



## ARTICLE

**The Positive U-Turn**

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**Abstract.** Theories of legal interpretation have taken a “positive turn” in recent years. Some scholars have argued that disputes over how to interpret statutes and the Constitution should be resolved by looking to the social facts that determine what our positive law requires. Most of the commentary on the positive turn has focused on the substantive claim that what the law requires as a matter of constitutional interpretation is a version of originalism. Less attention has been paid to the more interesting and provocative methodological thesis that we ought to resolve our debates about legal interpretation by looking to “our law” and that doing so requires making claims about the nature of law—specifically, claims about the social facts that determine its content.

Because positivist theories vary with respect to which social facts matter for the purpose of determining the existence and content of law, an obvious (and obviously important) question for the positive turn is whether generating its alleged methodological benefits requires choosing from among rival positivist theories. Yet the chief proponents of the positive turn say very little on this question, and what they do say is ambiguous.

This Article thus sets out to answer that question by testing how the positive turn would work under four different positivist accounts of law. The result of the analysis is that the positive turn fails under every approach considered. Although certain aspects of the positive turn fit well with each account of law, not one of those accounts is capable of supporting it. Instead, each approach either leads to obviously false conclusions or fails to produce the normative and methodological payoff the positive turn promises. Even in its failure, however, the positive turn is instructive because it illustrates the difficulty of endeavoring to reconcile legal theory and practice.

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## Introduction

*“Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in eighteenth-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”*

—Chief Justice John G. Roberts Jr., June 25, 2011<sup>1</sup>

When Chief Justice Roberts made the comment above, suggesting that much contemporary legal scholarship is unhelpful to the bench and bar, he provoked a fierce reaction from the legal academy.<sup>2</sup> Two of the Chief Justice’s former clerks, however, seem to have taken their former boss’s critique of legal scholarship to heart. In a series of articles, William Baude and Stephen E. Sachs have advanced an agenda for public law scholarship, an agenda that has been dubbed the “positive turn.”<sup>3</sup> The core idea of the positive turn is that debates about how to properly interpret statutes and the Constitution ought to be settled neither by analyzing concepts of meaning, interpretation, or authority nor by engaging in normative debates sounding in political or moral philosophy. Instead, scholars should look to the same source lawyers and judges do to resolve legal disagreements: the law. Since both the existence and content of law are determined by certain facts about our legal system, scholars should devote their energies to figuring out what those facts tell us about how to interpret our legal materials. Once you look at those law-determining facts,

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1. *A Conversation with Chief Justice Roberts* 30:41 (C-SPAN television broadcast June 25, 2011), <http://www.c-span.org/video/?300203-1/conversation-chief-justice-roberts>.
  2. Some scholars suggested that statistical evidence contradicted Chief Justice Roberts’s claim, showing that the Court cites law review articles a great deal, especially in hard cases. See, e.g., Lee Petherbridge & David L. Schwartz, *An Empirical Assessment of the Supreme Court’s Use of Legal Scholarship*, 106 N.W. U. L. REV. 995, 998-99 (2012). Still others took it as an opportunity for satire. See, e.g., Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2d 251, 251-53 (2015) (concluding that Kant had no influence on evidentiary approaches in eighteenth-century Bulgaria).
  3. William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015) (“We ought to ask: Is originalism our law? If not, what is? This question has been called ‘one of the two most difficult questions in legal philosophy.’ But if it can be answered, it has the potential to reorient the debates and allow both sides to move forward. This move is the ‘positive turn.’” (footnote omitted) (quoting Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 642 (2014))); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082-85 (2017); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 819 (2015) (“This inquiry points the way toward what we could call ‘positive’ defenses—claims that originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law.”).

you can see that, for instance, what the law requires as a matter of constitutional interpretation is originalism.<sup>4</sup>

The positive turn has seized the attention of constitutional theorists, quickly generating a flurry of commentary—much of it critical.<sup>5</sup> Most of the

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4. See *infra* Part I.

5. JAMES E. FLEMING, FIDELITY TO OUR IMPERFECT CONSTITUTION: FOR MORAL READINGS AND AGAINST ORIGINALISMS 16-19 (2015) (discussing Baude’s “inclusive originalism” and concluding that it is too inclusive to provide any meaningful guidance when it comes to constitutional interpretation); Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1846-47, 1847 n.82 (2016) (including the articles of both Baude and Sachs as examples of what I characterize as a late form of constitutional originalism that broadens its appeal but threatens to sacrifice originalism’s promise of providing a source of judicial constraint); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 102, 108-16 (2016) (characterizing the positive turn as “one of the most important and promising developments in originalist theory in recent years” but going on to criticize it for its lack of normative foundations); Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, yet Eminently Curable: Part II*, 19 GREEN BAG 2d 257, 259, 264 (2016) (discussing Baude’s “inclusive originalism” and characterizing the modification it makes to traditional originalism as one that reflects what “the most intelligent originalists are beginning to realize,” namely that making constitutional decisions based on the original understanding of the Constitution is impossible “because society has changed radically since the eighteenth century”); Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 44 (2016) (arguing that Baude’s description of originalism relies more on what judges say than on what they do); Eric J. Segall, *Originalism as Faith*, 102 CORNELL L. REV. ONLINE 37, 40 (2016) (arguing that Baude’s version of originalism is “either inaccurate or irrelevant”); Steven D. Smith, *Decisional Originalism: A Response to Critics*, LIBR. L. & LIBERTY (Dec. 19, 2014), <http://www.libertylawsite.org/liberty-forum/decisional-originalism-a-response-to-critics> (criticizing the positive turn on the ground that it fails to provide a sufficient normative justification for originalism). Some of the earliest commentary appeared on blogs. See, e.g., Jack M. Balkin, *New Developments in Originalist Theory*, BALKINIZATION (Dec. 18, 2014, 5:35 PM), <http://balkin.blogspot.com/2014/12/new-developments-in-originalist-theory.html> (discussing the work of Baude and Sachs and concluding that “[i]t will be very interesting to see how this new contender in originalist theory develops”); Ian Bartrum, *Will Baude: Is Originalism Our Law?*, PRAWFSBLOG (Dec. 28, 2015, 3:58 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2015/12/will-baude-is-originalism-our-law.html> (endorsing various criticisms of Baude’s inclusive originalism); Michael Ramsey, *Stephen Sachs: Originalism as a Theory of Legal Change*, ORIGINALISM BLOG (Sept. 23, 2014, 6:54 AM), <http://originalismblog.typepad.com/the-originalism-blog/2014/09/stephen-sachs-originalism-as-a-theory-of-legal-change-michael-ramsey.html> (“The bottom line is that this is going to be one of the most important articles—quite possibly the most important—in originalism theory in 2014. (Its spot in the ‘originalism top ten for 2014’ seems assured.) It’s a very ambitious attempt to justify originalism by reference to legal practices, not (as I’m inclined to do) by reference to normative claims. Also—and this is an odd thing to say about a draft article on legal theory that’s 74 pages and 259 footnotes—it’s fun to read.” (quoting Michael Ramsey, *USD Originalism Conference: Second Paper—Stephen Sachs on Originalism and Legal Change*, ORIGINALISM BLOG (Feb. 25, 2014, 5:12 PM), <http://originalismblog.typepad.com/the-originalism-blog/2014/02/usd-originalism-conference-second-paper-stephen-sachs-on-originalism-and-constitutional-change-michael.html>)); Asher

*footnote continued on next page*

criticism has focused on the authors' substantive claim that our law is best described as originalist.<sup>6</sup> Yet the authors candidly acknowledge the limits of their substantive claim that originalism is our law.<sup>7</sup> What they really care about, they each emphasize, is the *methodological* thesis that we should resolve interpretive debates by reference to what "our law" is, whether or not they happen to be right that originalism is our law.<sup>8</sup> Lest there remain any doubt about these ambitions, Baude and Sachs subsequently coauthored another article in the *Harvard Law Review* in which they broaden the argument to include methods of statutory interpretation, in addition to constitutional interpretation, and again frame their argument largely in methodological terms.<sup>9</sup>

This methodological thesis, which is the essence of the positive turn, is also the most perplexing part of Baude and Sachs's project. This perplexity arises from the fact that the claim seems at once banal and inventive. How is it that an argument that scholars should look to the law to settle scholarly debates could possibly be a methodological innovation? Have not law professors always

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Steinberg, *Why It Doesn't Matter if the Court's Opinions Are Originalist—A Comment on Baude on Originalism*, NARROWEST GROUNDS (Oct. 19, 2015, 4:30 PM), <http://narrowestgrounds.blogspot.com/2015/10/why-it-doesnt-matter-if-courts-opinions.html> (discussing and criticizing the articles of Baude and Sachs). Baude himself weighed in on Sachs's piece. See Will Baude, *Originalism and the Positive Turn*, WASH. POST: VOLOKH CONSPIRACY (Sept. 23, 2014), <http://wapo.st/1B4YIU3> ("In any event, one of the important developments in originalism today is 'the positive turn'—the question of the legal status of originalism. Originalists are thinking about it much more than they were two years ago . . .").

6. The main exception here is Pojanowski and Walsh. See Pojanowski & Walsh, *supra* note 5, at 98-110. In the early pages of their article, they make a couple of jurisprudential criticisms similar to those developed in this Article before going on to offer a natural law defense of something like Sachs's "original law originalism." *Id.* (quoting Sachs, *supra* note 3, at 874-75). Pojanowski and Walsh primarily take the authors to task for their descriptive methodological posture, see *id.* at 107-13, an issue raised in Part II.C.2.c below.
7. Baude, *supra* note 3, at 2403 (acknowledging that his substantive claim that "originalism . . . is our law" is "certainly not airtight" and then proceeding to defend the weaker thesis that originalism is "part of the law" (emphasis omitted)); Sachs, *supra* note 3, at 874 ("This account of our current law, as reflected in familiar legal practices, may or may not sound convincing to you. If it's wrong, then it's wrong, and our system isn't fully originalist.").
8. Sachs, *supra* note 3, at 874 ("[T]he goal of this Article isn't to prove, once and for all, that our law is originalist. Rather, it's to suggest that our law may well be originalist if—and precisely to the extent that—we take as our own the Founders' law, as it's been lawfully changed." (emphasis omitted)); see also Baude, *supra* note 3, at 2404 ("In any event, however many modalities or components one finds, the positive inquiry can make some progress in that world.").
9. Baude & Sachs, *supra* note 3, at 1147 (concluding with the acknowledgment that the authors "don't claim to have produced all of the answers here" but instead "hope that [they] can lead others to ask the right questions").

argued about what the law requires? Yet the authors do seem to be saying *something* interesting and provocative. But what, exactly?

The answer lies in two core insights of the positive turn: The first is the observation that “our law” not only substantively regulates our social, economic, and political life but may also speak to second-order questions about how judges should determine the meaning of such substantive law.<sup>10</sup> Second, as its label suggests, Baude and Sachs tie their claim about what the law requires to one about the *nature* of law, namely that its existence and content are primarily, if not exclusively, a matter of positive, empirical fact.<sup>11</sup>

The promise and appeal of the positive turn, then, may lie in its apparent capacity to bridge the alleged gulf between legal theory and legal practice that the Chief Justice’s comment highlights.<sup>12</sup> It does so in two ways: On the one hand, it suggests that turning to legal practice (“our law”) can help resolve, or at least reorient, our scholarly debates about how to interpret our Constitution and statutes. On the other hand, it suggests that deep questions of legal theory or philosophy may shed light on what legal practice requires. Theory and practice are brought together again in an ingenious sort of way.

This second insight, about the role of legal philosophy, however, remains largely undeveloped. Baude and Sachs insist that the law depends on “the right kind” of social facts<sup>13</sup> or “modern social facts,”<sup>14</sup> but they do not say much about what those facts are or how we would know them when we see them. At times they suggest that we can know roughly which facts matter by relying on

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10. See, e.g., *id.* at 1095 (“Our law of interpretation helps determine the legal content of our written instruments.”); Pojanowski & Walsh, *supra* note 5, at 116 (“This new movement in constitutional theory has much to recommend it. It takes seriously the notion that second-order practices and commitments like interpretive rules and principles can have legal, or at least law-like, authority absent formal legislative promulgation.”).

11. See Baude, *supra* note 3, at 2351 (“Yet there is a third way to assess originalism—and constitutional theories more broadly—by looking to our positive law, embodied in our legal practice. We ought to ask: Is originalism our law? If not, what is? This question has been called ‘one of the two most difficult questions in legal philosophy.’” (quoting Alexander, *supra* note 3, at 642)); Sachs, *supra* note 3, at 819 (“This inquiry points the way toward what we could call ‘positive’ defenses—claims that originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law.”).

12. Griffin has suggested a slightly different connection between the authors’ motivation and the Chief Justice. Stephen Griffin, *Originalism and Living Constitutionalism: Concluding Thoughts*, BALKINIZATION (Oct. 16, 2015, 12:44 PM), <http://balkin.blogspot.com/2015/10/originalism-and-living.html> (“Is it too speculative to suggest that the idea of originalism as ‘our law’ as a basis for bottom line agreement reflects the influence of Chief Justice Roberts on his former clerks Will Baude and Stephen Sachs—that is, insisting that there must be a middle way between the contending camps on the Court and in the academy[?]”).

13. Sachs, *supra* note 3, at 835.

14. Baude, *supra* note 3, at 2364 (emphasis omitted).

“lawyers’ assumptions rather than technical jurisprudence.”<sup>15</sup> At other times, they characterize it as an issue of jurisprudence that matters a great deal but that may be left for another day.<sup>16</sup> At still other times, they seem to commit themselves to one particular theory of law, namely that of H.L.A. Hart.<sup>17</sup> For Hart, the relevant social facts are the current practices of courts, so that may be one answer to the question which social facts matter.<sup>18</sup> But then the authors quickly clarify that they rely on Hart partly for “ease of exposition” because, in reality, “much of our framework should hold true on any mainstream theory.”<sup>19</sup>

The ambiguity on this point matters because legal positivists have long debated which facts are the important ones in determining the existence and content of law.<sup>20</sup> So it is fair to ask whether the positive turn will generate its purported methodological benefits irrespective of which theory of law is employed to determine the relevant social facts. There is a world of difference between the claim *A* that a given theory’s success depends on how one resolves a controversial issue that will be temporarily bracketed and the claim *B* that the theory succeeds irrespective of how one decides a controversial issue. Whereas *A* is an admission of the theory’s dependence on controversial matters

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15. Baude, *supra* note 3, at 2351 n.5; *see also* Sachs, *supra* note 3, at 836 (“Without having solved all of jurisprudence, we can make some plausible guesses about which social facts matter—plausible enough for ordinary lawyers to make accurate legal judgments on a routine basis.”).
  16. Baude & Sachs, *supra* note 3, at 1116 (“Whether our system is textualist, intentionalist, purposivist, or something else is a legal question, to be answered by our sources of law—and, in the end, by the appropriate theory of jurisprudence.”); Sachs, *supra* note 3, at 835 (observing that “experts disagree about exactly which social conditions make something the law” and then insisting that “[b]efore we can evaluate a positive defense [of originalism], we need to know if those details support originalism”).
  17. *See* Baude & Sachs, *supra* note 3, at 1116 (“We assume in this Article something like Hartian positivism . . .”); *see also* Baude, *supra* note 3, at 2365 n.80 (“Hart will sometimes make appearances in the footnotes here because his work is more frequently invoked in the relevant legal scholarship.”); *cf.* Pojanowski & Walsh, *supra* note 5, at 109 (referring to the “positive turn’s embrace of Hart’s legal positivism”).
  18. *See infra* Part II.A.
  19. Baude & Sachs, *supra* note 3, at 1116; *see also* Baude, *supra* note 3, at 2364-65 (“There are different jurisprudential formulations for making this inquiry and this Essay won’t attempt to resolve the questions of technical jurisprudence.”).
  20. Candidates offered have included: the command of a sovereign, *cf.* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 132 (David Campbell & Philip Thomas eds., Ashgate 1998) (1832); the rules laid down by courts, *see* JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 82-83, 90-92 (1909); the practices of officials, *see* H.L.A. HART, THE CONCEPT OF LAW 272-75 (3d ed. 2012); and the predictions about “what the courts will do in fact,” *see* Justice O.W. Holmes, Supreme Judicial Court of Mass., The Path of the Law, Address at the Dedication of the New Hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 461 (1897).

(and hence a theoretical vice), *B* is an assertion of its independence (and hence a theoretical virtue).

The aim of this Article, therefore, is to see how the positive turn fares under a few different well-known positivist accounts of law. The hope is that it will not only reveal something about the positive turn's true methodological payoff, or lack thereof, but also yield some insight into the motivations and ambitions behind it.

Examining how the positive turn would work under a variety of jurisprudential approaches demonstrates why the promise of the positive turn is more apparent than real. The turn achieves an air of novelty and plausibility only because the authors are ambiguous, evasive, or downright inconsistent about some of the deepest questions about the nature of law—questions about the relationship between legal validity and judicial practice, about the nature and implications of judicial disagreement, and about the criteria for theory choice among philosophies of law. These are hard questions, and (for that reason) they are questions that have, in part, set the course of jurisprudential debate at least since Hart published *The Concept of Law* in 1961.<sup>21</sup> Yet the authors write as if those debates never happened—as if the questions were never raised, let alone answers to them offered and challenged. The result is that what they present as a methodological advance in fact takes us back to some of the foundational debates about the nature of law and legal argument. The positive turn is really a U-turn.

Still, even in its failure, the positive turn is instructive. All of the various ambiguities and tensions one finds in the authors' arguments for and applications of the positive turn reduce to one fundamental tension concerning the nature and function of legal scholarship. That tension is the one mentioned at the outset between the demands of legal theory and those of legal practice. It may seem that the authors' ambition to reconcile these twin demands is futile, and the confusions that plague the positive turn might seem to give grounds for such skepticism. But that conclusion should be resisted. To the contrary, I respect the authors' ambition (if I understand it correctly) to show both that legal philosophy matters for law and that law itself can be a source of intellectual guidance rather than just a set of rules and institutions to be analyzed from the perspective of some other discipline. Thus, this Article suggests—albeit only briefly—a somewhat different approach to meeting the same challenge, one that rejects the distinction, now so entrenched in legal scholarship, between “internal” and “external” accounts of law.<sup>22</sup>

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21. HART, *supra* note 20.

22. I defend this approach in more depth in a prior article. See Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1212-24 (2015).



The rest of this Article supports these broad claims. Part I first summarizes the three main applications of the positive turn. It then reveals the common syllogistic structure to which all three applications conform, which I call the “Core Argument.” The Core Argument holds that for any given interpretive rule, that rule counts as law (and thereby imposes a duty on courts to apply it) if it is supported by the kind of social facts that determine the content of law. The positive turn is best understood as the methodological thesis that scholars should evaluate the propriety of interpretive rules by seeing how well they fare under the Core Argument.

Part II, which constitutes the bulk of the Article, shows why the promise of the positive turn evaporates under scrutiny. It shows this by testing the Core Argument under four jurisprudential approaches. The first three correspond to the theoretical accounts of law advanced by H.L.A. Hart, Joseph Raz, and Scott Shapiro.<sup>23</sup> The fourth approach is one that makes no claims at all about the nature of law, resting instead on “lawyers’ assumptions rather than technical jurisprudence.”<sup>24</sup> As Part II shows, certain elements of the positive turn fit well with some aspects of each of these approaches but less well with others. This result is just what one would expect because, as noted above, these accounts of law developed in part as responses to difficulties of precisely the sort raised by the authors’ arguments.

In a very brief Conclusion, I suggest an alternative path for pursuing the authors’ scholarly ambitions—or at least what I understand those ambitions to be.

## **I. The Positive Turn at Work**

The best way to understand the positive turn is to see it in action. This Part begins by showing how it has been applied to debates in constitutional and statutory interpretation.<sup>25</sup> In separately written papers, Baude and Sachs have each argued that a positive analysis supports particular versions of constitutional originalism. More recently, they have together endorsed taking the same approach to answer questions about statutory and constitutional interpretation more generally. After briefly summarizing each of these

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23. I choose these mainly because they are three of the best-known modern positive accounts, as recognized by one of the authors. See Baude, *supra* note 3, at 2365 n.80 (“Three important versions of legal positivism are those espoused by Hart, Joseph Raz, and Scott Shapiro.”).

24. *Id.* at 2352 n.5.

25. The authors do not use the phrase “positive turn” in their most recent article, but they repeatedly cite their earlier articles as support for the approach they take to analyzing the “law of interpretation.” See Baude & Sachs, *supra* note 3, at 1091 & n.53, 1116 & n.207, 1120 & nn.236-38, 1127 & n.281, 1135 & n.331, 1136 & n.339, 1146 & n.401.

arguments, it will be relatively easy to see the Core Argument, which underlies all of them and whose defense constitutes the central thesis of the positive turn.

A. Inclusive Originalism

William Baude argues that debates about originalism have been too focused on conceptual questions about the nature of meaning or authority and normative questions about whether or why originalism promotes democracy, constrains judges, or enhances welfare.<sup>26</sup> Given that most people agree that judges have at least a *prima facie* obligation to apply the law, the relevant question ought to be: What is our law?<sup>27</sup> Even if a method of interpretation is conceptually confused or normatively problematic, if that method is required by law, then it occupies a privileged position over its competitors.<sup>28</sup> Baude then argues that “inclusive originalism” occupies that privileged position.<sup>29</sup>

Inclusive originalism describes the view that “the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision.”<sup>30</sup> Under this view, the validity of a rule, whether substantive or interpretive, is determined by whether the original meaning of the Constitution either *incorporates* the rule or at least *permits* the rule.<sup>31</sup> For instance, the Eighth Amendment might incorporate through the phrase “cruel and unusual punishments” the Court’s doctrine prohibiting death sentences for crimes committed while the defendant was a minor.<sup>32</sup> Crucially, then, inclusive originalism authorizes a court to look to other sources of law to resolve ambiguities in the text *if and only if* the original Constitution included such methods.<sup>33</sup> Baude suggests that such is the case with the doctrine of *stare decisis*.<sup>34</sup> Thus, “[i]t is not necessarily unoriginalist to adhere to an unoriginalist precedent.”<sup>35</sup> Still, the key point is that for the inclusive originalist, original meaning is not simply one of many

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26. Baude, *supra* note 3, at 2351, 2392.

27. *See id.* at 2392-93.

28. *See id.* at 2353, 2393.

29. *Id.* at 2392.

30. *Id.* at 2355.

31. *Id.* at 2356.

32. *See id.*; *see also* U.S. CONST. amend. VIII; *Roper v. Simmons*, 543 U.S. 551, 575, 578 (2005) (holding that the Eighth Amendment prohibits the death penalty for defendants who were minors at the time of their crimes).

33. *See* Baude, *supra* note 3, at 2355 (explaining that under inclusive originalism, “judges can look to precedent, policy, or practice, but only *to the extent that the original meaning incorporates or permits them*”).

34. *Id.* at 2358.

35. *Id.* at 2361.

legitimate sources of law. Rather, because it is the source of the authority of other methods, such as precedent or tradition, it is, methodologically speaking, “first among equals.”<sup>36</sup>

Baude next argues that inclusive originalism best describes our law because it is reflected in both our “higher-order practices” (widespread conventions about how we treat the Founding era) and our “lower-order practices” (the explicit reasoning of Supreme Court decisions).<sup>37</sup> With respect to our higher-order practices, Baude observes that we revere the Constitution and accept the authority of the Framers;<sup>38</sup> we generally treat the law as being continuous since the Founding, only recognizing a change in the law if that change has been brought about lawfully (as opposed to by revolution);<sup>39</sup> and we generally agree about how to decide the “easy cases” of constitutional law, such as how to select the President and members of Congress.<sup>40</sup>

According to Baude, our lower-order practices also point to inclusive originalism. Indeed, those Supreme Court decisions that remain canonical or “fixed star[s]” of our constitutional law reflect many interesting facts indicative of inclusive originalism.<sup>41</sup> First, the Court generally begins with the original meaning of a constitutional provision and only draws on other sources, such as practice, after finding ambiguity as to textual meaning.<sup>42</sup> Second, if there is a conflict between the textual meaning of a provision and another source of law, the text always wins.<sup>43</sup> Third, when the Court overturns precedent, it typically does so on originalist grounds, enabling the Court to say plausibly that the overruled case was “wrong the day it was decided.”<sup>44</sup> Finally, one sees that the Court never contradicts inclusive originalism.<sup>45</sup> Even famous, seemingly antioriginalist cases like *Brown v. Board of Education*,<sup>46</sup> *Gideon v. Wainwright*,<sup>47</sup>

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36. *See id.* at 2391.

37. *See id.* at 2365.

38. *Id.* at 2365-67.

39. *See id.* at 2367.

40. *Id.* at 2367-69.

41. *See id.* at 2371 (alteration in original) (quoting Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2277 (2014)).

42. *See id.* at 2372-74 (discussing *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)).

43. *See id.* at 2374-75 (discussing *District of Columbia v. Heller*, 554 U.S. 570 (2008); and *INS v. Chadha*, 462 U.S. 919 (1983)).

44. *See id.* at 2375-76 (quoting Jack M. Balkin, “*Wrong the Day It Was Decided*”: *Lochner* and *Constitutional Historicism*, 85 B.U. L. REV. 677, 696-98 (2005)) (discussing the Court’s use of original meaning in *Crawford v. Washington*, 541 U.S. 36 (2004), to overrule *Ohio v. Roberts*, 448 U.S. 56 (1980)).

45. *See id.* at 2376-86.

46. 347 U.S. 483 (1954).

47. 372 U.S. 335 (1963).

*Miranda v. Arizona*,<sup>48</sup> *Roe v. Wade*,<sup>49</sup> and, more recently, *Obergefell v. Hodges*,<sup>50</sup> when properly interpreted, are “consistent with inclusive originalism.”<sup>51</sup>

Baude concludes that if judges have a duty to apply the law (as most agree they do) and if inclusive originalism is our law, then it follows that judges have a duty to practice inclusive originalism.<sup>52</sup>

### B. Original-Law Originalism

Like Baude, Stephen Sachs argues that debates about originalism have been too consumed with conceptual and normative questions.<sup>53</sup> He emphasizes the need for and value of “positive” defenses of constitutional originalism, which assert that “originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law.”<sup>54</sup> He then offers “original-law originalism” as a form of originalism reflected in current practice.<sup>55</sup>

Original-law originalism interprets originalism as a “theory of legal change” rather than a theory of constitutional interpretation.<sup>56</sup> In particular, this view holds that “[o]ur law is still the Founders’ law, as it[] [has] been lawfully changed.”<sup>57</sup> According to Sachs, “lawful[] change[s]” include only those changes made by the application of a “rule[] of change” that was itself valid at the time of the Founding (or itself “lawfully changed” since then).<sup>58</sup>

Sachs seeks to show that our “higher-order” practices are committed to original-law originalism by pointing to various features of conventional legal reasoning that seem to assume this view.<sup>59</sup> For one thing, we do not trace the pedigree of legal rules to a period before the Founding.<sup>60</sup> Instead, we take the

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48. 384 U.S. 436 (1966).

49. 410 U.S. 113 (1973).

50. 135 S. Ct. 2584 (2015).

51. See Baude, *supra* note 3, at 2376-86.

52. See *id.* at 2392-95.

53. See Sachs, *supra* note 3, at 819, 823-35. In an earlier article, Sachs made arguments similar to those discussed below. See generally Sachs, *supra* note 41. I have chosen to focus on the later article because it develops the arguments at greater length and in more depth.

54. Sachs, *supra* note 3, at 819.

55. See *id.* at 874-75.

56. See *id.* at 818-20.

57. *Id.* at 838.

58. *Id.* at 845.

59. See *id.*

60. See *id.* at 842 (observing that it would “be absurd to insist on legal compliance all the way back—concluding, say, that our law today is invalid because the Constitution disobeyed the Articles of Confederation”).

Founding as the crucial event in our legal history and understand today's law as continuous from the law of the Founding.<sup>61</sup> In other words, we (that is, courts) assume that the law at the time of the Founding is still our law today unless it was changed through some legally valid method.<sup>62</sup>

According to Sachs, there are three primary ways in which we recognize our law to have changed validly since the Founding. First, it may be that a general term used in the Constitution incorporates something that itself changes (such as what is required for "the public Safety" under the Suspension Clause<sup>63</sup>) or is stated in sufficiently broad terms that the application of the term changes over time (such as what Congress's power to regulate commerce<sup>64</sup> properly entails).<sup>65</sup>

Second, the Constitution may be changed through the application of a rule of change that is valid because it existed as law at the time of the Founding.<sup>66</sup> The paradigmatic instance of this kind of rule is Article V's amendment procedure, but there may be other, subtler forms of authorized legal change.<sup>67</sup> For example, it may be that under the Founders' law, a "regular course of practice" could "liquidate & settle the meaning" of an ambiguous provision of the constitutional text.<sup>68</sup>

The third and final way the Founders' law can be validly changed (according to current law) is through what Sachs calls "domesticating doctrines."<sup>69</sup> Domesticating doctrines validate *ex post* what were initially unauthorized changes to a legal right or rule.<sup>70</sup> These doctrines thus enable courts to treat a legal claim "as if" it were legally valid even though courts recognize that, in some sense, it is not.<sup>71</sup> *Stare decisis* is the most important example of a domesticating doctrine in the constitutional context. Once again, so long as this doctrine was authorized by the Founders or "has been lawfully added since," the Court's use of it to legitimize even erroneous decisions counts as valid legal

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61. *See id.* at 845.

62. *See id.* at 840, 845.

63. U.S. CONST. art. I, § 9, cl. 2.

64. *See id.* art. I, § 8, cl. 3.

65. *See Sachs, supra* note 3, at 853.

66. *See id.* at 855.

67. *See id.*

68. *See id.* at 855-56 (quoting *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014)); *cf.* THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

69. *See Sachs, supra* note 3, at 858-60.

70. *See id.* at 859.

71. *See id.*

change.<sup>72</sup> So even if the use of paper money, for instance, would have been unconstitutional at the Founding, if it has been ratified as precedent, then it counts as valid law.<sup>73</sup>

In short, Sachs argues that our law cares about the historical pedigree of our rules—even the interpretive ones. Thus, “[i]f we can’t say *when* things have changed, that makes it harder to explain *how* they changed, which makes us less confident *that* they’ve changed.”<sup>74</sup> And this is true even if there have been earlier periods in our history when our law did not have the same concern with tracing the pedigree of our rules to the Founders’ law.<sup>75</sup>

### C. The Law of Interpretation

In their most recent, jointly authored piece, *The Law of Interpretation*, Baude and Sachs turn their sights to interpretive methods more generally, particularly methods of statutory construction.<sup>76</sup> They begin by observing that legal theorists tend to adopt one of two untenable positions about the meaning of statutes. The first is what the authors call, following Mark Greenberg, “the standard picture.”<sup>77</sup> Under this view, the legal content of a statutory provision is fully determined by the linguistic meaning of the statute’s text.<sup>78</sup> Other scholars, skeptical of the idea that texts have single determinate meanings, insist that judges must make recourse to normative values (for instance,

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72. *Id.* at 863. Sachs insists, however, that there remains a debate about what kind of practice of precedent the Founders had (and therefore we have) and that the debate should be resolved, again, by using a “historical approach.” *See id.* at 863–64.

73. Baude uses this example, which he attributes to Richard Fallon. *See* Baude, *supra* note 3, at 2361 (citing Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1113 (2008)).

74. Sachs, *supra* note 3, at 865.

75. *Id.* at 847 (“In fact, we can adhere to the Founders’ law today even if we haven’t always done so, and even if there’ve been occasional interruptions along the way.”).

76. *See* Baude & Sachs, *supra* note 3, at 1097–99.

77. *See id.* at 1085–88 (citing Mark Greenberg, *The Standard Picture and Its Discontents*, in 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 48 (Leslie Green & Brian Leiter eds., 2011) [hereinafter Greenberg, *The Standard Picture*]). There is a certain irony in the authors’ use of Greenberg’s critique of the standard picture of how legal content is generated from texts. Elsewhere Greenberg argues that what the standard picture fails to appreciate is that determining the content of law requires reference to moral facts—something the authors forcefully deny. *See* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1290 n.2 (2014) (“I argue that non-normative facts cannot by themselves determine the content of the law because they cannot explain their own relevance to the content of the law. Normative facts are the best candidates for what can provide the necessary reasons.”). Hence the authors’ disclaimer: “By relying on Greenberg’s account of the standard picture, we don’t mean to suggest agreement with the rest of his account of legal obligation . . . .” Baude & Sachs, *supra* note 3, at 1086 n.21.

78. *See* Baude & Sachs, *supra* note 3, at 1086.

democratic or rule-of-law values) to pick out one meaning from among several and thereby establish the statute's legal content.<sup>79</sup>

Baude and Sachs argue for a third way. They concede that the skeptics are right that the text alone does not determine the legal content of a statutory provision, but they deny that judges must—or generally do—rely directly on normative values.<sup>80</sup> Instead, the law may direct them to apply interpretive rules to particular texts.<sup>81</sup> And there are in fact such interpretive rules in the law—what they call the “law of interpretation.”<sup>82</sup> Much of their article is thus devoted to surveying this interpretive law, some of which is written law (for example, the repeal-revival rule)<sup>83</sup> but much more of which is unwritten law (for instance, the rule of lenity and other canons of construction).<sup>84</sup> Still, it is *law* nonetheless and therefore offers a source of legal determinacy that does not depend on the implausible assumption that statutory texts alone produce determinate meaning.<sup>85</sup>

According to Baude and Sachs, recognizing the existence of this law of interpretation “clarif[ies] two of the hoariest and hottest debates” about legal interpretation: the debates about the proper role of canons of construction in statutory interpretation and about the proper role of constitutional “construction” in constitutional adjudication.<sup>86</sup>

With respect to the first debate,<sup>87</sup> the law of interpretation provides a framework for “answering endless questions about why the canons have

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79. See *id.* at 1088-93. Baude and Sachs's particular targets are Richard Fallon and Cass Sunstein. See *id.* at 1092-93 (citing Richard H. Fallon Jr., *The Meaning of Legal “Meaning” and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015); and Cass R. Sunstein, *There Is Nothing That Interpretation Just Is*, 30 CONST. COMMENT. 193, 193 (2015)).

80. See *id.* at 1093.

81. *Id.*

82. *Id.* at 1095-96.

83. See *id.* at 1099-104. The repeal-revival rule provides that the repeal of an act that itself repealed a previous statute does not bring the original statute back into force unless “expressly so provided.” 1 U.S.C. § 108 (2015); see also Baude & Sachs, *supra* note 3, at 1102.

84. See, e.g., Baude & Sachs, *supra* note 3, at 1104-12.

85. See *id.* at 1097-99.

86. *Id.* at 1084-85.

87. For some contributions to the scholarly debate about the legality, effectiveness, and value of the canons of construction cited by Baude and Sachs, *id.* at 1082 n.6, 1089 n.39, 1121 n.242, see Fallon, *supra* note 79; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Sunstein, *supra* note 79; and Andrew Koppelman, *Passive Aggressive: Scalia and Garner on Interpretation*,  
*footnote continued on next page*

authority and which putative canons are valid or not.”<sup>88</sup> Invoking a familiar distinction in statutory interpretation, they argue that whereas “linguistic” canons derive their validity from their ability to accurately track linguistic usage, what they call “legal” canons are justified by reference to “other, higher-order rules and practices.”<sup>89</sup> Specifically, the validity of legal canons “turns on the recognized legal practices of those who constitute the legal system (perhaps including judges, officials, lawyers, or the legally educated public), and on inferences from these practices that the participants themselves might not have drawn.”<sup>90</sup> In other words, if judges usually invoke a given canon of construction in a particular kind of case, then that canon properly counts as part of our law.

The second debate Baude and Sachs purport to clarify is the one surrounding the “interpretation/construction” distinction in constitutional theory.<sup>91</sup> The basic idea of this distinction is that the first task of constitutional interpretation is to decipher the linguistic content of a particular constitutional provision.<sup>92</sup> This is a factual or historical question. But if that linguistic content is vague or ambiguous, then the interpreter must engage in “construction,” requiring her to fix the provision’s legal meaning by reference to other sources of law, including moral or political values.<sup>93</sup>

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BOUNDARY 2, Summer 2014, at 227 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012)). For further discussion, see, for example, EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 1-2 (2008); SCALIA & GARNER, *supra*, at 6-9; Larry Alexander & Saikrishna Prakash, *Mother May I?: Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 CONST. COMMENT. 97, 98 (2003); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110-12 (2010); and William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 535-36 (2013) (reviewing SCALIA & GARNER, *supra*).

88. Baude & Sachs, *supra* note 3, at 1084.

89. *See id.* at 1122-23.

90. *See id.* at 1124 (footnote omitted).

91. For some contributions to the debate about the need for, and dangers of, constitutional construction cited by Baude and Sachs, *id.* at 1128 nn.285-90, 1129 nn.291-97, see SCALIA & GARNER, *supra* note 87, at 14; KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* 1-17 (1999); Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 74, 80-81, 92 (2016); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 69-70 (2011); Gary Lawson, *Dead Document Walking*, 92 B.U. L. REV. 1225, 1226 (2012); John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 783 (2009); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 5 (2015); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 473 (2013); and Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119, 120-21 (2010).

92. *See* Baude & Sachs, *supra* note 3, at 1128.

93. *See id.*



Although the authors consider the interpretation/construction distinction to be “real and useful,” they empathize with its critics who see it as a license for judges to engage in open-ended construction based on their own values.<sup>94</sup> The reader can likely guess how the authors resolve the conflict:

When there’s a question about the law that the Constitution made, the right place to turn isn’t to just any construction, but to the particular construction prescribed by law. Call it original methods, call it a form of construction; our point is that linguistic content must be processed through law.<sup>95</sup>

#### D. The Core Argument

Each of these three arguments takes the same basic structure, which—borrowing from Sachs’s own schema—can be formalized as the following pair of syllogisms. I call these syllogisms the Core Argument:

- *Major Premise (MP)*: The law is whatever is supported by the right kind of social facts.
- *minor premise (mp)*: *X* interpretive rule or method is supported by the right kind of social facts.
- *Conclusion 1*: Therefore, *X* interpretive rule or method is the law.
- *Premise 3 (P3)*: Judges have a prima facie duty to apply the law.
- *Conclusion 2*: Therefore, judges have a prima facie duty to apply *X* interpretive rule or method.<sup>96</sup>

The Core Argument is a way to determine, for any given interpretive rule *X*, whether *X* is the proper rule for judges to apply in a given context.<sup>97</sup> The “positive turn” may then be understood as a *methodological* thesis asserting that applying the Core Argument is the proper way for scholars of statutory and constitutional interpretation (and judges) to determine whether any given interpretive rule has the status of law and should thus be used by judges.

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94. See *id.* at 1128-29.

95. *Id.* at 1131 (emphasis omitted).

96. Cf. Sachs, *supra* note 3, at 835. Sachs frames his originalism as “part of our law.” *Id.* But later in his article, it becomes clear that his claim is stronger than that. See *id.* at 864 (“[T]he best understanding of originalism is the far stronger position . . . that no rule is valid unless it can be rooted in the Founders’ law.”). Baude, but not Sachs, explicitly defends *P3*. See Baude, *supra* note 3, at 2392-97 (arguing that judges have a prima facie obligation to apply the law either by virtue of the oath they must take to uphold the Constitution or because democratic theory requires it). For more on judges’ promissory duty arising out of the oath, see Richard M. Re, *Promising the Constitution*, 110 NW. U. L. REV. 299, 301-06 (2016). Baude endorses a version of Re’s argument, suggesting that it “demonstrates the stakes of the positive inquiry” and “shows how this form of originalism can have normative force.” Baude, *supra* note 3, at 2394.

97. For simplicity, I refer to *X* as an “interpretive rule or method” (or sometimes just “interpretive rule”), but I should clarify that *X* could be a rule, standard, principle of construction, or even a theory of interpretation, such as originalism.

Formalizing the Core Argument in this way reveals both the scope of Baude and Sachs's ambitions and why most of their critics have scarcely challenged those ambitions. As stated in the Introduction, Baude and Sachs profess a stronger commitment to the methodological thesis than to any particular application of it.<sup>98</sup> The purported benefits of their approach are twofold. First, the Core Argument offers a way to solve the dead hand problem in constitutional theory and, more generally, to enable fundamentally factual or "legal" arguments to generate normative conclusions.<sup>99</sup> One only has to accept the relatively uncontroversial *P3* (that judges have at least a *prima facie* duty to apply the law).<sup>100</sup> Second, the Core Argument offers more fertile and promising terrain for scholarly debate about interpretive questions because it focuses scholarly attention on traditional legal sources and redirects it away from heady conceptual questions or controversial normative debates.<sup>101</sup> The Core Argument thus "clear[s] away some theoretical underbrush"<sup>102</sup> with the hope that doing so will "allow both sides to move forward."<sup>103</sup>

Despite these methodological ambitions, most of the positive turn's critics have focused on only one of the many possible minor premises, namely one where *X* = originalism. Some have argued that the positive turn's versions of originalism are too capacious to be of any interest.<sup>104</sup> Others have denied that they offer plausible readings of the case law.<sup>105</sup> Still others suggest that they put too much stock in judicial rhetoric.<sup>106</sup> An entirely different line of attack questions whether the argument really has the resources to make normative

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98. See *supra* Introduction.

99. Cf. Baude, *supra* note 3, at 2408 ("This positive turn answers the dead-hand argument famously leveled against originalism: The earth belongs to the living, so why should constitutional law be controlled by the decisions of the dead? The original meaning of the Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document's past."); Sachs, *supra* note 3, at 847 ("So we might need to know the law of a previous era to know who owns Blackacre today. We don't use this rule because we're forced to do so (in some dead-hand sense) or out of slavish devotion to our ancestors. Instead, *nemo dat* is part of our current law, which we know to be law because of current social facts, and which we've currently chosen to suspend in some cases and not others.").

100. The "prima facie" qualification is important, as Baude well recognizes. See Baude, *supra* note 3, at 2395 (clarifying that the judicial duty to apply the law "is not at all absolute" and may be overridden by "more pressing moral concerns").

101. See *id.* at 2351; Sachs, *supra* note 3, at 819.

102. Sachs, *supra* note 3, at 822.

103. Baude, *supra* note 3, at 2351.

104. See, e.g., FLEMING, *supra* note 5, at 19; Segall, *supra* note 5, at 38.

105. See, e.g., Primus, *supra* note 5, at 50-51; Segall, *supra* note 5, at 45.

106. See, e.g., Primus, *supra* note 5, at 52.

arguments in the way it seems to assume, thereby questioning the adequacy of *P3* to solve the dead hand problem.<sup>107</sup>

Such criticisms are valid and important. But the most serious potential problem with the Core Argument is its (first) major premise, *MP*, which states that “the law is whatever is supported by the right kind of social facts.”<sup>108</sup> Plainly, much hangs on defining the “right kind of social facts.”<sup>109</sup> For unless or until that phrase is given concrete meaning, the Core Argument is empty. The label “positive” implies that the facts are meant to be nonmoral facts or what Mark Greenberg calls “descriptive facts,” to be contrasted with moral or “value facts.”<sup>110</sup> And they are typically dubbed “social” facts to indicate that they are facts about how groups of certain individuals behave. So that is a start. But, as already noted, legal positivists have disagreed about which descriptive social facts determine law’s content and existence.<sup>111</sup> Are they facts about what a sovereign commands?<sup>112</sup> About the rules laid down by courts?<sup>113</sup> About the practices of officials?<sup>114</sup> About the intentions of, or the actions taken by, a legal system’s planners?<sup>115</sup> Without knowing which facts are the law-determining ones, judges cannot know which interpretive rules they are under a legal obligation to apply. Nor can scholars know how to begin the process of asking which interpretive rules are part of “our law.”

So how *do* we know which social facts require attending to? Does it even matter? If it does matter, what kind of inquiry does answering those questions involve? Remarkably, Baude and Sachs provide no clear answers to these questions.<sup>116</sup> It is remarkable because if it turns out that the content of *MP* makes a difference as to whether the Core Argument can produce its supposed benefits, then one’s choice of jurisprudential theory is critical to the positive turn. And if it further turns out that any decision to specify *MP* with a particular theory of law depends on controversial conceptual or normative

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107. See, e.g., Pojanowski & Walsh, *supra* note 5, at 114-15; Smith, *supra* note 5.

108. Sachs seems to agree. He explains that the crux of his objection to the “conceptual” approach to constitutional theory lies in its choice of major premise. See Sachs, *supra* note 3, at 829.

109. *Id.* at 835.

110. See Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157, 157 (2004) (emphasis omitted) (“A central claim of legal positivism is that the content of the law depends only on *social facts*, understood as a proper subset of descriptive facts.”).

111. See *supra* Introduction.

112. See AUSTIN, *supra* note 20, at 8-14.

113. See GRAY, *supra* note 20, at 86.

114. See HART, *supra* note 20, at 110.

115. See SCOTT J. SHAPIRO, LEGALITY 193-208 (2011).

116. See *supra* Introduction.

arguments, then the positive turn will have failed to clear away any “theoretical underbrush”<sup>117</sup> at all. We will still be knee deep in it.

## II. Testing the Positive Turn

As it turns out, both things are true. It matters which theory of law underwrites the Core Argument, and defending any of them requires engaging in conceptual or normative argument. The burden of this Part is to show why that is. It meets that burden by analyzing how the Core Argument would run under four different approaches to giving meaning to the phrase “right kind of social facts” in *MP*.<sup>118</sup> The first three each derive different specifications of *MP* from well-known theories of law: those of H.L.A. Hart, Joseph Raz, and Scott Shapiro. The final approach takes the “internal” perspective of a legal participant who denies the need to ground *MP* in a larger theory of law at all.

Although each of these approaches fits certain aspects of Baude and Sachs’s arguments quite well, not one of them enables the positive turn to fulfill its potential. The Core Argument is either patently false as applied to some of Baude and Sachs’s core substantive claims,<sup>119</sup> or it fails to generate its purported benefits—because it cannot reduce the number of (let alone settle) disagreements over interpretive methodology,<sup>120</sup> because it leads to the kind of normative and conceptual debates it was meant to supplant,<sup>121</sup> or because it simply replicates the kind of arguments lawyers already make.<sup>122</sup> In either case, we are back to where we started.

The lesson, though, is not simply that Baude and Sachs must find some other theory of law to ground the Core Argument. It is rather that any such effort would be self-defeating. The reason is that the positive turn manages to convey a sense of both originality and profundity only because it elides deep and hard questions about the nature of law and legal argument. Tracing out the

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117. Sachs, *supra* note 3, at 822.

118. It is worth noting that framing the question in this way may imply a view that Mark Greenberg has called “Atomism,” according to which the legal status of each norm can be identified one by one. See Greenberg, *The Standard Picture*, *supra* note 77, at 49-50. Greenberg rejects Atomism and argues that assuming it to be true in a sense stacks the deck in favor of positive theories because it unduly limits the available options for antipositive theories like Dworkin’s (or Greenberg’s). See *id.* at 49, 62-65. If Greenberg is right, then Baude and Sachs may have an even bigger problem than this Article suggests. But this Article puts that issue aside, giving the authors the benefit of the doubt on this question.

119. See *infra* Part II.A.2.a (discussing one aspect of Hart’s theory).

120. See *infra* Part II.A.2.b-c (discussing another aspect of Hart’s theory).

121. See *infra* Part II.B-C (discussing Raz’s and Shapiro’s theories).

122. See *infra* Part II.D (discussing the view that denies the need to ground an interpretive approach in a philosophical account of law).

implications of each of these different theories of law illustrates why such moments of ambiguity and evasion preclude the positive turn from delivering on its promise.

A. Hart's Rule of Recognition

Baude and Sachs seem most inclined to adopt Hart's theory of law.<sup>123</sup> Their embrace of Hart is understandable given how influential and widely accepted his theory has become.<sup>124</sup> It turns out, though, that Hart's model of law is poorly suited to the authors' purposes. Hart's theory is well known, so this Subpart gives only a brief outline of his view, glossing over complexities in his theory and exegetical disputes about his meaning. It then considers how the positive turn would look under Hart's view.

1. Summary

The problem Hart set out to solve in *The Concept of Law* was how to reconcile two features of legal systems that seemed potentially in tension with one another. On the one hand, the existence and content of law seemed to be mainly questions of fact; on the other hand, those who live within a legal system tend to treat its rules of law as *normative*, or as guides to action.<sup>125</sup> Although previous positivists (for example, Austin<sup>126</sup> and Holmes<sup>127</sup>) had offered theories that explained the former quality of law, they had mostly ignored the latter.<sup>128</sup>

Hart sought to solve this problem by introducing two key distinctions, both about the nature of rules (or, more specifically, what he called "social rule[s]" or rules of conduct<sup>129</sup>). First, he distinguished between two points of view or perspectives with respect to any given rule or pattern of conduct.<sup>130</sup> The "internal" perspective was that of someone who took such a rule as a guide for his or her own conduct.<sup>131</sup> Such a person would describe the rule using

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123. See *supra* note 17.

124. For a variety of views about how Hart's model applies to the U.S. legal system, see Matthew D. Adler & Kenneth Einar Himma, *Introduction to THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, at xiii (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

125. See HART, *supra* note 20, at 6-8.

126. See AUSTIN, *supra* note 20, at 132-33.

127. See Holmes, *supra* note 20, at 457-58.

128. Cf. HART, *supra* note 20, at 84.

129. *Id.* at 9-10.

130. See *id.* at 56.

131. Cf. *id.* at 9-10, 56.

normative language, with words like “should” and “must,” in sentences like “there is a rule that a man *must* bare his head in church.”<sup>132</sup> But one could also view the exact same behavior from an “external” perspective.<sup>133</sup> Taking this perspective did not require the use of such normative language; instead, one could simply describe the rule as a pattern of conduct in purely descriptive and predictive terms<sup>134</sup>—for example, “as a rule, men tend to take off their hats when entering church.” Crucially, a social rule can be said to exist only if a sufficiently large number of people take the internal point of view with respect to it.<sup>135</sup>

Hart’s second distinction was between two types of social rules. “Primary” rules are rules of conduct that tell people how they should act.<sup>136</sup> They could be legal rules, but they could also be rules of etiquette or baseball or whatever. “Secondary” rules, however, are rules that govern how one makes primary rules.<sup>137</sup> So for instance, an organization’s bylaws providing that any change to the bylaws requires a two-thirds vote of the membership is a secondary rule.

In the union of these two ideas, Hart thought he had found “the key to the science of jurisprudence.”<sup>138</sup> The reason is that together they explained how law could exist as a matter of fact and yet also be the source of normative obligations for those who live under it.<sup>139</sup> A primitive society with only

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132. *Id.* at 10 (emphasis altered).

133. *Cf. id.* at 10, 56.

134. *Cf. id.* What precisely Hart meant by the “external” point of view is a subject of debate, as he used the term in a couple of different ways. This Article passes over those complexities. For my own take on (and criticism of) Hart’s use of this internal/external distinction, see Barzun, *supra* note 22, at 1212-24.

135. See HART, *supra* note 20, at 116.

136. See *id.* at 81.

137. See *id.* The precise meaning of this distinction, too, has been the subject of debate. For an analysis of some of the ambiguities in Hart’s primary/secondary rule distinction, see NEIL MACCORMICK, *H.L.A. HART* 55-88 (2d ed. 2008), which discusses Hart’s distinction between “duty-imposing” and “power-conferring” rules.

138. HART, *supra* note 20, at 81 (borrowing a phrase from Austin); see also AUSTIN, *supra* note 20, at 11.

139. Some dispute that Hart sought to show how law could generate genuine normative obligations. See, e.g., Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 48 AM. J. JURIS. 17, 38 (2003) (“Hart has nothing to say about the normativity of law in the main text of *The Concept of Law*, beyond a refutation of the Austinian account.”); Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157, 1166 (2006) (“Hart did not intend for the internal point of view to provide an explanation for the reason-giving nature of social rules and law.”). But see Veronica Rodriguez-Blanco, *Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View*, 20 CAN. J.L. & JURIS. 453, 460 (2007) (interpreting Hart as seeking to explain how “rules give reasons for actions”). But for reasons I have provided elsewhere, the better reading, in my view, is that Hart did set for himself that goal. Barzun, *supra* note 22, at 1224 n.65. For what it is worth, one of Hart’s biographers takes the same view. See NICOLA LACEY, *footnote continued on next page*

“primary rules of obligation” cannot be said to have a legal system because there is no “identifying or common mark” that distinguishes and sets primary rules apart from rules of morality or etiquette.<sup>140</sup> Furthermore, such rules are difficult to define, hard to enforce, and hard to change.<sup>141</sup> To overcome these “defects,” societies develop secondary rules, the satisfaction of which indicates that a given primary rule “is a rule of the group to be supported by the social pressure it exerts.”<sup>142</sup> Once a group of people—in particular, a group whom Hart calls “officials”—develops a practice of “accept[ing] as [a] common public standard[]” (in other words, taking the internal point of view toward) such a secondary rule, one of two necessary and sufficient conditions of a legal system is satisfied.<sup>143</sup> Such a rule, or set of rules, is what Hart famously called the “rule of recognition.”<sup>144</sup> The rule of recognition is shorthand for the set of rules that provide the criteria for making valid law.<sup>145</sup> And because the rule of recognition is constituted by the practice of officials taking the internal point of view with respect to it, the key social facts for Hart are facts about what *officials* do and say.<sup>146</sup>

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A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 228 (2004) (“Herbert was never convinced that he had satisfactorily resolved this dilemma about the restricted, but genuinely normative, notion of obligation in law: he returned frequently to the issue, trying to capture the precise sense in which law, its existence in his view a matter of social fact, generates genuine obligations to conform to its duty-imposing rules.”).

140. See HART, *supra* note 20, at 91-92.

141. See *id.* at 91-93.

142. *Id.* at 94.

143. See *id.* at 100, 116. The other necessary condition is that there be general compliance with the system’s primary rules of obligation. See *id.* at 116. To be precise, this foundational, accepted rule is what Hart calls the “ultimate” rule of recognition. *Id.* at 107. But Hart frequently omits the “ultimate” when discussing the rule of recognition, as have subsequent theorists. See, e.g., *id.* at 110 (explaining that the “rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria”); Matthew D. Adler, *Constitutional Fidelity, the Rule of Recognition, and the Communitarian Turn in Contemporary Positivism*, 75 FORDHAM L. REV. 1671, 1671 (2006) (“A legal system exists only if the system’s rule of recognition, stating its ultimate criteria of legal validity, is accepted by the persons who count as officials within that system—only if those persons adopt the internal point of view towards the rule of recognition.”). Hart also sometimes used the term in its singular form, e.g., HART, *supra* note 20, at 100, and sometimes in its plural form, e.g., *id.* at 95.

144. HART, *supra* note 20, at 94.

145. See *id.*

146. See *id.* at 110 (“For whereas a subordinate rule of a system may be valid and in that sense ‘exist’ even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.”).

2. The Core Argument and the rule of recognition

What would the Core Argument look like under this understanding of the nature of law? It is tempting to fill out the major premise with something like, “*The law is whatever the practice of current officials makes law.*” This formulation nicely captures Hart’s core idea that law depends on a current social practice—a view Baude and Sachs repeatedly endorse.<sup>147</sup>

So stated, however, this Major Premise contains two ambiguities, one of which can be put aside but the other of which is critical to clarify. The first ambiguity is about who counts as an “official.” Every government employee? Only high-ranking employees? Only judges? Lawyers, as well? Hart was not always entirely consistent on this matter, and other theorists have suggested other answers while remaining faithful to the spirit of Hart’s model.<sup>148</sup> To their credit, Baude and Sachs both recognize the difficulty of this question and are upfront about their own provisional answers to it.<sup>149</sup> So although making choices about exactly *whose* practice counts could lead to some of the same problems raised below, this Subpart will not pursue that possibility here. Instead, it will follow Baude and Sachs in assuming that the relevant officials, at least for the purposes of determining the legal validity of interpretive rules, are judges.<sup>150</sup>

The second ambiguity, however, must be addressed head on. According to Hart, there are two ways a rule can achieve the status of law: either it satisfies the criteria of the rule of recognition (for example, “it was passed by a majority of both houses of Congress and signed by the President”) or it is simply “accepted” by current officials as law (like the rule of recognition itself).<sup>151</sup> In

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147. See, e.g., Baude, *supra* note 3, at 2364 (“To ask whether the written Constitution and the original interpretive rules are the law today is to ask a question about modern social facts.” (emphasis omitted)); *id.* at 2390; Sachs, *supra* note 3, at 819 (explaining that an inquiry into whether originalism is part of our law “points the way toward what we could call ‘positive’ defenses—claims that originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law”); *id.* at 849.

148. Compare HART, *supra* note 20, at 110 (referring to the rule of recognition as a “practice of the courts, officials, and private persons”), with *id.* at 116 (specifying that a necessary and sufficient condition of a legal system is that its rules of recognition and change are “accepted as common public standards of official behaviour by its officials”). For additional analysis, see Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 729-45 (2006).

149. See Baude, *supra* note 3, at 2370 (“[I]t may ultimately be important to look to official practice beyond judges.”); Sachs, *supra* note 3, at 883 (acknowledging the significance of—without actually answering—the question, “Does the best positivist theory identify law through the conventions of ordinary people, or through the practices of lawyers, judges, and officials?”).

150. See, e.g., Baude, *supra* note 3, at 2370.

151. See HART, *supra* note 20, at 110; see also *id.* at 103 (“If this use of an accepted rule of recognition in making internal statements is understood and carefully distinguished  
*footnote continued on next page*”)



other words, the officials take the internal point of view with respect to it, viewing it as a source of legal obligation. Thus, a fleshed-out version of the Major Premise would state something like the following:

*MP(H)*: The law is *either* (a) whatever satisfies the criteria that officials treat as providing the necessary and sufficient conditions of making valid law (operand *A*) or (b) whatever officials simply accept as law (operand *B*).

The difference between the two operands of the disjunction, *A* and *B*, matters because it determines which kinds of facts are relevant to determining whether a rule qualifies as “law.” Both ultimately depend on the current practice of judges. But whereas *B* begins and ends with current practice (to determine if judges “accept” a given rule), *A* asks whether the rule has satisfied certain criteria of validity that current practice requires in order for something to qualify as law. In other words, it asks judges to examine a rule’s *pedigree*.<sup>152</sup>

It is not always easy to discern which kinds of facts Baude and Sachs think matter for determining an interpretive rule’s legal status. Are they facts about whether the rule meets particular criteria of validity, which requires inquiry into the rule’s *historical* pedigree? Or are they simply facts about the interpretive rule’s *current* acceptance by judges, which does not require any such inquiry? Let us consider each possibility separately.

a. Validated by the rule of recognition?

Sometimes Baude and Sachs seem to argue that whether an interpretive rule (or method or theory) is part of “our law” depends on whether it satisfies our legal system’s criteria of legal validity (or Hart’s rule of recognition).<sup>153</sup> And they suggest that the relevant procedure is the ratification of the Constitution itself, so that the question of any given interpretive rule, whether constitutional or statutory, is whether it was part of our law at the Founding (or has been

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from an external statement of fact that the rule is accepted, many obscurities concerning the notion of legal ‘validity’ disappear.”).

152. See Baude, *supra* note 3, at 2363 (“This form of inclusive originalism simply requires all other modalities to trace their pedigree to the original meaning.”); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17 (1967) (ascribing to legal positivism the view that “[t]he law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power” and that such rules “can be identified and distinguished by specific criteria, by tests having to do not with their content but with their *pedigree* or the manner in which they were adopted or developed”); Sachs, *supra* note 3, at 865 (“Our legal practices care about history. Whether a rule has the right historical pedigree does a great deal to show that it’s part of our law.”).

153. See *supra* Part I.

added through a valid rule of change).<sup>154</sup> The problem with this view is that judicial practice does *not* require interpretive rules to be validated in this way.

Let us start in the constitutional context. Baude and Sachs provide a total of three examples in support of the claim that judges today require constitutional interpretive rules to have been ratified at the Founding, but two of them actually count as evidence *against* the authors' thesis. Their best example is the recent *Noel Canning* case, which is probably why both authors discuss it.<sup>155</sup> In that case, Justice Breyer—in holding that subsequent governmental practice is relevant to the interpretation of the Recess Appointments Clause—quoted James Madison's suggestion that such governmental practice may “liquidate & settle” ambiguous provisions of the Constitution.<sup>156</sup> Justice Breyer thus implied that using practice to interpret the Constitution is an interpretive method that must itself be authorized by Founding-era sources in just the way Baude and Sachs claim.

It is not obvious that Justice Breyer meant to assert that the turn to practice required validation from the Founding, but let us grant Baude and Sachs that one.<sup>157</sup> One case is hardly sufficient to constitute a “practice,” and the fact that the other two cases Baude briefly mentions actually contradict his claim rather than support it suggests that establishing the existence of such a practice will be difficult. Baude explains that in the *Pocket Veto Case* the Court

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154. See *supra* Part I; see also Baude, *supra* note 3, at 2355 (“Under inclusive originalism, the original meaning of the Constitution is the ultimate criterion for constitutional law, including of the validity of other methods of interpretation or decision. This means that judges can look to precedent, policy, or practice, but only to the extent that the original meaning incorporates or permits them.” (emphasis omitted)); Baude & Sachs, *supra* note 3, at 1127 (explaining that in order to determine the legal validity of a canon of construction, the authors “would ask whether the canons were rules of law at the Founding or have validly become law since, pursuant to rules of legal change that were themselves valid in this way”); Sachs, *supra* note 3, at 820-21 (“What originalism requires of legal change is that it be, well, legal; that it be lawful, that it be done according to law. This is a requirement of procedure, not substance.” (emphasis omitted)).

155. Baude, *supra* note 3, at 2372-74 (discussing *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)); Sachs, *supra* note 3, at 856 (discussing the same case).

156. *Noel Canning*, 134 S. Ct. at 2556, 2559-60 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 447, 450 (Gaillard Hunt ed., 1908)).

157. In support of its conclusion that “in interpreting the [Recess Appointments] Clause, we put significant weight upon historical practice,” the Court first quoted *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819), and the *Pocket Veto Case*, 279 U.S. 655, 689 (1929). *Noel Canning*, 134 S. Ct. at 2559 (emphasis omitted). It then went on to observe that “[t]hat principle is neither new nor controversial,” *id.* at 2560, and quoted a letter from James Madison to Spencer Roane in 1819, in which Madison said that it was “foreseen at the birth of the Constitution” that governmental practice might “liquidate & settle the meaning of” certain constitutional provisions, *id.* (quoting Letter from James Madison to Spencer Roane, *supra* note 156, at 450).

stated that subsequent practice “is a consideration of great weight,”<sup>158</sup> and he observes that in *Mistretta v. United States* the Court looked to subsequent practice only after looking to the text of the relevant provision and its original history.<sup>159</sup> But neither of these facts supports Baude’s claim that the Court requires *validation* of an interpretive rule by its presence at the Founding. The Court in the *Pocket Veto Case* cited three cases in support of its use of subsequent practice as an interpretive aid, but in none of those cases did the various courts trace the method’s lineage back to the Founding.<sup>160</sup> In fact, one of them cited provisions of Justice Story’s treatise on the Constitution in which he explicitly invokes subsequent practice as an *alternative* to original meaning.<sup>161</sup> Nor is it sufficient that the Court in *Mistretta* looked to text or original meaning before looking to practice as a source of additional guidance. What inclusive originalism supposedly requires is that a court may only look to subsequent practice *because of* its inclusion in the original Constitution.<sup>162</sup> And yet nothing in the Court’s opinion indicates that it saw itself as so constrained.

Baude acknowledges that the Court has not made its “methodological hierarchy explicit” in these cases, but he seems to consider that inconsequential.<sup>163</sup> It is not. The reason is that there is an obvious alternative explanation for how courts treat interpretive rules. What the Court requires is *some* historical support for its interpretive approach in order to prove that it is not making the approach up out of whole cloth. The fact that a rule has been around for a long time suggests that it may be considered custom. And customary law is authoritative not because its pedigree is traceable to a particular validating event but rather because its age and endurance over time

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158. Baude, *supra* note 3, at 2374 (quoting *The Pocket Veto Case*, 279 U.S. at 689).

159. *Id.* (citing *Mistretta v. United States*, 488 U.S. 361, 399-401 (1989)).

160. *See* 279 U.S. at 689-90 (citing *Myers v. United States*, 272 U.S. 52, 119, 136 (1926); *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 284 (1919); and *State ex rel. Town of Norwalk v. Town of South Norwalk*, 58 A. 759, 761 (Conn. 1904)).

161. *Myers*, 272 U.S. at 149-50 (citing 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1543, at 343-44 (Boston, Charles C. Little & James Brown 2d ed. 1851)); *see also* 2 STORY, *supra*, § 1544, at 345 (“Whether the predictions of the original advocates of the executive power, or those of the opposers of it, are likely, in the future progress of the government, to be realized, must be left to the sober judgment of the community, and to the impartial award of time. If there has been any aberration from the true constitutional exposition of the power of removal, (which the reader must decide for himself,) it will be difficult, and perhaps impracticable, after forty years’ experience, to recall the practice to the correct theory.”).

162. *See* Baude, *supra* note 3, at 2397 (“Originalism obligates judges to a particular method of reasoning, both by placing the original meaning at the top of the pyramid of authority and by providing a test for which other methods may be used in the lower steps.” (emphasis added)).

163. *See id.* at 2374.

suggest that it works well or has been broadly accepted.<sup>164</sup> Under this quite conventional common law understanding, the Court’s “methodological hierarchy” is not just not “explicit.” It is nonexistent.

The same point responds to Sachs’s suggestion that courts have a deep concern for pedigree when it comes to interpretive rules. Lacking much case law support beyond *Noel Canning* for this view, Sachs looks to “higher-order principles” and lawyerly intuitions about how we typically think about law.<sup>165</sup> “If we found out tomorrow that stare decisis didn’t exist at the Founding, and that it had been invented out of whole cloth by Chief Justice Burger,” he asserts, “that’d surely be concerning to many American lawyers and academics.”<sup>166</sup>

Maybe so, but this is surely a false dichotomy. If we found out that our practice of stare decisis in its current form was neither an “invention” of the last half-century nor a feature of the Founders’ law but was instead the result of gradual changes in legal practice throughout the nineteenth century, would that be “concerning to many American lawyers and academics”? I doubt it, which may be why it is easy to find examples of the Court employing methods for interpreting sources of constitutional law without bothering to trace the methods’ pedigrees back to the Founding.<sup>167</sup>

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164. See Oliver Wendell Holmes, Jr., *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) (saying of the common law that a “well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step”); Gerald J Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 170 (2002) (“Most common lawyers [in the seventeenth century] were inclined to accept some version of the idea that the long experience exemplified in the continuous tradition of common law was on the whole one of the common law’s greatest assets.”). Baude and Sachs seem to acknowledge and endorse this common law view in their most recent article. See Baude & Sachs, *supra* note 3, at 1138 (“Courts might have a judicial obligation to find common law rules in other sources (including customary sources), not merely to make them to fit one’s will.” (emphasis omitted)).

165. See Sachs, *supra* note 3, at 867.

166. *Id.* at 873. This Article puts to the side the question whether Sachs’s suggestion implies that the views of “lawyers and academics” in part constitute the rule of recognition. Sachs’s point could be made equally well by referring to the views of judges.

167. For example, *Home Building & Loan Ass’n v. Blaisdell* explained that “the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature.” 290 U.S. 398, 427 (1934). *Blaisdell* cited *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434 (1932), and *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 505 (1841) (opinion of McLean, J.), neither of which traces the lineage of this interpretive rule back to the Founding. The Court in *NLRB v. Jones & Laughlin Steel Corp.* also observed that “[w]e have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act.” 301 U.S. 1, 30 (1937). *Jones & Laughlin* cited *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 346 (1928); *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.); *Missouri Pacific*  
*footnote continued on next page*

Thus, even if Baude and Sachs are right that courts today in some sense “start” with original meaning, “inclusive originalism” and “original-law originalism,” as they describe those theories, require more than that. They require that interpretive rules and methods become part of our law *by virtue of* their inclusion in the Founders’ law (or by virtue of having been subsequently authorized by a valid rule of change).<sup>168</sup> And yet Baude and Sachs provide scant evidence that courts today are (or ever were) in the slightest bit concerned about tracing the pedigree of second-order interpretive rules to the Founding.

The case for judicial concern with pedigree is even weaker in the context of statutory interpretation. Some interpretive rules (such as the Dictionary Act<sup>169</sup>) do have a clear legal pedigree, and Baude and Sachs mention some of these.<sup>170</sup> But the hottest and hoariest debates among courts and scholars are not about the Dictionary Act. They instead revolve around unwritten interpretive rules and methods—things like canons of construction.<sup>171</sup>

When it comes to such rules, Baude and Sachs again say that an interpretive rule’s legal status hangs on whether it was either ratified at the Founding or became part of our law through a valid rule of legal change subsequent to the Founding.<sup>172</sup> The most likely candidate for such a rule of change in the context of unwritten law would be one that flows from *stare decisis* (because the term “unwritten law” typically refers to case law). Such a rule might provide, for instance, that an interpretive rule qualifies as law if and only if its use is compelled by a controlling decision.<sup>173</sup> So the *Chevron* rule requiring court deference to an agency’s reasonable interpretation of a statute it administers may be such an interpretive rule.<sup>174</sup> It is an interpretive rule that qualifies as law, and it does so because the Supreme Court decided a case in which it articulated and applied that rule. But *Chevron* is the exception that proves the rule, as even Baude and Sachs recognize. They concede that courts

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*Railroad Co. v. Boone*, 270 U.S. 466, 472 (1926); *Panama Railroad Co. v. Johnson*, 264 U.S. 375, 390 (1924); and *FTC v. American Tobacco Co.*, 264 U.S. 298, 307 (1924)—none of which traces that interpretive rule back to the Founding (or cites a case that does so).

168. See Baude, *supra* note 3, at 2363 (“This form of inclusive originalism simply requires all other modalities to trace their pedigree to the original meaning.”).

169. 1 U.S.C §§ 1-8 (2015).

170. See Baude & Sachs, *supra* note 3, at 1099-104.

171. See *supra* note 87 (collecting sources).

172. See Baude & Sachs, *supra* note 3, at 1127.

173. This Article puts aside the difficult question how one would decide when a given decision “controls.”

174. I take this example from Asher Steinberg, who uses *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to make a similar point. See Steinberg, *supra* note 5.

generally do *not* treat interpretive rules as binding as a matter of stare decisis.<sup>175</sup>

Baude and Sachs may object that I have only challenged their minor premise—that the sort of methods originalism they advance is in fact the law. I have done nothing to show that the positive turn *as such*, which requires looking to “our law,” is not a useful methodological development. So, for instance, Baude and Sachs at one point characterize their requirement that an interpretive rule’s pedigree be traceable back to the Founding as their own personal view, while recognizing that “other people might propose other tests instead.”<sup>176</sup>

But that misses the point of the discussion above. The problem is not just that courts do not adopt original-law (or original-methods) originalism. The problem is that courts today rarely trace the pedigrees of the unwritten interpretive rules they standardly employ to *any* ultimate criterion of legality.<sup>177</sup> Thus, when it comes to interpreting the Constitution or statutes, the first operand of the disjunction in *MP(H), A*, cannot help us distinguish between lawful and unlawful interpretive rules.

b. Accepted by current practice?

Even if interpretive rules are not made part of the law by virtue of having satisfied some accepted set of criteria determining legal validity, those rules may nevertheless attain the status of law on Hart’s view so long as they are “accepted” by judges as part of what performing their official duty requires them to do. Under this view, such rules are best thought of as part of the rule of

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175. Baude and Sachs cite Abbe Gluck, *see* Baude & Sachs, *supra* note 3, at 1137 n.344, who observed that “the federal courts do not recognize the canons as having the status of law—of any kind” and that “[o]ne of the strongest pieces of evidence to this effect is the absence of any kind of system of precedent for statutory interpretation methodology,” Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 777 (2013). But Baude and Sachs then point out that on a view of the common law they endorse, “a new rule might be slowly absorbed or rejected as general law, rather than imposed through the fiat of a single majority.” Baude & Sachs, *supra* note 3, at 1137.

176. Baude & Sachs, *supra* note 3, at 1127.

177. One might instead say that courts engage in a very cursory kind of pedigree analysis insofar as they typically cite a previous decision in which the court has relied on the rule or method, as in the examples discussed earlier in this Subpart. But as stated in the text above, Baude and Sachs recognize that courts do not treat stare decisis as binding with respect to interpretive rules, so it is not even clear that use in a prior case would qualify as a “condition of validity” for interpretive rules.

recognition itself. This, of course, is the second operand, *B*, in the disjunction contained in *MP(H)*.<sup>178</sup>

Baude and Sachs at various points suggest that this is how they imagine interpretive rules—both constitutional and statutory—becoming law. Sachs, for instance, devotes considerable attention to what he calls “domesticating doctrines”—like *stare decisis*—which validate *ex post* changes that did not come about through valid rules of change.<sup>179</sup> And Baude and Sachs suggest that we ought to understand canons of construction as part of what they call “general” (unwritten) law.<sup>180</sup> Under this view, when judges invoke canons of construction, “they aren’t necessarily ‘inventing rules of decision out of whole cloth.’”<sup>181</sup> Rather, “they might be recognizing elements of an existing general-law tradition—a tradition that makes its appearance in judicial decisions, but isn’t merely their creature.”<sup>182</sup> In other words, they encourage us to think of canons of construction and other unwritten interpretive rules as incorporated into our legal corpus because judges have accepted them as law.

The first point to observe about this suggestion is just how starkly it contrasts with Baude and Sachs’s concern with pedigree discussed above.<sup>183</sup> Recall Sachs’s insistence that “[i]f we can’t say *when* things have changed, that makes it harder to explain *how* they changed, which makes us less confident *that* they’ve changed.”<sup>184</sup> Now we learn that “a new rule might be slowly absorbed or rejected as general law, rather than imposed through the fiat of a single majority.”<sup>185</sup> Really? But if the new rule is “slowly absorbed” by the general law, then we cannot say precisely when the law changed. And if we cannot say *when* the law changed . . . ?

The more important point, though, goes to what is required for a rule to become part of the law if it does not do so by virtue of having satisfied the criteria of validity provided by the rule of recognition. Hart is quite clear on this score: a “social rule” like the rule of recognition only exists if deviation from the rule is met with criticism among the relevant community,<sup>186</sup> which

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178. Recall *MP(H)*: The law is either (a) whatever satisfies the criteria that officials treat as providing the necessary and sufficient conditions of making valid law or (b) whatever officials simply accept as law.

179. See Sachs, *supra* note 3, at 858-61.

180. See Baude & Sachs, *supra* note 3, at 1137.

181. See *id.* at 1137-38 (quoting Caleb Nelson, *The Legitimacy of (Some) Federal Common Law*, 101 VA.L. REV. 1, 7 (2015)).

182. *Id.*

183. See *supra* text accompanying notes 168-70.

184. Sachs, *supra* note 3, at 865.

185. Baude & Sachs, *supra* note 3, at 1137.

186. See HART, *supra* note 20, at 57.

in this case (we are still assuming) consists of other judges. So, for instance, a judge who failed to treat as binding law a congressional statute passed by both houses of Congress and signed by the President would be criticized by other judges for violating our legal system's rule of recognition.

Is the same true of judges who fail to apply a canon of construction in a given case? Is there a "general demand for conformity"<sup>187</sup> with respect to the use of any particular canon of construction? Is it the case that the "social pressure brought to bear upon those" who fail to use the rule of lenity or the rule of constitutional avoidance is "great," as Hart would require?<sup>188</sup> To be sure, one can find criticisms in any given case of a court's failure to apply a particular canon, but the key terms here are "general demand" and "social pressure." In Hart's view, in order for a social rule like the rule of recognition to exist there must be consensus or near-consensus as to its obligatory status.<sup>189</sup> Because the rule of recognition derives its legal status from its existence as official practice (rather than from having passed through the rule of recognition), under Hart's view, there can only be a "law of interpretation" insofar as such consensus or near-consensus exists.<sup>190</sup>

No doubt consensus is achieved around *some* interpretive approaches. A Supreme Court that completely fails to cite relevant precedent (even if only to then overrule it) might be said to violate such an accepted practice.<sup>191</sup> Similarly, Lawrence Solum points out that pretty much everyone agrees that the Constitution's text contributes in some way to its legal content.<sup>192</sup> More

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187. *Id.* at 86.

188. *Cf. id.* at 85-86 (describing the characteristics of the subclass of social rules we call "obligations").

189. This is a conceptual point about the nature of social rules. *See id.* at 116 (explaining that the requirement that judges be "critically concerned with . . . deviations [from the rule of recognition] as lapses from standards, which are essentially common or public," is "not merely a matter of the efficiency or health of the legal system, but is logically a necessary condition of our ability to speak of the existence of a single legal system").

190. Pojanowski and Walsh hint at this problem as well. *See Pojanowski & Walsh, supra* note 5, at 113 ("The positive turn cannot identify originalism as our law if there is substantial disagreement about the rule of recognition."). But they do not further develop the point. They also seem to conflate the problem disagreement poses for the rule of recognition with a methodological objection to Hart's descriptive form of conceptual analysis. *See id.* at 113-14. Both criticisms are valid, but in my view, the former stands independent of the latter.

191. Though, of course, which precedent is relevant is itself often a source of disagreement. *See, e.g., Romer v. Evans*, 517 U.S. 620, 640 (1996) (Scalia, J., dissenting) (arguing that "[t]he case most relevant to the issue before us today is not even mentioned in the Court's opinion" and then going on to discuss *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

192. Lawrence B. Solum, *Semantic Originalism* 9 (Apr. 21, 2009) (unpublished manuscript), <https://philpapers.org/archive/SOLSO> ("The contribution thesis is widely accepted. Indeed, so far as I know, no constitutional theorist rejects it.").



subtly, Baude and Sachs suggest that reading accessory liability into a criminal statute is a practice largely taken for granted.<sup>193</sup>

But recall that the promise of the positive turn was to show how “our law” (of interpretation) could offer us a way out of the scholarly impasse over proper interpretive methodologies. Because such debates are usually about precisely those interpretive methods about which there is *not* consensus (for instance, whether and how to use canons of construction and how to “construct” constitutional provisions when the text is vague), it is hard to see how the positive turn to “our law” could possibly be of value to either judges or scholars.<sup>194</sup> This is why Richard Fallon, whom Baude and Sachs take to task for resorting immediately to normative assessment of interpretive rules,<sup>195</sup> did not linger long on the possibility that the “law of interpretation” could provide answers to such interpretive debates. Fallon recognizes that under Hart’s view, where there is no consensus, there is no law.<sup>196</sup>

c. The problem of disagreement

Given these difficulties, it may be tempting to simply deny the requirement Hart imposes. Baude and Sachs might argue, for instance, that such judicial consensus about interpretive rules is too demanding a requirement. They sometimes say exactly that.<sup>197</sup> When judges rely on such methods, after all, they offer *legal* arguments for them and typically assert that relying on them is necessary to determine what the law requires. In that sense, such interpretive methods properly qualify as “law,” and if that is inconsistent with Hart’s framework, then so much the worse for his framework.

In fact, that is just what Ronald Dworkin argued thirty years ago.<sup>198</sup> Pointing to exactly the kinds of interpretive rules and methods that interest Baude and Sachs, he argued that Hart’s theory of law could not account for the

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193. See Baude & Sachs, *supra* note 3, at 1143.

194. It is true that there is a difference between controversies among scholars and controversies among judges, but the two tend to go hand in hand.

195. See Baude & Sachs, *supra* note 3, at 1143-44.

196. See Fallon, *supra* note 79, at 1277 (“Legal norms can and sometimes do distinctively govern legal interpretation. Nevertheless, an undeniable phenomenon of American legal practice involves interpretive disagreement. Absent agreed legal standards for choosing among linguistically eligible senses of or potential referents for claims of legal meaning, participants in legal interpretation and surrounding debates must therefore make normatively inflected judgments or choices—judgments or choices that are structured, but not wholly determined, by settled legal norms.” (footnote omitted)).

197. See Baude & Sachs, *supra* note 3, at 1146 (“[W]e don’t need a true consensus on individual legal disputes; within a given legal system, there can be correct and incorrect views of the law.”).

198. Cf. RONALD DWORKIN, *LAW’S EMPIRE*, at vii-ix (1986).

pervasive disagreement one sees in judicial practice over the proper methods to employ when interpreting cases, statutes, and the Constitution.<sup>199</sup> Dworkin thought that was a problem for Hart because Dworkin, like Baude and Sachs, observed that judges treat these interpretive rules as law-determining ones even though they disagree with each other about whether and when to use them.<sup>200</sup> Thus, these rules seem to serve a function analogous to the rule of recognition, yet they do *not* enjoy the judicial consensus that Hart's theory requires. Dworkin called this the problem of "theoretical disagreement,"<sup>201</sup> and it is one of his most lasting and influential critiques of Hart.

There have been various responses to the problem of theoretical disagreement—and we will consider two, including Dworkin's, below<sup>202</sup>—but the point now is just to see why Hart's own response to it is not available to the authors.<sup>203</sup> Hart accused Dworkin of taking judicial rhetoric too seriously.<sup>204</sup> Although it is true that judges *say* they use these interpretive principles and methods to determine "the law," in reality they are implementing a kind of discretion that exists when there is ambiguity as to how to read some statute, case, or the Constitution.<sup>205</sup> In other words, they are making law, not finding law.<sup>206</sup>

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199. *Cf. id.* at 37.

200. *Cf. id.* at 3-11.

201. *Id.* at 5. Scott Shapiro devotes over a quarter of his book, discussed in Part II.C below, to the problem of theoretical disagreement. *See* SHAPIRO, *supra* note 115, at 284 ("[W]hether positivists have any defense against [Dworkin's theoretical disagreement objection] is a matter that will occupy us for the rest of the book.").

202. *See infra* Part II.C.2.b.

203. *See, e.g.*, Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1227-32 (2009) (arguing that there is less theoretical disagreement than Dworkin claims and that Dworkin's theory cannot explain the massive amount of theoretical agreement one finds). *But see* Dale Smith, *Agreement and Disagreement in Law*, 28 CAN. J.L. & JURIS. 183, 190 (2015) (arguing that Dworkin's theory can explain pervasive theoretical agreement on the ground that there is pervasive moral agreement). For Leiter's latest intervention on the issue, see Brian Leiter, *Theoretical Disagreements in Law: Another Look*, in *ETHICAL NORMS, LEGAL NORMS: NEW ESSAYS IN METAETHICS AND JURISPRUDENCE* (David Plunkett et al. eds., forthcoming 2017) (manuscript at 1), <http://ssrn.com/abstract=2830732>.

204. *See* HART, *supra* note 20, at 273-74.

205. *Cf. id.* at 274-75.

206. *Cf. id.* For a sophisticated analysis explaining why what Dworkin characterizes as theoretical disagreement is more plausibly interpreted as a form of "metalinguistic negotiation" over proper word usage, see David Plunkett & Timothy Sundell, *Dworkin's Interpretivism and the Pragmatics of Legal Disputes*, 19 LEGAL THEORY 242, 248 (2013) (emphasis omitted).

Baude and Sachs cannot endorse Hart's response for two main reasons. First, they repeatedly defend the value of taking judicial rhetoric seriously.<sup>207</sup> Their whole point in suggesting that we look to our "general" (unwritten) law or our "legal tradition" to resolve our interpretive disputes depends on the idea that "the law" offers some determinate answers to the questions they raise in the way that judicial argument seems to assume.<sup>208</sup> And yet that is precisely what Hart denied.<sup>209</sup> The second and more important reason is the one already stated above: if there is no "law" on these questions, then the second syllogism in the Core Argument fails to go through.<sup>210</sup> Because interpretive rules that do not enjoy widespread consensus do not qualify as law (in Hart's sense), there is no obligation on the part of judges to apply them. And that was supposed to be one of the chief payoffs of the positive turn.

At times, Baude and Sachs seem to recognize the problem of disagreement,<sup>211</sup> but their responses indicate that they fail to grasp its significance. For instance, at one point, they frame the problem of disagreement as a "practical" problem because such disagreement "makes it harder to see what the law is."<sup>212</sup> But the problem is theoretical, not practical, and it is not that the disagreement makes it harder to "see" the law. At least under Hart's view, if there is pervasive disagreement about whether a rule is part of the rule of recognition, then it cannot be part of the rule of recognition, which means that *there is no law to see*.<sup>213</sup> That is why, as Mark Greenberg explains, no defender of *any* controversial theory of legal interpretation can appeal to Hartian positivism for support.<sup>214</sup> It follows that the same is true of Baude and Sachs's original-methods sort of originalism.

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207. See, e.g., Baude, *supra* note 3, at 2387 ("I will briefly state that I do think it is a mistake to dismiss the public reasoning by which the Court purports to justify its actions."); Sachs, *supra* note 3, at 837 ("We need to know the social facts of how these participants conventionally justify their legal positions[] [and] the arguments they're willing to accept and defend in public . . .").

208. Cf. Baude & Sachs, *supra* note 3, at 1146 ("[W]e don't need a true consensus on individual legal disputes; within a given legal system, there can be correct and incorrect views of the law.").

209. See HART, *supra* note 20, at 274 (describing the view of those judges who have "insisted that there are cases left incompletely regulated by the law where the judge has an inescapable though 'interstitial' law-making task, and that so far as the law is concerned many cases could be decided either way").

210. See *supra* Part I.D.

211. See Baude, *supra* note 3, at 2369; Baude & Sachs, *supra* note 3, at 1140-41.

212. See Baude & Sachs, *supra* note 3, at 1140.

213. To put the point in technical language, the existence of theoretical disagreement presents a metaphysical problem (about law's existence), not an epistemic one (about our knowledge of it).

214. Mark Greenberg, Response, *What Makes a Method of Legal Interpretation Correct?: Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105, 115 (2017) ("Because of  
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Elsewhere, Baude and Sachs suggest that in order for there to be “no law” on a topic, a legal system would have to utterly break down, which they quite rightly deny has happened.<sup>215</sup> But such deep and pervasive disagreement is not necessary to cause a problem for their approach. All that is needed is for there to be insufficient judicial consensus about whether a particular interpretive rule is a criterion of validity for establishing the legality of other rules. Without such consensus, a rule cannot be part of the rule of recognition and (therefore) fails to qualify as law at all.<sup>216</sup>

For this reason, it may be tempting for Baude and Sachs to instead insist that one *can* find judicial consensus if the issue is framed at a sufficiently high level of generality. All or nearly all courts agree, for instance, that there has been constitutional “continuity” since the Founding.<sup>217</sup> They all recognize, in other words, that there have been “no revolutions” between 1789 (or at least 1866) and today.<sup>218</sup> Disagreement among courts, on this view, only arises when it comes to *applying* our shared commitment to the “original law.” As Baude and Sachs put it in a subsequent essay, it is a view that is “catholic in theory but exacting in application.”<sup>219</sup>

But this response is either false or vacuous, depending on what Baude and Sachs mean by “continuity.” If they mean that courts treat the original meaning

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the straightforward way in which the rule of recognition is determined by the convergent practice of judges, nothing that is uncertain or controversial can be part of the rule of recognition.”)

215. See, e.g., Baude & Sachs, *supra* note 3, at 1146 (acknowledging the possibility that “there’s irreconcilable disagreement on the grounds of our legal order”); *id.* at 1146 n.401 (denying that the authors believe this “is the case with the American legal system”); Sachs, *supra* note 3, at 884-85 (“It’s hard to say the disagreements at the Founding were so fundamental as to eliminate the possibility of operative law.” (emphasis omitted)).

216. Unless, of course, it is a subordinate rule that has itself been validated by a (widely accepted) rule of recognition, but we have already covered that ground. See *supra* Part II.A.2.a.

217. Sachs, *supra* note 3, at 839 (“The American legal system, for example, accepts all sorts of changes made before the Constitution was adopted. Alleged changes made since the Founding, by contrast, aren’t accepted as brute historical facts; they need some kind of legal justification. Even after two hundred years, we share what some scholars have called ‘constitutional continuity’ with the Founding.” (quoting Joseph Raz, *Two Views of the Nature of the Theory of Law: A Partial Comparison*, in HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 11 n.22 (Jules Coleman ed., 2001))).

218. See Baude, *supra* note 3, at 2367; Sachs, *supra* note 3, at 820-21.

219. William Baude & Stephen E. Sachs, *Originalism’s Bite*, 20 GREEN BAG 2d 103, 104-06 (2016) (“General theories, open to a wide variety of facts, can be highly demanding once you fill in the details. The scientific *method* doesn’t prejudge whether the moon is made of green cheese. But the scientific *evidence* for that claim is terrible, and applying the method should tell you so . . . . In the same way, originalism doesn’t prejudge whether Justice Kennedy or Justice Scalia is correct about the Fourteenth Amendment. It identifies tools and criteria for deciding who is right.”).

of the Constitution as the “ultimate criterion for constitutional law, including of the validity of other methods of interpretation,”<sup>220</sup> then it is descriptively false for the reason already given, namely that there is little evidence that courts scrutinize the pedigree of many of the interpretive methods they employ at all, let alone trace them back to the Founding.<sup>221</sup> Alternatively, if Baude and Sachs mean that courts see themselves as operating as part of the same constitutional tradition as the Founders, then that seems true but too weak a claim to be of any use in rechanneling debates over interpretation in more productive ways. The reason is that so framed, there is still a lot of room for the sort of theoretical (rather than empirical) disagreement Dworkin observed. Does being part of the same continuous legal tradition as the Founders, for instance, entail that methods of interpretation may be absorbed through an evolutionary, common law process, or does it require a more formal “rule of change” to validly include such methods? Historical facts cannot answer that question because whether the Framers’ view on this issue matters is precisely the question at issue. Yet one can imagine reasonable judges disagreeing about it. Indeed, as suggested in their articles, the authors themselves seem to be of two minds about it.<sup>222</sup>

As a last resort, Baude and Sachs claim that there is less “indeterminacy” than one might think because there are interpretive rules whose function is to resolve close cases. First, “closure rules” tell courts what to do in zones of doubt, much as a burden of proof does in the factfinding context.<sup>223</sup> The rule of lenity, by which courts interpret ambiguous criminal statutes in favor of defendants, is one example of such a closure rule.<sup>224</sup> Second, “when even the closure rules run out, we have authority rules to tell us how to resolve individual disputes—such as a rule that five Justices beat four.”<sup>225</sup>

This response is so bizarre that it practically amounts to a *reductio ad absurdum* of their whole argument. True, there is widespread consensus supporting rules of court procedure like voting rules, so such rules would indeed qualify as “law” under Hart’s model. And no one can stop Baude and Sachs from including within the scope of the “law of interpretation” such

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220. Baude, *supra* note 3, at 2355.

221. *See supra* Part II.A.2.a.

222. Compare Baude & Sachs, *supra* note 3, at 1137 (“[A] new rule might be slowly absorbed or rejected as general law, rather than imposed through the fiat of a single majority.”), with Sachs, *supra* note 3, at 865 (“If we can’t say *when* things have changed, that makes it harder to explain *how* they changed, which makes us less confident *that* they’ve changed.”).

223. *See* Baude & Sachs, *supra* note 3, at 1110-12.

224. *See id.* at 1111; *see also, e.g.,* United States v. Santos, 553 U.S. 507, 514 (2008) (plurality opinion) (describing the rule of lenity).

225. Baude & Sachs, *supra* note 3, at 1146.

procedural rules for settling intracourt disagreement. But if Baude and Sachs aim to “clarify”<sup>226</sup> and “reorient”<sup>227</sup> scholarly debates over the proper roles of, among other things, canons of construction, legislative history, stare decisis, executive practice, original meaning, linguistic analysis, purposive interpretation, and political theory in statutory and constitutional interpretation by looking to a rule that says five Justices beat four, then the positive turn is not a U-turn. It is a lobotomy.

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In short, contrary to Baude and Sachs’s suggestions, if we fill out the major premise along the lines of *MP(H)*, the Core Argument is not up to the task they demand of it. Hart requires that we look to current judicial practice to determine what counts as law, and yet courts today generally do not trace the pedigree of interpretive rules (in either constitutional or statutory interpretation) back to the Founding or even to any valid rule of change. Nor do the interpretive rules Baude and Sachs discuss qualify as “law” by virtue of judicial consensus in the way that the rule of recognition does. The result is that under Hart’s view, there is very little “law of interpretation,” which means that the interpretive rules Baude and Sachs discuss impose upon judges no legal obligation.

None of this means that the positive turn is necessarily a failure. What we have been testing here is its consistency with one particular way of conceptualizing law. True, it is the most widely accepted theory of law and the one Baude and Sachs themselves purport to endorse. But the implication of the analysis above may be that we must abandon Hart’s theory of law, not the positive turn.<sup>228</sup> So let us see how *MP* might be filled out with two alternatives to Hart’s approach.

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226. *Id.* at 1084.

227. Baude, *supra* note 3, at 2351.

228. The same could be said of the argument in Sachs’s earlier article, which defends the coherence of the idea that a constitutional theory (such as originalism) could exist “in exile”—that is, while not currently enforced by courts. *See* Sachs, *supra* note 41, at 2255, 2261. Sachs argues that it is possible for courts to be in “global error” as to what the law requires. *See id.* at 2261, 2268. The reason is that even if what courts actually do becomes radically divorced from our shared higher-order practices (such as the hierarchical structure of legal reasoning), one can still talk intelligibly about the “law” that courts pervasively ignore. *Cf. id.* at 2256. Sachs may be right about that, but if he is, then Hart is wrong. As Sachs recognizes, for Hart the validity of a rule depends on its satisfaction of the rule of recognition, which exists as a “complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.” *Id.* at 2264 (quoting HART, *supra* note 20, at 110). It follows under this view that a rule no court applies cannot be law. Sachs may have been misled into thinking he can enlist Hart on his behalf by Hart’s observation that compliance with a

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B. Raz's Sources Thesis

Joseph Raz has developed one of the main rivals to Hart's version of legal positivism. Like Hart, Raz holds that the existence of a legal system's criterion of legal validity (and, therefore, the existence of its law) is entirely a question of social fact.<sup>229</sup> But unlike Hart, Raz further insists that it is impossible for the criterion of validity to incorporate moral principles as a basis for determining what counts as law.<sup>230</sup> That is why legal philosophers dub his view "hard" or "exclusive" legal positivism, thereby distinguishing it from Hart's "soft" or "inclusive" legal positivism.<sup>231</sup> To see why Raz imposes this further restriction

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rule is a distinct conceptual question from its validity. *See id.* (noting that on Hart's view, there is "no necessary connection between the validity of any particular rule and its efficacy" (emphasis omitted) (quoting HART, *supra* note 20, at 103)). But there Hart was talking about a rule's efficacy as a matter of guiding the conduct of those people to whom the rule has been applied—assuming that judges do apply the rule. *See* HART, *supra* note 20, at 103. He was not talking about a rule that is ineffective because no courts apply it. *See id.* And that makes all the difference because for Hart, as we have seen, the social practice on which law depends is the practice of courts and officials (and perhaps some "private persons," such as lawyers), not that of most people living under the law. *See id.* at 110.

229. *See* Joseph Raz, *Authority, Law and Morality*, 68 *MONIST* 295, 295-96 (1985).

230. *See id.* at 303-05 (building to this conclusion slowly, first by offering a theory of authority and then by insisting that law has to claim authority in the right kind of way); *see also* Brian Bix, *Patrolling the Boundaries: Inclusive Legal Positivism and the Nature of Jurisprudential Debate*, 12 *CAN. J.L. & JURIS.* 17, 19 (1999) (noting that on Raz's view, "for all (current and possible) legal systems, the content of current legal norms can be ascertained without recourse to moral evaluation").

231. The difference between hard and soft positivism is sometimes framed as the difference between the thesis *A* that all law necessarily does not require moral evaluation in order to be identified (hard or exclusive positivism) and the thesis *B* that whether law does require evaluation in order to be identified is itself a contingent social fact (soft or inclusive positivism). *See* Bix, *supra* note 230, at 19; *see also* Andrei Marmor, *Exclusive Legal Positivism*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 104, 104 (Jules Coleman & Scott Shapiro eds., 2002) ("Exclusive positivism denies, whereas inclusive positivism accepts, that there can be instances where determining what the law is[] follow[s] from moral considerations about that which it is there to settle."). The debate between exclusive and inclusive legal positivism has occupied the attention of legal philosophers for some time. For one of the earliest and most famous articles exploring the ambiguities in Hart's original formulation of the rule of recognition that led to the recognition of the distinction, *see* Jules L. Coleman, *Negative and Positive Positivism*, 11 *J. LEGAL STUD.* 139, 139-40 (1982). *See also* Stephen R. Perry, *The Varieties of Legal Positivism*, 9 *CAN. J.L. & JURIS.* 361, 362 (1996) (referring to Coleman's article as a "classic"). For other contributions, *see*, for example, Scott J. Shapiro, *On Hart's Way out*, 4 *LEGAL THEORY* 469, 476 (1998), which criticizes Hart and endorses hard positivism; and Perry, *supra*, at 361. *See also* W. J. WALUCHOW, *INCLUSIVE LEGAL POSITIVISM* 2-3 (1994) (articulating and defending inclusive legal positivism). For his part, Hart subsequently confirmed that he intended his version of legal positivism to be of the "inclusive" or "soft" sort. *See* HART, *supra* note 20, at 250-52. Whether this debate merits the ink that has been spilled on it is another matter. *See* Danny Priel, *Farewell to the Exclusive-Inclusive Debate*, 25 *OXFORD J. LEGAL STUD.* 675, 676-77, 676 n.3  
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on which kinds of facts can determine law, this Subpart examines how he develops his theory of law from his understanding of the nature of authority. Doing so demonstrates why Baude and Sachs cannot rely on Raz as jurisprudential support for *MP* without invoking just the kinds of arguments they insist the positive turn avoids.

### 1. Summary

Raz's account is based on the authoritative nature of law.<sup>232</sup> According to Raz, every legal system either has legitimate authority or claims to have such authority.<sup>233</sup> Authorities in general should base their directives on reasons that already apply to those subject to their authority.<sup>234</sup> Someone's authority over a subject is legitimate if the subject will "better comply with reasons which apply to him" if he follows the directives of the authority "than if he tries to follow the reasons which apply to him directly."<sup>235</sup> In this way, an authority's directives depend on (and preempt) the reasons that apply to a subject, and when the authority is legitimate, they do so to the benefit of the subject.

Not all (or even any) legal systems possess legitimate authority, but according to Raz, they all *claim* to possess it (which is why we call legal sources "authorities").<sup>236</sup> And if law claims to have legitimate authority, then it must at least be the kind of thing that is capable of having it.<sup>237</sup> Any person or persons claiming authority must be capable of issuing a binding directive that possesses at least two features: (1) it must be "presented as[] someone's view of how its subjects ought to behave" and (2) "it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which the directive purports to adjudicate."<sup>238</sup> Therefore, law—legal rules and directives—must possess these two qualities.

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(2005) (observing that, with one possible exception, the debate has "no practical implications" and offering an argument that he suggests ought to put it to bed).

232. Raz, *supra* note 229, at 300. The argument summarized in the text comes from Raz's article *Authority, Law and Morality*. See *supra* note 229. Raz has continued to write about the nature of law and authority, but this Article focuses on this work because it is a clear and succinct statement of the Sources Thesis.

233. Raz, *supra* note 229, at 300.

234. See *id.* at 299.

235. See *id.*

236. See *id.* at 300.

237. See *id.* at 301.

238. *Id.* at 303.



We can now see the nature of Raz's criticism of Hart. Hart allowed for the possibility that a rule of recognition might incorporate moral criteria.<sup>239</sup> So, for instance, if the practice of officials is such that they all agree that for a rule to be legally valid it must satisfy the requirements of "due process" or be "reasonable," and if application of those concepts itself requires moral judgments, then the law incorporates moral rules or principles.<sup>240</sup> But Raz argues that this possibility is inconsistent with the second requirement of binding directives mentioned above because it would mean that determining the law requires making reference to precisely the reasons the law was meant to replace.<sup>241</sup>

According to Raz, only the Sources Thesis satisfies both of the requirements above.<sup>242</sup> The Sources Thesis holds that the existence and content of law "can be identified by reference to social facts alone, without any resort to any evaluative argument."<sup>243</sup> This is true of each of the typical sources of law in most legal systems: statutes, cases, and custom.<sup>244</sup> But it is not true of moral principles.<sup>245</sup> Hence, law is necessarily and exclusively determined by social facts.

## 2. The Core Argument and the Sources Thesis

Perhaps, then, the Sources Thesis offers Baude and Sachs a jurisprudential basis for the positive turn. Consistent with their views, it emphasizes that social facts primarily—indeed, exclusively—determine the existence and content of law. Moreover, the emphasis on authority seems to fit well with Baude and Sachs's suggestion that our practices take seriously the Founders' authority.<sup>246</sup> Because we treat the Founders as authorities on matters of substantive constitutional law, we should also treat them as issuers of binding

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239. See HART, *supra* note 20, at 204 ("In some systems, as in the United States, the ultimate criteria of legal validity explicitly incorporate principles of justice or substantive moral values . . ."); see also *supra* note 231 and accompanying text.

240. See HART, *supra* note 20, at 204.

241. See Raz, *supra* note 229, at 303-05. It is also inconsistent with the first requirement of binding directives, but I leave that issue aside.

242. See *id.* at 315-20.

243. *Id.* at 296.

244. See *id.* at 305-06.

245. *Cf. id.* at 309-10.

246. Baude, *supra* note 3, at 2366 ("[I]t is empirically true, if slightly less obvious, that the Constitution is accepted in a particular way. We accept it as a legal command enacted by people in authority hundreds of years ago, made law through the process of ratification (and later amended)."); Sachs, *supra* note 3, at 849 ("What's distinctive about American practice . . . is that it relies on the law of the Founding." (emphasis omitted)).

directives with respect to our rules and methods of constitutional and statutory interpretation. So maybe *MP* could be filled out along the lines of:

*MP(R)*: The law is whatever can be found in the relevant social sources, so long as they can be “identified by reference to social facts alone, without any resort to any evaluative argument.”

The first thing to observe about *MP(R)* is that it may not help resolve the problem of disagreement discussed above.<sup>247</sup> The question is how one determines what the “relevant” social sources are, and it seems that Raz probably has something like a rule of recognition in mind as the means by which judges are able to identify the law.<sup>248</sup> If that is the case, then the problem raised by judicial disagreement, discussed above in reference to *MP(H)*,<sup>249</sup> would beset *MP(R)* as well.

But even putting that issue aside, there are two related, and deeper, problems. The first is that Raz’s exclusive legal positivism cuts against the whole thrust of Baude and Sachs’s defense of originalism. In their view, quite expansive methods of constitutional interpretation are permissible if (but only if) they were part of our “original law.”<sup>250</sup> Thus, if it turned out that as a historical matter, the Founders intended future judges to determine the law by reference to moral principles, it would seem that Baude and Sachs are committed to allowing for that scenario. After all, the possibility that the Founders may have envisioned more flexible forms of interpretation is precisely the basis on which Baude and Sachs criticize more traditional, restrictive forms of originalism. “Why be more ‘originalist’ than the Founders, or more Catholic than the Pope?” they each ask.<sup>251</sup> Baude even dubs his brand of originalism “inclusive originalism,” explicitly drawing an analogy to the exclusive/inclusive positivism distinction that divides Raz and Hart.<sup>252</sup>

Baude and Sachs might object that I have conflated two distinct issues. There is a difference between the Founders’ authorizing (a) forms of constitutional interpretation that allow judges considerable discretion to

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247. See *supra* Part II.A.2.c.

248. For evidence suggesting that Raz endorses something like a rule of recognition, see JOSEPH RAZ, PRACTICAL REASON AND NORMS 146-47 (1975). Raz characterizes the rule of recognition as “one of the most important contributions to our understanding of institutionalized systems.” *Id.* at 146. And he observes that because there may be more than one such rule, “[w]e should . . . conclude that, although every legal system must contain at least one rule of recognition, it may contain more than one.” *Id.* at 147.

249. See *supra* Part II.A.1.

250. See *supra* Part I.A-B.

251. Baude, *supra* note 3, at 2363 (quoting Sachs, *supra* note 3, at 821).

252. *Id.* at 2355; see also *id.* at 2355 & n.17 (“[I]t is useful to distinguish [exclusive from inclusive originalism] just as some within jurisprudence find it useful to distinguish between ‘inclusive’ and ‘exclusive’ legal positivism.”).

change the meaning of terms as society evolves (operand *A*) and (b) forms of constitutional interpretation that involve judges determining what the law is by reference to moral principles (operand *B*). Baude and Sachs might well concede that their theories of originalism allow for *A* but insist that, along with Raz, they deny that *B* is true. In other words, when judges interpret the Constitution's broad language, they make law rather than find it.<sup>253</sup>

But this response leads to the second problem. For the question is: What motivates Baude and Sachs's resistance to *B*? Raz has an answer to this question. For Raz, *B* is conceptually impossible because it is inconsistent with the nature of law, and it is inconsistent with the nature of law because it is inconsistent with the nature of authority. In particular, as we have just seen, it would mean that identifying the law requires referring to precisely those considerations (specifically, moral ones) that an authority's binding directive purports to settle.<sup>254</sup> But because law claims authority, its directives must at least be identifiable without referring to such underlying considerations. Thus, law cannot incorporate moral principles in this way.

Whether Raz's argument is convincing is not this Article's concern. Rather, the point is that Baude and Sachs cannot avail themselves of the argument without undermining the whole rationale for the positive turn. Recall that they offer a turn to "positive" defenses of originalism and other forms of constitutional and statutory interpretation on the ground that "conceptual" arguments are irrelevant to what really matters.<sup>255</sup> Even if, for instance, philosophers insist that the nature of "interpretation" requires looking to the original intentions of a document's drafters, if that is not how lawyers in, say, France read their legal documents, then so much the worse for the philosopher's theory. French legal practice trumps philosophical theory (in France, at least).<sup>256</sup> Presumably, then, the same would be true of the concept of authority. If it appears that judges invoke moral principles in determining what the law is, then it is not at all obvious why, under Baude and Sachs's view, we should allow such a "conceptual" argument like Raz's to refute an observed practice.<sup>257</sup>

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253. Raz himself draws this distinction in distinguishing his own position from that of Dworkin, who argues that something like *B* is also true. *See Raz, supra* note 229, at 310 ("[Dworkin and I] still have a disagreement regarding what judges do when they follow his advice. We assume that they follow right morality, but do they also follow the law or do they make law[?]"). Raz argues that they make law. *See id.*

254. *See supra* Part II.B.1.

255. *See supra* Part I.A-B.

256. *See Sachs, supra* note 3, at 834 ("[I]f the French practice is to ignore the philosophers and to derive legal rules by reading their own constitution in their own specific way, how can we say that this social practice is legally 'incorrect?'").

257. Baude even begins his article by encouraging scholars to move away from "conceptual debates" that "focus 'on the nature of interpretation and on the nature of constitutional

*footnote continued on next page*

The same point responds to a different objection. Baude and Sachs might (again) insist that I have conflated the methodological with the substantive claim. Perhaps the turn to our (now Razian) understanding of law does not vindicate their version of originalism, but that would just mean that their substantive argument fails, not that the positive turn is itself futile. But we have seen that any substantive claim about what the law requires based on the Sources Thesis will have to defend that thesis, which is itself the conclusion of a conceptual argument about the nature of authority.

In short, although it is conceivable that one could develop an originalist account based on Raz's theory of law, the spirit of Baude and Sachs's "inclusive" versions of originalism seems deeply inconsistent with Raz's hard positivism. And although it is possible to offer an interpretation of legal practice (originalist or otherwise) that is consistent with the Sources Thesis, any substantive legal claims derived from such an interpretation would depend on the kind of conceptual arguments that the positive turn promised to enable us to avoid.

### C. Shapiro's Planning Theory of Law

Scott Shapiro has recently advanced a theory of law that he calls the "Planning Theory" of law because it conceptualizes law as a type of plan formed by a group of individuals.<sup>258</sup> The Planning Theory fits Baude and Sachs's ambitions better than does either Hart's or Raz's theory. Even so, modeling the positive turn on Shapiro's account would lead to the same sorts of difficulties that plagued our earlier efforts.

#### 1. Summary

To understand why Shapiro's account may prove attractive to Baude and Sachs, it is useful to first show how Shapiro builds on Dworkin's criticism of Hart.<sup>259</sup> Dworkin argues that Hart cannot explain the way judges disagree with one another about what he calls the "grounds of law," which are propositions

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authority." Baude, *supra* note 3, at 2351 (quoting Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 37-38 (2009)); *see also* Berman, *supra*, at 66-68, 77-82 (discussing Raz's account of authority and how it bears on the originalism debate).

258. Technically, they are either plans or what Shapiro calls "planlike norms," which refer to customary laws. SHAPIRO, *supra* note 115, at 140; *see also* Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586, 590 (2010) (reviewing SHAPIRO, *supra* note 115) (calling *Legality* an "important contribution to analytic jurisprudence"); John Gardner & Timothy Macklem, *Scott J. Shapiro: Legality*, NOTRE DAME PHIL. REV. (Dec. 8, 2011), <http://ndpr.nd.edu/news/27609-legality> ("Scott Shapiro's much-anticipated book, *Legality*, sets out to provide a new account of the nature of law.").

259. *See supra* Part II.A.2.c.

that make legal propositions true or false.<sup>260</sup> These include exactly the kind of interpretive rules and methods under discussion.<sup>261</sup> A better way to explain this “theoretical disagreement,” according to Dworkin, is to recognize that law is a social practice and that judges are participants in that practice.<sup>262</sup> Because they participate in the practice of law, judges must adopt an “interpretive attitude”<sup>263</sup> (or what Dworkin elsewhere called an “internal point of view”<sup>264</sup>) toward the legal materials they face. Adopting this attitude requires judges to impose meaning on those materials by putting them in their “best light.”<sup>265</sup> Dworkin called this process of interpretation “constructive interpretation.”<sup>266</sup> Such interpretations must both “fit” the practice (plausibly describe its central features) and justify it as a normative matter.<sup>267</sup> So, for instance, even a judge who interprets a statute by reference to its “plain meaning” does so on the ground that it makes best sense of the practice and serves important political values (for example, preserving democracy and rule-of-law values).<sup>268</sup> Thus, legal interpretation—all legal interpretation—depends on political and moral values.<sup>269</sup>

Shapiro agrees with much of this analysis. He agrees with Dworkin that the interpretive disagreement Dworkin describes is a real and pervasive feature of our legal system and that such disagreement cannot be explained by Hart’s

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260. See DWORKIN, *supra* note 198, at 4; *supra* Part II.A.2.c. One of Dworkin’s most famous examples purports to show judges disagreeing about whether the equitable principle that “no one should profit from his own wrong” contributes to the legal content of a statute of wills. See DWORKIN, *supra* note 198, at 15-20 (discussing *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889)).

261. Cf. DWORKIN, *supra* note 198, at 20 (characterizing a disagreement between a judge who interpreted a statute so as to conform with the principle that “no one should profit from his own wrong” and a judge who interpreted the statute according to its plain meaning as a dispute about “what the law was”).

262. Cf. *id.* at 13-14.

263. See *id.* at 47.

264. *Id.* at 13.

265. See *id.* at 47.

266. See *id.* at 52.

267. See *id.* at 65-68.

268. Cf. *id.* at 114-15 (“In America it is settled by convention that law is made by statutes enacted by Congress or the state legislatures in the manner prescribed by the Constitution . . . . Conventionalism holds that legal practice, properly understood, is a matter of respecting and enforcing these conventions, of treating their upshot, and nothing else, as law. If [someone] has a right . . . according to a convention of this sort—if he has a right . . . according to social conventions about who has the power to legislate and how that power is to be exercised and how doubts created by the language are to be settled—then he has a legal right to it, but not otherwise.”).

269. See *id.* at 87-88.

rule of recognition, which requires consensus among officials.<sup>270</sup> He also agrees with Dworkin that part of that disagreement is disagreement about the point or purpose of legal practice overall.<sup>271</sup> He even joins Dworkin in concluding that the proper theory of statutory or constitutional interpretation is largely determined by how well it achieves that purpose.<sup>272</sup> But whereas Dworkin argues that making such a judgment requires reference to moral and political principles, Shapiro insists it is *a question of social fact alone*.<sup>273</sup> To see why that is, one must know a bit more about Shapiro's Planning Theory of law.

Shapiro holds that laws are best understood as plans and, specifically, plans of a particular sort—they are “shared” plans among groups of people whose purpose is to “guide, organize, and monitor the shared activity of legal officials.”<sup>274</sup> More importantly, they are plans whose existence and content are determined exclusively by publicly ascertainable social facts rather than by moral theory.<sup>275</sup> This requirement follows from the fact that the fundamental aim of law, according to Shapiro, is to solve social problems that involve controversial moral and practical questions and require solutions that are often complex.<sup>276</sup> Therefore, if determining the content of law required making moral judgments, which are invariably contested and contentious, it would undermine the whole point of having law in the first place.<sup>277</sup>

Shapiro then develops a “Planning Theory of [m]eta-interpretation.”<sup>278</sup> A meta-interpretive theory is one that provides a method for selecting the methods for interpreting plans (statutes) or the master plan (a constitution).<sup>279</sup> According to Shapiro, one of the central considerations for any such meta-

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270. See SHAPIRO, *supra* note 115, at 381 (“The Planning Theory concedes that the plain fact view, or any other account that privileges interpretive conventions as the sole source of proper methodology, ought to be rejected. Because theoretical disagreements abound in the law, interpretive methodology may be fixed in ways other than specific social agreement about which methodologies are proper.”); see also *id.* at 286 (“The plain fact view . . . maintains that the grounds of law in any community are fixed by consensus among legal officials.”).

271. See *id.* at 381.

272. See *id.*

273. See *id.* at 382.

274. See *id.* at 177.

275. See *id.*

276. See *id.* at 170. Shapiro refers to these circumstances as the “circumstances of legality.” *Id.*; see also *id.* at 309 (“The Planning Theory maintains that the fundamental aim of all legal systems is to rectify the moral deficiencies of the circumstances of legality.”).

277. See *id.* at 177.

278. *Id.* at 355.

279. *Id.* at 305.

interpretive theory is the degree of trust it places in different officials.<sup>280</sup> “Purposivists” in the context of statutory interpretation, for instance, generally have confidence in the competence and good character of judges to understand the purposes of legislation, whereas those who are “textualists” tend to be more skeptical that judges possess either virtue.<sup>281</sup> The crucial point is that under the Planning Theory’s approach, picking interpretive methodologies requires discerning the planners’ judgments about judicial character and competence and then asking whether a particular interpretive approach is consistent with those judgments.<sup>282</sup> Under this view, we should resolve our debates about constitutional interpretation by looking to whether—and if so, to what degree—the Framers of and signatories to the Constitution trusted future judges to implement the “master plan.”<sup>283</sup>

Thus, Shapiro argues for a different procedure for settling meta-interpretive disputes than does Dworkin. Because Dworkin thinks that the proper interpretive methods (like all law) depend on how well those methods fit and justify legal practice, choosing from among them requires the interpreter to engage in moral theorizing.<sup>284</sup> But for Shapiro, the proper interpretive methods (like all law) are determined by the plan that the planners created—in particular, by the plan’s economy of trust.<sup>285</sup> Therefore, choosing such an interpretive theory requires the interpreter to defer to the planners’ judgments about interpretive methodology.

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280. *Id.* at 331 (“[T]he Planning Theory entails that the attitudes of trust and distrust presupposed by the law are central to the choice of interpretive methodology.”).

281. *See id.* at 354.

282. *See id.* at 359.

283. There may be a problem of circularity here in Shapiro’s argument, at least as applied to methods of constitutional interpretation. According to Shapiro, the proper method of interpreting the master plan depends on the master planner’s intentions with respect to the “economy of trust.” *See id.* at 331 (formatting altered). But then how could we ever recover those intentions if our method of interpreting them depends on those same intentions? It seems that interpreters must instead aim to accurately discern the master planner’s actual intentions with respect to their economy of trust, which entails a particular form of interpretation, namely an original intentions form of originalism. I thank Larry Alexander for suggesting this point. Regardless of whether it is a devastating criticism of Shapiro’s argument, however, I do not think it poses a problem for Baude and Sachs because they suggest looking to the (in theory, objective) interpretive rules that were part of our “original law” rather than to the (subjective) attitudes of the Framers about judicial competence and character. So I put this worry about Shapiro’s theory aside for the purpose of the following analysis.

284. *See* DWORKIN, *supra* note 198, at 87-88 (“Each judge’s interpretive theories are grounded in his own convictions about the ‘point’—the justifying purpose or goal or principle—of legal practice as a whole . . .”).

285. Actually, it turns out things are not so simple, for reasons explained in Part II.C.2.b below.

## 2. The Core Argument and the Planning Theory

Baude and Sachs hardly mention Shapiro's account, but in many ways, it seems to be a perfect fit for the Core Argument. We might formulate its major premise as the following:

*MP(S)*: The law is whatever plans were made pursuant to the master plan, including its "economy of trust," where the "economy of trust" describes the planners' plan for how future officials (particularly judges) would go about interpreting the master plan and its subsidiary plans.

*MP(S)* has a lot going for it. Unlike *MP(H)* or *MP(R)*, it does not appear to depend on judicial practice at all, let alone judicial consensus, to determine the criteria of legal validity.<sup>286</sup> Instead, it looks to the content of the master plan and, in particular, to the "economy of trust" embodied in it. And yet it remains positivist in orientation because the disagreement over the grounds of law that Dworkin points to is interpreted as empirical, not moral, disagreement.<sup>287</sup> *MP(S)* thus seems capable of fulfilling the promise of the positive turn. It shows how turning to "our law" could offer a genuine methodological advance insofar as it *both* demands an essentially factual inquiry *and* applies to methodological issues about which courts and scholars disagree.

It is true that under Shapiro's account, as under Raz's, moral principles cannot be incorporated into the criteria of legality. So, as with Raz, Baude and Sachs would need to explain why judges who seem to be applying moral principles in determining the law are better viewed as employing judicial discretion to make or develop the law. And, as we will see below, Baude and Sachs may ultimately confront the same difficulty they did in relying on Raz, namely having to defend their choice of legal theory on "conceptual" grounds.<sup>288</sup> But for now it is sufficient to observe that Shapiro gives Baude and Sachs more resources than does Raz for interpreting judicial conduct in the way their theory requires. In particular, Shapiro defends his emphasis on the "economy of trust" by showing the extent to which concerns with trust do, as a matter of fact, pervade American legal thought and practice.<sup>289</sup>

For these reasons, the fit between Baude and Sachs's methodological agenda and Shapiro's account is sufficiently strong that they may want to explore the possibility of committing themselves to something like his view. Nevertheless,

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286. The only consensus required is one about "which texts are legally authoritative," see SHAPIRO, *supra* note 115, at 383, and that is one easily established.

287. Cf. Sachs, *supra* note 3, at 881 ("Originalists can agree—or ought to—that we adhere to the Founders' law, as lawfully changed. What they might disagree about is the historical content of that law (including its interpretive rules) or how we've changed it since.").

288. See *infra* Part II.C.2.c.

289. See SHAPIRO, *supra* note 115, at 340-42.



the remainder of this Subpart will flag two concerns about whether Shapiro's account really can save the positive turn in the way I have just suggested. Each questions whether the two advantages just identified hold up under scrutiny: First, does Shapiro's theory really allow that law can exist without consensus among some relevant group? Second, does it really enable interpreters to identify the law without recourse to normative arguments? I then explain why, even if these worries can be overcome, the positive turn still is incapable of achieving its purported aims.

a. Consensus at the Founding?

Both Shapiro and Baude and Sachs (at times) argue that we should look to facts about the Founding to determine which interpretive methods we should use today. True, they are not precisely the same historical facts. Shapiro's Planning Theory of meta-interpretation looks to the planners' attitudes about future judges and legislators (how much the planners trusted them to get the plans right), whereas Baude and Sachs ask us to look at specific interpretive rules embodied in the law at the time. But let us put that wrinkle aside and assume that Shapiro offers support for the basic idea that we should look to the Founders' law to settle our disputes over interpretive methodology.

The question then becomes: How do we tell which interpretive rules were part of the law at the time of the Founding? Baude and Sachs are quite insistent, after all, that we must rely on only those rules that had the status of *law*, not just *custom*, at the Founding.<sup>290</sup> Once again, though, it is not at all obvious how that is to be done. Baude and Sachs acknowledge that “[d]ifferent theories of jurisprudence look to different facts to identify a society's law,” but just as we saw above when discussing Hart, it is unclear what kind of facts such theories look to.<sup>291</sup> Sometimes it is suggested that the theories pick out different criteria of validity (or “higher-order legal rules”),<sup>292</sup> but other times it seems that we must look to the practices of certain groups of people.<sup>293</sup> The ambiguity stems in part from the fact that it is not always apparent whether Baude and Sachs mean that interpretive rules require validation by reference to other “higher-

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290. See Baude & Sachs, *supra* note 3, at 1136 (explaining that they would exclude from original methods those “interpretive customs that weren't incorporated by law”); Sachs, *supra* note 3, at 857 (“The Founders might have really liked active liberty, but they also might have liked raindrops on roses and whiskers on kittens; we need to know what was part of their law.”).

291. Baude & Sachs, *supra* note 3, at 1140-42; *supra* Part II.A.

292. *Cf.* Baude & Sachs, *supra* note 3, at 1141 (“[W]e want to know who had the better of the argument, based on the higher-order legal rules of the era.” (emphasis omitted)).

293. *Id.* at 1142 (“If the practices of lawyers who participate in the legal system have a heightened claim to determining the law, at least as compared to the policy preferences of the general public, then it's the elite practice that matters.”).

order legal rules” or whether those interpretive rules *are* the higher-order rules by reference to which substantive interpretive disputes were resolved.

The ambiguity does not much matter, however, because in the end, both answers require the existence of consensus at the Founding about law-determining practices at some level. If the “legal” status of certain interpretive rules depends on their satisfaction of some criteria of validity, we must ask what makes those criteria the law-validating ones. We already know that under Hart’s theory, the existence of such rules (of recognition) depends on there being a common practice of officials treating them as such.<sup>294</sup> So this approach will mean that the existence of a “legal” answer to questions about interpretive methodology will depend on there being a consensus among judges. As it turns out, the same is true under Shapiro’s account. In his view, for there to be content to the master plan’s economy of trust, there must be consensus with respect to it among those who “created and adopted” it.<sup>295</sup>

The worry, of course, is that no such consensus existed. Baude and Sachs discuss the work of historians, for instance, who argue that there was considerable disagreement about the proper way to interpret the Constitution at the time of ratification.<sup>296</sup> Their response to this problem is to observe that those same historians characterize the meta-interpretive conflict as one between, on the one hand, elite lawyers (who adopted Blackstone’s interpretive methodology) and, on the other, popular critics like the Antifederalist Brutus (who challenged the Blackstonian view “on policy grounds”).<sup>297</sup> If that is right, and if it is “elite practice that matters,” then what the historians have shown according to Baude and Sachs is, ironically, that the elites actually had a “jurisprudential obligation” to ignore such popular criticisms.<sup>298</sup>

But that characterization of the Founding-era debate is more than a little misleading. Cornell, for instance, argues that Brutus, and critics like him, represented a constitutional “middle ground” that embraced neither the elites’ view of law nor the “popular champions of the people’s constitution.”<sup>299</sup> And although those critics challenged a particular, Blackstonian approach to statutory and constitutional interpretation, it is not obvious why their criticisms of the Blackstonian view would not have equal claim to the label

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294. See *supra* Part II.A.

295. See SHAPIRO, *supra* note 115, at 383.

296. See Baude & Sachs, *supra* note 3, at 1140-42 (citing Saul Cornell, *The People’s Constitution vs. the Lawyer’s Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295 (2011); and Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149 (2015) (book review)).

297. See *id.* at 1141.

298. See *id.* at 1142.

299. Cornell, *supra* note 296, at 310.

“legal.” As Cornell points out, although some of the state courts were dominated by elite opinion, the highest courts of some other important states, such as New York and Pennsylvania, were dominated by men “whose approach to law reflected the ideas of the constitutional middle ground.”<sup>300</sup> In other words, there seem to have been genuinely “legal” arguments on both sides of the methodological issue.

Of course, it is open to Baude and Sachs to say that their own “theory of jurisprudence” picks out the relevant social facts in such a way that it includes the views of the elites they mention and excludes those of Brutus. But the question would then be: On what basis do they make that choice of theory? How do we determine *whose* practice counts?<sup>301</sup> As shown below, this question points to a core difficulty at the heart of the positive turn.

b. Empirical disagreement?

Before taking up that question, however, let us look at the other advantage Shapiro’s account appears to offer. According to *MP(S)*, the law depends on the existence and content of shared plans. Thus, when people disagree about what those shared plans require—either substantively or as a matter of interpretive methodology—those disagreements are factual in nature, even if they are facts that are not always easy to prove. But we need to look more carefully at how *MP(S)* (and the meta-interpretive approach it requires) flows from Shapiro’s account of the nature of law.

Sometimes Shapiro seems to argue that such an approach to choosing an interpretive theory is entailed by the Planning Theory of law itself. If laws are plans whose purpose is to foreclose contentious disagreements, and if making judgments about the proper “economy of trust” leads to such disagreements, then the “logic of planning” would seem to require interpreters to defer to the planners’ understandings of such an economy of trust as well.<sup>302</sup> The same logic by which law forecloses reopening the substantive underlying normative disputes also forecloses reopening second-order disputes about how to interpret the meaning of those settlements.<sup>303</sup>

It turns out, though, that that is not what Shapiro argues. Instead, identifying the proper meta-interpretive procedure is an empirical inquiry because it depends on facts about *current* legal practice.<sup>304</sup> In particular, choosing the right

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300. *See id.* at 317-18.

301. Recall that we put this issue aside when asking *whose* practice matters for the purpose of applying Hart’s theory. *See supra* Part II.A.2. The problem here is the same.

302. *See* SHAPIRO, *supra* note 115, at 347.

303. *Cf. id.* (noting that the “God’s-eye” approach is “inconsistent with the logic of planning and, as such, frustrates the ability of the law to achieve its fundamental aim”).

304. *See id.* at 350.

method requires asking *why* the current participants of the legal system accept, or at least purport to accept, the system as designed by its planners.<sup>305</sup> Different systems provide different answers to that question.<sup>306</sup> In “authority systems,” current officials accept “the rules of the system” because “these rules were created by those having superior moral authority or judgment,” which makes the rules’ pedigrees particularly important.<sup>307</sup> Under these kinds of systems, the Planning Theory of meta-interpretation that grounds *MP(S)* above is indeed the proper one.

But not all legal systems are authority systems. Shapiro explains that there are also “opportunistic” legal systems.<sup>308</sup> In these systems, the officials accept the system’s rules not because of the moral authority of the planners but because “they judge [those rules] to be morally good.”<sup>309</sup> For that reason, it is perfectly appropriate in opportunistic systems for officials to make their own meta-interpretive judgments—that is, they may choose their interpretive methods based on what they think are the proper moral or political criteria rather than by deferring to the planners’ views on the economy of trust.<sup>310</sup> In these systems, then, *MP(S)* would not hold. The law would *not* depend on the attitudes about the economy of trust held by the planners; instead, it would depend on the attitudes of *current* officials.

How, then, do we know whether our own legal system is an authority system, which supports *MP(S)*, or an opportunistic system, which does not? For his part, Shapiro asserts that the United States “strongly resembles an authority system.”<sup>311</sup> The reverence for our “Founding Fathers,” the “privileging of democracy to the exclusion of all other modes of political legitimization,” the “political impossibility of criticizing the Constitution,” and the significance assigned to the text of the Constitution all suggest that we live in a system in which the Constitution derives its authority from “its special provenance.”<sup>312</sup> No doubt Baude and Sachs would agree. As we have already seen, they make more or less the same kind of argument on behalf of their own versions of originalism.<sup>313</sup>

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305. *Id.*

306. *See id.*

307. *See id.*

308. *See id.* at 351.

309. *Id.*

310. *Cf. id.* at 343-47 (offering Judge Posner as an example of someone taking the “God’s-eye approach”).

311. *Id.* at 351.

312. *Id.*

313. *See supra* Part I.

But not everyone would agree. It is easy to think of arguments on behalf of an “opportunistic” interpretation of our legal system. One might consider the following facts: most people do not take the Framers as moral authorities on all matters, the relations among races and between the sexes being the two most obvious examples; even Supreme Court decisions invalidating democratically enacted legislation are accepted when they are in line with general public opinion;<sup>314</sup> and having a clear textual basis is neither a necessary nor sufficient condition for a rule to qualify as a valid and enforceable rule of constitutional law.<sup>315</sup>

Nor does Shapiro deny such reasonable disagreement. To the contrary, the pervasiveness of such disagreement is part of the phenomenon he seeks to explain. In fact, it turns out that disagreement about whether our legal system is an authority system or an opportunistic one is yet another example of the kind of “theoretical disagreement[.]” Shapiro thinks his theory explains in a more satisfactory way than does Dworkin’s.<sup>316</sup> His explanation is more satisfactory, remember, because under his view such disagreement is *empirical*, not moral, in nature—it is about the beliefs and attitudes of current officials.<sup>317</sup> It is thus consistent with the logic of planning.<sup>318</sup>

Is this really empirical disagreement, though? Shapiro’s own description of how such disagreement plays out gives cause for doubt. The sole example he provides of such meta-interpretive debate is one about how to decide whether the Eighth Amendment’s ban on “cruel and unusual punishments” renders the death penalty unconstitutional.<sup>319</sup> Shapiro first imagines an originalist who emphasizes the Founders’ distrust of judges in support of the view that the Founders wished to cabin judicial discretion.<sup>320</sup> In response, an antioriginalist might suggest that the tenure and salary protection the Constitution affords

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314. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5 (2004) (arguing that constitutional jurisprudence “almost inevitably reflects the broader social and political context of the times”).

315. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973). *Roe* is the most obvious (if controversial) example of a decision holding that a particular right is constitutionally protected despite the lack of a clear textual basis for it in the Constitution (though there are many other examples). The Contracts Clause may be the best example of a constitutional provision whose textual meaning is fairly clear but that the Court no longer recognizes as providing an enforceable right. See, e.g., *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 415-16, 447 (1934) (upholding a state-imposed mortgage moratorium as permissible under the Contracts Clause); see also U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

316. See SHAPIRO, *supra* note 115, at 382.

317. See *id.*

318. See *id.*

319. *Id.* at 384.

320. *Id.*

judges reflects a greater confidence in their competence and character.<sup>321</sup> Such an antioriginalist may even go on to challenge whether the United States is an authority system at all.<sup>322</sup> What Shapiro says here is striking:

The text of the Constitution, [antioriginalists] might point out, has been relatively stable for over two hundred years. *Why would those who currently participate in the practice allow themselves to be governed by the “dead hand of the past”?* It is more plausible, they might say, that current participants accept the constitutional system because they regard it as independently justifiable.<sup>323</sup>

It is true that the proposition in dispute is a factual one insofar as its truth hangs on a question about the beliefs and attitudes of a group of people, namely the officials of our legal system. But moral principles seem to be playing an important role in the explanation of official behavior.<sup>324</sup> In particular, the alleged democratic illegitimacy posed by the dead hand problem seems to count as a reason for believing that officials possess certain attitudes about our practices rather than other attitudes. And if that is the case, then the truth of moral propositions will be relevant to the debate. Shapiro would then be correct in concluding that there is “something for everyone” in his picture because it would include even Dworkinians who argue about what the law requires in evaluative terms.<sup>325</sup>

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321. *See id.* at 385.

322. *See id.*

323. *Id.* (emphasis added).

324. Note that some metaethicists consider the question whether moral principles may properly figure in explanations of human behavior to be a useful criterion for distinguishing between realist and antirealist views about morality. *See* Geoff Sayre-McCord, *Moral Realism*, STAN. ENCYCLOPEDIA PHIL. (Feb. 3, 2015), <http://plato.stanford.edu/archives/spr2015/entries/moral-realism> (observing that “one might argue that to be a realist about some area (morality or whatever) is to hold that the properties distinctive to that area (in this case moral properties) figure in some fundamental way in our explanations” and that “one might rely on either explanation or mind-independence to mark an important contrast between various metaethical views”).

325. *See* SHAPIRO, *supra* note 115, at 385. Of course, none of this is to deny that it is *possible* to run such an argument without any moral premises. One would simply convert all moral propositions into psychological or sociological (and hence “empirical”) propositions by inserting “people around here believe that” before each of them. But the point is just that as Shapiro frames it, one *could* make such moral arguments and they would be relevant to the legal question presented. Moreover, as a descriptive matter, one would have to ask which is a more plausible description of what lawyers and judges are doing when they offer “explanations” of legal materials: Are they offering rationalizations of sources of law by showing how fidelity to them vindicates certain widely accepted moral principles or public policies? Or are they offering sociological explanations of the sort that one might offer about the religious rituals of a foreign culture?

c. Theory choice and jurisprudence

But suppose this is wrong. Suppose Shapiro is right that theoretical disagreement is primarily empirical disagreement, that we do live in an authority system, and that the proper meta-interpretive theory is one that looks to the Founders' economy of trust. Suppose, too, that it is wrong to suggest, as I did above,<sup>326</sup> that there was meta-interpretive disagreement at the time of the Founding. So imagine we *could* establish in some relatively uncontroversial way which interpretive rules really were included in the Founders' law and that looking to such law to settle our meta-interpretive debates fits naturally with (even if it does not follow deductively from) Shapiro's Planning Theory of law. In short, imagine that *MP(S)* does offer Baude and Sachs a way of making the Core Argument produce plausible and nonbanal conclusions, rendering its use a genuine methodological advance.

Let us grant all of that, and still we must ask: What if Shapiro's Planning Theory is wrong? As we have now seen, the Core Argument does not go through in the way Baude and Sachs envision under either of two alternative accounts of law—those of Hart and Raz.<sup>327</sup> So we have at least established that it matters which account of law one adopts. The next question is: How do we choose from among competing theories? Or put in more technical jargon, what are the criteria for theory choice when it comes to philosophical accounts of law?

As it happens, this question is one of the most fiercely debated in jurisprudential circles these days. The issue is whether jurisprudential accounts are more analogous to scientific theories, on the one hand, or moral or political philosophical theories, on the other. If they are analogous to theories in the natural and social sciences, then the thought is that they should respond exclusively to such epistemic criteria as empirical adequacy, consistency, simplicity, and explanatory power.<sup>328</sup> But if they are like moral or political philosophical theories, then (not surprisingly) they must be judged by such moral criteria as, for example, whether they conform to our best understanding of how people should live and what they owe to each other.<sup>329</sup> In other

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326. See *supra* Part II.C.2.a.

327. See *supra* Part II.A-B.

328. See Leiter, *supra* note 139, at 34-35 ("Epistemic values specify (what we hope are) the truth-conducive desiderata we aspire to in theory construction and theory choice: evidentiary adequacy ('saving the phenomena'), simplicity, minimum mutilation of well-established theoretical frameworks and methods (methodological conservatism), explanatory consilience, and so forth.").

329. See *id.* at 35 ("Moral values are those values that bear on the questions of practical reasonableness, e.g., questions about how one ought to live, what one's obligations are to others, what kind of political institutions one ought to support and obey, and so forth.").

words, the basic question is whether philosophical accounts of law are best understood as descriptive or normative theories.<sup>330</sup>

We need not resolve this debate because under either view, the positive turn leads us right back into the kinds of debates from which it promised escape. If the descriptivists are right, then jurisprudential theories are accounts of the “nature” of law, the discovery of which requires what philosophers call “conceptual analysis.”<sup>331</sup> And we have already seen in the discussion of Raz why taking this approach would undermine the positive turn.<sup>332</sup> The whole purpose of the positive turn was to allow scholars to avoid not just normative but also “conceptual” debates about whether, for instance, the “nature” of interpretation or meaning or authority entails an originalist interpretive approach.<sup>333</sup> Choosing Shapiro’s theory would require a conceptual defense of the claim that laws are plans (or plan-like norms).<sup>334</sup>

What about the other approach? The normativists argue that jurisprudence is and ought to be a fundamentally normative form of inquiry.<sup>335</sup> Under this view, *MP(S)* might be reinterpreted as a normative premise. It would state something like:

*MP(S)\**: The law *ought to be understood as* whatever plans are made pursuant to the master plan, including its “economy of trust,” where the “economy of trust” describes the master planners’ plan for how future officials (particularly judges) would go about interpreting the master plan and subsidiary plans.

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330. For defenses of what I call the descriptivist view, see JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 179-217 (2001); HART, *supra* note 20, at 239-44; Andrei Marmor, *Legal Positivism: Still Descriptive and Morally Neutral*, 26 OXFORD J. LEGAL STUD. 683, 693 (2006); and Scott J. Shapiro, *The Bad Man and the Internal Point of View*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 197, 199-200 (Steven J. Burton ed., 2000). For defenses of the normativist view, see RONALD DWORKIN, *JUSTICE IN ROBES* 140-86 (2006); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* 328-35 (1986); Stephen R. Perry, *Interpretation and Methodology in Legal Theory*, in *LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY* 97, 123 (Andrei Marmor ed., 1995); and Danny Priel, *Evaluating Descriptive Jurisprudence*, 52 AM. J. JURIS. 139, 153-57 (2007).

331. See SHAPIRO, *supra* note 115, at 13. It is worth mentioning that some endorse descriptivism but reject conceptual analysis as the proper method of conducting such a descriptive inquiry, preferring instead a more empirical approach. See, e.g., Leiter, *supra* note 139, at 43-51 (arguing for a “naturalistic turn” in jurisprudence (formatting altered)). There is nothing (that I could find) in Baude’s or Sachs’s arguments that indicates a naturalistic bent to the positive turn.

332. See *supra* Part II.B.2.

333. See Baude, *supra* note 3, at 2352; Sachs, *supra* note 3, at 828-35.

334. That is why Shapiro devotes roughly half the first chapter of his book to explaining and defending his method of conceptual analysis. See SHAPIRO, *supra* note 115, at 8-22.

335. This is Pojanowski and Walsh’s core criticism of the positive turn. See Pojanowski & Walsh, *supra* note 5, at 11 (“Our primary problem with the positive turn is its attempt, like Hart’s, to separate description from evaluation in legal theory.”).



The justification for  $MP(S^*)$  would look to the rule-of-law values and settlement function that sticking to shared plans helps societies achieve. Scott Hershovitz has shown why Shapiro's Planning Theory may be better understood as a sophisticated elaboration of such a normative brand of legal positivism—one that privileges the political value known as "legality," which serves as the title of Shapiro's book.<sup>336</sup>

One could easily imagine an argument of this sort supporting Baude and Sachs's substantive claims.<sup>337</sup> They might argue that their approach to resolving meta-interpretive disputes both privileges democratic decisionmaking and preserves important rule-of-law values. Even if many groups were excluded from the Constitution's ratification process (for example, women and African Americans), for its time it was a virtually unprecedented act of popular sovereignty. Of course, the law must change over time to reflect the will of the people as the body politic changes, but because people disagree about the direction legal change should take, we need procedures for settling such disagreements and for enacting particular understandings into law.<sup>338</sup> And because the meanings of the texts that form the primary material of our legal corpus are themselves a source of disagreement, we need second-order interpretive rules to settle those debates by determining the legal content of particular texts—whether constitutional, statutory, or case law. Thus, by demanding that we ask whether some particular second-order interpretive rule was part of the law at the Constitution's ratification, we both vindicate the rule-of-law values that all rules provide (stability, predictability, et cetera) and do so in a way that preserves democratic legitimacy.

The problem with this approach is obvious. The positive turn would no longer be positivist in the methodological sense. Under this view, because "law" is an inherently contestable concept fraught with moral and political meaning, the core positivist view becomes the thesis that "what the law is and what it ought to be" *ought to be* treated as conceptually distinct sets of norms.<sup>339</sup> That is, positivism itself becomes a normative position the defense of which depends

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336. See Scott Hershovitz, *The Model of Plans and Prospects for Positivism*, 125 ETHICS 152, 163 (2014) ("The problem with Shapiro's argument is that it has the wrong sort of premise for the conclusion he aims at. An argument that rests on the claim that law has a fundamental aim is more apt to establish positivism as a success condition for law than as a necessary truth about it.")

337. Pojanowski and Walsh aim to provide precisely such an account—one based on the natural law philosophy of John Finnis. See Pojanowski & Walsh, *supra* note 5, at 110-26.

338. The authors occasionally do make such arguments. See, e.g., Baude & Sachs, *supra* note 3, at 1096 ("[P]eople persistently disagree on the real answers, and the legal system helpfully offers fake answers instead—answers that hopefully are somewhat close to the real ones, but on which society (mostly) agrees and which allow us (mostly) to get along.")

339. See Sachs, *supra* note 3, at 867.

on moral judgments about, say, the moral value of the principles of legality. Yet the whole point of the positive turn was to avoid having to make such arguments.

D. Ignoring Jurisprudence: Lawyers' Assumptions

A natural response to the problems detailed above would be to deny that the positive turn needs to rely on any theory of law at all.<sup>340</sup> Sometimes Baude and Sachs seem to assert as much. Sachs suggests that without having “solved all of jurisprudence,” we can fill out the major premise by relying on assumptions “plausible enough for ordinary lawyers to make accurate legal judgments on a routine basis.”<sup>341</sup> He further emphasizes the importance of adopting the perspective of the “faithful participant” in a legal system.<sup>342</sup> Meanwhile, Baude “relies on lawyers’ assumptions rather than technical jurisprudence,”<sup>343</sup> which he demonstrates in practice by looking to case law to support his claim that our law is originalist.<sup>344</sup>

So understood, the major premise of this version of the argument would be something like:

*MP(∅)*: The law is whatever makes the best sense of the relevant legal materials.

The supporter of *MP(∅)* need not be embarrassed by the tautological use of “legal” and “relevant” because the whole point of taking the perspective of a “faithful participant” is that one may leave unquestioned certain assumptions about what counts as law. Nor need this view necessarily interpret “best sense” as requiring a normative judgment in the way Dworkin’s demand that judges interpret legal practice in the “best light” does.<sup>345</sup> Instead, that phrase could refer to whatever is the most accurate, coherent, and simple explanation of the relevant legal materials.

*MP(∅)* is in many ways an attractive approach for the positive turn because it can ignore all the knotty difficulties thwarting this Article’s efforts

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340. One could label the sort of approach described in this Subpart as taking a “quietist” stance with respect to the metaphysics of law. A quietist denies either the coherence or the profitability of asking metaphysical questions about the nature or reality of some domain of inquiry. See Charles L. Barzun, *Metaphysical Quietism and Functional Explanation in the Law*, 34 LAW & PHIL. 89, 95 (2015) (describing quietism as a meta-metaphysical position as to “whether, or in what way, it is appropriate to ask the first-order metaphysical question about the reality or unreality of the phenomena described by the terms of a given discourse”). As I have suggested elsewhere, it is a tempting position for legal scholars to take. See *id.* at 92.

341. See Sachs, *supra* note 3, at 836.

342. See *id.* at 837.

343. Baude, *supra* note 3, at 2352 n.5.

344. See *id.* at 2370-86 (analyzing Supreme Court case law).

345. See DWORKIN, *supra* note 198, at 90.

to find an acceptable version of *MP*. We no longer need to worry about whether or in what way law depends on a consensus among officials, nor about the implications of disagreement over which facts determine the content of law, nor about the criteria for theory choice among philosophies of law. None of that matters anymore because now the Core Argument just requires making the kinds of arguments lawyers typically make, using the traditional methods and sources of law.

Under this view, Baude and Sachs's claim is basically that what the best interpretation of our legal practices overall entails—what the law *really requires*—is that courts trace the pedigree of second-order interpretive rules back to the Founding (or to a valid rule of change). Support for this claim can be found in the fact that in many areas of law, we care about the historical pedigree of legal rules.<sup>346</sup> For instance, we chase back chains of title to ensure that a property is fit for sale.<sup>347</sup> Moreover, in the context of public law, the ratification of the Constitution is the crucial historical event.<sup>348</sup> We do not look for legal authority before the Founding, and we generally try to explain changes since the Founding in terms that preserve a sense of continuity with the Founding.<sup>349</sup>

That seems like a reasonable sort of argument, but notice two related implications of going down this path. The first is that it would require Baude and Sachs to jettison their efforts to ground their version of methods originalism in “social facts” or “theories of jurisprudence” because those are precisely what tie them in knots. Sachs insists that “[w]e need to *know the social facts* of how these participants *conventionally justify* their legal positions[] [and] the arguments they’re willing to accept and defend in public.”<sup>350</sup> And both write that “[w]hether our system is textualist, intentionalist, purposivist, or something else is a *legal question*, to be answered by our sources of law—and, in the end, by the appropriate *theory of jurisprudence*.”<sup>351</sup>

If we are taking an “internal” or “lawyer’s” approach, this is all pure confusion. The reason is that lawyers do not “conventionally justify” their claims by reference to “social facts” at all, nor does the resolution of a “legal question” in a court of law typically depend on a “theory of jurisprudence.”<sup>352</sup>

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346. See Sachs, *supra* note 3, at 839-42.

347. See *id.* at 842.

348. See *id.* at 820-21.

349. See Baude, *supra* note 3, at 2367; Sachs, *supra* note 3, at 820-21.

350. Sachs, *supra* note 3, at 837 (emphasis added).

351. Baude & Sachs, *supra* note 3, at 1116 (emphasis added).

352. No doubt the authors' former boss would agree: “If the academy wants to deal with the legal issues at a particularly abstract and philosophical level, that’s great and that’s their business. But they shouldn’t expect that it would be of any particular help or even  
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Recall that Hart's purpose in introducing the concept of the rule of recognition was to show how such a rule was, from one (external) perspective, a mere sociological fact about the attitudes of a certain social group (namely, officials) and yet, from another (internal) perspective, the premise for making the kind of normative statements that pervade the law.<sup>353</sup> By establishing a set of criteria for what makes a rule count as "law," the rule of recognition introduces and makes intelligible the *normative* concept of "legal validity." So when a lawyer says that there is "no rule" prohibiting her client's conduct, she is not understood to be making an empirical claim about the existence or nonexistence of a particular set of "social facts." Instead, she is making a claim about legal *validity* based on traditional legal sources. In other words, to paraphrase Sachs, if you go into court in a constitutional (or any other) case and say, "well, Judge, my client wins because social facts of the right sort entail that she does," you may not lose, but you will almost certainly get a look of justified bewilderment from the judge.<sup>354</sup>

The second implication of this approach is just the flipside of the first. Adopting *MP(∅)* for the Core Argument means that the "positive turn" no longer qualifies as a methodological innovation because it just describes the most traditional kind of argument that lawyers and legal scholars have been making for centuries. Now, Baude and Sachs may happily concede that point. Their complaint, they might insist, lies with the recent efforts of legal scholars to focus on normative and conceptual questions, at least when it comes to interpretive rules and methods. But of course those scholars would respond that they do so because they are taking up issues on which the law has run out or fails to provide determinate answers.<sup>355</sup>

Interestingly, Baude and Sachs deny this assertion of legal indeterminacy, suggesting that even where there is widespread disagreement about the law, there may still be right answers.<sup>356</sup> Lawyers and judges are just not seeing what

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interest to members of the practicing bar, or judges." *A Conversation with Chief Justice Roberts*, *supra* note 1, at 31:08.

353. See HART, *supra* note 20, at 110 ("The statement that a rule exists [in a mature legal system] may now no longer be what it was in the simple case of customary rules—an external statement of the *fact* that a certain mode of behaviour was generally accepted as a standard in practice. It may now be an internal statement applying an accepted but unstated rule of recognition and meaning (roughly) no more than 'valid given the system's criteria of validity.'").

354. Cf. Sachs, *supra* note 3, at 871 ("[I]f you go into court in a constitutional case and say, 'well, Judge, the original Constitution is against us, but we superseded it through an informal amendment in 1937,' *you will lose*.").

355. See, e.g., Fallon, *supra* note 79, at 1277.

356. See Baude & Sachs, *supra* note 3, at 1146 ("[W]e don't need a true consensus on individual legal disputes; within a given legal system, there can be correct and incorrect views of the law."); see also *id.* at 1138 ("Courts might have a judicial obligation to *find* common  
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the law, properly understood, *really* requires. That view—known as the “right answer thesis”—is yet another deeply controversial position that seems to depend on a controversial metaphysics of law that legal philosophers have long debated.<sup>357</sup> Whereas Hart denied it, Dworkin once defended it.<sup>358</sup> But under *MP(∅)* there is no room to engage in such debates because once you begin making claims about the nature of judicial disagreement over the meaning of legal sources, you must make judgments about what kinds of facts make some rule, text, or principle count as “law.” And then you are doing jurisprudence—perhaps even “technical” jurisprudence.<sup>359</sup> And yet under the approach now under consideration, such inquiry is foreclosed. Thus, Baude and Sachs would not be able to look to positivist jurisprudence to either show how certain social facts in general yield determinate legal outcomes or (even if they so wished) show how such determinacy could flow from the application of principles of political morality, as Dworkin argued.<sup>360</sup>

Instead, the only resources available to fill out *MP(∅)* are the sources lawyers rely on (particular statutes, cases, treatises, et cetera) and the methods

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law rules in other sources (including customary sources), not merely to *make* them to fit one’s will.”).

357. For a few of the contributions to this debate, which mostly consists of criticisms of Dworkin’s initial statement of the thesis and Dworkin’s replies to them, see RONALD DWORKIN, *A MATTER OF PRINCIPLE* 119-45 (1985) [hereinafter *DWORKIN, PRINCIPLE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 279-90 (1977) [hereinafter *DWORKIN, RIGHTS*]; HART, *supra* note 20, at 272-76; Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978); Ronald Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1241-46 (1977); Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin’s Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369 (1984); Stephen R. Munzer, *Right Answers, Preexisting Rights, and Fairness*, 11 GA. L. REV. 1055, 1060 & n.6 (1977); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 875-79 (1988); and Michael S. Moore, *Metaphysics, Epistemology, and Legal Theory*, 60 S. CAL. L. REV. 453 (1987) (reviewing *DWORKIN, PRINCIPLE*, *supra*).
358. Compare *DWORKIN, RIGHTS*, *supra* note 357, at 290 (“The ‘myth’ that there is one right answer in a hard case is both recalcitrant and successful. Its recalcitrance and success count as arguments that it is no myth.”), with HART, *supra* note 20, at 273-74 (endorsing the view of those judges who have acknowledged that “there are cases left incompletely regulated by the law where the judge has an inescapable though ‘interstitial’ law-making task, and that so far as the law is concerned many cases could be decided either way”). I say “once” because Dworkin subsequently reformulated (or restated more clearly, depending on your interpretation) the thesis as a claim “about morality, not metaphysics.” *DWORKIN, supra* note 198, at ix; see also Posner, *supra* note 357, at 875 n.83 (“Dworkin later retracted the metaphysical (ontological) implications of the ‘Right Answer’ paper.” (citing *DWORKIN, supra* note 198, at viii-ix)).
359. Cf. Baude, *supra* note 3, at 2352 n.5 (“[T]his Essay relies on lawyers’ assumptions rather than technical jurisprudence.”).
360. See *DWORKIN, PRINCIPLE*, *supra* note 357, at 143 (“The availability of this second dimension [of political morality] makes it even less likely that any particular case will have no right answer.”).

they use to analyze them (for instance, analogical and deductive reasoning). As noted above, Baude and Sachs do provide some of that sort of conventional legal support for their substantive claims about inclusive and original-law originalism.<sup>361</sup> No doubt they and others will continue to make such traditional arguments on behalf of particular originalist views. That is what lawyers and law professors do. But when they do, they need not seek support (because there is none) from a so-called positive turn.

### **Conclusion: The Dilemma at the Heart of the Positive Turn**

The Introduction suggested that the appeal of the positive turn lay in its apparent capacity to bridge the gulf between legal practice and legal scholarship that Chief Justice Roberts's quip about Bulgarian evidence law highlights.<sup>362</sup> Baude and Sachs seek to put theoretical tools to work in service of answering practical legal questions while also showing how legal practice itself can resolve (or at least "reorient") some scholarly debates that seem otherwise intractable. A proper understanding of legal philosophy (that is, positivism) directs us to sources from the Founding (that is, originalism). And those sources not only help us decide actual legal cases but also provide a way of refocusing scholarly and theoretical debates over interpretive methodology. In this way, Baude and Sachs aim to reconcile legal theory and practice.<sup>363</sup>

Once we followed through the logic of their proposal, however, we ran into various ambiguities that prompted further questions. Are the law-determining facts the positivists seek themselves "higher-order" legal rules or brute practices of officials? Are those facts historical facts about the Founding or facts about current judicial practice? Does discovering them require knowing something about the "nature" of law, or can it be done by relying on "lawyers' assumptions"?

Stepping back, we can now see that these ambiguities all arise from that original ambition to reconcile legal theory and practice. For they are all symptoms of one underlying dilemma: Does the positive turn—and the Core Argument it endorses—involve making "legal" arguments of the sort a lawyer might make to a court? Or does it require theoretical inquiry *about* law? If the former is the case, then the positive turn is not a methodological advance because it describes what lawyers and legal scholars have traditionally done. But if the latter is the case, then taking the positive turn leads to just the kind of conceptual and normative debates from which the positive turn purported to offer escape.

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361. *See supra* Part IA-B.

362. *See supra* note 1 and accompanying text.

363. *See supra* Introduction.

Dworkin offered one approach to resolving this dilemma. He famously (and controversially) argued that “no firm line divides jurisprudence from adjudication or any other aspect of legal practice.”<sup>364</sup> In his view, philosophical accounts of law are properly developed from the “internal point of view,” which reflects the “practical” interest of those who seek arguments about the “sound[ness]” of particular legal claims.<sup>365</sup> The resulting accounts of law are, as we have seen, what he called “constructive interpretations” of legal practice as a whole.<sup>366</sup> That is, they are interpretations that put legal practice in the “best light” in essentially the same way that judicial opinions constructively interpret particular legal materials.<sup>367</sup> In other words, Dworkin resolved the dilemma by characterizing the philosophical study of law as the natural (if more abstract) development of the traditional forms of argument one sees in law and legal practice.

In some ways, Dworkin’s approach seems to be an attractive route for Baude and Sachs. Dworkin has made repeated appearances throughout this Article (though not in any of the Baude and Sachs papers discussed here) because there is much in his understanding of law that fits Baude and Sachs’s agenda well: not only their ambition to reconcile legal theory and practice but also (as we have already seen) their (a) insistence that law exists even in the absence of consensus about which facts determine the law;<sup>368</sup> (b) privileging of the perspective of the “faithful participant” in legal practice;<sup>369</sup> (c) commitment to taking judicial rhetoric seriously;<sup>370</sup> and, relatedly, (d) conviction that right answers may exist, even in hard cases.<sup>371</sup> But Baude and Sachs would not only reject Dworkin’s claim that determining law necessarily depends on moral principles; I suspect they would also likely chafe against the idea (as have many others) that the purpose of legal theory *necessarily* involves putting legal practice in the “best light.”<sup>372</sup>

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364. DWORKIN, *supra* note 198, at 90.

365. *See id.* at 13.

366. *See id.* at 37-38.

367. *See id.* at 90 (“[F]or all their abstraction, [general theories of law] are constructive interpretations: they try to show legal practice as a whole in its best light . . .”).

368. *See supra* Part II.

369. *See* Sachs, *supra* note 3, at 837 (citing HART, *supra* note 20, at 89) (“Fully understanding the law means trying on the ‘internal’ perspective of a faithful participant in the system.”). Sachs cites Hart here, but Dworkin’s version of the internal point of view is actually a better fit. *See* DWORKIN, *supra* note 198, at 13.

370. *See* DWORKIN, *supra* note 198, at 37-38; Baude, *supra* note 3, at 2388-89.

371. DWORKIN, RIGHTS, *supra* note 357, at 290; Baude & Sachs, *supra* note 3, at 1146.

372. *See, e.g.*, HART, *supra* note 20, at 241 (“It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin’s conception of legal theory.”); Leiter, *supra* note 139, at 31-32 (charging that  
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My own view is that Dworkin's approach goes both too far and not far enough. It goes too far in the sense that it characterizes the legal theorist as someone necessarily driven by an agenda—in particular, a rationalizing agenda that aims to *justify* current practice. But it does not go far enough in the sense that it holds fast to the core distinction between two “perspectives” on legal practice, one “internal” and one “external,” even as it aims to pull legal philosophy over to the “internal” side of that divide. So, for instance, Dworkin argues that sociological and historical accounts of law, which seek to criticize legal doctrines by showing the interests or ideologies that have actually shaped them, are “external” accounts and thus fail to make a dent against “interpretive” arguments.<sup>373</sup>

Admittedly, something like Dworkin's internal/external distinction runs deep in today's legal-academic culture. Lawyers and legal scholars invoke it to shield certain forms of argument from attack by other disciplines.<sup>374</sup> Meanwhile, scholars in other disciplines invoke something like it to distinguish their genuinely epistemic or truth-seeking goals from the “rhetorical” aims of law professors writing about the law.<sup>375</sup> The distinction runs so deep, in fact, that recently two law professors claimed that scholars and judges who ignore it risk committing a methodological “fallacy.”<sup>376</sup>

Nevertheless, in my view, the distinction has outlived whatever utility it may once have had and should be abandoned. I will not defend that view here

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in calling law an “interpretive concept” that requires constructive interpretation, Dworkin has, in effect, “simply changed the topic”).

373. See DWORKIN, *supra* note 198, at 13 (“This crucial argumentative aspect of legal practice can be studied in two ways or from two points of view. One is the external point of view of the sociologist or historian, who asks why certain patterns of legal argument develop in some periods or circumstances rather than others, for example.”); *id.* at 272-73 (arguing that efforts to “describe [the] law genetically” may reflect “a serious misunderstanding of the kind of argument necessary to establish a skeptical position: the argument must be interpretive rather than historical”).
374. See, e.g., Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153-54 (2002) (“Legal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists’ rules can indict legal scholarship . . . . Epstein and King miss this point because their empirical methodology blinds them to legal scholarship’s internal perspective.”).
375. See Lee Epstein & Gary King, *A Reply*, 69 U. CHI. L. REV. 191, 192 (2002) (contrasting the purposes of legal scholarship, as articulated by Goldsmith, Vermeule, and others, with that of empirical research, which aims to “learn about the world” (quoting Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 9 n.23 (2002) [hereinafter Epstein & King, *Rules of Inference*])).
376. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013). For my own defense of this alleged “fallacy,” see Charles L. Barzun, *Getting Substantive: A Response to Posner and Vermeule*, 80 U. CHI. L. REV. DIALOGUE 267 (2013).



because I have done so elsewhere.<sup>377</sup> But the basic idea is that we ought to broaden our understanding both of what “legal practice” properly includes and what genuine intellectual inquiry involves.<sup>378</sup> Legal inquiry may involve “learning about the world” even if it also requires making controversial moral judgments.<sup>379</sup> At the same time, historical or social-scientific accounts of why or how law changes can serve as useful and relevant critiques of legal practice and, thereby, make arguments (*pace* Dworkin) relevant to the “soundness” of legal claims. The key assumption underlying these suggestions is that the methods of reasoning in different disciplines, including law, ultimately differ less than is sometimes assumed. The result is that practitioners of different disciplines may be able to join in more productive debate with one another than the invocation of the “internal/external” distinction would seem to allow.<sup>380</sup>

Which brings us back to the positive turn. If I am right about Baude and Sachs’s methodological ambition to reconcile legal practice and legal theory, the view just sketched may offer them one route to doing so. But I doubt it is one that would attract them. That is because it would require them to give up on the positive turn’s promise of showing how our disagreements over legal interpretive techniques can be settled by “facts” alone (once we figure out what the right facts are, of course). It would mean recognizing instead that the positive turn puts judges and legal scholars right back where they have always been—in a position where they are bombarded by empirical, normative, and conceptual questions of all sorts, and where there is no way to exclude, without cost, one class of those questions from view. Anyone in such a position—whether “inside” or “outside” legal practice—must decide which features of legal practice are worth investigating, which methods are the proper ones for doing so, and how to proceed once the investigation is complete. Such choices, like any choice about what to do, ultimately involve both intellectual and moral

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377. See Barzun, *supra* note 22, at 1285-88.

378. See *id.* at 1286.

379. *But cf.* Epstein & King, *Rules of Inference*, *supra* note 375, at 10 n.23 (“We can see the lack of contradiction only by recognizing that the Ph.D.s’ goal of learning about the empirical world differs from the J.D.s’ goal of political persuasion.”).

380. *Cf.* MORTON WHITE, A PHILOSOPHY OF CULTURE: THE SCOPE OF HOLISTIC PRAGMATISM 169 (2002) (characterizing White as a “methodological monist,” which describes one who believes “that we test both physical and moral beliefs by checking [them] against a pool of experiences—in the former case a pool consisting wholly of sensory experiences, and in the latter a pool composed of sensory experiences and feelings of obligation”).

considerations.<sup>381</sup> If the positive turn, in its failure, reminds us of that inescapable predicament, then it may have served a useful function after all.

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381. Cf. Fallon, *supra* note 79, at 1308 (emphasizing that in the face of uncertainty, adopting what Fallon calls “interpretive eclecticism” in the legal domain “embodies a judgment about how best to exercise intellectual, legal, and moral responsibility”). This statement is true even if the only moral consideration is an implicit one about the moral permissibility of taking some action.