce a text*, which would then be turned into law through the existing interpretive rules. (One reason for this kind of limited commission is that we can't read their minds to find out the law they made;²⁵⁴ we can only read their texts, and so we might need interpretive rules to help us along.) Either way, we need to know the answer to this question of authority before we can say whether the authors' intentions always control.

A similar approach applies to "public meaning" originalists, who emphasize what an actual member of the public²⁵⁵—or, perhaps, a "reasonable person" of that place and time²⁵⁶—would have thought the document meant. If the relevant reader is already familiar with the entire corpus juris, including all applicable interpretive rules, then "public meaning" may just collapse into original law. If not, then presumably we have some reason for depriving them of that knowledge—for instance, a view that "[t]he Constitution was written to be understood by the voters."²⁵⁷ But that too is a claim about Founding-era interpretive rules, one that might be true or false and that remains hotly debated.²⁵⁸ If the law at the Founding attributed a *different* legal content to the Constitution than what the ordinary voter understood (say, the understandings of the delegates they elected), that might pose a problem of democratic theory or legitimacy, but not a problem of law.

Of all the popular interpretive methods, the original-law approach most closely resembles what's known as "original methods" originalism,²⁵⁹ which generally tries to use the interpretive methods that would have been used by the Founders. In fact, perhaps the only real difference between the two is how they

254. Cf. Alexander, *Telepathic Law*, *supra* note 9 (discussing such a hypothetical).

255. Cf. Smith, *supra* note 11, at 225 (describing this view).

256. See generally Lawson & Seidman, *supra* note 34.

257. *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (alteration in original) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)).

258. See, e.g., Mike Rappaport, *Justice Scalia, Ordinary Meanings, and Legal Meanings*, LIBR. L. & LIBERTY (Aug. 22, 2014), <http://www.libertylawsite.org/2014/08/22/justice-scalia-ordinary-meanings-and-legal-meanings/> [<http://perma.cc/VA6V-MCC8>] (describing the ongoing debate among originalists).

259. See sources cited *supra* note 225.

decide which Founders' methods to follow. For example, suppose that the lay reader of the Constitution would have used method *A*, but a technically educated elite reader would have used method *B*.²⁶⁰ Different versions of "original methods" might use different means to choose among them. On an original-law approach, though, this would be a question for jurisprudence to answer: Does the best positivist theory identify law through the conventions of ordinary people, or through the practices of lawyers, judges, and officials? Whose rules actually constituted the law of the Republic? To the extent that we want to use this text as a ground for legal conclusions today, we need to start by determining its role in the Founders' law.

B. Addressing Objections

To the uninitiated, all this might sound like splitting hairs—or worse, like angels dancing on the head of a pin. An original-law approach assumes that the Founders had a full set of interpretive rules ready to go, and that these rules were part of American law, not just the laws of individual states.²⁶¹ But given how much people disagreed back then, was there really any law to apply?²⁶² And if we're not sure about the interpretive rules, and if the theory is such a big tent, won't its flexibility and theoretical abstraction take away the predictability and constraint that originalism promised to deliver? These objections are important, but ultimately not effective. There *was* law to apply at the Founding, and this law itself provides the only kind of constraint we need.

1. Was There Any Law?

The Founding was a time of extraordinary ferment, when Americans were deeply divided on first principles of law and politics. In particular, they disagreed about how to interpret the

260. Cf. Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 *YALE J.L. & HUMAN.* 295, 323 (2011) (describing Founding-era divisions between lay and elite understandings of the Constitution).

261. See *supra* note 108.

262. Cf. Cornell, *supra* note 260 (describing the variety of Founding-era interpretive approaches); Larry Kramer, *Two (More) Problems with Originalism*, 31 *HARV. J.L. & PUB. POL'Y* 907, 912 (2008) (arguing that "there was no more agreement about what the 'correct' way to interpret the Constitution was or should be in the early years of the Republic than there is today").

Constitution.²⁶³ Was this new document more like a statute, a state constitution, or a treaty that binds sovereign states? Should it be construed broadly to achieve its objects, or strictly to protect the contracting parties? We, today, shouldn't be surprised by this kind of disagreement—nor should we expect people back then to have agreed any more than we do.²⁶⁴

But that disagreement doesn't leave us at sea. For one thing, if we still adhere to the Founders' law, *their* disagreements are the ones that matter. If some questions were well settled at the time and only became confusing later on (say, due to obscuring changes in language), recovering original history can help solve questions rather than raise them.

For another, disagreement is just the start of an inquiry, not the end. When *we* disagree on legal questions, we don't always conclude that they lack a right answer; we each have opinions on which answers make the most sense to us, and we usually manage to muddle through. The same may be true of the Founding. The evidence cited by Jefferson Powell, for example, suggests that early interpretive practice was dominated by common-law methods of statutory interpretation, and that the treaty analogy gained particular prominence only after the Virginia and Kentucky Resolutions.²⁶⁵ If that's right, then we may be able to resolve a number of interpretive questions well enough, even if the Founders lacked an absolute consensus.

Maybe evidence of radical and thoroughgoing disagreement at the Founding, of the kind that wholly undermines the social conventions giving rise to legal rules, would make the original-law project impossible. Law is a matter of social fact, and some societies simply lack the features necessary to generate legal answers at a given time. (When, during the Revolution, did British law really lose force on the ground?) But however chaotic the Founding was, there wasn't *that* much disagreement. Even before the Constitution's adoption, the United States of America was an independent confederated state, with a functioning government, officials, and courts. The Confederation might have functioned poorly, given the Articles' many defects; but it existed, and it both generated and was governed by legal rules. It's

263. See generally Nelson, *supra* note 240; Powell, *supra* note 142.

264. See Smith, *supra* note 11, at 228.

265. See Powell, *supra* note 142.

hard to say the disagreements at the Founding were *so* fundamental as to eliminate the possibility of operative law.

In the same way, the existence of the United States as a real live government before the Constitution suggests that there were some interpretive rules around too. After all, the legal system had to have *some* means of interpreting enactments like the Articles or the various ordinances of the Confederation Congress. The thirteen states all shared the English common-law tradition, and they all relied on common-law principles as the natural background against which to read Congress's enactments. Indeed, the very fact that people argued over which *interpretive model* to use—statutes, treaties, contracts, etc.—shows that they *assumed* some degree of consensus as to the rules that would properly govern in each case.

2. *The Founders' Law and Constraint*

A practicing lawyer, reading about the disputing schools of originalism, might be forgiven for wondering what relevance all this could have to the law. The first modern originalists were easy to understand: They wanted to constrain judges, in reaction to what they saw as a wild-and-crazy Warren Court.²⁶⁶ Since then, constraint has become less important to “new originalism,” but it still plays a role in common intuitions about originalist theory.²⁶⁷ Original-law originalism, though, seems to blow constraint out of the water. History aside, the theory is potentially compatible with a bizarre variety of methods, from Bork to Breyer to Strauss. If we have to go through all this complicated theoretical apparatus, and we *still* don't know the answers when we're done, what good is it to originalism?

Part of the answer turns on the difference between theory and practice.²⁶⁸ A practicing lawyer, reading about the disputing schools of originalists, might feel like a short-order cook being lectured about organic chemistry: “Sure, at *some* level this might help explain what I do, but hopefully not very often.” On most ordinary questions, the range of plausible theories about our

266. See, e.g., Bork, *supra* note 10, at 7; Rehnquist, *supra* note 10.

267. See, e.g., Smith, *supra* note 11; see also Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713 (2011).

268. See generally William Baude, *Impure Originalism* (July 26, 2013) (unpublished manuscript, on file with author).

law—including the Founders’ law—will be relatively narrow, in which case the theory won’t do much harm to constraint.

Where it does make a difference, though, the theory may provide a better kind of constraint than the early modern originalists had in mind. One longstanding problem with “constraint”—as others have pointed out before—is that it can be achieved in many different ways, most of which look nothing at all like originalism. Any number of procedures can restrict judges’ decisions: flip a coin, always rule for the defendant, always follow your party’s political preferences,²⁶⁹ always follow the original meaning of the *French* Constitution (or the U.S. Constitution with the Fifth and Fourteenth Amendments removed), and so on. If the only goal is to produce determinate results, there’s no reason to pick originalism in particular. And the Constitution’s original meaning might itself license judicial discretion—or, even worse, the sheer difficulty of recovering its meaning may let judges call any result “originalist.”²⁷⁰

But a focus on the Founders’ law helps explain the intuitive connection between originalism and constraint. The problem with coin-flipping or the French Constitution isn’t that they impose few constraints on judges; they might be rather demanding in practice. The problem is that the *choice of constraint* is so unconstrained. We have no good explanation, from the perspective of constraint alone, why judges should follow the Constitution’s original meaning as opposed to any other set of equally determinate rules, so long as all of them use the same ones. Adherence to the Founders’ law provides that explanation, because the source of constraint is *the law*, whatever that might be.

Judges, like all government officials, have to act according to law. Sometimes the law provides determinate rules, sometimes flexible standards (like “neglect”); each has its own costs and benefits, and we use them each in different ways.²⁷¹ If the law happens to give the judges plenty of room to play fast-and-loose, that’s *our* fault, not the judge’s fault. Following the law is what judges are supposed to do.

269. Lawson, *No History, No Certainty, No Legitimacy*, *supra* note 197, at 1554.

270. See Redish & Arnould, *supra* note 46 (making this argument).

271. See Calabresi & Lawson, *supra* note 155.

Original-law originalism imposes few substantive requirements on the law; it leaves a great deal up to history. Perhaps, as a policy matter, it'd allow judges to get away with too much.²⁷² But the method stands or falls, not by whether it limits judicial creativity, but whether it's an accurate statement of our law. And, in some ways, that's the most important constraint of all.

IV. ORIGINALISM AND HISTORY

Original-law originalism is extremely demanding from a historical perspective. There's an awful lot we need to know. At the same time, though, it suggests new ways of resolving ongoing debates between historians and lawyers.

One of the common complaints about originalism is that it forces lawyers and judges to "play historian," to learn a great deal about matters (the Founders' beliefs, political experience, or linguistic practice) in which they lack real expertise. This is perfectly fair, as far as it goes. Originalism requires a great deal of historical knowledge, and the research producing that knowledge ought to be done well.

But if originalism is really based on the Founders' law, rather than the meaning of a particular eighteenth-century text, then the lawyers aren't really treading on anyone's turf. Instead, they're doing something eminently legal: determining what U.S. law *was* as of a particular date. That's obviously a job for lawyers, albeit with the benefit of historians' help.²⁷³

Moreover, it's the kind of job that lawyers perform all the time. *Nemo dat* might require us to figure out whether *A* or *B* owned Blackacre long ago.²⁷⁴ State border disputes can turn on the proper construction of an old interstate compact or the Crown grant to Lord Baltimore.²⁷⁵ Ex post facto claims force courts to determine what the law was when a crime was committed, not what it is today.²⁷⁶ And so on. We have domesticating doctrines like adverse possession to help us avoid difficult inquiries into the past; but we

272. See Redish & Arnould, *supra* note 46, at 1495.

273. Cf. Lawson & Seidman, *supra* note 34, at 50–51 (advancing a similar argument).

274. See *supra* notes 99–101 and accompanying text.

275. E.g., *United States v. Old Dominion Boat Club*, 630 F.3d 1039, 1041 (D.C. Cir. 2011).

276. E.g., *United States v. Seale*, 577 F.3d 566 (5th Cir. 2009).

only have them because inquiry into the past would *otherwise* be a normal part of our legal reasoning.

Viewing historical inquiry as just one component of ordinary legal practice also helps answer the criticism that originalism, and particularly original-law originalism, is just too difficult to carry out.²⁷⁷ Finding out the standard interpretive methods in a legal system at a certain time isn't any harder, in the abstract, than comprehending a term of art in a contemporary trade,²⁷⁸ both require knowledge of conventions that are broadly held and at the same time potentially contested. (Indeed, translators of historical documents do this work *all the time*.) We read texts for their obvious signification, and if someone wants to argue that we're doing it wrong, we wait for them to do so persuasively. In the meantime, we do what seems right on the evidence we have.

And in any case, this might just be what our law requires. Understanding originalism as a legal project, rather than a primarily historical one, doesn't let us avoid the historical research by focusing on lawyers' questions. Rather, it shows why the historical issues *are* lawyers' questions. We try all the time to answer questions of the form, "what was the law on topic X as of date Y?" That's precisely what originalism does, for good or ill. And it's also precisely what we do, albeit with a broader universe of legal materials, when we answer questions of the form, "what is the law on topic X *today*?"—questions that lawyers ought to be able to answer, if anyone can.

CONCLUSION

Originalism as adherence to the Founders' law is complicated and simple at the same time. It's extremely complicated, because we have to know the content of the Founders' law in its full glory—interpretive rules, context, rules of change, and so on. But it's also very simple, because it makes the basis for originalism very easy to understand: our law stays the same until it's lawfully changed. That ought to be the originalist's slogan, because originalism is a theory of legal change.

277. See, e.g., Kramer, *supra* note 262.

278. E.g., *Frigalment Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960) ("The issue is, what is chicken?").