VOLUME 135 JANUARY 2022 NUMBER 3

HARVARD LAW REVIEW

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ORIGINALISM: STANDARD AND PROCEDURE

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Stephen E. Sachs[*]

Originalism is often promoted as a better way of getting constitutional answers. That claim leads to disappointment when the answers prove hard to find. To borrow a distinction from philosophy, originalism is better understood as a standard, not a decision procedure. It offers an account of what makes right constitutional answers right. What it doesn't offer, and shouldn't be blamed for failing to offer, is a step-by-step procedure for finding them.

Distinguishing standards from decision procedures explains originalism's tolerance for uncertainty about history or its application; justifies the creation of certain kinds of judicial doctrines (though not others); clarifies longstanding battles over interpretation and construction; identifies both limits and strengths for the theory's normative defenders; and gives us a better picture of originalism's use in practice.

It would be nice if the correct constitutional theory also gave us easy answers in contested cases. But you can't have everything. Knowing the right standard might not lead us to those answers, but it still might be worth knowing all the same.

Many debates over originalism seem to go in circles. Originalists say our law depends on facts about the past. Nonoriginalists respond that these facts are unknown to us, that lawyers and judges are bad at doing history, and that originalism can be a cover for conservative politics (or insufficiently conservative politics). Originalists respond that all this may sometimes be true, and if so unfortunate, but that it doesn't undermine the argument for originalism. Nonoriginalists wonder how anyone could disregard matters of such importance. And so it goes.

One way to escape these circles is to borrow a well-recognized distinction from philosophy, that between a *standard of rightness* and a *decision procedure*.[1] Consequentialists, for example, have a standard

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[1] *See, e.g.*, R. Eugene Bales, *Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedure?*, 8 AM. PHIL. Q. 257, 260–61 (1971) (advancing the argument in terms of utility).

for right action: an act is right if it has the best consequences.[2] We might not know which acts do this, and the theory gives us no procedure for finding out; there's no "consequentialist method" for making real-life choices among real-life acts. Yet consequentialists think they have good arguments for their standard nonetheless. ("What, do you want *worse* consequences?")

So too for originalism. As Professor Christopher Green has explained, constitutional theories need "truthmakers": features that make correct legal statements correct and true constitutional claims true.[3] For originalists, the right answers to constitutional questions might depend on our original law,[4] or perhaps on the original meaning of the Constitution's text.[5] What these theories don't offer, and shouldn't be blamed for failing to offer, is a step-by-step procedure for finding out what those answers are. To call originalism an "interpretive methodology" is something of a misnomer, as there's no particular method to follow: the theory picks out a destination, not a route. Yet originalists think they have good arguments for their standard nonetheless. ("What, do you want *wrong* answers?")

To be clear, originalism may well provide clear answers to some very important and controverted questions.[6] But that's not the test of a good standard. Whatever the best account of legal truth may be, we shouldn't demand that it also serve as the best at-home testing method for diagnosing legal truth — just as we shouldn't require the best chemical theory of acids and bases to serve as an instruction manual for a box of litmus paper. What something is, and how we identify it in practice, are two different things.[7] That said, if you're trying to design a new kind of litmus paper, or just to understand chemistry, it helps to know what acids and bases are; and if you're trying to make constitutional decisions, or just to understand constitutional law, it helps to know what makes those decisions correct.

This focus on standards, not procedures, helps explain originalists' serene acceptance — or smug disregard, as their critics might say — of

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[2] *See, e.g.*, Derek Parfit, *Is Common-Sense Morality Self-Defeating?*, 76 J. PHIL. 533, 534 (1979) (describing "Act Consequentialism" as "giv[ing] to all one common aim: the best possible outcome").

[3] Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 499, 506 (2018).

[4] *See, e.g.*, William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457 (2019); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 99 (2016); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838 (2015).

[5] *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, 976 (2004); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456 (2013).

[6] *See* William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 108 (2016) (listing some possibilities).

[7] *See* Green, *supra* note 3, at 501–02.

the difficulties of doing legal history or the frequent mistakes of prominent judges. Consider, again, the comparison to ethics. People often claim to be doing the right thing or to be making the world a better place. We may suspect that they're falling down on the job, that they're blinded by ideology or partisanship, and so on. But this hardly argues for ignoring ethics entirely, let alone for doing the wrong thing instead. If originalism is right about the law, then it's right about the law, though it may be hard to carry out well.

Still, in practice we can't do without a decision procedure, and good procedures are hard to find. This problem undermines some popular arguments for originalism based on its consequences, either for particular policies (say, gun rights) or for the legal system at large (say, constraining judges). The less we can find out about the original law, the less likely we are to benefit from looking for it.

But originalists don't lack procedures altogether. Burdens of proof, waiver rules, and some forms of stare decisis might have their own originalist pedigrees, and they might help courts reach decisions when the substantive standards remain obscure. As in Professor Mitchell Berman's discussion of operative rules and decision rules,[8] or Professor Richard Fallon's distinction between meaning and implementation,[9] those aiming to satisfy a particular standard may follow a process more complicated than "do whatever adheres to the standard." Bona fide originalists might develop new methods for adhering to old standards: the original package doctrine, say, needn't have been mentioned by James Madison to have been a reasonably originalist way of applying the Import-Export Clause.[10] The longstanding intra-originalist divide over "interpretation" and "construction"[11] can be seen as a battle over standards and decision procedures, with construction's critics urging a search for accurate standards, and its supporters emphasizing the need for useful decision procedures.

At the same time, we can distinguish decision procedures that really seek to implement originalist standards from those that reflect judicial lawmaking. What we ought to do, legally, in cases of ignorance is one thing; what we ought to do, morally, is something else. In any case, if one wanted to argue for originalism based on a normative assessment of its consequences — and not every originalist does — there are still benefits to be found in the search for original answers, if not in their discovery.

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[8] *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9–10 (2004).

[9] *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 60–62 (1997).

[10] *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441–42 (1827) (applying U.S. CONST. art. I, § 10, cl. 2); *cf.* Low v. Austin, 80 U.S. (13 Wall.) 29 (1871) (applying the doctrine to general property taxes), *overruled by* Michelin Tire Corp. v. Wages, 423 U.S. 276, 301 (1976).

[11] *See* Solum, *supra* note 5, at 457 (distinguishing the activity of discerning the meaning of a legal text from that of discerning its legal effect).

This theoretical distinction also helps us avoid certain mistakes regarding originalism's use in practice. We can't assume that originalist standards will always be revealed in originalist-seeming decision procedures. Criticizing modern Justices for citing too few primary sources in their opinions, or claiming Chief Justice Marshall as a nonoriginalist because he did anything *but* cite primary sources, may be like impugning consequentialists for getting dressed in the morning without first thinking through all the consequences. What judges write down is only partial evidence of the procedures they use; what we really need is evidence of the standards they're expected to follow.

The goal of all this isn't to prove originalism true. Rather, it's to show that "one type of argument against" originalism, "a type of argument which enjoys some popularity nowadays[,] is not a good type of argument."[12] Misunderstandings like these aren't unique to originalism; they afflict many nonoriginalist theories too, which also need the standard-procedure distinction (though its application to nonoriginalism is left as an exercise for the reader). They look like unique failures of originalism only if one sees originalism's unique value as providing, not right answers, but easy ones. And if we have to choose, right answers count for more.

I. THE PRACTICAL OBJECTION

"If there is one point on which virtually all originalists agree," Professor John Compton writes, "it is that originalism constrains judicial behavior."[13] The theory comes in many flavors, but each flavor aims, in its own way, to preserve a preexisting Constitution against ill-disguised attempts at revision. To proponents such as Professors John McGinnis and Michael Rappaport, originalism stands in the way of modern officials' "updating" the Constitution.[14] Without it, then-Professor Robert Bork famously argued, "the Court will be able to find no scale, other than its own value preferences, upon which to weigh the [parties'] respective claims."[15] Even committed nonoriginalists like Judge Posner have seen a case for originalism in "curtail[ing] judicial discretion" and

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[12] Bales, *supra* note 1, at 257 (discussing utilitarianism).

[13] John W. Compton, *What Is Originalism Good For?*, 50 TULSA L. REV. 427, 434 (2015).

[14] JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 14 (2013); *cf.* FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 173 (2013) ("The case for originalism was substantially grounded in the desire to restrain ideological decisions by the justices, replacing such 'willful judging' with decisions according to law."); Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 717 (2011) (describing it as "difficult to overstate the extent to which the Old Originalism was characterized by its own proponents as a theory that could constrain judges and preclude them from reading their own policy preferences" into the text).

[15] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9 (1971).

"transfer[ring] political power from judges to legislators, including the framers and ratifiers of constitutional provisions and amendments."[16]

Yet originalism has trouble putting these aims into practice. The idea (for example) that the original Constitution is law, and that it remains law until lawfully altered,[17] is simple and straightforward, at least in general outline. But the simplicity of that theory lends itself to a simplistic view of how easy it is to follow. As Professors Daniel Farber and Suzanna Sherry note, many originalists, especially those outside the academy, "seem to view constitutional interpretation as a simple exercise that inevitably leads to a single right answer."[18] Those who study it closely know different.[19] Identifying old rules and applying them to new facts is a complex process, with many "interpreter degrees of freedom" along the way.[20] And neither professing a commitment to originalism, nor citing original sources, guarantees uniform decisions by judges with other interests at stake.[21]

This Part sets out what we might call the *practical objection* to originalism. The theory is beset by difficulties of history and application. So if a theory of constraint can't constrain, what good is it? Shouldn't a good interpretive methodology be, well, *methodical*, leading us reliably to right answers and away from wrong ones? The objection can be answered, but first we should recognize it as serious.

A. History

That originalism can be difficult its greatest defenders will concede. Justice Scalia saw the theory's "greatest defect" as "the difficulty of applying it correctly";[22] he imagined a properly done version of *Myers v. United States*[23] as requiring, not "three years and seventy pages," but "thirty years and 7,000 pages" instead.[24] Discerning "the original understanding of an ancient text" means wading through "an enormous mass of material," evaluating "the reliability of that material," and "immersing oneself in the political and intellectual atmosphere of the time — somehow placing out of mind knowledge that we have which an earlier age

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16 Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 591 (2000).

17 *See* Sachs, *supra* note 4, at 818–19.

18 DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 13 (2002).

19 *See* Colby, *supra* note 14, at 716.

20 *Cf.* Joseph P. Simmons, Leif D. Nelson & Uri Simonsohn, *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22 PSYCH. SCI. 1359, 1359 (2011) (describing the concept of "researcher degrees of freedom" (emphasis omitted)).

21 *See generally* CROSS, *supra* note 14.

22 Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

23 272 U.S. 52 (1926).

24 Scalia, *supra* note 22, at 852.

did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day."[25] And this kind of work, "sometimes better suited to the historian than the lawyer," must be undertaken in contentious cases argued in April and decided in June: hardly "the ideal environment for entirely accurate historical inquiry."[26]

Others find the problem still more serious — especially those lacking Justice Scalia's confidence that "for the vast majority of questions the answer is clear."[27] Many crucial provisions, like section 1 of the Fourteenth Amendment, are frustratingly opaque. Others that seem clear on first glance may become less so on examination.[28] The result, per Farber and Sherry, is that "committed and competent scholars often disagree sharply on the historical meaning of most of the important provisions of the Constitution."[29]

This disagreement "may not impeach the legitimacy of originalism as a theory," Farber and Sherry concede, but it does "suggest serious problems" for originalism "as a practical way of deciding constitutional issues": the "historical record cannot successfully constrain ideology" if no one knows what it is.[30] When competent scholars disagree, the lawyers and judges will disagree too, and we can't ask James Madison to play referee.[31] So resting central issues of modern governance on the next report from the archives seems like a terrible way to run a railroad. Why should cornerstones of modern law, as Professor Paul Brest puts it, "turn on the historian's judgment that it seems 'more likely than not,' or even 'rather likely,' that the adopters intended it some one or two centuries ago"?[32] Who would let the lawfulness of independent agencies or of the Civil Rights Act of 1964 come down to what the bespectacled historians say?

All this uncertainty can provide cover for abuse. Professor Saul Cornell, for example, argues that "originalists have used and abused history in a variety of academic debates," producing "result-oriented" and

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[25] *Id.* at 856–57; *accord* Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995) (discussing the need to "view[], or at least attempt[] to view, events, ideas, and controversies in a larger context").

[26] Scalia, *supra* note 22, at 856–57, 861; *cf.* Martin S. Flaherty, Foreword, *Historians and the New Originalism: Contextualism, Historicism, and Constitutional Meaning*, 84 FORDHAM L. REV. 905, 912 (2015) (noting that lawyers have "little time to become immersed in a subject outside the law").

[27] Scalia, *supra* note 22, at 863.

[28] *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 208 (1980) (noting that a modern interpreter "cannot assume that a provision adopted one or two hundred years ago has the same meaning as it had for the adopters' society today").

[29] FARBER & SHERRY, *supra* note 18, at 14.

[30] *Id.* at 15–16 (emphasis omitted).

[31] *Cf.* MARC BLOCH, THE HISTORIAN'S CRAFT 57 (Peter Putnam trans., 1953) ("What historian has not had daydreams of being able, like Ulysses, to body forth the shades for questioning?").

[32] Brest, *supra* note 28, at 222.

"anachronistic" work that "generally ignores recent scholarly developments in the relevant historiography.[33] Maybe these worries could be dismissed as an application of Sturgeon's Law, that "90 per cent of everything is crap."[34] But the problem isn't that there's too much bad legal history getting published; if that were all, the discipline would correct itself over time. The problem is that it's too hard for officials, who have to arrive at legal decisions *now*, to separate the wheat from the chaff.

B. Application

When we turn from history to application, things might seem even worse. Judges who agree on historical facts, noted the late Professor Frank Cross, "might well disagree as to the correct application of the original meaning."[35] The goal of originalist history isn't to learn "what James Madison thought about video games," as Justice Alito famously put it,[36] but "to determine what principle Madison and his contemporaries adopted, and then to figure out whether and how that principle applies to the current case."[37] This second step is a doozy, as any law student faced with a vehicles-in-the-park hypothetical knows.[38] So how can originalism claim to constrain constitutional decisions, if it still involves so much discretion and judgment?

When judges lack clear guidance from the law, they sort themselves into predictable ideological patterns. According to Cross, "countless studies have shown that the justices' decisions . . . that trace contemporary ideological differences."[39] Like everyone else, judges engage in motivated reasoning, given the "natural tendency of people to favor information that confirms their preexisting beliefs."[40] If originalism isn't "particularly constraining," then we should expect judges to "exercise their ideological preferences" whether they claim to use it or not.[41]

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[33] Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 FORDHAM L. REV. 721, 722 & n.7 (2013); *accord* JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 211 (2005) ("If self-described originalist judges manipulate or ignore historical facts, then the approach is no more judge-proof than the alternatives . . . .").

[34] *Sturgeon's Law*, OXFORD ENGLISH DICTIONARY (3d ed. 2003), https://www.oed.com/view/Entry/246938 [https://perma.cc/TH9V-5GQV].

[35] CROSS, *supra* note 14, at 117.

[36] Transcript of Oral Argument at 17, Schwarzenegger v. Ent. Merchs. Ass'n, No. 08-1448 (U.S. Nov. 2, 2010) (statement of Alito, J.), *decided sub nom.* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011).

[37] Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004).

[38] *See* Brest, *supra* note 28, at 209–10 (invoking the example to critique originalism). *See generally* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958) (introducing the example); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109 (2008) (describing its influence).

[39] CROSS, *supra* note 14, at 165.

[40] *Id.*

[41] *Id.* at 189.

Cross tried to measure originalism's influence by examining "all historic references" in Supreme Court opinions to *The Federalist*, *Elliot's Debates*, and Farrand's *Records*, as well as to Founding-era dictionaries and the Declaration of Independence.[42] His hypothesis was that, "[i]f originalism were constraining, one would expect to see a material difference between" liberal or conservative votes in opinions that cited or failed to cite originalist sources.[43] Unfortunately, "the important and controversial Supreme Court opinions will commonly have originalist evidence for both sides."[44] Both the majority and the dissent in *District of Columbia v. Heller*[45] cite pages of original sources,[46] so how can originalism be doing the case-deciding work? "[A]t least as measured by use of originalist sources," Cross concluded, originalism "has failed to constrain the justices" — not because they "ignore it," but because the "sources can be employed for either a liberal or a conservative result."[47]

Studies like Cross's aren't the last word; maybe more extensive immersion in original sources really does affect judicial behavior.[48] But without knowing the original answers ourselves, we can't tell whether the original sources are affecting the judges in the right ways. The more mixed the historical record, the more likely these sources are to point us in random directions, rather than the right direction. Maybe originalism just adds noise to an ideological signal: judges might be less partisan when citing original sources simply because they're easily misled by them.

All this is part of a broader problem. On Professor Eric Segall's telling, political scientists find that judges routinely evade, not merely originalism, but a wide array of "legal sources such as text, history, precedent, and prior positive law."[49] If "[t]he justices are rarely influenced by stare decisis," as Professors Jeffrey Segal and Harold Spaeth claim,[50] why should we expect that they'll listen to *Elliot's Debates*? A theory that can only guide "disinterested, fair-minded thinkers," as Farber and Sherry suggest, can't possibly constrain a "judge who *needs* constraining."[51] (Maybe Diogenes with his lamp could find us a truly principled

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[42] *Id.* at 120–21.

[43] *Id.* at 184.

[44] *Id.* at 170.

[45] 554 U.S. 570 (2008).

[46] *Compare, e.g.*, *id.* at 581–95 (opinion of the Court), *with id.* at 646–51 (Stevens, J., dissenting).

[47] CROSS, *supra* note 14, at 186.

[48] *See* Lorianne Updike Toler, Law Office Originalism 36–37 (Aug. 3, 2020) (unpublished manuscript), http://ssrn.com/id=3659611 [https://perma.cc/PQG2-LP7F] (suggesting that the appropriate use of primary sources can have a "swaying" effect on outcomes, especially for judges identified as originalist).

[49] ERIC J. SEGALL, ORIGINALISM AS FAITH 156 (2018).

[50] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 298 (2012).

[51] FARBER & SHERRY, *supra* note 18, at 155.

judge; elected Presidents and Senators have no reason to want such a person on the bench, compared to a more reliable ideologue.[52])

If the point of originalism is to constrain judges, then it's open to the criticism that its supporters haven't been constrained. Critics on the left see Justices like Scalia or Thomas as failing to "practice[] what they preached," thus proving "how impractical and unworkable originalism is as a method of constitutional interpretation."[53] Critics on the right portray the Court as *too* focused on abstract methodology over concrete substance, arguing that "textualism and originalism and all those phrases don't mean much at all" if they can't prevent such opinions as *Bostock v. Clayton County*.[54]

When researching the history and making their arguments, originalists can still do the best they can. Yet, as Brest writes, "the best is not always good enough."[55] Originalism is supposed to tell actual legal decisionmakers what to do in actual cases. If it can't perform that function, critics might say, what good is it? The perfect constitutional theory for the faculty lounge might be entirely unusable in a judge's chambers — so complex and uncertain, Professor Steven Smith suggests, "that only a theoretical elite can fully understand and participate in it."[56] Developing that sort of theory would be like designing "the perfect car, except that it is so complicated that only people with advanced degrees in engineering can actually drive it."[57]

This objection isn't an attack on theory in general. It's a claim that *constitutional* theory, in particular, is there to provide answers to real questions in real cases. If a theory can't do that, it can't protect democracy from willful judges, defend the rule of law, or do anything else worth doing. And "[w]hatever may be said of originalism as a matter of first principle," Farber and Sherry write, "it seems dubious as a reliable method for answering constitutional questions."[58]

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[52] CROSS, *supra* note 14, at 188.

[53] SEGALL, *supra* note 49, at 123.

[54] Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), https://www.thepublicdiscourse.com/2020/06/65043 [https://perma.cc/L2VX-R8K6] (discussing 140 S. Ct. 1731 (2020)).

[55] Brest, *supra* note 28, at 222.

[56] Steven D. Smith, *That Old-Time Originalism*, *in* THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 223, 229 (Grant Huscroft & Bradley W. Miller eds., 2011).

[57] *Id.*; *accord* Colby, *supra* note 14, at 744 n.183 (suggesting that the more "philosophical complexity and sophistication" originalism acquires, the harder it will be "for lawyers and judges to understand and apply it, or for lay audiences to see any obvious, commonsensical merit to it").

[58] FARBER & SHERRY, *supra* note 18, at 15; *accord* CROSS, *supra* note 14, at 21 ("A claim that originalism is the ideal method of constitutional interpretation has little real value if that ideal cannot be realized in practice.").

II. STANDARDS AND PROCEDURES

The practical objection might be wrong on its own terms. Originalism might turn out to be difficult but not impossible.[59] Lawyers and judges who lack the time for historical research can still read and assess others' work, as they do in other fields outside their expertise.[60] And originalism might compensate for its inability to answer some questions by offering substantially better answers to others.

Regardless, the objection is misplaced. Precisely because originalism *is* a "matter of first principle," in Farber and Sherry's words,[61] its effectiveness as an answer-generating machine is beside the point. Right or wrong, originalism should be assessed as a standard, not as a decision procedure. A statement like "[o]ur law is still the Founders' law, as it's been lawfully changed,"[62] is what Professor Eugene Bales called "an account of right-making characteristics"[63]: it purports to identify features in virtue of which a claim of constitutional law is true or false. It makes no pretense of identifying a "procedure for singling out, under immediately helpful descriptions, [the] right acts so characterized."[64] Indeed, demanding that kind of guidance from this kind of theory is something of a category error. Many useful and important theories offer one but not the other, in ethics as well as in law.

Borrowing distinctions from philosophy might not persuade those who find originalism too theoretical already. But scholars have no alternative to following the arguments where they lead: the truth is only as simple as it is, not as we'd like it to be. As Green points out, "[l]aw and philosophy are both in the distinction business, and law would benefit from attention to distinctions that have survived considerable philosophical scrutiny."[65] If standards of rightness are still worth having in philosophy, then they're probably also worth having in law.

A. Standards and Procedures in Ethics

Bales invoked the standard-procedure distinction to solve a problem in ethics. To some people, the right thing to do is whatever makes the world a better place. There are many objections to this view, and one of them is that it's impossible to apply. "Maximize utility," for example,

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[59] *See* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 813–17 (2019).

[60] *Id.* at 816 (noting that judges "hear antitrust cases without producing cutting-edge microeconomic research," and "decide issues of toxic-tort causation without ever donning lab coats").

[61] FARBER & SHERRY, *supra* note 18, at 15.

[62] Sachs, *supra* note 4, at 838.

[63] Bales, *supra* note 1, at 260.

[64] *Id.* at 263.

[65] Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 561 (2006).

is indeterminate in practice, because we don't always know what will make the world happier, or what our actions will do in the long run. (Attempting the calculations could make the theory self-defeating: if someone is drowning, Bales writes, and "if we take the time to attempt to calculate and compare the relative utilities," we'll have no time left in which to help him.[66])

What we make of these challenges depends partly on what "we expect of an ethical theory" — that is, what "we think an ethical theory is supposed to do."[67] We might ask only that a theory correctly identify a standard of rightness: "that characteristic, or perhaps that very complex set of characteristics, which all and only right acts have by virtue of which they are right."[68] Or we might demand "a decision-making procedure": a process "which, if followed, would provide us in practice with correct and helpful answers."[69]

A standard of rightness "does provide a correct answer, of a kind, to such questions."[70] For example, it might tell us to undertake an act "[i]f and only if doing so would maximize utility."[71] This answer, "under one description," is as complete as we could need; it's also "singularly unhelpful."[72] It fails to reveal, of the real-world alternatives available, "*which* alternative to perform."[73]

Bales's point is that a given ethical theory "could satisfy one of the expectations enumerated above, and do it very nicely, and yet fail to satisfy others."[74] A standard requiring that we maximize utility (or treat others as ends in themselves, or display virtuous character, or . . .) might still be a *better standard* than any alternative. Maybe the correct account of ethics comes packaged together with an easy-to-use decision procedure; maybe not. So long as a proposed theory "*could* provide a correct account of right-making characteristics *without* spelling out a procedure which, if followed, would crank out in practice a correct and

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66 Bales, *supra* note 1, at 258.

67 *Id.* at 260.

68 *Id.*

69 *Id.* at 261; *accord* Roger Crisp, *Utilitarianism and the Life of Virtue*, 42 PHIL. Q. 139, 139 (1992). Note that this notion of a decision procedure may differ from similar notions in which the right answers are justified as being the outputs of a particular process, as opposed to being merely discovered through that process. *See* John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 195–96 (1951); *cf.* Jeff McMahan, *Moral Intuition*, *in* THE BLACKWELL GUIDE TO ETHICAL THEORY 103, 113–15 (Hugh LaFollette & Ingmar Persson eds., 2d ed. 2013) (contrasting the processes of discovery and of justification). I am indebted to Professor Lawrence Solum for this point.

70 Bales, *supra* note 1, at 261.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

immediately helpful answer,"[75] we simply have no guarantee. To abandon the right standard for lacking a decision procedure would be to imitate the drunk who looks under the streetlight for his keys, not because he dropped them nearby, but because that's where the light is.[76]

A standard without a decision procedure might seem pointless or academic — especially if "the one thing we expect most of an ethical theory" is "help in making moral decisions."[77] Still, having the right standard *is* helpful, on reflection if not at every moment. No one jumping out of a window to escape a fire stops "to calculate the mass of the physical bodies involved"; this fails to prove that "Newton's Laws are of no help at all in coping with the world around us."[78] And despite the many "differences between a scientific theory and an ethical theory," it remains true that "theories of any kind may be too general to provide the immediately practical kind of help the objection suggests an ethical theory should provide."[79]

In some ways, Bales's view is a pessimistic one: we have "no reason to believe that the help we reasonably can expect from an ethical theory is as immediate or direct as the objection suggests it should be."[80] But it also offers grounds for optimism. Without a "foolproof procedure" for use "in each and every case," we can still "look to those procedures which have tended to be reliable in the past," and search for other "reliable procedures to use in the future."[81] The standard at least "tell[s] us what to look for," and it gives us something "against which to measure the success or failure of rules-of-thumb."[82] Whether or not our procedures are effective guides, at least we'll have the right destination.

B. Standards and Procedures in Law

At this point, the application to originalism should be clear. Many originalist theories are framed as accounts of right-making characteristics. They aren't designed "to produce unique and indisputable answers to legal questions," but "simply to get the constitutional truthmaker right, whatever dispute that might engender."[83] So these theories should be judged as standards, not as decision procedures.

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[75] *Id.*

[76] *Cf.* Green, *supra* note 3, at 509 (invoking this example).

[77] Bales, *supra* note 1, at 264.

[78] *Id.*

[79] *Id.*

[80] *Id.*; *cf.* Robert L. Frazier, *Act Utilitarianism and Decision Procedures*, 6 UTILITAS 43, 43 (1994) (describing Bales's "somewhat unappealing" but "effective reply").

[81] Bales, *supra* note 1, at 264.

[82] *Id.*

[83] Green, *supra* note 3, at 511–12 (quoting Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1919 (2012)); *accord id.* at 511 (discussing

Consider the theory that the Founders' law, as lawfully changed, is still our law today. This theory rests on claims about the "deep structure" of U.S. legal practices, especially our "practices of identifying, justifying, and debating the content of our law."[84] These practices expect our legal rules to have an ultimate pedigree in Founding-era law; they refuse to "acknowledge, and indeed reject, any official legal breaks or discontinuities from the Founding."[85] This kind of theory combines a jurisprudential major premise, that law is determined by certain social practices, with an empirical minor premise about the practices we happen to have. It says nothing at all about how to dig up the law at the Founding, how to identify alterations lawfully made since, or how to apply that resulting law to present-day facts. But if the argument is right, then it's right, however uncertain its entailments.

In one sense, a theory like this one is procedural, rather than substantive: it starts with a view of how things get to be part of our constitutional law, and only then picks out the rules we actually find there. But in another sense it's clearly about substantive standards, rather than decision procedures: it evaluates legal *propositions*, not scholarly methods of discovering them.[86] Someone who concludes that the President has a four-year term after a long study of Article II is just as right, on originalist grounds, as someone who picks the number "4" out of a hat. And while hat-pickery is an unreliable procedure in constitutional law, having the right standard helps explain why.

C. Answering the Objection

Once we see originalism as a standard, not a decision procedure, we can answer the objection of the previous Part — both as to history and as to application.

1. History. — If originalism is the right standard, for reasons independent of its usefulness in practice, then it's still the right standard even if original history is hard to do. The theory's conclusions might be uncertain, the historians might often disagree, the judges might balk at wading through the materials, and so on, but the standard is the standard. Whatever its defects, the theory provides, "under one description,"[87] as much information about constitutional law as we could need: our law is the Founders' law, as lawfully changed.

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whether "originalism is an ontological thesis about what makes constitutional claims true, rather than an assumption about what we can ascertain").

84 Baude & Sachs, *supra* note 4, at 1458.

85 *Id.* at 1477; *accord* Sachs, *supra* note 4, at 846–52, 868–71.

86 As law often recycles the same words, it should go without saying that the standard-procedure distinction has nothing to do with the better-known distinctions between substance and procedure, *see* Hanna v. Plumer, 380 U.S. 460, 471 (1965), or between rules and standards, *see* Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592 (1988).

87 Bales, *supra* note 1, at 261.

That description may not be immediately helpful. But it's a kind of description the law uses *all the time*. Kentucky's law includes whatever Virginia's law was as of June 1, 1792;[88] conduct in a federal enclave is governed by whatever local criminal laws were "in force at the time";[89] new federal civil trials are granted when they would have been granted "heretofore";[90] and federal "Debts" and "Engagements" existing "before the Adoption of this Constitution" are just as valid "as under the Confederation."[91] Law is suffused with what John Foster calls *opaque specification*.[92] As he explains:

> Suppose I have a sealed envelope and I know that inside it there is a piece of paper on which someone has drawn a geometrical figure, but I do not know what type. If someone who does know tells me, correctly, that the figure is a triangle, his specification of the type is *transparent*. If he tells me, again correctly, that it is an instance of that type of figure whose geometrical properties are discussed in the fourth chapter of the only leather-bound book in Smith's library, his specification is *opaque*. In both cases, the information he provides is, in a sense, *about* the intrinsic nature of the figure. . . . [But u]nless I already have further relevant information about the contents of the leather-bound book in Smith's library, the second specification leaves me, in the most obvious sense, none the wiser as to what type of figure the envelope contains.[93]

Congress may never have thought of enacting a draft statute "discussed in the fourth chapter of the only leather-bound book in Smith's library,"[94] but it's come pretty close.[95] So the idea that our constitutional law in general might be specified opaquely, rather than transparently, should hardly surprise us, given that our constitutional and statutory provisions regularly do the same thing. We can bemoan the opaqueness of our constitutional law, but bemoaning it won't make it go away.

In fact, we often have good reason to leave our descriptions opaque. When we want to preserve a customary standard as is, without doing

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[88] *See* KY. CONST. § 233.

[89] 18 U.S.C. § 13(a).

[90] FED. R. CIV. P. 59(a)(1)(A)–(B).

[91] U.S. CONST. art. VI, cl. 1.

[92] *See* JOHN FOSTER, THE CASE FOR IDEALISM 62 (1982).

[93] *Id.*; *see also* Lucy Allais, *Intrinsic Natures: A Critique of Langton on Kant*, 73 PHIL. & PHENOMENOLOGICAL RSCH. 143, 159 (2006) ("[A]n opaque description still refers to the thing, but does not give descriptively contentful knowledge of its intrinsic nature."); Rae Langton, *Kant's Phenomena: Extrinsic or Relational Properties? A Reply to Allais*, 73 PHIL. & PHENOMENOLOGICAL RSCH. 170, 171, 179–80 (2006) (discussing the distinction).

[94] FOSTER, *supra* note 92, at 62.

[95] 1 U.S.C. § 113 ("The edition of the laws and treaties of the United States, published by Little and Brown, . . . shall be competent evidence of the several public and private Acts of Congress . . . ."); *see also, e.g.*, N.J. ADMIN. CODE § 11:3–10.4(a)(1)(iii) (2021) (requiring auto insurers to calculate settlements in light of the "'Automobile Red Book' and 'Older Car/Truck Red Book' published by Maclean Hunter Market Reports, Inc.," among other sources).

the risky work of recodification, we reenact the law as it was "heretofore" rather than spell it out in detail.[96] Or when we want to be precise about which officials can alter the law under which they serve, we create strict tests for new statutes or constitutional amendments,[97] necessarily disallowing any proposals that failed to jump through the relevant hoops.

The argument is easiest to see for statutes. As Judge Easterbrook writes, "[w]e the living" enforce the "[d]ecisions of yesterday's legislatures" by letting today's legislatures decide whether or not to change them.[98] If a legislature chooses not to pass anything, then all the old laws remain in force, whatever they are — and the only way to find out *what they are* is to look to history.

For the Constitution, this kind of opaqueness lends itself to originalism. If Congress and the states choose not to pass any amendments, the old provisions remain in force, whatever they are — and, again, the only way to find out *what they are* is to look to history. We send constitutional lawyers into the archives, not out of love for archives, but as a side effect of narrowing the circumstances in which new constitutional law is made. If we admit only certain ways of changing our constitutional law, then we have to treat anything *not* so changed as remaining the same, and as determined by facts about the past.[99]

Given that our law often chooses opaqueness, we should worry less about whether any particular constitutional theory also serves "as a practical way of deciding constitutional issues."[100] To borrow Bales's pessimism, why should we expect the two to be packaged together — why must the *correct* approach also be a *practical* one? Consider Congress's choice, in the Assimilative Crimes Act,[101] to subject California naval bases to California criminal law, enforced through federal criminal procedure.[102] Anyone applying that statute has to confront hard questions about which California laws define substantive offenses and which address criminal procedure — questions that California's legislature, which usually governs both substance and procedure, never

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96 FED. R. CIV. P. 59(a)(1)(A)–(B); *cf.* Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 156 (2006) (describing the "near-impossibility" of rewriting the words while leaving the law "as it was before").

97 *See* U.S. CONST. art. I, § 7; *id.* art. V.

98 Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998); *see* Sachs, *supra* note 4, at 841; *cf.* KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 156 (1999) ("By maintaining the principle that constitutional meaning is determined by its authors, originalism provides the basis for future constitutional deliberation by the people.").

99 Sachs, *supra* note 4, at 840.

100 FARBER & SHERRY, *supra* note 18, at 16.

101 18 U.S.C. § 13.

102 *See, e.g.*, United States v. Roberts, 845 F.2d 226, 226–27 (9th Cir. 1988) (applying 18 U.S.C. § 13 (1982)).

needed to face.[103] That very unpractical inquiry follows directly from a practical choice, namely to borrow substantive offenses from local law while sticking with uniform federal procedures. Likewise, the practical decision to keep the Constitution in effect over time, until there's a broad-based, formal, and public decision to change it under Article V, forces lawyers and judges into unpractical inquiries about long-ago rules. Nonetheless, that's their job. The difficulty of finding out prior law isn't a reason to ignore the question, especially whenever we *do* know the answer.[104]

"[T]hat originalism asks too much of history"[105] might be a reason not to want originalism *to be* the law, were the choice up to the reader.[106] But it has very little force as against arguments that originalism *already is* the law, at least those arguments having nothing to do with consequences.[107] Like an economic argument "that tax rates are too high," this objection is a complaint "that our law is not any better than it is"[108] — and an argument for *changing* the law, rather than pretending that it's already been changed.

2. Application. — Treating originalism as a standard, not a decision procedure, also relieves some of our worries about its application. Originalism *is* uncertain in application, even once we know all the historical facts. But it's uncertain the way that legal rules *in general* are uncertain. The original rules don't enforce themselves; like all legal rules, they depend on fallible humans to carry them into effect. And while abstract arguments about standards may seem too distant to matter to "real law," claims about what counts as "real law" trade on just these kinds of abstractions.

(a) Uncertainty. — To the extent that originalism is supposed to guide officials, it's natural for the theory's critics to worry about its uncertain application. For example, if the correct originalist standard yields a legal rule forbidding vehicles in the park,[109] we might have trouble applying that rule to new cases — motorized wheelchairs, say, or some type of e-scooter unknown to the Founders.[110]

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[103] *See id.* at 228–29.

[104] *Cf.* Green, *supra* note 3, at 511 (arguing that "we cannot infer ontological vices from epistemic ones," at least not without additional assumptions).

[105] Baude & Sachs, *supra* note 59, at 817.

[106] *See* Michael L. Smith, *Originalism and the Inseparability of Decision Procedures from Interpretive Standards*, 58 CAL. W. L. REV. (forthcoming 2022) (manuscript at 17), http://ssrn.com/id=3909659 [https://perma.cc/TH3R-C9JW] ("If originalism tends to lead to situations where procedural implementation of the standard is difficult or impossible, alternative standards may be preferable.").

[107] *See* sources cited *supra* note 4.

[108] Baude & Sachs, *supra* note 59, at 817.

[109] *See* sources cited *supra* note 38.

[110] *But see* Tom Knowles & Graeme Paton, *E-scooters: Highways Act from 1835 Puts Brake on Revolution*, THE TIMES (London) (July 20, 2019, 12:01 AM), https://www.thetimes.co.uk/article/

Vehicles-in-the-park problems aren't *originalist* problems, though. They're problems we always have in applying existing legal rules, whether two years old or two hundred, so long as those rules remain in force.[111] Indeed, the Founders might not have had any easier of a time interpreting their own work. If you'd asked Alexander Hamilton whether Vice Presidents would preside over their own impeachments (as the text suggests, but in conflict with longstanding rules of construction[112]), he might have said "Huh," scratched his head, and started rereading the relevant passages just like the rest of us. In other words, he might have approached the document as a lawyer would, trying to discern what rules it enacted and how they applied, "according to the usual & established rules of construction."[113] These problems have less to do with the two-century gap separating Hamilton from today than with the far less bridgeable chasm between creating a new rule and applying one already adopted. It would make sense to treat these problems as *originalist* problems, in particular, only if originalism were just another word for following the preexisting rules.

(b) Efficacy. — Other critics focus on a second worry, namely originalism's incapacity to secure compliance. If the Justices' originalist rhetoric doesn't show up in their voting patterns,[114] then maybe originalism is causally inert. Subscribing to it doesn't change anyone's behavior, so it can't possibly make any difference whether it's right.

But many important truths don't change behavior, at least not directly. Our daily behavior isn't much changed by whether acids are really "[l]iquors . . . composed of pointed particles," as Dr. Johnson had it,[115] or whether they're proton donors or electron pair acceptors, as the competing modern theories would say.[116] On either account, we should

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e-scooters-highways-act-from-1835-puts-brake-on-scooter-revolution-zzjpx9f7x [https://perma.cc/RBB5-TCPA] (finding a clear prohibition of e-scooters in the Highway Act 1835, 5 & 6 Will. 4 c. 50, § 72 (UK), which prohibited sidewalk use by any "horse, ass, sheep, mule, swine, or cattle or carriage of any description").

111 *See* H.L.A. HART, THE CONCEPT OF LAW 128 (3d ed. 2012) ("[H]uman legislators can have no such knowledge of all the possible combinations of circumstances which the future may bring."); Baude & Sachs, *supra* note 59, at 817–20.

112 *Compare* U.S. CONST. art. I, § 3, cls. 4, 6 (making the Vice President "President of the Senate," *id.* cl. 4, but providing only that "[w]hen the President of the United States is tried, the Chief Justice shall preside," *id.* cl. 6), *with* 1 WILLIAM BLACKSTONE, COMMENTARIES *91 ("[I]t is unreasonable that any man should determine his own quarrel.").

113 ALEXANDER HAMILTON, *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank* (Feb. 23, 1791), *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 111 (Harold C. Syrett ed., 1965).

114 *Compare* CROSS, *supra* note 14, at 186 (suggesting this result), *with* Updike Toler, *supra* note 48 (manuscript at 36–37) (suggesting the contrary).

115 Hasok Chang, *Acidity: The Persistence of the Everyday in the Scientific*, 79 PHIL. SCI. 690, 691 (2012) (quoting Samuel Johnson).

116 *See id.* at 691–93, 695 (discussing competing explanations from the eighteenth century through modern Brønsted-Lowry and Lewis theories).

be careful when pouring them. We notice the difference only when we can test it carefully, and when the surrounding circumstances will produce a clear answer one way or the other.

On this score, the studies critical of originalism simply lack the needed precision. Because those studies can't evaluate the quality of originalist arguments on their own terms and at scale, they have to rely on various proxies, such as whether an opinion cites to Founding-era sources.[117] To choose the proxy is to prejudge the question. If quoting Madison made for a more accurate *decision procedure* — if Madison quotations could ward off ideology, as garlic does vampires — then this proxy might make sense: we'd expect opinions containing Madison quotations to be more correct and thus more uniform in outcome. But if quoting Madison is useful only in advancing some further *standard* — if there are good originalist arguments and bad ones, and if the devil can cite Publius for his purpose — then counting citations can't possibly show us who the better originalists are.[118]

If we want to know whether originalism, as a standard, demands different decisions than we're getting, we can't tell that by looking to the potentially flawed decisions of individual originalists. Or if we want to know whether a personal commitment to originalism has real effects on conduct, we can't tell that if our dataset includes every instance of originalism done half-heartedly or for show. Such a study design presumes what it set out to prove, namely that deep intellectual commitments have no particular motive force. These sorts of commitments usually operate through subtler channels, not immediately visible in the outcomes: consider testing whether "[p]oets are the unacknowledged legislators of the world"[119] by regressing legislators' DW-NOMINATE scores against number of poems quoted per year.[120] The studies notwithstanding, originalism may well prescribe real limits on official decisions, and a more thoroughly originalist legal culture may well produce more thoroughly originalist decisions. (Indeed, if "originalist sources are simply used to 'decorate' opinions reached on other grounds,"[121] there'd be little policy reason for nonoriginalists to fear a more thoroughly

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117 *See* CROSS, *supra* note 14, at 120 ("Use of an originalist source for interpretation is surely direct evidence of originalism.").

118 *See id.* at 123 (disclaiming any attempt "to assess the degree to which the originalist source *caused* the decision of the [J]ustice"); *id.* at 184 ("[I]nsincerity cannot be readily detected, so the relative effect of interpretive methods cannot be compared.").

119 PERCY BYSSHE SHELLEY, *A Defence of Poetry*, *in* 1 ESSAYS, LETTERS FROM ABROAD, TRANSLATIONS AND FRAGMENTS 1, 57 (Mary Wollstonecraft Shelley ed., London, Edward Moxon 1840).

120 *See* Keith T. Poole & Howard Rosenthal, *D-NOMINATE After 10 Years: A Comparative Update to* Congress: A Political-Economic History of Roll-Call Voting, 26 LEGIS. STUD. Q. 5, 6–8 (2001) (quantifying legislators' ideologies based on their propensities to vote together).

121 CROSS, *supra* note 14, at 188.

originalist culture,[122] as both sides of any policy debate could use the decoration.)

What the studies really seem to measure is the broad acceptance of originalist reasoning. On Cross's account, judges think originalist citations "may better legitimize and give credibility to their decisions," as "originalism has great appeal to the public generally and various legal constituencies."[123] That's why judges might "invoke originalism as rhetorical support for conclusions grounded in other reasons."[124] Faced with this sort of social-norm evidence, many originalists might be delighted; as Judge Bork put it, "[t]he way an institution advertises tells you what it thinks its customers demand."[125]

In other fields, we regularly distinguish bad or self-serving arguments from their underlying standards. Moral arguments can be masks for interests or ideology; not everyone gives up on moral reasoning as a result. Economic arguments in Congress might best be explained by partisanship or public choice; few infer from this that economic analysis is a waste of time, much less that prosperity or poverty are illusions. So why is a failure to adhere to a standard a criticism of the standard, and not of its adherents?

Efficacy arguments like these don't apply just to originalism. *Every* legal rule has to be implemented by fallible people. That was Madison's point about "parchment barriers"[126]: the parchment never reaches out and shakes you until you comply. And *every* legal rule might be misapplied through motivated reasoning or dishonesty, or might be abandoned later on.[127] If we want to know how originalism compares to the alternatives, it seems relevant that its competitors fare little better on this count: empirical studies of precedent, for example, reach similarly pessimistic conclusions.[128] (And good luck designing studies to tease out the effects of ideology from theories of pluralism or pragmatism.[129])

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[122] *Cf.* 133 CONG. REC. S9188 (daily ed. July 1, 1987) (statement of Sen. Edward Kennedy) (describing "Robert Bork's America" in unpleasant terms).

[123] CROSS, *supra* note 14, at 188.

[124] *Id.* at 14.

[125] Bork, *supra* note 15, at 4.

[126] THE FEDERALIST No. 48, at 305 (James Madison) (Clinton Rossiter ed., 2003).

[127] JAMES MADISON, Location of the Capital (July 6, 1790), *in* 13 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 264, 265 (Charles F. Hobson & Robert A. Rutland eds., 1981) ("It is not in our power to guard against a repeal — our acts are not like those of the Medes and Persians, unalterable. . . . If that is an objection, it holds good against any law that can be passed.").

[128] *See* SEGAL & SPAETH, *supra* note 50, at 298; *supra* p. 785.

[129] *See* Baude & Sachs, *supra* note 6, at 105 (describing originalism as "actually rather good at distinguishing good arguments from bad ones," at least as compared to "pragmatism," as to which "it's wickedly difficult to tell whether its practitioners are doing it right or wrong").

Some things we might be legally obliged to do, even if we have every reason to expect we'll fail. Perhaps our officials won't succeed at enforcing the same old rules. But until a proper decision is made to change the rules, they might be without legal authority to do anything else.

(c) Abstraction. — All this might strike the skeptical reader as a sort of "No True Scotsman" originalism, in which the only kind of originalism worth discussing is the ideal theory found in the heaven of concepts, not the one practiced in real life. To Cross, for example, "[h]owever compelling the theoretical case for some form of originalism might be, the theory still offers relatively little if it cannot be formally realized in practice."[130] Any "theoretical debate over the correctness of interpretive originalism" would be "irrelevant to the actual law": "If originalism is so manipulable in practice, the debate over its validity could have a theoretical philosophical value but lends little to actual judicial decisionmaking practice."[131]

Disparaging the "theoretical philosophical" issues in favor of "the actual law" might sound like hard-nosed empiricism, but in fact it's just more theory in disguise.[132] Words like "actual" stand in for theoretical claims about what counts as law and what doesn't. Looking for the "actual law" in "actual judicial decisionmaking practice" is a well-known school of thought, more than a century old,[133] with many well-known flaws (for instance, that judges can hardly be predicting their own decisions).[134] Some people treat claims about law as really just predictions about cases;[135] others say the cases themselves might be right or wrong based on the standards that legal actors publicly accept and

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130 CROSS, *supra* note 14, at 194.

131 *Id.* at 19; *accord* SEGALL, *supra* note 49, at 11–12 ("[W]e cannot have a reasonable debate over the proper role of originalism in real cases (as opposed to a theoretical discussion) without recognizing the difficulties even allegedly pro-originalist justices have had applying the doctrine."); *id.* at 34 ("Relying on original meaning is nice as a theoretical matter, but for real judges deciding actual cases, they must do much more work to resolve cases."); Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006) ("[P]ragmatically speaking, the meaning of a constitutional provision *is* its implementation.").

132 *Cf.* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 383 (Macmillan & Co. 1957) (1936) ("Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist.").

133 *See, e.g.*, O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."); *cf.* Hills, *supra* note 131, at 180 (paraphrasing Holmes, *supra*, at 461).

134 HART, *supra* note 111, at 105; *see also id.* at 147 (noting that such predictions "are like the prediction we might make that chess-players will move the bishop diagonally: they rest ultimately on an appreciation of the non-predictive aspect of rules"); Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278, 290, 298–99 (2001) (expressing great sympathy for empirical skepticism as to the causes of judicial decisions, but describing "conceptual rule skepticism" as "manifestly ridiculous").

135 *See* Holmes, *supra* note 133, at 461.

defend.[136] Who is right (if either) is nothing if not a "theoretical philosophical" debate: it can't be settled by empirical studies of outcomes, any more than empirical studies of social mores can tell us what's actually ethical.

We should resist these kinds of efforts to smuggle in theory on the cheap — not least because knowing "the actual law" can make a real difference to real people, enabling them to criticize their officials for failing to live up to it. (It's plausible, for example, that a statute banned segregation in the District of Columbia for decades, despite its widespread nonenforcement by officials.[137]) If some people still wish to learn the actual law, whatever the current decisionmaking practice may be, then there's no avoiding the "theoretical philosophical" debate.

III. THE OBJECTION FROM CLUELESSNESS

Originalism can be defended as a standard of legal rightness. But how it's defended may matter. The previous Part described a version of originalism resting solely on current practice, but many originalists add normative defenses of their theory: say, that it preserves liberty,[138] enhances popular sovereignty,[139] or promotes human welfare.[140] And many ordinary citizens worry less about virtues like these than about particular hot-button issues, such as gun rights.[141] Whether originalism can advance any of these goals depends on whether its practitioners are reasonably capable of getting things right. If practicing originalists are just throwing darts at the wall, why would those darts end up promoting liberty, human welfare, or particular policy positions?[142] Why not discard the trappings and just pursue liberty, welfare, or our favorite policies directly? Or if we stick with the theory, then without a reliable procedure for finding right answers, what guidance can it offer in the meantime? Before the Senate, Judge Bork offered the example of a

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136 *See* Baude & Sachs, *supra* note 4, at 1468–77; Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2260–78 (2014).

137 *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 113–17 (1953).

138 *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 91–119 (rev. ed. 2014).

139 *See, e.g.*, Bork, *supra* note 15, at 3; Scalia, *supra* note 22, at 862.

140 *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 14, at 11.

141 *Cf.* Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 556 (2006) ("Invoked in these ways [by the Reagan Administration], originalist argument clearly signaled (and continues to signal) its affiliation with a particular political perspective passionately concerned with outcomes rather than processes.").

142 *Cf.* Hawley, *supra* note 54 (questioning, after recent Supreme Court decisions, "the bargain that people of faith have been offered and asked to hold to for all of these years").

constitutional provision obscured by an inkblot;[143] if some of our original Constitution is just as obscured by the mists of time, will applying what we *do* know advance any of our goals?

Here, too, the ethics literature offers some parallels. Often we make decisions in ignorance of the right answer, by following rules of thumb. But sometimes our ignorance is so deep that even rules of thumb seem unavailable. So either ethics is just silent here, or else we ought to act a certain way without knowing how, or else our ethical theory must be wrong.[144]

Originalism, too, faces what we might call the *objection from cluelessness*. We don't know how much of the history we don't know,[145] or how dangerous our ignorance might be. Still, the decisionmakers need to decide *now*, before the historical work is complete. So either originalism is silent here, or else we legally ought to act a certain way without knowing how, or else our constitutional theory must be wrong.

As above, this Part sets out the problem, deferring its solution to the next. But the first step is to recognize we have a problem.

A. Consequentialism and Cluelessness

The problem of cluelessness arises when our standard is so obscure as to resist any attempts at formulating a decision procedure. An ethical theory focused on consequences, for example, has to admit that we don't always know the consequences. Acts that seemed good at the time can have bad effects, and acts that seemed bad can have good ones; a butterfly's flapping its wings might change the weather half a world away, and so on. As Professor Shelly Kagan asks, "how can you possibly tell what *all* the effects of your act will be," or what act "lead[s] to the best results overall — counting *all* the results?"[146] Kagan expects that the unknown odds of either good or bad consequences will be roughly equal, so that the unknowns come out in the wash;[147] but this is hard to credit. (Do we know enough about history to say that past events have washed

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[143] *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 249 (1987) [hereinafter *Nomination of Robert H. Bork*] (statement of Judge Robert Bork) (discussing how judges should act if the Constitution's text were partly obscured).

[144] *See* Elinor Mason, *Consequentialism and the "Ought Implies Can" Principle*, 40 AM. PHIL. Q. 319, 320 (2003).

[145] *Cf.* Donald H. Rumsfeld, Sec'y of Def., Department of Defense News Briefing (Feb. 12, 2002, 11:30 AM), https://web.archive.org/web/20061002064445/http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636 [https://perma.cc/KJ3J-6S45] (discussing "unknown unknowns").

[146] SHELLY KAGAN, NORMATIVE ETHICS 64 (1998).

[147] *Id.* at 65; *see also* Joanna M. Burch-Brown, *Clues for Consequentialists*, 26 UTILITAS 105, 119 (2014) (suggesting that we're often sufficiently "accurate in our appraisal of systematic effects").

out so far — let alone that they'll keep washing out from now on?[148]) Without knowing those odds, how can we use consequences as "a moral guide to action"?[149] If we can't "get a grip on the consequences of an act," then we can't use *any* theory that considers consequences — "and that will be virtually all theories."[150]

Consider a memorable illustration of the problem, paraphrased from Professor James Lenman.[151] A bandit in prehistoric Europe burns the nearby villages, which is bad. He decides on a whim to spare a woman's life, which is good. A hundred generations on, the woman's descendant turns out to be Hitler, which is bad. But because her life was spared, her husband didn't remarry someone else — preventing an even *worse* descendant later on, which is good.

Lenman's point is that actions that appear unambiguously bad or good (burning villages, sparing lives, and so on) may have "massive causal ramifications" that alter the future "in incalculable ways."[152] Some credit as awful an event as the Black Death with Western Europe's later escape from serfdom and poverty,[153] something that likely eluded any contemporary cost-benefit analysts. Less notable events, such as a couple's decision to have two children or three, can have substantial consequences for the identities of those alive ten generations later.[154] Those consequences may not be dramatic in scale, but they could still overwhelm any factors the couple considered at the outset, making their decision essentially arbitrary. "The worry," Lenman writes, "is not that our certainty is imperfect, but that we do not have a clue about the overall consequences of many of our actions."[155] (Or, at best, that we have "a clue of bewildering insignificance bordering on uselessness," such as "a detective's discovery" that the murderer is "under seven feet tall."[156])

To be clear, Lenman isn't arguing that we should stop trying to pursue good consequences. Rather, he worries that a standard which looks *only* to consequences can't justify any decision procedure at all. "If consequentialism is to be a theory of any real normative interest," he

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148 *See* James Lenman, *Consequentialism and Cluelessness*, 29 PHIL. & PUB. AFFS. 342, 354 (2000) ("[T]here are no such cases in which we have good grounds to suppose the ramification has yet come close to running its course.").

149 KAGAN, *supra* note 146, at 64.

150 *Id.*

151 Lenman, *supra* note 148, at 344–45.

152 *Id.* at 345.

153 *See* Remi Jedwab, Noel D. Johnson & Mark Koyama, *The Economic Impact of the Black Death*, 59 J. ECON. LITERATURE (forthcoming 2021) (manuscript at 40), https://www2.gwu.edu/~iiep/assets/docs/papers/2020WP/JedwabIIEP2020-14.pdf [https://perma.cc/E4NL-VM4M].

154 *See* Lenman, *supra* note 148, at 346–47.

155 *Id.* at 349.

156 *Id.* at 349–50.

argues, "it must at least furnish us with a regulative ideal to guide our choices either of actions or decision procedures; it must offer such choices a consequentialist rationale."[157] But if the *full* consequences of our actions bear little relation to their *foreseeable* consequences, then we can hardly defend any given procedure on the grounds that its foreseeable consequences look good. A full-consequences standard simply can't be put into action: a fatal defect, Professor Frank Jackson suggests, when "the passage to action is the very business of ethics."[158]

B. Originalism and Cluelessness

For originalism, the epistemic problems aren't nearly so dire: the past is rather more accessible than the future. Still, we don't know what we don't know, and the argument from cluelessness suggests that we might not know something important. If our ignorance of history won't be cured anytime soon, why should we look to history? Recall Judge Bork's inkblot example:

> [I]f you had an amendment that says "Congress shall make no" and then there is an ink blot and you cannot read the rest of it[,] and that is the only copy you have, I do not think the court can make up what might be under the ink blot if you cannot read it.[159]

What history still conceals might be as lost to us as the words under that inkblot. On crucial issues of constitutional structure and rights — the nondelegation doctrine, say, or the Fourteenth Amendment's Privileges or Immunities Clause — talented scholars remain divided.[160] To be sure, some answers may still be better than others; and if originalism is the governing legal standard, then we're legally required to follow whatever the original Constitution provides. But if we don't know what that Constitution provides — if some of that Constitution is hidden to us, as if by an inkblot — then what exactly is the decisionmaker to do? If we really don't know the underlying law, how can we defend *any* decision procedure as a reliable means of adhering to it? What does it mean to have a constitutional theory that we can't put into action,

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157 *Id.* at 360.

158 Frank Jackson, *Decision-Theoretic Consequentialism and the Nearest and Dearest Objection*, 101 ETHICS 461, 467 (1991).

159 *Nomination of Robert H. Bork*, *supra* note 143, at 249.

160 On nondelegation, compare, for example, Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–80 (2021), with Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1556 (2021). On privileges or immunities, compare, for example, KURT T. LASH, THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP 279 (2014), with Randy E. Barnett & Evan D. Bernick, *The Privileges or Immunities Clause, Abridged: A Critique of Kurt Lash on the Fourteenth Amendment*, 95 NOTRE DAME L. REV. 499, 588 (2019), and CHRISTOPHER R. GREEN, EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE 11 (2015).

when — to paraphrase Jackson — the passage to action is the very business of law?[161]

Worse, our ignorance of some of the Constitution might diminish our confidence in what we think we do know. A power conferred in one provision might be restricted by another provision, now forgotten or misunderstood. (In Judge Bork's example, "Congress shall make no . . . ."[162]) Giving full rein to the powers we know, while ignoring the restrictions we don't, could leave us less rather than more faithful to the original plan. This situation resembles the problem of the "second best," in which case-by-case originalism might trade off with originalist fidelity overall, given all the nonoriginalist water under the bridge.[163] Yet even a universal commitment to originalism won't help if we don't know which original rules to be faithful *to*.

If we can't fully trust the parts of the Constitution we do know, we also can't trust in their substantive merits. Maybe the original Constitution had various benefits (preserving liberty, enhancing popular sovereignty, and so on) only in virtue of the parts we don't know. A defense of originalism resting on the Constitution's contents — say, that the document was "passed in the main under appropriate supermajority rules," such that "the norms entrenched in the Constitution tend to be desirable"[164] — has to overcome our partial ignorance of what was actually approved. The enactors' choices might have been interlinked, with some provisions producing good results only when combined with others now obscure. On whatever substantive grounds we assess the Constitution, telling officials to faithfully apply it *in part* might turn out to make our constitutional law worse, rather than better;[165] without knowing what we don't know, it seems hard to make educated guesses either way.

In short: the more historical uncertainty there is, the less reason we have to trust that the Constitution we *think* we know truly reflects the choices of its enactors. And the Constitution we think we know is the only one we can really use. This poses serious difficulties to any theory that justifies originalism by its faithfulness to those enactors' choices, or to the substance of the choices themselves.

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161 *See* Jackson, *supra* note 158, at 467.

162 *Nomination of Robert H. Bork*, *supra* note 143, at 249.

163 *Cf.* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 324–29; Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 2–3 (1994); Adrian Vermeule, *The Supreme Court, 2008 Term — Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 54–58, 62–63 (2009).

164 MCGINNIS & RAPPAPORT, *supra* note 14, at 11.

165 *Cf.* Note, *Bundled Systems and Better Law: Against the Leflar Method of Resolving Conflicts of Law*, 129 HARV. L. REV. 544, 563–65 (2015) (advancing similar arguments against certain choice-of-law theories).

IV. Standards and Procedures in Practice

To respond to this problem of cluelessness, we might recognize different kinds of obligation, some of which we still have clues about. Both in ethics and in law, questions of ultimate value may involve one set of considerations while those of situational praise or blame involve another. When we're clueless about the ultimate questions, we still might know whether a person acted as they should have under the circumstances, whether or not they made the right choice overall. The ultimate-value questions concern the right standard, while the praise-or-blame questions concern the right decision procedure.

In other words, we ought to distinguish different senses of "ought."[166] In ethics, there might be one way we ought to act in an ultimate sense, or from the God's-eye view, and another way we ought to act with the knowledge and capacities that are given to us. Similarly, in law, the substantively correct outcome might be one thing, and the legally appropriate conduct for a decisionmaker might be another. Just as we distinguish standards from decision procedures, we should distinguish the substance of what our standard legally requires of us from how we're legally required to go about deciding. We can follow the latter sort of instructions in practice, even when we're unsure of the former.

Much that goes by the name of "constitutional doctrine" could be understood as an attempt at generating a decision procedure — and some of it may, under limited circumstances, be compatible with a standard of uncompromising originalism. Sometimes a theory itself contains *internal* decision procedures, instructions to be followed by particular people in cases of uncertainty. These include the doctrines and institutions specifically designed for fallible decisionmakers, such as burdens of proof, hierarchical court systems, horizontal precedent, and so on. When the theory itself offers no help, we might try to approximate its results through *external* decision procedures, creating heuristics such as the *n*-factor tests used to standardize analysis across courts and across cases. To the extent that these doctrines have their own originalist pedigree, or serve as heuristics for other doctrines that do, an originalist can use them without shame. Yet to the extent that these doctrines go beyond mere heuristics, they also go beyond any "construction" that originalism can permit.

When these instructions run out, of course, we still have to decide. In such cases, we might have an obligation to *honor* certain values even if we can't *promote* them,[167] or to *try* to achieve what we can't achieve directly.[168] In this way, some normative defenses of originalism can still

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[166] *See* Fred Feldman, *True and Useful: On the Structure of a Two Level Normative Theory*, 24 UTILITAS 151, 151, 157–58 (2012).

[167] *See* Lenman, *supra* note 148, at 366; Philip Pettit, *Consequentialism*, *in* A COMPANION TO ETHICS 230, 230–31 (Peter Singer ed., 1991) (distinguishing the two).

[168] *See* Mason, *supra* note 144, at 323.

have purchase, especially defenses that emphasize the current attitudes and practices of originalist officials rather than the content of the rules that they enforce. It might be that *trying* to do originalism is at least as important, for various ends we care about, as doing it successfully.

A. Different Kinds of "Oughts"

When we don't know the right choice to make, sometimes our intuitions tell us to make what we know to be the wrong choice. To paraphrase Jackson's famous illustration, suppose that a doctor must find a treatment for her patient. Drug A would partly relieve a minor skin complaint; Drugs B and C would cure it entirely, but each is fatal to half the population, and we can't tell which half the patient is in.[169] In one sense, the correct answer is obviously Drug A; a partially uncured skin complaint isn't worth a fifty percent chance of death. But in another, more accurate sense, the correct consequentialist answer is Drug B, which just happens to be the drug that would cure the condition safely and produce the best outcome overall. If right actions produce the best consequences, then the right action for the doctor is to guess correctly — even though "guess correctly" is hardly useful advice, and no responsible doctor would try it. So, Jackson asks, if prescribing Drug B "would have been the wrong thing to do at the time, how can it be what she ought to have done?"[170]

The same possibility arises in law. When we encounter a Borkian inkblot, our only good guess at its content might be that the provision imposed a limit of some kind ("Congress shall make no . . . "). And yet Judge Bork would have the court impose no limit at all — the one thing we know the enactors *didn't* mean to do![171] Here, too, in one sense the legally right approach would be to guess correctly. The law is whatever was ratified at the time, not whatever an inkblot later left obscure; and if we still had an unstained copy, or if new technology let us remove the blot safely, presumably the judge would be obliged to read what was written there, the better to enforce the law as it stood. So, in a very plausible sense, the law includes whatever the inkblot concealed, and a judge who ignores the provision decides in error. But obviously Judge Bork was correct, and ignoring the provision is the only responsible course. How can we reconcile the two?

One possibility, described by Kagan, is to abandon "objective" theories that look to "facts as they actually are" in favor of "subjective" ones

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169 *See* Jackson, *supra* note 158, at 462–63.

170 *Id.* at 471.

171 *Cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1094 (2017) (noting a similar feature of contract law, as to sales contracts missing their quantity terms).

that look to "what the agent believes."[172] Maybe the right thing to do is the best option you can see, not the best option overall. This approach might work for some ethical theories (like Jackson's "decision-theoretic account"),[173] but it can't work for law, because law *is* objective in Kagan's sense: the rules are what they are, no matter how little the judge knows about them. A decision can be legal error even if no one realizes it in time; say, if it's squarely controlled by some nonwaivable and unrepealed statute from the 1920s, which no one would have found without extraordinary diligence. The judge and the lawyers might have done as much as one could reasonably expect, and yet the judgment remains legally erroneous, as anyone who knew the whole corpus juris would know.

So a more promising answer, related to that proposed by Jackson, is to "recognize a whole range of oughts."[174] Considerations of ultimate right and wrong, or "what [one] ought to do by God's lights," may differ from the considerations that make one praiseworthy or blameworthy — whether one acted appropriately under the circumstances, in light of the information available, and given one's capacities and "beliefs at the time of action."[175] The first "ought" concerns what you should do to avoid error; the second, what you should do to avoid being blameworthy.[176] We can all agree that the best world is one where the patient is wholly cured, the world we have an obligation to bring about if we know how; but we can also agree that a doctor who prescribes Drug A should be praised for her prudence, and that a doctor who picks Drug B should lose her license.

In the same way, we can identify different types of legal "oughts." The best legal world is the one where the court enforces the actual rule, and we have an obligation to bring that about if we know how. Still, the judge who ignores the inkblot provision acts responsibly, and the one who tries guessing at what's underneath should be impeached. The actual law is whatever it is, but we can't apply it, so in the meantime we ought to do the best we can. This latter "ought," the one "most immediately relevant to action," is the one Jackson sees as "the primary

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172 KAGAN, *supra* note 146, at 65.

173 Jackson, *supra* note 158, at 464.

174 *Id.* at 471.

175 *Id.*

176 *See* Julia Driver, *What the Objective Standard Is Good For*, *in* 2 OXFORD STUDIES IN NORMATIVE ETHICS 28, 43 (Mark Timmons ed., 2012) (describing the "objective standard of 'right[]'" as the "overarching standard," but looking to "our justifiable expectations regarding how a person should be held responsible in the service of promoting the good" as "guid[ing] the standard of praise"); Feldman, *supra* note 166, at 158 (proposing different versions of "obligation" along these lines); *accord* Mason, *supra* note 144, at 328 ("Doing what you ought to have done is perfectly consistent with having made grave mistakes.").

business of an ethical theory to deliver"[177] — and perhaps of a legal theory as well.[178]

B. Internal Decision Procedures

Where would this other "ought" come from? Maybe the theory itself supplies one. An objective theory — one concerned with things as they are, not as we understand them — can still include separate instructions for when the agents are uncertain.[179] For example, if the Constitution said "whenever anyone is uncertain about the foregoing, use the following decision procedure," then following that procedure would be complying with the law — even if fallible human beings might sometimes follow it to the wrong answer, with "wrong" determined by the underlying constitutional standard. Here the Constitution would itself provide two kinds of legal "oughts": a destination we ought to reach, and a route we ought to use to get there.

On some versions of originalism, the law does this already. It offers a variety of doctrines to guide decisionmakers, some of which serve to organize our reasoning (such as presumptions or burdens of proof), and some of which counsel us to defer to others (such as rules of waiver or precedent). Crucially, these "internal" rules exist *within* the system rather than outside it: they tell specific decisionmakers when the law itself requires them to reach a potentially incorrect decision on the merits.

Consider first what we might call the evidentiary doctrines, such as presumptions and burdens of proof. We don't always think of legal propositions as needing evidence, though often they do[180]: for example, when we aren't sure what a statute says, the volumes of the Statutes at Large and of the U.S. Code have different evidentiary force.[181] In this context, common law burdens and presumptions help us order our thinking, so that we might come to better answers on the content of the law in general. The reason why judges can't guess about a Borkian inkblot is that we normally presume a statute to be valid, unless pre-

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177 Jackson, *supra* note 158, at 472.

178 For a recent, independent application of Jackson's drug case to legal decisionmaking, see Courtney M. Cox, *Confronting Normative Uncertainty: Deciding Cases When You Don't Know How to Decide* 14–16, 28–32 (Fordham L. Legal Stud. Rsch. Paper No. 3794982, 2021), http://ssrn.com/id=3794982 [https://perma.cc/D6YS-DVRV] (discussing uncertainty about the truth of various constitutional theories, rather than about the application of a given theory). *Cf.* Evan D. Bernick, Constitutional Hedging 1 (Feb. 10, 2021) (unpublished manuscript), http://ssrn.com/id=3783472 [https://perma.cc/QN8K-ZAQK] (suggesting that constitutional decisionmakers should consider a number of "theories that they deem plausible, taking into account their confidence in those theories and the perceived gravity of the stakes under each").

179 *See* Mason, *supra* note 144, at 322 (discussing this possibility).

180 *See generally* GARY LAWSON, EVIDENCE OF THE LAW: PROVING LEGAL CLAIMS (2017).

181 *Compare* 1 U.S.C. § 112 (Statutes at Large as "legal evidence"), *with id.* § 204(a) (U.S. Code as "prima facie" evidence).

sented with a constitutional defect; if we can't tell whether a defect exists, the statute wins.[182] "Congress shall make no . . . " tells us that *some* statute would be invalid, but never that any particular statute is; so any party relying on the Inkblot Clause has to lose.[183]

Other doctrines are designed, not to organize our reasoning, but to force us to distrust it. For example, common law rules of waiver and party presentation tell us to ignore correct arguments that the parties didn't raise.[184] (Incorrect arguments should be rejected on their merits, so these rules have real bite only when the arguments they rule out might have prevailed.) Issue preclusion tells us to ignore valid positions that a party has advanced unsuccessfully;[185] stare decisis tells us to reject some potentially meritorious arguments rejected by prior courts;[186] and so on.

What makes these doctrines controversial is that they legally forbid us from reaching what would otherwise be the legally correct answer — correct, that is, from the God's-eye view.[187] A lower court might be legally obliged to follow a higher court's precedent, even if that precedent is both mistaken and likely to be rejected on further review.[188] (Adding insult to injury, if the precedent *is* rejected, the lower court's decision will then be reversed as legally erroneous.) How could the court have had a legal duty to render a legally erroneous judgment? Some legal scholars are troubled by that question,[189] but one might ask Jackson's doctor the same thing: "[I]f it would have been the wrong thing to do at the time, how can it be what she ought to have done?"[190] One answer would be that there are two kinds of "ought" involved. A

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182 *Cf.* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 436 (1827) (Marshall, C.J.) ("It has been truly said, that the presumption is in favour of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality.").

183 *Cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983) (noting that whoever relies on an inapplicable provision loses).

184 *See* Singleton v. Wulff, 428 U.S. 106, 120 (1976) (describing the "general rule . . . that a federal appellate court does not consider an issue not passed upon below"); Greenlaw v. United States, 554 U.S. 237, 243 (2008) (describing "the principle of party presentation" as requiring courts to "rely on the parties to frame the issues for decision," and to play "the role of neutral arbiter of matters the parties present").

185 *See* Brownback v. King, 141 S. Ct. 740, 747 n.3 (2021).

186 *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1–2 (2001).

187 *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 291 (2005).

188 *See* United States v. Hatter, 532 U.S. 557, 566–67 (2001); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

189 *See* Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's* Justice Accused, 7 J.L. & RELIGION 33, 82–87 (1989) (arguing that lower courts need not follow erroneous precedent).

190 Jackson, *supra* note 158, at 471.

lower court that followed mistaken precedent and rendered the wrong judgment has legally erred, but it erred blamelessly, and it might have been legally blameworthy if it had just guessed at the answer and gotten it right.

Legal systems include rules like these precisely because we aren't omniscient, and because we often make mistakes about what our own standards require. Rules that limit courts to the parties' own arguments pay a form of deference to the adversarial process and to the advocates' legal judgment; they prevent creative judges and law clerks from going off on frolics of their own. Rules of vertical precedent promote uniformity across different fora and help focus attention on areas of disagreement.[191] Doctrines of horizontal precedent preserve stability in cases of uncertainty, when today's court might see things either way (though not necessarily when the prior court's reasoning is "demonstrably erroneous").[192] And so on. Thoroughgoing originalists can accept these rules because — and to the extent that — they have their own pedigree in Founding-era law.

Similar rules apply at higher levels of abstraction. Originalists might debate, say, whether statutes are traditionally presumed valid as against constitutional challenge,[193] or whether the Constitution requires a presumption "against the existence of federal power and in favor of the existence of state power."[194] Or they might dispute whether the duty "to say what the law is"[195] must be performed by a judge's own best lights, or whether courts must defer to legislatures, upholding statutes except "in a very clear case."[196]

These kinds of arguments remain *originalist* arguments, because they rest on claims about Founding-era law. The fact that Congress might be more democratic, more representative, more flexible, and so on, doesn't show that courts are legally obliged to defer to Congress on

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191 *See, e.g.*, SUP. CT. R. 10(a) (focusing attention on circuit splits).

192 *See* Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring); Nelson, *supra* note 186, at 1; *see also* Baude, *supra* note 163, at 321–22 (distinguishing Nelson's approach from that of Justice Thomas); *cf.* Randy J. Kozel, *Original Meaning and the Precedent Fallback*, 68 VAND. L. REV. 105, 108 (2015) (arguing that "deferring to precedent is a coherent response to constitutional uncertainty").

193 *See, e.g.*, INS v. Chadha, 462 U.S. 919, 944 (1983).

194 Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1234 (2012) (emphasis omitted).

195 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

196 Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796) (opinion of Chase, J.) (emphasis omitted). *Compare* Christopher R. Green, *Clarity and Reasonable Doubt in Early State-Constitutional Judicial Review*, 57 S. TEX. L. REV. 169, 172–83 (2015) (arguing that early practice required substantial deference to legislatures), *with* Steven G. Calabresi, *Originalism and James Bradley Thayer*, 113 NW. U. L. REV. 1419, 1438, 1442 (2019) (arguing that it did not).

constitutional matters, over and above whatever respect it actually deserves. If there isn't a good originalist case for Thayerian deference,[197] then an originalist can't support a court choosing Congress's answer, as opposed to the answer the court thinks is true. The same goes for descriptions of stare decisis as a "principle of policy."[198] If a court doesn't have a legal obligation to heed past cases — an obligation that needs its own originalist pedigree — then it has no business withholding correct judgments from the parties entitled to them, sound policy or no.[199] So we can't be sure whether, as Fallon suggests, an official's obligation of "fidelity to the Constitution is met by fidelity to a reasonable structure for implementing the Constitution,"[200] until we've consulted the existing law: sometimes law demands *adherence*, and not merely maximizing adherence overall.

C. External Decision Procedures

Internal decision procedures make life easy; a theory that includes them offers both types of "ought" at once. When no internal procedures are available, sometimes we can come up with external ones of our own. A couple buying a house isn't bound by any internal rules requiring adversary presentations or deference to prior house purchases; but they might still produce a checklist of relevant factors for themselves, to help answer the ultimate question of which house they should buy.[201] Similarly, a court enforcing a constitutional standard — say, "the original law, as lawfully changed, is still the law today" — might assemble a checklist of sources to consult as it goes, to make that inquiry less open-ended.[202] And for any given legal rule under that standard (say, that venue transfers may be granted "[f]or the convenience of parties and witnesses, in the interest of justice"[203]), a court might draw up a long

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[197] *Cf.* JAMES BRADLEY THAYER, THE ORIGIN AND SCOPE OF THE AMERICAN DOCTRINE OF CONSTITUTIONAL LAW 18 (Boston, Little, Brown & Co. 1893) (arguing that courts may disregard statutes only when they are so clearly unconstitutional "that it is not open to rational question").

[198] *See* Citizens United v. FEC, 558 U.S. 310, 363 (2010) (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

[199] *See* Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 423 (2018) (book review); *cf.* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

[200] Fallon, *supra* note 9, at 106.

[201] *See* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 569–70 (2019).

[202] *E.g.*, Gregory E. Maggs, *A Guide and Index for Finding Evidence of the Original Meaning of the U.S. Constitution in Early State Constitutions and Declarations of Rights*, 98 N.C. L. REV. 779 (2020); William Baude & Jud Campbell, Early American Constitutional History: A Source Guide (Sept. 9, 2021) (unpublished manuscript), http://ssrn.com/id=2718777 [https://perma.cc/7Y5A-2US5].

[203] 28 U.S.C. § 1404(a).

list of factors to organize its thinking, which it and other courts might then apply.[204] So long as these checklists or *n*-factor tests operate as fallible heuristics for the underlying law, rather than alternative requirements in place of the law, they can serve as external decision procedures for adhering to an originalist standard.

1. How to Choose a Decision Procedure. — Court-invented heuristics are quite common. For example, the Supreme Court didn't find the framework of *McDonnell Douglas Corp. v. Green*[205] squirreled away inside the Civil Rights Act of 1964; still, it might have found that framework a sensible way of ordering the Title VII inquiry and identifying likely violations. Having built the framework for that purpose, the Court might then choose to employ it in future cases, and lower courts might be obliged by vertical precedent to do the same. "External" procedures like these are just ways that particular decisionmakers, such as courts, have chosen to carry out their preexisting legal duties. So they usually provide further guidance on top of the underlying legal standards, as well as any legally required internal procedures. (If nothing else, they greatly assist lawyers in structuring their briefs.[206])

Berman identifies a closely related distinction between "constitutional operative propositions," which reflect the "judiciary's understanding of the proper meaning of a constitutional . . . provision" (and thus of the relevant law on the matter), and "constitutional decision rules," the "doctrines that direct courts how to decide whether a constitutional operative proposition is satisfied."[207] On Berman's account, if the tiers of scrutiny are neither found in the Constitution nor derived directly from rules that are, they still might be proper methods for "determining whether *to adjudge* the operative proposition satisfied when, as will always be the case, the court lacks unmediated access to the true fact of the matter."[208] Likewise, a court might lawfully refuse to consider whether a statute was unconstitutionally motivated, not because the Congress's motives were in fact proper, but because the court doubts its own ability to identify the true motives, such that its conclusions would fail to reach some legally necessary threshold of certainty.[209]

Originalists may use the same sorts of heuristics to resolve issues left unclear by original history. Consider the Import-Export Clause, which

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[204] *See* Atl. Marine Constr. Co. v. U.S. Dist. Ct., 571 U.S. 49, 62 n.6 (2013) (listing venue transfer factors). *See generally* Mitchell Chervu Johnston, *Stepification*, 116 NW. U. L. REV. 383 (2021) (describing the recent history of this process).

[205] 411 U.S. 792, 802–04 (1973) (applying 42 U.S.C. § 2000e-2(a)(1)); *cf.* Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 252–56 (1981) (refining the framework).

[206] Johnston, *supra* note 204, at 430.

[207] Berman, *supra* note 8, at 9.

[208] *Id.* at 10.

[209] *See id.* at 68–69. *See generally* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

restricts a state's power, "without the Consent of the Congress, [to] lay any Imposts or Duties on Imports or Exports."[210] To apply the original law as established by this Clause, we need to know what's an import and what isn't. Is a good that's been carried a few feet across the border, and that's now wholly within the territory of a state, no longer an import and thus taxable? Chief Justice Marshall thought it "obvious[] that this construction would defeat the prohibition," as goods might be tax-free only for "the instant that the articles enter the country."[211] Or is any item that crosses state borders kept in a tax-free bubble forever, even after passing from hand to hand for a thousand years? That can't be right either; "there must be a point of time when the prohibition ceases, and the power of the State to tax commences."[212] Our uncertainty as to the meaning of "Imports" leaves us in much the same place as if the Clause included a helpful definition of the term ("'imports' shall be defined as . . . "), with the crucial portion covered by an inkblot.

So what should we do? Chief Justice Marshall put the problem memorably:

> The power [to tax], and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colours between white and black, approach so nearly as to perplex the understanding, as colours perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise.[213]

Confronted by uncertainty about how to satisfy a constitutional standard, the Justices didn't just throw up their hands, much less "push away their law books and start to legislate without further guidance."[214] Instead, Chief Justice Marshall tried to articulate a heuristic that might roughly track the Clause's distinction:

> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the constitution.[215]

This "original package" doctrine went on to have a long and infamous career, until it was substantially (and rather carelessly) abrogated

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[210] U.S. CONST. art. I, § 10, cl. 2.
[211] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441 (1827).
[212] *Id.*
[213] *Id.*
[214] HART, *supra* note 111, at 274.
[215] *Brown*, 25 U.S. at 441–42.

in 1976.[216] But the doctrine wasn't so strange as it might have seemed. To distinguish the taxable "general mass of property"[217] from untaxable imports, it made sense to view the latter's special character as lost once they were no longer distinguishable as imports, because someone had "mixed them up with the common mass."[218] Of course, the words "original package" aren't in the Constitution, and under different social circumstances, the doctrine might be of no help (imports of direct-downloaded software, for example). But the test could still be a reasonable attempt to satisfy a standard whose precise requirements are uncertain.

When the underlying standard fails to carve nature at the joints, the law might provide internal instructions or procedures instead. When it doesn't, and when the decisionmaker has no way to avoid legal error, the best one can hope for is to avoid legal blame — and we aren't legally blameworthy for doing the best job of line-drawing we can.[219] Chief Justice Marshall articulated a decision procedure he thought would get to right answers, most of the time. In this case, he did so by identifying what we might call a *subsidiary standard*: the better to adhere to standard *X*, try adhering to the more comprehensible standard *Y* instead. His distinction was based on the visible character of the goods (their importyness, so to speak); a modern Court might try a different distinction, given the different ways that goods are now handled. But either way, the subsidiary standard is there to serve the primary one, not the other way around. Revising the doctrine based on a belief, say, that import taxes are more useful than they used to be, or that coastal states now pose less danger of exploiting inland states (as the Court suggested in 1976),[220] seems more like a quarrel with the Clause than a

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[216] Michelin Tire Corp. v. Wages, 423 U.S. 276, 294–301 (1976); *see id.* at 302 (White, J., concurring in the judgment) (noting that the issue was neither raised, nor briefed, nor argued by the parties). *See generally* Boris I. Bittker & Brannon P. Denning, *The Import-Export Clause*, 68 MISS. L.J. 521, 530–40 (1998) (assessing the Court's reasoning).

[217] *Brown*, 25 U.S. at 443.

[218] *Id.*; *see* Bittker & Denning, *supra* note 216, at 531 (noting that "large-scale 'merchants'" and "local 'shopkeepers'" were socially distinct in the Founding era, and that "the removal of merchandise from long distance shipping containers may well have been a useful and easily enforced way to determine when imported goods became local goods").

[219] *Cf.* Mitchell N. Berman, *Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space*, 27 CONST. COMMENT. 39, 50 (2010) (describing arguments for *n*-factor tests as "couched in terms of what the court should *do*, and not in terms of what the law, rightly understood, already *was*").

[220] *See Michelin Tire Corp.*, 423 U.S. at 288 ("Modern transportation methods such as air freight and containerized packaging, and the development of railroads and the Nation's internal waterways, enable importation directly into the inland States.").

response to its obscurity. To paraphrase another of the Court's decisions, the means employed must be such as one desirous of actually satisfying the standard might reasonably adopt to accomplish it.[221]

2. How Not to Choose a Decision Procedure. — So the choice of decision procedure isn't untrammeled. The problem of choosing a procedure arises only when other legal instructions have run out; the external procedure is a stand-in for the law, not a replacement. And whatever external procedure we choose, it has to remain consistent with other rules of law, including the internal procedures we already have.

An external procedure is one particular means of enforcing a governing legal standard, not an independent requirement that has to be marched through in every case. In the Title VII context, for example, a court ought to disregard step one of the *McDonnell Douglas* framework (the prima facie case of discrimination) once the employer has already jumped ahead to step two (offering a potentially pretextual reason for its action).[222] To enforce the *McDonnell Douglas* framework anyway, even when step one does no work in resolving the Title VII question, would impose the Court's framework in place of Title VII's; it would let courts assume the power to add or subtract statutory requirements, making the statute more or less determinate than Congress chose to do.[223]

Many *n*-factor tests or *n*-step analyses run similar risks of displacing their underlying standards. Just as a poorly drafted medical questionnaire can lead to misdiagnosis, the process of "stepification" can sometimes change the results of legal inquiries, requiring yes-or-no answers to binary questions that don't quite match the law.[224] And while a medical questionnaire may still be an excellent diagnostic tool, a good doctor ought to try to respond to the patient's *actual* malady, not just to whatever the form *suggests* is the malady. In law, this problem can be particularly serious: lower courts are obliged to apply whatever tests the higher courts have come up with, and higher courts (especially the Supreme Court) aren't always inclined to clean up their mistakes.

Precisely because they're superadded to the legal system's existing requirements, external decision procedures run the risk of running roughshod over other legal rules, including internal procedures. Consider Berman's account of *Miranda v. Arizona*.[225] Berman identifies

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[221] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 315 (1950).

[222] *See* Brady v. Off. of the Sergeant at Arms, 520 F.3d 490, 494 (D.C. Cir. 2008) (Kavanaugh, J.).

[223] *See id.* at 494 n.2 (describing the ultimate issue as "whether intentional discrimination occurred"); *cf.* United States v. Riccardi, 989 F.3d 476, 479 (6th Cir. 2021) (disregarding Sentencing Guidelines commentary assuming the value of stolen gift cards to be $500 each, even when the actual value was known to be far less, because such "commentary may only interpret, not add to, the guidelines themselves").

[224] *See* Johnston, *supra* note 204, at 436–40.

[225] 384 U.S. 436 (1966).

the relevant standard as follows: a statement is unconstitutionally "compelled"[226] if it results from inappropriate psychological pressures, such as from police efforts "exerted for the specific purpose of overcoming the suspect's unwillingness to talk."[227] *Miranda* went on, in Berman's telling, to add a new kind of decision procedure, conditioning the admission of a custodial statement on a prior warning by police.[228] He explains this rule, not as something directly entailed by the Fifth Amendment, but as reflecting the Court's doubts about the efficacy of case-by-case litigation: "[I]f the accuracy of case-by-case inquiries is close to random, then courts might maximize right answers simply by presuming all such statements to have been compelled hence inadmissible."[229] On this account, the Court hoped the warnings would reduce the rate of unconstitutional compulsion, so that afterwards "a trial court could achieve greater adjudicatory accuracy by investigating compulsion case by case than by globally presuming it."[230] In other words, a regime that presumed a warningless custodial statement to be compelled, and that investigated other statements case-by-case, would "minimize errors" overall.[231]

If all this were true, there would be good reason to want a *Miranda* rule. But the problem with the decision-procedure defense of *Miranda* (and there may, of course, be other defenses) is that it assumes the Court wasn't bound by preexisting rules of evidence and procedure. If the constitutional standard were simply that "compelled confessions are inadmissible," then we might need some decision procedure to sort through which confessions were really compelled (how much psychological pressure is too much, and so on). Yet once we apply our procedure, producing a finding of fact that a confession *wasn't* compelled, there'd be no further work to be done — just as there's no further work to be done, in an excessive-force suit against a police officer, once the jury accepts a mistaken-identity defense and finds that another officer was there instead. However one might understand compulsion, this sort of fact question is resolved under rules we already have, with the applicable burdens of proof and standards of evidence. It may be true, as Berman notes, that a court often can't "know what has occurred in the interrogation," and that sometimes "a trial court's answer would be little better than a guess."[232] Yet the same is true in many ordinary tort cases, including constitutional torts — and the enactment of a new tort hardly

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[226] U.S. CONST. amend. V.
[227] Berman, *supra* note 8, at 123.
[228] *Id.* at 124–26.
[229] *Id.* at 127.
[230] *Id.* at 127–28 (emphasis omitted).
[231] *Id.* at 128.
[232] *Id.* at 127.

"overrides the rules of evidence, the [proper] burden of persuasion, the jury, and other elements of the legal system" that might determine the ultimate result.[233] Likewise, a trial court may have little idea what really happened in a self-defense or assault case, and maybe such verdicts are often mistaken; after all, "[s]tudy after study confirms that fact-finders substantially overvalue eyewitness testimony."[234] Still, it takes some kind of legislative power to shift the burden of proof to a different party or to apply a heightened standard of evidence.

The same goes for *Miranda*. Berman's defense succeeds only if it was already within the Supreme Court's power to create new evidentiary presumptions in compelled-confession cases, abrogating whichever statutory or common law rules supplied the preexisting standards and burdens of proof. Within the federal system, the Supreme Court might be able to create presumptions like these under the Rules Enabling Act.[235] But no such power exists as to state courts — and in any case, rulemaking may be overridden by legislation, of the kind which Congress enacted in 1968,[236] and which the Court rejected as invalid in *Dickerson v. United States*.[237] Or maybe some other doctrine does the work: maybe due process requires a different presumption in *Miranda*-like cases, or maybe the Fourteenth Amendment confers a reserve power on the courts to create new evidentiary rules to prevent substantive violations. Those kinds of explanations are hard to see in the text (which, if anything, gives enforcement power to Congress); regardless, each would need to be argued on its own merits.

Without such a power, *Miranda*'s new *external* decision procedure would be legally improper, to the extent that it conflicted with the old *internal* decision procedures found in preexisting law. The Court would be engaging in one legal error to prevent other, potentially more serious legal errors — something it may lack authority to do. If the Court's job is to obey the law, and not to maximize legal obedience, then it can't override real legal standards in the name of choosing new decision procedures.

D. Interpretation and Construction

Distinguishing standards from procedures, and internal decision procedures from external ones, sheds some useful light on the well-known

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[233] Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1913, 1913 (1999).

[234] Berman, *supra* note 8, at 139.

[235] 28 U.S.C. § 2072(a) (authorizing the Court "to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts").

[236] 18 U.S.C. § 3501 (enacted 1968), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).

[237] 530 U.S. 428.

disagreements over interpretation and construction. The standard-procedure distinction doesn't quite line up with the interpretation-construction divide; but it does help identify which aspects of construction are properly controversial, and it might limit how far they might reach.

1. The Battle Lines. — As Professor Lawrence Solum describes it, "interpretation" is all about words, "discern[ing] the communicative content (linguistic meaning) of the constitutional text."[238] For example, it might be an interpretive question whether the phrase "Duties on Imports" referred to taxes on goods which *happen to be* imports,[239] or to taxes imposed *in virtue of* a good's being an import.[240] Once we understand the language aright, a separate layer of "construction" then converts the language to a legal rule, identifying "the content of constitutional doctrine and the legal effect of the constitutional text."[241] A taxpayer who pays the prohibited tax and fails to seek a refund in time might be forbidden from doing so later on, not because of anything in the words "Duties on Imports," but because the legal rule the Clause enacted doesn't abrogate an ordinary statute of limitations. These sorts of moves, elsewhere described as "the law of interpretation" (or, alternatively, "the law of construction"),[242] generally give rise to little debate.

What does give rise to debate is whether construction has a role to play in cases of uncertainty. Professor Keith Whittington, for example, argues that "[c]onstitutional meaning must be 'constructed' in the absence of a determinate meaning that we can reasonably discover."[243] When the text is "unavoidably vague, leaving substantial uncertainties about cases that arise on the margins,"[244] then "political actors" must "exercise political judgments" as to "how best to structure politics."[245] Likewise, Solum argues that in cases of "[i]rreducible ambiguity" or "vagueness," we have no choice but to look beyond the "communicative content of the constitutional text,"[246] and to consider "normative concerns,"[247] such as "defer[ring] to decisions made by the political branches"[248] or applying "the morally best theory of equality."[249]

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238 Solum, *supra* note 5, at 457.

239 *See* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 441–42 (1827).

240 *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 298 (1976) (holding the Clause inapplicable to "neutral and nondiscriminatory taxation" which is "imposed without regard to the origin of the goods taxed").

241 Solum, *supra* note 5, at 457.

242 Baude & Sachs, *supra* note 171, at 1130.

243 Whittington, *supra* note 37, at 611.

244 *Id.* at 611–12.

245 *Id.* at 612.

246 Solum, *supra* note 5, at 471.

247 *Id.* at 472.

248 *Id.* at 473.

249 *Id.*

These sorts of claims provoke strong responses, because they involve precisely the sorts of factors that originalism was supposed to exclude. In construing the Imports-Exports Clause, should officials prefer understandings that promote individual rights to liberty and property, or ones that give effect to democratically enacted state taxes? Some originalists portray considerations like these as legally improper — unless, perhaps, they were "deemed applicable to the Constitution by the constitutional enactors."[250] The "spirit" of a law,[251] or the "mischief" targeted by its enactment,[252] would then be permissible considerations if and only if they were so at the Founding;[253] in other words, if they were internal decision procedures rather than external ones.

But internal procedures only postpone the problem, as they too can be uncertain in application or can simply run out. And we can't always just look at the two best readings of a provision and pick the better one,[254] as we rarely have just two readings to choose from. Chief Justice Marshall wasn't facing a binary choice: the parties' positions aside, there were any number of ways the Imports-Exports Clause might have been carried into effect, and no obvious means of deciding among them. Thus the endless battles between those who see construction as essentially lawless and those who see it as inescapable.

2. Redrawing the Lines. — The standard-procedure distinction offers a different way to approach the problem. Dividing our work between interpretation and construction, though sometimes sensible, doesn't quite capture what's at stake in the controversy. Instead, we might distinguish between two other kinds of activities: identifying legal standards and choosing decision procedures.

On an original-law approach, for example, the key standard for interpreting the Imports-Exports Clause is that it enacts whatever rule of law it enacted at the Founding. (Or, for public meaning devotees, the Clause's words mean whatever they publicly meant at the Founding, and so on.) As we've seen, this fails to specify a precise decision procedure for identifying the historical answer. There are all sorts of guides that might be helpful in practice;[255] but other than the internal decision procedures described above, the law gives little guidance among them, beyond the underlying aim of implementing the standard accurately.

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[250] MCGINNIS & RAPPAPORT, *supra* note 14, at 150.

[251] Miller v. The Ship Resolution, 2 U.S. (2 Dall.) 1, 4 (Fed. Ct. App. 1781).

[252] Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 440 (1827) (Marshall, C.J.) ("It has already been shown, that a tax on the article in the hands of the importer, is within its words; and we think it too clear for controversy, that the same tax is within its mischief.").

[253] *See* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 31 (2018) (arguing for spirit); Robert G. Natelson, *The Founders' Hermeneutic: The Real Original Understanding of Original Intent*, 68 OHIO ST. L.J. 1239, 1251 (2007) (same); Samuel L. Bray, *The Mischief Rule*, 109 GEO. L.J. 967, 990–99 (2021) (arguing for mischief).

[254] *See* MCGINNIS & RAPPAPORT, *supra* note 14, at 141–42.

[255] *See, e.g.*, Maggs, *supra* note 202, at 782; Baude & Campbell, *supra* note 202, at 1.

Once we decide on a decision procedure, whatever it is, we'd then apply this decision procedure to the history, to derive a particular legal standard from the Clause: say, a ban on taxing goods that happen to be imports, or perhaps only on taxing goods for being imports. That standard, now in hand, might itself be uncertain in application. (What are "Imports," anyway?) If no further internal procedures are on hand, we might need to choose an external one to settle unclear cases (say, imported goods still in their original packages).

This process, of starting with constitutional text and ending with an original-package doctrine, might be lumped under a single label of "construction" — but it really involves two kinds of tasks rather than one. In identifying standards, our goal is to avoid legal error; in choosing decision procedures, our goal is to avoid meriting legal blame. The controversial parts of this process involve, not the standards, but the decision procedures.

3. Construction and Normative Theories. — So how do we choose a decision procedure? Construction is criticized for relying on normative theories unrelated to law. Any theory that applies in uncertain cases has to be normative in some sense, in that it tells us what to do. And by assumption, once the law runs out, only a nonlegal theory can tell us what to do next. To some of its supporters, construction serves as this kind of normative backstop: when you can find out what the legal standard requires, you follow it, and when you can't, you do whatever the correct theory of political morality requires.

The trouble with this picture is that morality isn't content to be a backstop. We're *always* obliged to do what's morally required of us, given all the considerations relevant to our position. When the law is clear, we usually assume that government officials ought to follow it, in both the moral and legal senses of "ought"; in these cases, their moral and legal obligations overlap. But not always: consider an official charged with enforcing the Fugitive Slave Act or the Nuremberg Laws, which might be very clear but also clearly wrong. To the extent that law and morals are distinct, it's wrong to think that moral obligations only ride in to the rescue of uncertain laws; those obligations are always in effect, whether the law is uncertain or not.

Precisely because moral considerations are always operative, there's no reason to think they have anything special to say about decision procedures in particular. If two heuristics are available for applying a given legal standard, and if the option that actually seems closer to the standard also has various moral defects (it's more confusing to the public, it fails to protect property rights, and so on), the presence of these defects won't necessarily settle the legal issue. Decision procedures are there to serve standards, not to achieve other ends; the fact that a given decision procedure might promote democracy, distributive justice, or the like might not be a factor of which the law takes account. (The

Constitution confers no general authority on anyone to rewrite its provisions to make them better and easier to apply.)

One reason for this confusion is that legal officials make many decisions that aren't really legal in nature. Think of a court addressing matters of sound docket management,[256] a judge assessing how much historical research is good enough for government work,[257] or just two junior prosecutors agreeing on how to divide up their cases. Lawyers may make arguments for different approaches to these decisions, and they may make them in legal settings, but that doesn't mean that the grounds for their arguments will all be legal grounds. Something similar is true for the choice of an external decision procedure. If one external procedure is about as responsive to the relevant legal standards as another, then, by hypothesis, the choice among them won't be determined by legal considerations — though the choice, once made, may have legal consequences as precedent or as law of the case. So to say that "the *McDonnell Douglas* framework is the law, at least until the Supreme Court picks another framework instead," is a pretty good approximation most of the time, especially when arguing before lower courts. But taken literally, it's a grave mistake: the *statute* is the law, and *McDonnell Douglas* just some judges' guess at how best to adhere to it.

Facing a choice of decision procedures, each of them equally responsive to all the legal considerations at issue, a decisionmaker should of course choose the best one available, given the nonlegal considerations properly at stake. Yet this is a moral "ought," not a legal one. So long as decisionmakers respond adequately to all the legal considerations involved, they may be legally blameless — which is all that the legal system, in particular, would hope for.

E. Reasons to Try

In the last resort, when neither internal nor external procedures can tell us what originalism requires, we may have good reasons to try anyway. Some of those reasons may be legal reasons, if originalism is what the law indeed requires. But there may be other reasons too — especially reasons relating to the search for original rules, rather than their discovery. Whatever the relevant constitutional standard might be, we might have reasons to try to satisfy it; that is, to *honor* the values it reflects, even if we can't manage to *promote* them.

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[256] *See* Ryan C. Williams, *Lower Court Originalism*, 44 HARV. J.L. & PUB. POL'Y (forthcoming 2022) (manuscript at 9), http://ssrn.com/id=3847891 [https://perma.cc/E7RR-SJ2R] ("Those engaged in adjudication must also make decisions about how to allocate scarce time and decisional resources among competing cases . . . .").

[257] *See* William Baude, Impure Originalism 2 (July 26, 2013) (unpublished manuscript) (on file with the Harvard Law School Library).

Many popular normative arguments for originalism seem to require an adequate decision procedure. For example, if originalism's advantages flow from the quality of the decisions made way back when, and if the contours of those decisions are now lost to us, then much of their advantages might be lost along with them; there would be no returning to the originalist Eden. But if those benefits flow from attitudes that legal actors take today, or from the effects those attitudes have on our politics, then we can enjoy them even in our fallen state.

One simple example might relate to official oaths. Article VI requires that federal and state officers "be bound by Oath or Affirmation, to support this Constitution."[258] By statute, each federal officer must promise to "support and defend the Constitution of the United States," and to "well and faithfully discharge the duties of the office."[259] And a judge, in particular, must promise to "faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States"[260] — or, in the original version of that oath, "according to the best of my abilities and understanding."[261]

Each of these promises commits the promisor, if not to succeed in applying the Constitution, then to try. To support the Constitution, or to discharge faithfully one's duties thereunder, is to seek to conform one's conduct to its tenets. Whether these oaths specifically require originalism, as opposed to anything else, is hotly disputed.[262] But if originalism is attractive because it helps officials fulfill their oaths, then it remains attractive even when they might unintentionally err. Whatever else these oaths require, they demand an attitude of support and faithfulness, even if substantive inerrancy is impossible. (A military enlistee's oath to "obey . . . the orders of the officers appointed over me"[263] isn't violated by a conscientious effort to "take that hill," even if at day's end the hill remains untaken.)

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[258] U.S. CONST. art. VI, cl. 3.

[259] 5 U.S.C. § 3331.

[260] 28 U.S.C. § 453.

[261] Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76.

[262] *Compare, e.g.*, Evan D. Bernick & Christopher R. Green, What Is the Object of the Constitutional Oath? (Sept. 1, 2020) (unpublished manuscript), http://ssrn.com/id=3441234 [https://perma.cc/GVG4-PXGS], *and* Chris Green, *Is the Oath Argument for Originalism Circular?*, ORIGINALISM BLOG (May 11, 2020), https://originalismblog.typepad.com/the-originalism-blog/2020/05/is-the-oath-argument-for-originalism-circular.html [https://perma.cc/A9H2-ZZ6A], *with* Cass R. Sunstein, *The Debate over Constitutional Originalism Just Got Ugly*, BLOOMBERG OP. (May 15, 2020, 10:00 AM), https://www.bloomberg.com/opinion/articles/2020-05-15/is-the-constitution-a-living-document-supreme-court-can-decide [https://perma.cc/B5RR-R88J]. *See generally* Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299 (2016); William Baude, *The Role of Oath Theory*, SUMMARY, JUDGMENT (May 12, 2020), https://www.summarycommajudgment.com/blog/oath-theory-and-constitutional-interpretation [https://perma.cc/8HB8-R3XK].

[263] 10 U.S.C. § 502(a).

The same might be said about arguments grounded in popular sovereignty. As Chief Justice Rehnquist put the argument, "[t]he people are the ultimate source of authority"; by means of the Constitution and its amendments, they granted various powers to various governments, and the details of those grants should be respected without alteration.[264] If a judge tries but fails to follow the original Constitution, there's an obvious sense in which the resulting judgment has failed to *promote* popular sovereignty: the people chose one thing, and the judge gave them something else. But if the judge is pursuing the right target, and if the mistake is legally blameless, then the judgment does *honor* popular sovereignty: the judge has done as much as could be expected to apply the law that the people chose. To give up, or to pursue a different standard on purpose, might show inadequate respect for the self-determination of one's fellow citizens, who after all have chosen to live under the existing Constitution rather than to change it. (There may be many other objections to popular-sovereignty arguments, but the difficulty of originalism wouldn't be among them.)

Or consider Judge Easterbrook's contractarian version of the theory, which he describes as "the political theory the man in the street supplies when he appeals to the Constitution."[265] If the Constitution was a package deal, then those interpreting it ought to conform to the deal's terms; "[o]therwise a pack of lawyers is changing the terms of the deal, reneging on behalf of a society that did not appoint them for that purpose."[266] Honest mistakes about the deal's terms (for example, if they've been covered by an inkblot) are forgivable; deliberate departures are something else.

Even those who defend originalism based on its consequences might find much to like about committing to the theory in the future, whether or not we're any good at identifying rules from the past. For example, McGinnis and Rappaport praise the supermajoritarian Article V amendment process as compared to judicial "updating" of the Constitution, which in their view cuts off the demand for new amendments.[267] If so, then reviving the amendment process might have its own benefits, whether or not we understand our current Constitution as well as we should. Or, if originalism protects liberty, as Professor Randy

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[264] William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696 (1976); *accord* Brest, *supra* note 28, at 204 (describing the view that "[t]he Constitution manifests the will of the sovereign citizens of the United States"); *cf.* JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA 41 (Boston, Samuel Hall 1791) ("The several states . . . hold nothing under [the general government], but derive their authority immediately from the same source with that; no one drop of the stream of power, issuing from the people to them, commixes itself with that of the general government in its course.").

[265] Easterbrook, *supra* note 98, at 1121.

[266] *Id.*

[267] MCGINNIS & RAPPAPORT, *supra* note 14, at 88–90.

Barnett argues, it does so by preventing those in power from deliberately rewriting the terms of their appointments.[268] And if the goal of modern originalism is "to transfer political power from judges to legislators," as Judge Posner suggests,[269] that goal might be substantially achieved by judges' forswearing some of their power, and by the public no longer expecting the judges to use it. Originalism's future benefits (if any) would come from its future constraints, not from its historical accuracy; that is, from the side effects of our using a historical method, and not from the method itself.

The danger, of course, is that historical inaccuracy — and, worse, reading the history in different ways over time — could produce wild swings in doctrine, made all the worse by originalist indifference to present policy concerns or by ideological divides in the modern legal profession. If conservatives and liberals each have their own radically different historical views, then each new five-to-four Court might demand a wholesale revision of existing precedent. But we should remember that these divides among modern lawyers are almost certainly narrower than the divides between modern lawyers and virtually anyone alive in the late eighteenth century. So we might expect "most errors in judicial historiography" to be made in favor of "modern values," simply because of the political process of judicial selection and confirmation, which requires the participation of elected Presidents and Senators.[270] In that case, originalism may indeed be Justice Scalia's "librarian who talks too softly."[271]

To be clear, not all originalists rely on these normative defenses, even if they believe them to be true. To make a policy defense of a constitutional theory is to portray the Constitution's content as in some sense a matter of policy debate, rather than of legal fact *produced* by a policy debate. Yet if originalism turns out to be legally required, then those who wish to follow the law (as not everyone does) must pursue it, whether or not they expect to succeed. "For us, there is only the trying. The rest is not our business."[272]

V. IMPLICATIONS AND EVIDENCE

Up till now, this paper has largely bracketed the question of whether originalism is true. But distinguishing standards from decision procedures does somewhat more than knock down a negative argument

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[268] BARNETT, *supra* note 138, at 109–10.

[269] Posner, *supra* note 16, at 591 (describing this aim as "[t]he only good reason for originalism," though in his view not good enough).

[270] Scalia, *supra* note 22, at 864.

[271] *Id.*

[272] T.S. ELIOT, FOUR QUARTETS 17 (1943).

against originalism; it also points to potential evidence for an affirmative case in favor.

One positive case for originalism is based on actual practice within the legal community, especially as to the standards for correct legal decision.[273] Many people find this case implausible, as relatively little legal writing is straightforwardly originalist in tone. But if precedent, judge-created doctrines, *n*-factor tests, and the like have a limited but legitimate originalist role to play, then their presence in judicial opinions isn't necessarily evidence of originalism's rejection. What we want is evidence of how lawyers and officials respond when these tests and doctrines seem to conflict with first principles — and, in particular, which principles are characterized as "first." Both as to Founding-era evidence and modern usage, the tools actually deployed in arriving at constitutional conclusions may be less important than the principles seen as governing their use.

A. Founding-Era Evidence

One frequently debated question is whether the Founders were originalists. Of course, they can hardly have enacted rules licensing something *other* than their original law: any licensed changes would be part of that law, not departures from it. So these debates typically focus on the Founders' attitudes toward more fine-grained theories, such as original intentions or original public meaning.[274] But some scholars argue that the Founders abjured any particular method, or were constitutional pluralists, accepting a wide variety of interpretive techniques. Distinguishing originalist standards from particular decision procedures weakens the force of those critiques.

For example, Professor Stephen Griffin discounts early references to original meaning because these "statements most likely relate to the *purpose or ends* of constitutional interpretation rather than the *methods* used."[275] As Griffin writes, early nineteenth-century cases might employ structural, textual, and historical arguments in the same opinion, with their "overall purpose" likely being "to explicate the original meaning of the Constitution."[276] Likewise, Professor Jeremy Telman describes

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[273] *See* Baude & Sachs, *supra* note 4, at 1457–58, 1477–78.

[274] *See generally* Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2 (2020) (public meaning); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (intentions).

[275] Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1198.

[276] *Id.* at 1199 (discussing Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243 (1833)); *accord* D.A. Jeremy Telman, *John Marshall's Constitution: Methodological Pluralism and Second-Order* Ipse Dixit *in Constitutional Adjudication*, 24 LEWIS & CLARK L. REV. 1151, 1193 (2020).

Chief Justice Marshall's opinion in *M'Culloch v. Maryland*[277] as "combining intentionalism, textualism, and purposivism,"[278] as well as arguments from historical precedent,[279] general canons of construction,[280] and constitutional structure[281] — but all plausibly aiming at which powers were "given"[282] to Congress or "reserved to the states."[283]

To Griffin and Telman, these wide-ranging surveys of evidence on the original law may be a strike against originalism, because they show that Marshall-era judicial review was "pluralistic,"[284] "a complex institutional practice" involving multiple interpretive methods — many of which "are still used today" and which "could take on a life of their own."[285] Thus, Griffin presents as an "alternative to originalism . . . the array of traditional methods of constitutional interpretation, including arguments based on the text and structure of the Constitution, appeals to history . . . , and precedent," each of which "is the result of a tradition that extends back at least to the adoption of the Constitution."[286]

But a "complex interweaving of different methods of interpretation," each with "original meaning" as "an overarching goal or result,"[287] is precisely the sort of evidence of *procedures* that the adherents of an originalist *standard* would seek. According to Chief Justice Marshall, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."[288] That early lawyers used many methods to discover the original rules is just more proof of their reliance on original rules; their practice hardly licenses our misapplying those methods to search for different rules instead. The correct standard is determined by the destination, not by the routes used to get there.[289]

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277 17 U.S. (4 Wheat.) 316 (1819).

278 Telman, *supra* note 276, at 1210.

279 *Id.* at 1209.

280 *Id.* at 1210–11.

281 *Id.* at 1212–13.

282 *Id.* at 1210.

283 *Id.* at 1211.

284 *Id.* at 1217; *see also id.* at 1216 ("[O]riginalism as we conceive of it today does not provide a useful means for understanding the Marshall Court's interpretive method.").

285 Griffin, *supra* note 275, at 1199.

286 *Id.* at 1195–96.

287 *Id.* at 1199.

288 United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

289 *Cf.* Telman, *supra* note 276, at 1160 n.30 (suggesting that an original-law originalism might indeed "be reconciled with [Telman's] understanding of the Marshall Court's interpretive methodology to the extent that [the two] can agree on the range of interpretive modalities available to judges at the time of the Framing").

B. Modern Evidence

A more serious strike against originalism would be if officials now accepted these tools' use "in a freestanding sense," wholly disconnected from any search for original meaning.[290] Of course it's possible that modern invocations of precedent, structure, and so on are no longer interested in the original law.[291] But that depends on a much more detailed analysis of modern norms, including citation norms;[292] the mere infrequency of judicial "recourse to evidence from the founding period"[293] isn't enough to show which arguments rest on which. When tracing the threads of modern legal argument, we need to look for the destination, not just the routes.

Consider Professor David Strauss's observation that it's "the rare constitutional case in which the text plays any significant role," or that "[m]ostly the courts decide cases by looking to what the precedents say."[294] The standard-procedure distinction downplays the significance of observations like these. True, judges spend more time wandering through the menagerie of *n*-factor tests than they spend parsing original meaning. But because originalism admits such devices too, this habit isn't evidence of their rejecting an originalist standard. It may just be evidence that most of the questions they confront aren't questions of first impression, and that most of them are currently handled by the various decision-procedure devices discussed above. What the originalist would look for is evidence, in cases in which the decisionmaker actually *adverts* to a potential conflict, of what might render an existing *n*-factor test inappropriate, or what might make an otherwise binding precedent "wrong the day it was decided."[295] If the various tests and devices are taken as ultimately responsible to original history, and not the other way around, that should increase our relative confidence that the underlying standard is originalist.

The same goes for alternative modalities, such as "arguments from ethos, political tradition, and honored authority."[296] These arguments,

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[290] Griffin, *supra* note 275, at 1199.

[291] *Compare id.* at 1199–1202 (arguing that originalism was rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954)), *with* William Baude, Essay, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2380 (2015) (arguing that *Brown* tries "fighting the original-meaning question to a draw"), *and* Sachs, *supra* note 4, at 854 (reading *Brown* to apply old law to new facts).

[292] *See* Baude & Sachs, *supra* note 4, at 1477–78.

[293] Griffin, *supra* note 275, at 1199.

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

[295] Green, *supra* note 3, at 519; *cf. id.* at 517 (discussing "criteria by which to say where the Court had gone off the rails" (quoting JED RUBENFELD, REVOLUTION BY JUDICIARY: THE STRUCTURE OF AMERICAN CONSTITUTIONAL LAW 12 (2005))).

[296] Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 185 (2018).

too, can be made in support of an originalist standard. When alternative interpretations are on the table, all else being equal, the Constitution of 1788 is unlikely to have diverged *too* much from the ethos of the nation that enacted it, even if ethos *per se* has no legal relevance whatever. What matters is whether these indicators are cited for their own force, or as clues to some further standard, such as original law.

Consider honored authority in particular. As Professor Jamal Greene notes, although original intent has long been displaced by other theories, originalist arguments are still peppered with references "to Farrand's *Records*, to *The Federalist* (especially to James Madison's writings), and to independent writings or speeches of Madison, Washington, and Jefferson" — far more often than references to, say, the Antifederalists or to impartial members of the public.[297] Greene describes this practice as making implicit arguments from "American identity."[298] Judges might quote Madison and Hamilton to invoke "[t]he wisdom reflected in the expectations of heroic historical figures," or merely to "sound learned and convincing"[299] — much the way they might once have quoted Cicero,[300] or might nowadays quote prize-winning novelists[301] or Nobel laureates in literature.[302] American identity is hardly fixed by the Founding, so the force of this argumentative modality might be largely unfixed too.

But there are other ways of understanding this practice. For example, we may be interested in more than just public meaning. If the Constitution was to be interpreted in the manner of a public statute,[303] then perhaps we should give more weight to its supporters than its detractors, according to a long-standing "practice of constitutional and statutory construction."[304] In other words, this undue attention to Hamilton and Madison may reflect the workings of an internal decision procedure, rather than a different standard.

Our overreliance on these particular authors might also reflect a rule of thumb — an external decision procedure used to arrive at correct views of original history, given a culture of legal education that emphasizes particular sources of information about the Founding. Some sources of original history are better known, more widely read, and more thoroughly scoured than others. As a result, a Hamilton quotation may

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297 Jamal Greene, *The Case for Original Intent*, 80 GEO. WASH. L. REV. 1683, 1686, 1691–92 (2012).

298 *Id.* at 1697.

299 *Id.* at 1701.

300 *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842).

301 *See* PGA Tour, Inc. v. Martin, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting) (quoting Kurt Vonnegut, Jr., *Harrison Bergeron*, *in* ANIMAL FARM AND RELATED READINGS 129, 130 (1997)).

302 *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 301 (2008) (Roberts, C.J., dissenting) (quoting BOB DYLAN, *Like a Rolling Stone*, *on* HIGHWAY 61 REVISITED (Columbia Records 1965)).

303 *See generally* Peterson, *supra* note 274.

304 Greene, *supra* note 297, at 1694.

appear more reliable (and more helpful to brief writers) than the same words written at the same time by an unknown farmer. Judges must of course entertain sources beyond the usual suspects, and scholars certainly have a duty not to confuse popularity with accuracy. But those working on government time might have good reason to make rough cuts through the pile of available evidence, and to give more attention to those whose views have generally been treated as worthy of attention.

Either way, Greene's noticing the problem is itself evidence against treating the argument from authority as an independent interpretive modality in our system, a tub standing on its own bottom. As Professor Jack Balkin writes, "[i]t cannot be that a legal argument is a permissible construction of the Constitution if made by an honored authority," but not if "the very same argument" had been "made by any other citizen."[305] That commonplace intuition — that Madison's statements are merely evidence of the law, not the law itself — assumes some further standard of constitutional law, to which arguments from honored authority are only a helpful guide.

Finally, the standard-procedure distinction should lead us to a more charitable understanding of the Court's efforts to wrestle with the past. In one recent study, Lorianne Updike Toler assesses the "Justices' historical methodology" as "poor" overall, based on "whether any source was cited when they mentioned the Convention, how many and which primary and secondary sources were cited, and how much overlap there was between the two."[306] Her study is more hopeful about originalism's potential to change outcomes, as opinions displaying a deeper "immersion in primary sources" tend to reflect less partisan voting patterns.[307] Yet even this more promising data may not throw much light on the Justices' decision procedures, or indeed on their implicit standards. By way of comparison, the entry on the U.S. Constitution in the 1911 *Encyclopedia Britannica* likewise has few references to primary sources outside the text;[308] that doesn't make it a bad encyclopedia entry, nor does it show that the author failed to consult such sources while writing. A good entry ought to be a true and useful summary of the topic, and only sometimes an effective guide to future research. Something similar may be true of judicial opinions, which bear a burden of justifying the conclusions they reach, but not so heavy a burden as more scholarly treatments. In that sense, studies of judicial opinions run the risk of measuring unusual features of the genre — say, the Justices' distaste for law review–style footnotes, or their preference for citing past cases over private authorities, even primary ones.

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[305] Balkin, *supra* note 296, at 208.

[306] Updike Toler, *supra* note 48 (manuscript at 4).

[307] *Id.* (manuscript at 35).

[308] *See* James Bryce, *United States: Constitution and Government*, *in* 27 ENCYCLOPÆDIA BRITANNICA 646, 651–61 (11th ed. 1911).

Nor should we expect the Justices to delve as deeply into the records as scholars would. One reasonable way to write an encyclopedia entry, for example, might be to survey the well-regarded secondary works in a given field to see what they say about the subject and about each other. The Justices properly reach conclusions based on evidence and arguments from others — as do judges in mass tort cases, who only rarely don lab coats and start testing carcinogens.[309] Assessing the Justices' reliability would require us to know the methodologies of those whose work is being read behind the scenes. If the Justices read the brief writers, and the brief writers read the scholars, that might be a perfectly reasonable decision procedure for a committee of nine generalists facing a large number of certiorari petitions. The proper comparison wouldn't be to ideal research methods, but whether it's good enough for government work.

In any case, even quite bad research practices on the Justices' part should be condemned on their own grounds, as distinct from investigations of whether originalism is or isn't a shared standard of correctness. Those who take risks with their historical research might be bad original*ists* for using a reckless decision procedure. Their decisions are bad original*ism*, viewed as a standard, only if they're wrong.

CONCLUSION

Originalism should be understood as a standard, not a decision procedure. In this respect, it's far from unique: many other theories seek rules for judging answers, rather than means of reaching them. Originalism is a useful focus, though, not only because it's been widely criticized on inapt grounds, but also because it offers such a stark example of why the distinction matters. What makes an originalist proposition true has very little to do with how we come to know that it's true. Distinguishing between what's true in law, and how we know it to be so, is something nonoriginalists could use as well — perhaps even more so, as their danger of confusion may be greater.[310]

Consider *McDonald v. City of Chicago*,[311] which held the Second Amendment to be incorporated against the states under the Fourteenth.[312] Justice Breyer, in dissent, argued that when "the history is so unclear that the experts themselves strongly disagree," a court "should not look to history alone but to other factors as well" — such as

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[309] *See* Baude & Sachs, *supra* note 59, at 816. *But cf.* Mitchell v. JCG Indus., Inc., 745 F.3d 837, 842 (7th Cir.) (Posner, J.) (describing how Seventh Circuit employees practiced donning and doffing safety equipment), *reh'g en banc denied*, 753 F.3d 695, 703 (7th Cir. 2014) (Posner, J., concurring in denial of rehearing en banc) (identifying the employees as Judge Posner and his law clerks).

[310] *See* Green, *supra* note 3, at 509–11.

[311] 561 U.S. 742 (2010).

[312] *Id.* at 750.

"the basic values that underlie a constitutional provision and their contemporary significance," as well as "the relevant consequences and practical justifications that might, or might not, warrant removing an important question from the democratic decisionmaking process."[313] And he listed other considerations too, such as whether incorporation would "prove consistent, or inconsistent, with the Constitution's efforts to create governmental institutions well suited to the carrying out of its constitutional promises," and also "the Framers' basic reason for believing the Court ought to have the power of judicial review," namely the "comparative judicial advantage" in "resist[ing] popular pressure to suppress the basic rights of an unpopular minority."[314]

It's easy to respond that this new inquiry is no more determinate than the old. Experts *also* disagree on "the basic values that underlie a constitutional provision," the "contemporary significance" of those values, and so on. These factors hardly seem less fraught than the historical ones. The main difference seems to be that seat-of-the-pants claims about history are frowned upon, while seat-of-the-pants claims about basic values and practical justifications get respectful nods in the *U.S. Reports*. And, of course, if history remains one factor among many, then the whole enterprise requires strictly more information, not less.

But the more serious problem with this approach is its mixing and matching of standards and decision procedures. Whatever reasons there might be "for believing the Court ought to have the power of judicial review,"[315] they don't reveal *what it is* the Justices are reviewing legislation *against*.[316] The content of the Constitution is one thing; the best method for its enforcement another. We could by amendment abolish judicial review altogether, or alternatively supercharge it with hair-trigger invalidation, while leaving the substantive scope of the Second and Fourteenth Amendments the same. (And officials who aren't judges — governors, state legislators, lawyers, and so on — swear oaths just as the judges do, and have to obey the Constitution whether or not it will be judicially enforced.)

All that said, one could imagine a version of Justice Breyer's approach that minded its standard-and-procedure p's and q's. What the Second and Fourteenth Amendments provide might depend on one set of factors; what courts should do in cases of uncertainty, on another. Some nonoriginalist theories are quite careful in this regard. Professor Richard Primus, for example, holds that the validity of various methods ("text, precedent, structure, original meaning," and so on) depends on their "relationship" to important values (such as "democracy, the rule of

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313 *Id.* at 916 (Breyer, J., dissenting).
314 *Id.* at 918–19.
315 *Id.* at 918.
316 *See* Green, *supra* note 3, at 501.

law, liberal individualism, justice, and social welfare") — "as refracted through the institutional roles of the decisionmakers."[317] That's hardly an easy standard for courts to apply, so he pairs it with a precedent-heavy decision procedure, on the theory that usually "precedent is enough to resolve the issue," without so disserving the underlying values "as to warrant the application of other tools."[318]

No matter what constitutional theory is on the table, it ought to give serious attention to which parts of the theory concern underlying standards and which parts concern procedures for applying them. If "[l]aw and philosophy are both in the distinction business,"[319] we ought to keep our distinctions straight. Distinguishing standards from decision procedures will help.

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[317] Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 172 (2008).

[318] *Id.* at 184–85.

[319] Green, *supra* note 65, at 561.