TO: Participants at the UCLA Legal Theory Workshop

FROM: Mitch Berman (mitchberman@law.upenn.edu)

RE: Supplemental materials for my workshop (**entirely optional**)

DATE: November 1, 2026

For my workshop, I've asked you to read Chapter 5 from my long book in progress, *"To Say What the Law Is": The Constitution, the Supreme Court, and the Nature of Law.* This document consists of excerpts from Chapters 6 and 7 for anyone who might be interested. It helps address some of the questions that Chapter 5 might provoke.

CHAPTER 6. THE INEVITABILITY OF LIVING CONSTITUTIONALISM

> "[T]he great body of American constitutional law cannot be found in the written instruments, which we call our constitutions; it is unwritten, in the constitutional and legal acceptation of the term, and is to be found in the decisions of the courts and the acts of the National and State legislatures, constantly changing with the demands of the popular will."
>
> -- Christopher G. Tiedeman (1890)

We know where cougars come from. Every cougar comes from a mother cougar and a father cougar, each the product of a mother cougar and a father cougar of its own. It's cougars all the way down, back to the start of cougarhood. But where do our constitutional principles come from? How did they come to be what they are? What makes it the case that they have the contents and relative weights that they have?

A reminder: The constitutional principles that interest us now—"fundamental" constitutional principles—do not come from the constitutional text. In the words of the largely forgotten nineteenth-century scholar Christopher Gustavus Tiedeman, the "fundamental principles" that make up our law "cannot be found in the written instruments."[1] To be sure, some constitutional principles might be codified in the text. Suppose the text says straight out that "shoemakers are due special regard." And suppose too (as is surely true) that fundamental principles of our constitutional law invest the meanings of the constitutional text with substantial legal force. If the bearing of other applicable legal principles is even close to equal, this particular fundamental principle plus this particular stretch of text will jointly yield a new, "derivative," constitutional principle—a principle that demands partiality to cobblers. Many derivative constitutional principles owe their existence, in part, to the ordinary or original meaning of the text in this way. But fundamental principles do not. Fundamental principles lie behind or underneath

the text. They're what give legal significance to the meanings that are encoded in the text, and to other things besides—things such as intentions of those who authored the text, stable practices that have arisen under it, and values with which the American people have invested it. "*Grundgedanken*" in German, they are "the basic 'modes of thought' which lie behind the actual rules of law posited in statutes or evolved by the juristic writers, and which, though not expressed, nevertheless g[i]ve shape and form to the rules."[2] Where do fundamental constitutional principles—the most basic building blocks of constitutional content—come from?

Long jurisprudential tradition would sort answers into two big buckets. Positivists believe that fundamental principles are determined or constituted by some kinds of practices or actions, beliefs or attitudes by some classes of persons. In currently favored philosophical jargon, fundamental principles are "grounded in" certain facts about what certain people have said and done and believed.[3] Anti-positivists (known more familiarly as natural law theorists) believe that the principles are grounded not in the contingent, messy, changing practices of legal communities, but in God's everlasting will or in timeless truths about the nature of human beings and what is required for their flourishing.[4*] Legal positivists view fundamental constitutional principles as akin to social norms, word meanings, and norms of fashion, as those things are understood by most or all social scientists. They are grounded in human practices and thus necessarily change over time—maybe a little, maybe a lot, maybe for the good, maybe not. Legal anti-positivists view fundamental constitutional principles as akin to moral principles, as those are understood by most people. They are grounded in truths about human beings (or rationality, or agency, or the like) and are constant across time and space.

[*] This is not true of all modern anti-positivists, including Mark Greenberg. I hope to leave town with a more accurate formulation here of the difference between positivist and anti-positivist thinking on the question that motivates this chapter.

This chapter introduces, elaborates, and defends the positivist picture. Because a positivist account of law is inescapably dynamic (by which I mean only "not static," not "changing fast"), this chapter is also, most notably, a case for the inevitability of living constitutionalism. But "living constitutionalism" has meant many things to many people. What meaning should we embrace?

I observed at the start of last chapter that almost everybody is a pluralist about constitutional fundamentals, and that what has been needed is a coherent and plausible account of their workings, in particular an account of how plural fundamentals deliver singular rules. Broadly speaking, the same is true, if to a lesser degree, about living constitutionalism. A generation ago, the eminent constitutional theorist Sandy Levinson could fairly observe that "the notion of a living Constitution—especially when coupled with developmental or evolutionary notions—is one of the central metaphors, not to say clichés, of American constitutionalism. It is hard to find anyone who is truly willing to reject it."[5] Today, while most theorists continue to endorse some form of living constitutionalism, proponents of what Scalia enthusiastically pronounced the "dead Constitution" are no longer rare or well concealed.[6] One major reason is that the living constitutionalist account has been left vague and unstructured. "While a number of observers have asserted that the Constitution is an evolving document," one scholar complained several decades before Levinson wrote, "we have never been told much more than that. The concept of the 'living Constitution' has never been explained in detail so as to indicate how far it goes and what it means."[7] Although our collective understanding has improved somewhat in the generations since, that smart people persist in proclaiming the Constitution "a living, breathing document" is some evidence that we have a considerable distance still to travel.[8] (The *document* is not alive and doesn't breathe.) For anybody "who ventures into the 'Living Constitution' debate," a leading scholar of religion fairly observed,

it remains a thorny challenge "to identify with reasonable precision just what it is that one is defending or debunking."[9]

The task for this chapter is to do better. Once again, my aim is not to introduce and defend a radically novel account of the development of constitutional law over time. It is to make clearer what claims about the living character of the Constitution or of constitutional law are being defended and why they warrant our confidence. It's to explain in what ways or by what mechanisms constitutional content is aptly described as "living."

Here's how the chapter progresses. I'll first outline the affirmative case for the claim that our fundamental principles change as relevant actors change their embrace or acceptance of them. That case proceeds mostly by drawing on what we know (or think we do) about other social phenomena, such as word meanings and social norms. Although the explanation I first offer will leave out many details, it will be more than adequate to shift what lawyers call the burden of production to the anti-evolutionists.

The chapter turns, accordingly, to consider several objections to the evolutionary account—objections related to the account's inherent uncertainty, to its interaction with textual provisions for formal amendment, and to the implausible or unappealing speed of change that it supposedly counsels. After finding these counterarguments to organicism wanting, the chapter turns attention to two cutting-edge theories of constitutional content and adjudication that conspicuously reject the organicism that this chapter espouses: Professor Adrian Vermeule's natural law "Common Good Constitutionalism," and the positivist "Original-law Originalism" of Professors Will Baude and Steve Sachs. Both are elaborate, carefully argued-for theories advanced by leading constitutional scholars—possibly the three most influential conservative constitutional theorists of their generation. I cannot engage them fully in a long book that pursues an affirmative

agenda of its own. But precisely because each of the two accounts rejects the living constitutionalism that organic pluralism advances even while sharing some of organic pluralism's other salient commitments (its insistence on a rich plurality of fundamental principles that collectively determine rules, in the case of Vermeule; its firm embrace of a positivist theory of content, in the case of Baude and Sachs), they should be examined to assess whether either surfaces challenges that cause the organic, evolutionary account of multiple fundamental principles meaningful trouble. I believe that they don't and will explain why not.

After our encounters both with Vermeule and with Baude and Sachs, I hope that all the following propositions will strike you as highly probable: a mass of principles lies at the foundation of our constitutional law, collectively shaping the constitutional rules; positivism is the right basic account of law; and our principles necessarily change over time, thereby ensuring that our rules do too. I'm tempted to end this chapter there. Organic pluralism is a big theory comprised of many elements. This one book, thick as it is, will not work out all the details. But one important topic still calls for deeper exploration: what role the American people have in grounding our fundamental constitutional principles and thus in driving the organic change of our constitutional rules over time. Sorting out the relative roles of judges, legislative and executive officials, and the sovereign people in grounding our principles is, to my eyes, the toughest puzzle that confronts the organic account. I've left it to the chapter's end.

Language, Manners, Fashion, and Law

We'll turn to constitutional principles momentarily. Let's start with word meanings. In English, the word "dog" refers to a domesticated carnivorous mammal known to science as *Canis familiaris.* The word "cat" refers to a different domesticated carnivorous mammal known to

science as *Felis catus*. Why does "dog" mean *Canis familiaris* rather than *Felis catus?* Why does it mean anything at all? This is an exceptionally difficult question to nail down with precision.[10] But it's not hard in broad outline. As noted earlier (Chapter 3), linguists and philosophers of language widely agree that meanings are not intrinsic properties of words but are determined by social-linguistic practices—patterns of use, communal dispositions, relations to a body of inferences that members of the linguistic community make. Put simply, the English word "dog" means dog because of the practices of English speakers.

I am going to introduce a vocabulary to capture the wholly uncontroversial idea that the meaning of a word depends on or is determined by linguistic practices: "grounding." As philosophers increasingly use the term, *grounding* is a relationship of metaphysical determination by which more fundamental facts or entities explain, non-causally, less fundamental ones.[11] What explains the fact that copper is highly conductive, and wood is not? What makes it the case that iron is hard, and mercury is liquid? Macrophysical properties (such as conductivity, hardness, elasticity, and solubility) are grounded in microphysical properties (such as molecular structure and type of atomic bond). What explains sensations such as pain and mental states of belief and intention? Most neuroscientists and philosophers of mind believe that mental phenomena are grounded in physical, neurochemical states of the brain. I will adopt the grounding idiom without further defense. It allows us to say that the meanings of a word in a natural language are grounded in patterns of the word's use by members of the linguistic community. Put the other way around, usage of a word grounds its meaning.

Notice how much these statements leave out! They say nothing about the patterns of use that matter or whether the usage of each member counts the same, or even about what this grounding relationship consists in or "how it works." What they do is to assert that certain

phenomena at one level of reality or existence, or in one domain of discourse, are related to certain phenomena at another level or in another domain, such that the former explain or are responsible for the existence of the latter. The lower-level phenomena make the higher-level phenomena what they are.

Shift now from words to social norms. Greeting norms vary widely across cultures: handshake, fist bump, air kiss, bow, and more. Funerary norms vary, too. In the West, one ought to wear black to a funeral. Most Hindu and East Asian communities wear white. Brazilian Catholics wear purple. Among the Akan people of Ghana, close family members wear red. Why, in Japan, ought one to bow yay deep and for just so long? No god or statute has decreed it. What makes it the case that you ought to wear black to a funeral in Des Moines, white in Delhi, purple in Rio, red in Kumasi? Nothing about the intrinsic, natural, or symbolic properties of the colors themselves. It's all about social practices—people's behaviors and beliefs. Social norms in any given community are grounded in practices and attitudes of members of that community.

Which practices and attitudes? Is there a norm against cheating on one's taxes (or one's spouse) if and only if everybody in the community reliably conforms to it? Surely that is far too demanding. But what then? Is a supermajority required? A bare majority? A majority or supermajority of all members of the community, or only of some influential or important subset? Must the members who matter truly conform, or is it enough that they believe they should conform and feel guilty when they don't, or that they claim to conform and publicly criticize nonconformity by others? These are difficult questions. Theorists of social norms have not settled on definitive answers. But the basic claim that social norms depend on shared practices and attitudes (in a fashion that the relatively new language of "grounding" aims to capture) is among the field's most widely accepted.[12]

Grounding talk is not a linguistic convention alone; it is accompanied by a convention for graphically representing the grounding relationship: a vertical arrow pointing upward connecting the grounding phenomena and the grounded phenomena. These relationships are displayed in figure 6.1. I use the term "practices" capaciously to embrace a potentially broad range of behaviors and accompanying mental states, such as believing and stating that the standard a norm captures is normative, using it to guide and justify one's own conduct, criticizing oneself and others for deviance, and so on.

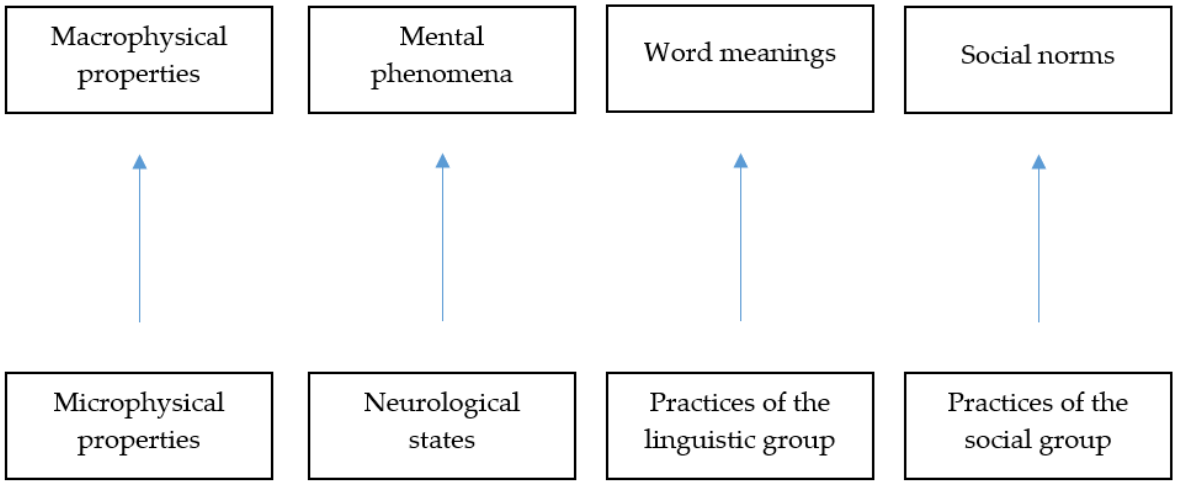


Figure 6.1: Grounding

The positivist punchline is predictable. Law is a social phenomenon. Like other social phenomena, it is grounded in acts and associated mental states of people. Principles, the fundamental normative elements in a legal system, are made what they are by the practices of real people accepting, promoting, and reasoning from them. For common lawyers in the seventeenth century, "the period in which modern notions of law took shape," the legal philosopher Gerald Postema explains, "the law in its fundament was understood to be not so much 'made' or 'posited'—something 'laid down' by will or nature—but rather, something 'taken up,' that is, used

by judges and others in subsequent practical deliberation."[13] Judges take up principles when deciding constitutional disputes, members of Congress take up principles when debating proposed legislation, the President takes up principles when issuing executive orders and when signing or vetoing legislation, the People take up principles when engaging in jury nullification or when petitioning Congress for a redress of grievances. Once taken up, a principle is further embedded in the law to the extent that the rules, decisions, and actions that they were taken up to support remain recognized law. Principles and the rules they collectively determine make up the fabric of the law. The more a principle is taken up by the relevant actors, and the more that subsequent legal decisions rely upon and reinforce the principles or the decisions they are understood to underwrite, the more secure is the principle's status as a legal norm of the system. The legal philosopher Rolf Sartorius put things loosely but not inaccurately when describing the fundamental principles of a legal system as those that are "embedded in or exemplified by numerous authoritative legal enactments: constitutional provisions, statutes, and particular judicial decisions."[14]

The paradigmatic speech act that grounds and embeds a constitutional principle is a majority judicial opinion that invokes a principle as a reason or basis for a constitutional ruling. By invoking a principle of separation of powers as a basis for its ruling on presidential immunity from prosecution, Chief Justice Roberts's opinion for the Court in *Trump v. United States* both reflected the majority's judgment that the principle was already a principle of our law and embedded that principle in the law a little more firmly.[15] Same too when Justice Kennedy's majority opinion in *Citizens United* invoked the supposed principle that government may not restrict speech based on the speaker's corporate identity: the judgment both expressed a belief that that principle already enjoyed constitutional status and served to help to make it so.[16] Acts of rule-

or practice-following in varied contexts have this dual character. Your use of a word to communicate a concept both reflects your belief that the word already does communicate that concept and, because word meaning is grounded in patterns of use, reinforces the conventional connection between word and meaning. Judges take up legal principles as grounds for legal judgments and in so doing embed them further into the law. Principles are much like trails: "They continually change—widen or narrow, schism or merge—depending on how, or whether, their followers elect to use them."[17] When you walk on a trail believing it's a trail, you thereby trailize that stretch of ground just a little bit more.

The weights of principles, like their contents or contours, are brought about by legal actors taking them up and deploying them in legal reasoning and decision-making. Weights are relative to one another and are given by what members of the legal community say about them and how they use them. They are also conferred, as it were, by battle—by the rules that are adjudged victorious, and thus made so, when principles press in opposing directions. Weights conferred in this manner will be rough at best (not 12 or .68, but slight, moderate, weighty, very weighty, or nearly conclusive) and change in organic fashion that is usually gradual. A principle's relative weight ebbs and flows, much as its contours constrict and expand.

Figure 6.2 depicts the rudiments of the dynamic just described: how our constitutional rules (the decisive content that we seek in litigation) are determined by the collective legal force of fundamental constitutional principles that are grounded in the practices of legal actors (quintessentially but not exclusively judges). Because the practices change over time (notice the timeline on which they ride), the principles that they ground change and thus so do the rules. Constitutional rules are inescapably subject to evolutionary change—"gradual, incremental, undirected, emergent and driven by natural selection among competing ideas."[18]

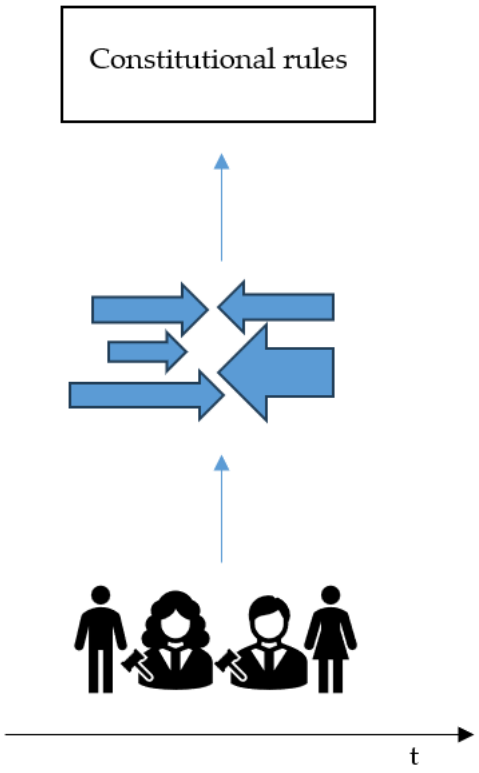


Figure 6.2: Grounding of rules in practices, via principles

Does this verbal account, and the accompanying graphic, leave out detail? Of course it does. Plenty. How many takings up of a principle are necessary for the takings up to succeed? What if an act that purports to take up an existing principle really makes up a new one? Must the taking up of a principle be explicit, or can a principle be taken up implicitly? What is the grounding force, if any, of concurring judicial opinions or dissents? What if judges systematically take up different principles, one from another? What if the People's principles differ from the judges'? What if battles between and among principles yield no consistent weights but a smorgasbord of conflicting ones? These are good and fair questions, and more could be added. I have answers to some of the questions but not all, and I like some of the answers I have but not all. I'll put off the most difficult until the chapter's end, after first raising and beating back objections that target any organic account along the lines I have already laid out, regardless of how the details might get

filled in. No sense in trying to complete the entire blueprint while doubts remain about the basic design. But before tackling challenges to that basic design, I'd like to elaborate on two aspects of the organic account on offer.

To begin with, there is nothing special about the beginnings. It doesn't matter whether the initial taking up of a principle issued from a good faith but mistaken belief that the principle was already embedded in the law or from a self-conscious act of creation. Social phenomena must originate somehow. New words are sometimes self-consciously coined as neologisms, but much more often arise via a gradual and mostly unconscious evolution from existing words. Either way, all that matters is success. Same with principles. Right now (when I'm writing these words and also, later, when you're reading them), the principles are what the principles are, some more crisp and others more vague, each possessing the relative (rough) weight that it does, regardless of the details of their genesis. The origins of a given principle might prove relevant to a theory of adjudication (as will be discussed in Chapter 7), but not of content.

If all that matters for a principle is success, how much success a principle requires—how much support from the legal community it demands—presents a hard problem. Three premises triangulate its solution. First, a norm's status as a principle of law does not require that it enjoys anything approaching consensus support. H.L.A. Hart's positivist theory does require near-consensus. On his theory, all law traces back to what he termed an "ultimate rule of recognition," a convergent social practice among judges of following and accepting the criteria that validate norms as legal.[19] (Although Hart distinguished ordinary rules of recognition that operate within a legal system from the single "ultimate" rule of recognition that grounds the whole thing, neither he nor his commentators respect the terminological distinction religiously, often meaning to refer to the ultimate, foundational rule even when dropping the modifier. Going forward, all references

to the "rule of recognition," in my voice or others', will refer to the ultimate one.) According to the standard reading of Hart, whenever the relevant officials (paradigmatically judges) fail to converge on some putative "criterion of validity," or whenever they agree that some criterion "counts" but fail to converge on how it fits within the rule of recognition's overall logic, the criteria grounded in the rule are unable to perform their validating function.[20] As the legal theorist Charles Barzun aptly encapsulates, "where there is no consensus, there is no law."[21] Some commentators who are hostile to the possibility of distinctly legal principles have thought such consensus is essential to positivism as such, and not only to Hart's (leading) version.[22] But that's not so, as the Australian philosopher C.L. Ten insisted decades ago when maintaining that an intelligible version of positivism may tolerate "considerable disagreement among judges about what rules and principles are embedded in the legal sources."[23] The foregoing sketch of the taking up and embedding of fundamental legal principles comports with Ten's wise dissent from Hartian orthodoxy.[24]

Second, as Ten suggests, disagreement about the principles can be considerable, but not total. As principles continue to multiply and as acceptance or recognition of the principles continues to fragment, legal content becomes less coherent and determinate until, at some point, it ceases to exist. Third and lastly, while it is natural to want to find or describe that inflection point, it's sensible to resist the temptation. Whenever we believe that a lot of something is enough and that a tiny bit isn't, we are led to wonder where the line lies. The ancient Greek philosopher Eubulides wondered just this back in Aristotle's day, when noting that a single grain of sand certainly is not a heap, that a million grains certainly is, and that there is no number of grains between 1 and 1,000,000 that would seem to demarcate heapdom. Eubulides's puzzlement over how the addition or subtraction of a single grain could make the difference is known to history as

the sorites paradox, from *soros,* the Greek word for "heap." Philosophers have proposed a handful of solutions but have converged on none.[25] I will have nothing new to say on this (literally) millennia-old puzzle.

That's enough for now. I'll put further elaborations and explorations on hold lest my admitted uncertainty about some details—important though they are—distract us from the prize. The prize is a concise, intuitive account of how constitutional principles are grounded in legal practices that makes positivism about legal principles as compelling as, and no more mysterious than, positivism about word meanings or about social norms. While philosophers and other experts in the relevant domains haven't worked out all the details, the coarse-grainedness of their accounts hasn't forestalled widespread acceptance. Same here; we should not lose the forest for the trees. Mores, fashion, the use of money, market prices, word meanings, rules of prescriptive grammar, etiquette, games, religion—all are "the result of human action, but not of human design. They are *evolutionary* phenomena, in the original meaning of the word—they unfold."[26] Constitutional principles are just the same. They can no more be fixed in place than could King Cnut's tides.

* * *

Living Originalism?

As you can tell, I think it's hard to feel neutral toward Vermeule's natural law theory of constitutional interpretation.[*] If that was your first encounter with his vision for twenty-first century America, you're likely now to feel either horrified or exhilarated. "I could take it or leave it," would be an odd reaction. Though I'm partly responsible for having stirred possibly strong

[*] *You* can't tell that because I've omitted the section on Vermeule's Common Good Constitutionalism for this workshop. This section discusses Baude and Sachs. I've included it not because their theory, Original-law Originalism, is critical for my purposes but because the discussion is jurisprudentially interesting in its own right and because the latter part of this section addresses whether the function that maps principles to rules is more complicated than mere aggregation. That's a hard and important question for organic pluralism. If you're not interested in Baude & Sachs and their take on Hartian positivism, jump to the bottom of p.69.

emotions, I'd ask you to try to submerge them for the moment and to recall one thing we just learned: natural law thinking can deliver either originalist or nonoriginalist theories of constitutional content or adjudication. What about positivism?

It might seem that positivism necessarily delivers nonoriginalism because positivism views legal fundamentals as grounded in human practices, and human practices are changeable; they have changed since any "origin." I admit to having hinted as much. But that's just a little too quick. Positivism as a general jurisprudential truth does not entail nonoriginalism as an account of American constitutional content *today*. Some form of originalism could be our law in 2027 (or fill in the date) because our socio-legal practices in 2027 (ditto) make it so. A living constitutionalist theory of content (as I use the phrase) is the idea that the law changes, even without amendment, because it depends upon human practices that are incapable of being fixed. An originalist theory of content maintains that our law, today, is determined by some facts about the world at the time of ratification of the 1787 text or subsequent amendments. Living constitutionalism would deliver originalism contingently if the current legal practices, picked out by the right positivist theory, make the historical facts that originalists latch onto our law. In short, positivism guarantees living constitutionalism, whereas living constitutionalism strongly biases toward nonoriginalism but does not guarantee it. I'll use the term "living originalism" for any theory that ends up with an originalist account of content by way of living constitutionalist premises.

Take public meaning originalism, the thesis that constitutional content is fully determined by fixed communicative contents of the constitutional text. If somebody were to attempt a positivist defense of that thesis, they'd end up maintaining, in broad strokes, that the law today is whatever set of rules correspond to the original public meaning of the text *because* that's the

fundamental law-making test that relevant legal actors (paradigmatically judges) accept today. Recall the brief syllogism introduced in Chapter 3 to represent the reasoning in *United States v. Heller*, the landmark gun rights case:

P1 In the United States, the original public meaning of the constitutional text, and it alone, is the law (public meaning originalism);

P2 The original public meaning of the Second Amendment was that Americans have a constitutional right against the federal government to possess firearms for personal use and defense, wholly apart from service in a militia (historical claim);

∴ C In the United States, Americans have a constitutional right against the federal government to possess firearms for personal use and defense (constitutional rule).

I said then that the first premise was implausible as a bare postulate and therefore needed argumentative support. Here's how a positivist originalist might try to recruit H.L.A. Hart to provide that support:

P1* In any legal system, the law is determined by the master rule that officials accept. (Hartian theory of legal content)

P2* In the United States, officials accept that the original public meaning of the constitutional text, and it alone, is the law (empirical claim about contemporary practices);

∴ C* In the United States, the original public meaning of the constitutional text, and it alone, is the law (public meaning originalism).

Because the conclusion of this second argument is the first premise of the first argument, if P1* and P2* are both true, thus securing C*, then *Heller*'s holding, C, would stand on secure ground too—at least if (contrary to the conclusion of most academic historians of the relevant periods) the historical claim P2 were true.[27] Of course, P1* can't be merely postulated without support any more than P1 could be, but let us suppose that Hart, or his followers, provide good arguments that make P1* plausible or even compelling. The stumbling block is P2*. Knowledgeable commentators widely agree that it is "not at all plausible" that practices of judges in recent generations fit this public meaning originalist claim.[28]

But, as we've known as far back as Raoul Berger, simple public meaning originalism is not the only originalist possibility. Professors William Baude and Stephen Sachs advance a distinct account in the most sustained and jurisprudentially sophisticated effort yet to vindicate constitutional originalism on terms that aim to be acceptable to current-day positivists. Baude and Sachs are among our most astute and insistent constitutional theorists on the need for a theory of constitutional content. The theory of content they offer—"original-law originalism"—provides that "our law today is the Founders' law, as lawfully changed."[29]

Original-law Originalism

On the surface, original-law originalism differs from orthodox public meaning originalism in two respects. First, the target of inquiry, the thing that really matters, is the original law, not the original meaning—legal content, not communicative content. Maybe the former was determined almost entirely by the latter, or maybe to a lesser extent than many of today's originalists would like. "This is a historical question," Sachs emphasizes, "not one that can be answered with pure theory."[30] Once they undertake that historical inquiry, Baude and Sachs end up concluding that our original law was an amalgam of original meanings and intentions, and what the founding generation understood to be "general principles" of law.[31] While slanted toward original meaning, this view of the original law is still unmistakably pluralist.

Second, our current practices do not provide that our law today is the law at the founding, full stop. As a form of "inclusive originalism," original-law originalism authorizes or requires whatever changes to the law the original law authorized or required. What sorts of changes to the original law were required or permitted at the founding is, again, a historical inquiry, not a theoretical one.[32] Baude and Sachs are (justifiably) confident that the original law permitted judicial devices for resolving ambiguity and vagueness, and also a doctrine of stare decisis that

enabled judges to reaffirm mistaken judicial precedents.[33] Beyond that, their minds are open. If the Supreme Court originally held the power to change constitutional rules in the manner that David Strauss believes they do today, then, Sachs concludes, America would have "a common-law constitution" because that's how "it was laid down in 1788."[34]

Baude and Sachs's major innovation lies not in the details of their theory of constitutional content so much as in their defense of that theory. As bog standard positivists, they embrace Hart's idea that legal content traces back to a convergent social practice among judges (and possibly other legal actors) of accepting law-validating criteria, the practice that Hart called the ultimate rule of recognition.[35] Because legal content depends upon this complex social practice, "American law might be originalist in nature, but then again it might not. Which view is right depends on facts about society today, not two hundred years ago."[36] This is unadorned living constitutionalism. "Just as current practice could easily discard the law of the Founding," Sachs acknowledges, "it can also *adopt* the law of the Founding, notwithstanding earlier departures therefrom. The best reading of our legal practices may be that we adhere to the law of the Founding *today*, whatever the unusual course of history might show."[37] As it happens, Baude and Sachs conclude that our current practices do make our law originalist, of the sort I just described. Because they end up at originalism via a basal commitment to legal positivism and the living constitutionalism that positivism entails, their original-law originalism is a version of what I've called living originalism.[*]

[*] Living originalism, as I've defined it, holds that our system is fundamentally one of living constitutionalism (because positivism is true), but one that, contingently, delivers originalism (of a sort). The converse view is also possible: our system is, at bottom, a form of original intentionalism (for reasons offstage) and the original intent was for judges to develop rules and principles in accordance with changing social values. Jack Balkin's version of originalism—what he calls "framework originalism," but introduced in a book entitled *Living Originalism*—takes this basic shape. Balkin-style living originalism is the converse of Baude and Sachs-style living originalism. It reaches living constitutionalism via a primary commitment to originalism.

How do they manage that? How do Baude and Sachs arrive at any form of originalism from a Hartian theory of legal content? Discerning a legal system's ultimate rule of recognition is a painstaking endeavor. Professor Kent Greenawalt's "rough approximation" of the ultimate rule of recognition in the United States ran over 400 words and required a long law review article to explicate and defend.[38] And even at that considerable length, Greenawalt acknowledged that his effort was radically incomplete when it came to describing "standards of constitutional interpretation." Unless "aspects of the criteria of recognition are cast in the simple circular and uninformative way that accepted standards of interpretation are part of the law," Greenawalt explained, "the ultimate criteria might stretch to volumes and require constant alteration with every subtle shift in prevailing standards."[39] Compared to Greenawalt, Baude and Sachs execute their analysis on the cheap, moving quickly from Hart's dry, technical vocabulary (of "rules of recognition" and "criteria of validity") to their own, folksier language. After rightly noting that "Hart argued that legal rules are grounded in social rules," Baude and Sachs promptly propose that "[a] social rule of recognition is reflected in what one might call the legal system's *official story*: its shared account of the law's structure and sources, which members of its legal community publicly advance and defend."[40]

And what is our current official story? Baude and Sachs's first pass seems anodyne: "The official story of American law rejects the idea of more than one Founding."[41] Americans believe that our "legal system hasn't yet departed (even a little bit) from the Founders' law in the way that the colonies threw off the British yoke or the states got rid of the Articles of Confederation."[42] It is a story of continuity, without "revolutions in the law since the Founding" or "rupture in the legal order."[43] I will call this thin statement of the official story—that actors in the American "legal system don't acknowledge, and indeed reject, any official legal breaks or discontinuities

from the Founding"[44]—the "impressionistic" version. In short order, Baude and Sachs put forward a version that is a little more theorized and specific. The official story's "key claim," Sachs says, is "that, at least at the level of our higher-order commitments, we accept claims of change only if they're ultimately rooted in the Founders' law."[45] Thus, Baude and Sachs conclude, "our system's official story is that we follow the law of the Founding, plus all lawful changes made since."[46] "Officially," that is, "whatever law [the Constitution] made back then remains the law, subject to various de jure alterations or amendments made since."[47] The "Founders' law plus lawful changes" formula is the official statement of original-law originalism. It is also what I will call the "formulaic" version of the official story. If the impressionistic and formulaic versions of the story ("no revolutions" vs. "Founders' law plus lawful changes") strike you as equivalent, that's fine. All you need to see now is that the formulations are not identical; they are communicated in different terms. You can imagine an ordinary person uttering something like the impressionistic version of the official story; only a constitutional theorist would put things as the formulaic version does (no shade).

That's Baude and Sachs's original-law originalism in brief. As with Vermeule's common good constitutionalism, my goal in introducing it is not to assess the theory on its own terms; it's to see whether it causes trouble for organic pluralism. Fortunately, it doesn't.

If we attend only to the impressionistic version of our official story, it's not a close call. Organic pluralism maintains that there exists a rich plurality of principles at the ground floor of our constitutional law. A random sample of the principles embedded in our law in the first quarter of the twenty-first century would include: "the principle of separation of powers,"[48] "the principle of separation of church and State,"[49] "the principle of colorblindness,"[50] "the constitutional principle of human dignity,"[51] "the principle of freedom of action for the States,"[52] and countless

others. Some of these principles may provide much as they did under the law at the founding or at reconstruction. The contents, contours, and relative weights of others will have changed considerably. As a result, some of our constitutional rules are different now than they were generations earlier, and without regard to formal amendment. But few organic pluralists would think that we've experienced "rupture" or "revolution." Organic pluralists are fully on board with "the official story of American law" that we have not undergone "more than one Founding."[53] Nothing about the picture I'm painting implies any "official legal breaks or discontinuities." Even the Reconstruction Amendments—often called "the second founding" in respect of the great changes they wrought to our principles of federalism and of equality[54]—were, as constitutional amendments, paradigmatic lawful changes within the framework set by the law at the founding.[55] Just like originalists, organic pluralists "don't think that we're living in a Fifth Republic, the way the French do, but rather in the same Republic we started with."[56] It's a legal regime that has undergone formal change over time, and, like all else in the social world, informal change too.

So if original-law originalism causes difficulty for organic pluralism, the source of that difficulty will be the formulaic version of the official story, not the impressionistic version. Here's a sketch of why one could conclude that the formulaic version does rule out the kind of organic changes to our legal rules that I've been arguing for. Start, as Sachs does, with the Hartian distinction between "substantive rules," which govern ordinary behavior, and "'rules of change,' which authorize alterations or amendments to the system's existing rules."[57] An "important consequence of having rules of change," he explains, "is that, until something happens to trigger those rules, everything that's already in the system is supposed to stay the same. That's what it *means* to have rules of change: if the rules aren't satisfied, there's no change."[58] If we add the supposition (far from a gimme, but to speed things along) that no rules of change that were part of

our original law authorized organic change to our fundamental principles,[59] then the conclusion follows that, because the organic changes aren't legally authorized, they're invalid and rules can't be built upon them.

But this obstacle to organic development of our fundamental principles rests on a jurisprudential error. Hartian rules of change do not govern organic change of the criteria of validity because the social practices (the practices that Hart dubs the ultimate rule of recognition) that ground the criteria of validity are prior to the rules of change, and therefore not subject to their governance. "[B]y their nature," explained John Gardner, Dworkin's successor (hence Hart's too) as Professor of Jurisprudence at Oxford, the ultimate rules of recognition "need not themselves meet those criteria [of validity]."[60] The ultimate rules that ground the criteria that, in Hart's theory, determine the law "are above the law, rather than part of it."[61] "No decision about what the ultimate rule of recognition does or should recognize as law," the late constitutional and legal theorist Fred Schauer elaborated, "can be thought of as a legal decision, in the sense of a decision dictated (or even guided) by legal materials."[62]

The point is not limited to Hart exegesis. It's a general truth about how legal systems work, on a positivist conception. On any positivist view, the most fundamental (or "highest-order") legal norms—"criteria of legal validity," nonderivative "constitutional principles," what-have-you—are prior to legal rules (including rules of change) and thus not subject to them. The most fundamental legal norms "cannot themselves be considered either constitutional or unconstitutional. They just are."[63] Therefore, it's not quite true that "if the rules aren't satisfied, there's no change."[64] There are changes *according to* the rules and also changes *prior to* the rules that help make the rules despite not being "de jure alterations or amendments." Law, for a positivist, and contra Sachs, can never be "supposed to change only in law-governed ways,"[65] for the changes in beliefs and

behaviors that ground changes in the fundamental principles that underpin the legal rules are prior to law, thus not governed by it.

The legal historian Jonathan Gienapp thus stands on firm jurisprudential footing when commenting that Baude and Sachs "misconstrue the primary ways in which constitutional law has changed over the course of our nation's history."[66] The greater part of constitutional change, he concludes, "has resulted not from the application of the Founders' own rules of change but as our legal consciousness increasingly departed from that of the Founders—as we left the Founders' legal imagination behind."[67] Because the fundamental constitutional principles are, in Schauer's apt terms, "necessarily pre-textual and extra-textual," to believe they are governed by rules that emerge, to any degree, from the text would be to commit a "logical error."[68]

I would not accuse Baude and Sachs of committing a basic error of logic or jurisprudence. To avoid one, however, the formulaic version of the official story must be modified. The necessary modification draws on the now-familiar difference between purposive and organic change. Here's a stab: our official story holds that our law is the law at the founding, except as it has been changed either formally, as authorized by law, or informally, in accordance with law's natural evolution. While this revision surely could be improved upon, it's on the right track. It preserves and sharpens the core insight from the intuitive version of Baude and Sachs's official story—that "valid legal claims [must] be somehow traceable to our system's origins"[69]—but is significantly more plausible than their formulaic version. It accommodates diverse views about what qualifies as "law's natural evolution." It satisfies Sachs's reasonable condition that "the rules of change have to have a certain amount of exclusivity or closure,"[70] without converting "certain amount" into "complete." And it makes his claim that, "in our system, explaining *when* something became the law is an important part of establishing *how* it became the law, and in turn to showing *that* it

became the law,"[71] more consistent with Ted Olson's uncontradicted observation, from two years earlier, that in practice the Supreme Court had never asked for the birthdate of organic legal change.[72]

Finally, if my proposed modification of the official story is more defensible than Baude and Sachs's formulaic version, it is also, once again, as friendly to organic pluralism as could be. Organic pluralists believe that our current law is "ultimately rooted" in founding law, not in Baude and Sachs's sense that all changes have been *authorized by* law, but in the sense, even truer to the arboreal image, that those changes have emerged from the organic *development of* law. In short, although I don't claim to be unbiased, it looks to me that the traveler who embraces original-law originalism is likely to reach organic pluralism through the back door.[73]

Do Baude and Sachs themselves reach organic pluralism? Some of what they say suggests they might. They acknowledge that general law "is shaped by" practice, and that "its contours can change as those practices change."[74] More strikingly, Sachs's claim that "[o]ur law is what's currently required by the higher-order principles that we currently accept and defend,"[75] looks like pure organic pluralism, save that their metaphors operate top-down, whereas mine are bottom-up.[76] Yet I'm certain that Baude and Sachs don't think that they have arrived at organic pluralism. Recall that what they call an official story is a legal community's "shared account of the law's structure and sources."[77] For them, "structure" performs significant work. "[O]ur legal conclusions typically come with complex legal justifications already attached," Sachs emphasizes.[78] "[I]t matters greatly," the pair contend, "*why* a court is doing what it's doing, and what kind of grounds it can cite in support."[79] These observations are not controversial on their face. But they lead to two ideas about the structure of our legal principles that threaten to cause trouble for the account I'm peddling.

First, if "[t]he proper chain of justification is part of our legal rules," Baude and Sachs might think that a chain of justification is part of our legal *principles* too.[80] Insofar as judges justify their taking up of the varied principles they do on grounds that the principles are the founders', then that justification becomes part of the principles themselves. Instead of "the principle of separation of powers," this argument would run, our law contains "the principle of separation of powers because, and in just the way, that was the law at the Founding" It's not "the principle of colorblindness," but "the principle of colorblindness because, and in just the way, that was the law upon ratification of the Fourteenth Amendment." Alternatively, the chain of justification that Baude and Sachs highlight could manifest, not as complexly structured individual principles, but as a hierarchy among principles. Principles of separation of powers, separation of church and state, colorblindness and the like might be "high-order" principles, on this view, but the principle that "our principles don't change" occupies a "higher order." In cases of conflict—where we take up a principle believing, incorrectly, that it is as it was at the founding—it's the higher-order, founding-era principle that governs.

I find this first possibility—that our principles contain "because" clauses that limit or qualify their force—highly doubtful for several reasons, most of which Baude and Sachs anticipate and other critics have pressed.[81] In point of empirical fact, most judicial speech acts that take up principles do not expressly reference the principle's supposed pedigree. When judges do justify a principle by reference to its founding pedigree, it is often empty rhetoric intended to assuage popular anxieties about judicial review, much as judges bend over backwards to deny that our principles conflict even when their being in conflict must be obvious to the speaker.[82] One should not underestimate the degree to which the justices report their reasoning insincerely to mask the judgmental aspects of judging that they fear would inflame counter-majoritarian anxieties among

the populace. "[T]he difficulty with this place," Justice Louis Brandeis once complained to a colleague, "is that if you're only fifty-five percent convinced of a proposition, you have to act and vote as if you were one hundred percent convinced."[83] Perhaps most importantly, while the pretense that founding-era principles have remained constant is admittedly the dominant judicial motif, it is nowhere near uniform. Justices do occasionally announce the truth that "constitutional principles evolve through repeated interpretation and application by both state and federal courts."[84] They proclaim that constitutional principles are subject to "evolution" and "development"[85] on subjects from Congress's commerce power to separation of powers to individual rights. They deem it "clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time."[86] And they announce that *stare decisis* analysis requires courts to attend specifically to the "evolution of legal principle."[87]

None of this can be a surprise in a legal system that continues, unbroken, from the days of Justice Holmes. The words of the Constitution "have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters," Holmes declared for the Court in one of his most celebrated judicial passages. "[T]hey had created an organism." Questions of constitutional law, accordingly, "must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[88]

My strong sense that our current practices are less uniform than they appear to Baude and Sachs also underwrites my response to the second possibility about the structure of our principles that could be drawn from their observations: that our fundamental constitutional principles occupy different levels, with some principles trumping others, and do not (or do not only) possess different relative weights. This alternative goes lexical, reminiscent of Professor Fallon's solution to the *e pluribus unum* challenge. It contends, in effect, that the function that determines or makes rules

from principles is not simple aggregation, as argued for last chapter, but hierarchical, like a decision tree. I suspect that some readers of this book who find aspects of the account on offer appealing but can't shake their originalist leanings will already have been playing with some variation on the idea that our ultimate rule of recognition is "if the original public meaning of the text is clear, then that's the law; if it isn't, then the law is determined by the net weight of principles." Something like that could be, as I quietly flagged earlier.[89] It is not impossible, and I do not insist that it's not actual. Compared to other pluralist (and "eclectic") theories, organic pluralism is distinctive in allowing for—and centering—aggregation, not in maintaining that aggregation is all there is. Already, however, we have seen some strong reasons to doubt that true lexicality does obtain in our system.

First, current Supreme Court doctrine furnishes clear counterexamples. As we saw in Chapter 3 ("Bitter Bullets"), the Court has expressly abandoned the original meaning of the Interstate Compact Clause on the ground that requiring congressional consent to all interstate agreements (in accordance with the clause's plain meaning) would be absurdly inefficient.[90] Similarly, the Court has held that states enjoy constitutional immunity from suits brought by in-state citizens that allege violation of federal law despite the plain meaning of Article III's declaration that "[t]he judicial power shall extend to all cases . . . arising under . . . the Laws of the United States,"[91] and without any support from the text of the Eleventh Amendment, which speaks only of suits brought "by Citizens of another State, or by Citizens or Subjects of any Foreign State."[92] As the Court has tellingly acknowledged, its immunity doctrines are inconsistent with "a mere literal application of the words of" Article III or the bare "letter of the Eleventh Amendment." That's okay because the meaning of the text doesn't necessarily determine the law. "Behind the words of the constitutional provisions," Chief Justice Charles Evans Hughes wrote for a

unanimous Court, "are postulates which limit and control."[93] Shifting from states to individuals, Article III declares unequivocally that "[t]he trial of all crimes, except in cases of impeachment, shall be by jury."[94] Yet over half of all federal criminal trials are conducted without a jury.[95] How? Because the Supreme Court has held that, despite "all," the jury right does not apply to "petty crimes" and that, despite "shall," the right, when it does apply, can be waived. Based on these and other examples, the constitutional historian Stephen Siegel has fairly concluded that "our constitutional tradition countenances a variety of doctrines and government practices that depart from clear and concrete constitutional command without the cover of a workaround."[96]

Indeed, if any of our principles are truly lexically superior to all others, the most plausible candidate is not any textualist or originalist principle but the principle of judicial precedent—roughly, that a rule announced in a non-overruled Supreme Court decision has great legal force. This principle is so weighty that one is tempted even to say that "what the Supreme Court has held is the law." Although that could be,[*] I'm disposed to think it a tad overstated. Commenting on the Supreme Court's decision in *Dred Scott,* Lincoln observed that "judicial decisions are of greater or less authority as precedents, according to circumstances," such as whether the decision was unanimous, whether it has been reaffirmed, whether consistent with "legal public expectation," and so forth.[97] If there remains any truth to these qualifications, then it is more probable that even principles of judicial precedent are just extremely weighty than that they enjoy

[*] That precedents can be overruled is not incompatible with the possibility contemplated in the text. Principles of content determine the contribution that judicial rulings make to legal content. Principles of adjudication (to be discussed in Chapter 7) address whether and when courts may overrule mistaken judicial precedents, thereby changing the law (even if changing the law back to what it once had been). I'd expect that principles that determine the contribution that precedents make to legal content and sibling principles that determine when judges may or should overrule precedents coevolve, which is to say that they reciprocally affect each other's evolution. Important discussions of the evolution of principles of stare decisis include Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents,* 87 VA. L. REV. 1 (2001); Frederick G. Kempin, Jr., *Precedent and Stare Decisis: The Critical Years, 1800 to 1850,* 3 AM. J. LEGAL HIST. 28 (1959).

true lexical priority over all others. That's why even Supreme Court precedents can be "overruled in the court of history."[98]

Second, we don't need to assume that original meaning (or any other principle or factor) has true lexical priority over the field to explain confident intuitions about what the law is when the original meaning, original legal intentions, and consistent practice all align. That was the lesson of Figure 5.3.

A third reason to be skeptical that our principles are arrayed in a neat hierarchy is the deepest and most telling: lexical ordering of principles demands more convergence in the practices that ground the mapping function than does aggregation, and more than we are likely to find in a vast, complex, decentralized legal system such as ours. Hierarchical ordering requires more underlying behavioral convergence than aggregation does in two respects: it requires more people to agree, and it requires them to agree on more. The first point is a little subtle but also the less important of the two; I've deposited it in an endnote for those interested.[99] The second point is unsubtle and crucial: if the function that generates rules from principles is lexical, legal actors whose behaviors ground the function must agree not only on whether a consideration is a factor, but also on where it fits in the ordering. That added level of coordination will often be the deal-breaker.

Community stews are a thing. Irish stew, Mulligan stew, burgoo—they all come in communal versions. Someone sets a pot simmering over an open fire, everyone tosses in a little of what they have, usually vegetables or game, and in time the community has dinner. Community cakes are not a thing. No community has a practice where some folks throw water and flour into the oven with the expectation that other neighbors will toss in eggs, salt, perhaps some more flour, and the outcome will be edible. Why the difference? Because stews, as aggregative dishes, can

be produced by many hands and little coordination. Baking, a lexical operation, cannot be executed successfully by many chefs freelancing. Hart's system appears to require judges to converge on a recipe in order for law to emerge. That's a big ask. For forty years Dworkin repeatedly objected that, given how much consensus the ultimate rule of recognition requires, and given how much disagreement obtains, if Hart's account of law were correct, "it would follow that there is actually almost no law in the United States."[100] That was an exaggeration but you get the idea: if you're depending on a large number of people to converge behaviorally on a structured function, good luck.

Baude and Sachs get this. They understand that, on Hartian premises, our principles will be structured in strict hierarchy only if the grounders (judges at a minimum, but not exclusively) converge both on the principles and on their ordering. But they are undeterred, contemplating that when we drill down deeper into our official story, we might discover "a more complex consensus, in which the acknowledged criteria have various implicit or unstated exceptions."[101]

I think that their hopes to unearth a more complex consensus will go unrealized. Recall Justice Story's disappointment at "the want of some uniform rules of interpretation, expressly or tacitly agreed on by the disputants."[102] Not only have we no reason to doubt Story's sincerity (the usual temptation of a treatise writer being to exaggerate the data's conformity to the writer's views),[103] but a diversity of interpretive approaches and jurisprudential assumptions is just what one should expect from a disparate and divided polity—Federalist and Anti-Federalist, slaveholding and free, agrarian and commercial—spread across a vast territory not yet blessed with modern means of transportation and communication. Indeed, respected legal historians have already objected that, when Baude and Sachs turn from our current official story to the original law that our current story supposedly picks out, they consistently find much more consensus than

existed. Professor Jonathan Gienapp contends that Baude and Sachs "minimiz[e] the depth of early constitutional contestation" to such a degree as to "furnish an implausible account of Founding-era law and legal rules."[104] Underscoring that "[d]issensus, not consensus, marked Founding Era constitutionalism,"[105] Professor Saul Cornell similarly objects that Baude and Sachs rely "on an outmoded version of consensus history that serious scholars of the Founding Era abandoned long ago."[106]

What was true of the founding is surely no less true of our day. To expect current practices to arrange our fundamental principles or inputs into a tidy hierarchy—to imagine a thick and nuanced "official story"—is, it seems to me, to place faith in an unrealistic degree of accord. In our "imperfect world" of limited resources of time and intellect, the philosopher Nicholas Rescher has argued, "a consensus among people, be it global or local in scope, international or familial, is in general unattainable."[107] I'm with Rescher. Given the persistence of "pervasive disagreement . . . , [w]e must learn to live with dissensus—with pluralism in matters of opinion." One thing that a sustainable "intellectual and social order [that] can function effectively even in the presence of dissensus" requires is that our politics and our ethics aim to tolerate and bridge differences. But that's not enough. It's just as essential that our theories about what exists in the social world not assume foundations that require a consensus that will not obtain. Original-law originalism, like the Hartian positivism upon which it's built, does not allow law to emerge out of dissensus. Organic pluralism does. That is one of its signal virtues.

* * *

Whither the People

I hope you find this chapter to have strengthened an intuitively plausible idea: that the fundamental building blocks of our constitutional law are grounded in social practices much like

word meanings, rules of grammar, social norms, and norms of fashion, and are inescapably dynamic (by which is meant only "not static" or "incapable of being fixed in place," not "changing rapidly"). The most common objections lobbed at the picture of evolving fundamental principles—that it is impossible to confidently date organic changes, that organic change renders a provision for formal amendment moot or superfluous, and that an organic picture requires that judges consciously update the law with a rapidity that is implausible and unappealing—fall flat. The dominant conservative pluralist alternatives—Vermeule's vision of fixed principles of natural law, and the Baude and Sachs positivist original-law originalism—provide no reason to abandon the organic pluralist model, if it is otherwise attractive.

But however compelling the view might be, it's undeniably incomplete. Much about the grounding mechanism remains to be spelled out. I'm content to leave lots open. Teasing out the secrets of grounding across metaphysical levels is hard philosophical work. If organic pluralism has any value, this book won't be the last word on the subject. My own more modest standard for success, then, is not to sort out all the details but to move the living constitutionalist idea from intuitive-but-mysterious to understandable-but-underspecified. However at least one issue needs comment before we turn from a theory of content to a theory of adjudication: Who matters? Whose behaviors ground constitutional principles? More particularly, what role is played by judges and what role, if any, is played by the people?

Revisit Figure 6.2. Its depiction of the kinds of persons whose actions and accompanying mental states ground our constitutional principles aims to suggest two things: that "the grounders" include ordinary citizens in addition to judges, and that the judges play the more central role, their actions "matter more." (A rough analogy: everyone who participates in the culture of fashion has some role to play in grounding its norms even while fashionistas play the leads.) Is this right? Do

ordinary people, either individually or in some sort of collective capacity, ground our constitutional principles at all? If so, do their actions count for less than the actions of judges, the same, or more? And what makes the correct answers correct?

H.L.A. Hart's position on ordinary people's role in grounding the law was clear: they have none. In his 1961 magnum opus, *The Concept of Law*, Hart assigned distinctly different roles to legal officials and to ordinary citizens. Remember that the ultimate rule of recognition is a convergent practice, obtaining among some members of a society, of following legal norms with an attitude of acceptance that Hart called the "internal point of view." That practice grounds the criteria of validity that pick out and "validate" ordinary legal rules. According to Hart, for a legal system to exist in a community, ordinary citizens must generally obey the rules that are validated by the criteria that are grounded in the convergent practice that is the rule of recognition. But they do not participate in that practice and therefore do not play a role in making the criteria of validity what they are. The system's "rules of recognition specifying the criteria of legal validity," says Hart, "must be effectively accepted as common public standards of official behavior by its officials." More pointedly, "the officials of the system"—but not the citizens—"must regard [the ultimate rule of recognition] as [a] common standard[] of official behavior and appraise critically their own and each other's deviations as lapses."[108] Decades later, in his posthumously published *Postscript*, Hart seemed to narrow the community whose recognitional practices matter to judges alone, describing "the rule of recognition" as "a form of judicial customary rule existing only if it is accepted and practiced in the law-identifying and law-applying operations of the courts."[109] On either view (all officials, or only judges), ordinary citizens do not participate in the social practice that grounds the fundamental criteria of legal validity.

That's Hart. But his apparent view that popular commitments have no bearing on legal fundamentals is not obviously right when applied to American constitutional law centered on a text famously issued in the name of "We the People." "[W]hy should the exclusive official class determine the law for everyone else?" Baude and Sachs wonder. "Scholars in the Hartian tradition have often suggested as much, but we see no good reason for it." Instead, they think, "the social rules that determine the law, like other social rules involved in other artificial normative systems, more plausibly rest on the beliefs and practices of those who jointly partake in them."[110]

Baude and Sachs's instinct is plenty sensible. Is it also defensible? How would it work? As we have seen, Hart's signature innovation, the ultimate rule of recognition, depends upon near-consensus among the participants. If the set of people who participate extends beyond judges to encompass all citizens, the prospects for consensus all but evaporate, destroying the prospects for law as well. Simply put, on Hartian premises, the more folks who participate in the grounding of our fundamental legal stuff, the less law we will have. Understanding that welcoming non-officials into "the recognitional community" threatens to make law impossible, the legal theorist Matthew Adler has reasoned that Hart was mistaken to suppose that any "single community defines the law of a given legal system." Instead, he argues, the Hartian picture entails that "there is no canonical group whose practices are the foundation for U.S. law. Propositions about U.S. constitutional law and, derivatively, U.S. law more generally are true or false relative to the practices of a stipulated group."[111]

Adler might be right. But his admission that his conclusion is "counterintuitive" is probably an understatement.[112] More than highly surprising, it's also disturbing, for the same basic reasons many people are unsatisfied with Philip Bobbitt's inescapable pluralism. Our social projects are greatly advanced if we can believe there is such a thing as *our* law, not just *your* law,

my law, and *their* law. So before embracing Adler's arresting conclusion, we should work hard to see whether the people can participate in the grounding of constitutional principles without having to abandon the commonsensical notion that there exists one legal system at the national level in the United States, not a collage of innumerable partially overlapping legal systems.[113] Because Adler's claim that multiple recognitional communities underwrite a multiplicity of legal systems claiming jurisdiction over the same territory follows from Hart's premise that legal norms must be grounded in near consensus among the members of the recognitional community, its counterintuitiveness provides some reason to prefer a theory of legal content that does not require consensus among the grounders. As I have emphasized, organic pluralism doesn't. Maybe, then, it can accomplish what the Hartian account cannot.

If the embrace of a constitutional principle (already established or fledgling) by ordinary citizens plays a very different role in grounding that principle in American constitutional law than does the embrace of a principle (established or fledgling) by judges, what explains that fact? If the people have no role as grounders of principles, or if they have a distinctly marginal role, in virtue of what is that so? (The same questions arise if it is claimed that ordinary people play a privileged role relative to judges, but I'll put that possibility aside to simplify exposition.) There are two ways to go here. It could be that the people are disqualified (or disadvantaged) as grounding agents: they are ineligible (or less eligible) to take up principles. (Why?) Alternatively (or in addition), it might be that the people are unable (or less able) to take up principles and to embed them in the legal materials even though they're perfectly eligible to do so. On the first way of thinking, there's an important sense in which the people *can* take up and embed constitutional principles but their doing so doesn't really count; on the second, the people can't take up principles (or they take up principles less competently), but if they could take them up well, their doing so

would count equally. (Compare laws that prohibit driving by women with laws that prohibit driving by the blind.) I'm attracted, at least in the first instance, to that second way of thinking. I'll conclude (against Hartians) that the people do play some role in directly grounding our constitutional principles, but (possibly against Baude and Sachs) that they have less ability to effectively take up and embed our principles than do most officials, and much less ability than do judges.

The first essential step in this argument is to say a bit more than I did earlier about how principles are taken up and embedded. While I do not pretend to have fully cracked the nut, two things about the process are apparent to me: (1) the taking up of a constitutional principle (in the sense that performs grounding work) is a communicative act, and (2) it's not just any act that communicates, but a communicative act of constitutional significance. (Declaiming your devotion to federalism while doing the laundry doesn't ground.) To a first pass, then, a constitutional actor takes up a principle by communicating commitment to, or recognition-and-acceptance of, that principle in the course of, and as basis for, performing a constitutionally meaningful action such as exercising a constitutionally recognized power. Judges take up principles when deciding constitutional cases. Legislatures take up principles in the preambular ("Whereas") clauses of legislation they debate and enact. As with most acts of communication, a taking up need not be explicit to be effective, even while explicitness helps. What is required is that the act adequately communicates what is being taken up, or at least has the capacity to do so.

If this is broadly on target, the people's ability to ground constitutional principles is significantly limited simply by the character of the acts they perform. Ordinary citizens' main constitutional powers are voting for candidates for elective office and deliberating and deciding when sitting as juries, both grand and petit. Ordinarily, these activities are not good mechanisms

for communicating the taking up of constitutional principles. Elections are usually opaque to the constitutional principles that drive the voting.[114] (What principles did the People take up in the 2024 presidential election when giving Donald Trump 49.8% of the popular vote? What principles did they take up four years earlier when electing Joe Biden with 51.3% of the vote?) Juries are mostly invisible; when a jury nullifies, we are not likely to know it. If we suspect it, we might have no way to know what constitutional principles the jurors were taking up. If they can communicate the principles that moved them, we may have no idea how representative of the citizenry that jury was. (Consider that almost everybody's Exhibit A of the constitutional significance of jury nullification is the acquittal of the publisher Peter John Zenger way back in 1735, and that few offer an Exhibit B.) In addition to these powers, however, the people also have First Amendment rights to peaceably assemble and to petition the government for redress of grievances. These activities do enable people to communicate their commitment to principles more legibly than voting and jury service permit. By marching on Washington, it seems to me, the people (or segments of them) do take up and embed the constitutional principles under which they march. So, yes, the people are in the picture. Ordinary citizens can take up constitutional principles in a way that grounds them. But deficits of visibility, legibility, and representativeness significantly limit their actions' efficacy. Moreover, people's grounding actions tend to be ephemeral; they lack the sticking power of enacting legislation or issuing judicial opinions. All in all, citizens play a minor role as direct grounders of our principles less because they are just ordinary citizens and mostly because, for ordinary citizens, taking up is hard to do.

That's the view that strikes me as most probable. It's why Figure 6.2 looks as it does: non-officials matter, but judges are the central players. I don't insist that that view is correct. My mind is open. If it's wrong—if the people's role in grounding is more prominent than I am claiming—

the argument will probably come from the advocates for "popular constitutionalism," a family of views that sprung up around the turn of the current century to theorize a more pronounced place for the people in constitutional governance than standard thinking allowed.[115] To be clear, we should not expect popular constitutionalists to address our question squarely. For one thing, their central (but not sole) aim was to challenge judicial supremacy in the announcement and application of general rules of law, whereas we are interested, not in the authoritative declaration of constitutional rules but in the grounding of constitutional principles, conceived of as contributors to the rules. Our question is whether popular constitutionalists provide good reason to believe, not that the people are supreme in their judgments of what the constitutional rules are or of how those rules apply to concrete disputes, but that they are supreme, or at least privileged, in grounding the principles that collectively determine the rules and thus the applications.[116] Furthermore, the difference between theories of constitutional content and of constitutional decisionmaking that is fundamental to this book was virtually no part of the scholarly discourse when popular constitutionalism had its moment, and many contributors to that literature might find the distinction uncongenial. So we're not all asking the same questions or talking the same language. Despite all that, if I've shortchanged the people's role in grounding principles, I'd expect the literature on popular constitutionalism to let us know.

Yet that is not, I think, what the literature teaches. The first relevant lesson it imparts is that, in the eighteenth-century heyday of popular constitutionalism, ordinary citizens deployed two potentially important mechanisms for taking up constitutional principles beyond the three (voting, jury service, and assembly) that I've already touched upon: petitioning and mobbing.[117] The first, petitioning, I did mention, but only in combination with assembly, not as a separate practice. During the first half-century of life under the Constitution, however, petitioning was a distinct and

robust mode of popular participation in governance.[118] Individual citizens, civic associations, religious groups, enslaved people, and state legislatures sent hundreds of thousands of petitions to Congress on a broad mix of issues—from sweeping constitutional disputes related to slavery, women's suffrage, and temperance, to humdrum administrative grievances related to war pensions, land grants, and political appointments. For its part, Congress took the petitions seriously, receiving and docketing them under established rules, and referring them to committees. The second mechanism, mobbing, refers not to chaotic rioting but to organized collective action by citizens claiming to enforce constitutional or natural rights, and not to be acting lawlessly. The famed Boston Tea Party of 1773, in which, to demonstrate opposition to British import taxes and to reinforce the constitutional principle against taxation without representation, scores of colonists, dressed as Indians, boarded British ships docked in Boston Harbor and tossed hundreds of chests of tea overboard, was classic mob action.

The second lesson is even more important: the world of eighteenth- and early-nineteenth century Americans is not ours. The rituals on which popular constitutionalists hang their tricorns have not been meaningfully practiced for well over 150 years. By the late nineteenth century, lobbying, parties, and the rise of the administrative state shifted the petition function into different channels. Although Congress still received petitions, they were increasingly perfunctory and carried little political weight. And by the early 20th century, petitioning had died as a mass civic practice. In parallel, we have also lost the conventions and social understandings needed to make mobbing a useful communicative practice. Consider: why did the revolutionary Bostonians who relieved the British ships of their cargo dress as Indians? Standard narratives suggest they were in "disguise."[119] But Indian dress was not disguise, at least not chiefly. It was costume, appropriate for men engaged in political theater. "From the 1760s through at least the 1840s," the legal

historian Farah Peterson explains, Indian dress "was a common element" in political protest, as "[w]hite Americans would dress up in Indian costume, make up their faces with their idea of Indian war paint, and participate in destructive and sometimes violent demonstrations."[120] Colonial and revolutionary Americans who engaged in mob action "thought they were making a constitutional argument," and "believed that their costumes added something to that claim."[121] Indian dress served as "a potent *legal* symbol, both for the people who wore the costume and the people who saw it," thanks to the symbolic meanings with which the customs and conventions of the people invested the attire,[122] thereby mitigating deficits of legibility and representativeness that mob action inevitably confronts. That symbolic language and the complex set of norms that sustained it have disappeared, much like Congress's practice of receiving and giving a hearing to, citizen petitions. Therefore, as much as the popular constitutionalism literature educates us about what once had been and perhaps could be again, it also reinforces that, as things currently stand, ordinary citizens play only a peripheral role in the grounding of our principles.

If I'm right about that, does it follow that the people are nearly irrelevant to the grounding of our constitutional principles today? Not at all. The people still matter a great deal, albeit mostly indirectly. In the long run, the people influence who are the judges by electing the president who makes the nominations. And principles often bubble up in the judicial system when taken up by trial and appellate judges in response to lawyers' arguments.[123] More generally, as the popular constitutionalists Robert Post and Reva Siegel emphasize, the relationship between the people's constitutional commitments and court-announced constitutional law "is dialectical, not unidirectional."[124] Accordingly, and unlike other prominent members of their band, they "regard the tension between popular constitutionalism and judicial supremacy as generative; the fundamental constitutional beliefs of the American people are informed and sustained by the

constitutional law announced by courts, just as that law is informed and sustained by the fundamental constitutional beliefs of Americans."[125] Thanks to ongoing dialogues between courts and the populace, Professors Post and Siegel explain, judges "incorporate[e] the political convictions of the nation into the substance of constitutional law . . . , however much they may proclaim that constitutional law is independent from political culture."[126] The constitutional theorist Michael Perry had similarly argued that the "interplay between judiciary and society in the shaping of societal morality is dialectical" twenty years before the popular constitutionalist moment. "The Supreme Court, relying in significant measure on the preliminary efforts of other courts, state and federal, derives from the totality of the American experience—past ('tradition') as well as present—various working principles," Professor Perry observed. "The rest of political society, in turn, must respond to the Court's work, and in responding will accept or reject or, most often, simply moderate (to a greater or lesser extent) the principles the Court has derived." And the dialectic continues, as the Court "will respond by assimilating society's response, by treating that response as a new facet of the evolutionary American experience that will underlie and inform the Court's future efforts to refine its working principles and to derive new ones."[127]

How the courts should conduct that dialogue—to what extent they ought consciously to take up and embed the People's principles—is a challenging question of constitutional theory. Archibald Cox, Solicitor General under President John F. Kennedy (and the Watergate special prosecutor fired by Acting Attorney General Robert Bork), believed that judges do and should. In a generally favorable contemporaneous review of John Hart Ely's *Democracy and Distrust*, Cox questioned Ely's decision to limit active judicial review to the vindication of participational but not substantive values. "[J]udges can find in the sources of constitutional law long-term values and general principles supported by an enduring consensus," he opined, "even though a misguided

political majority has rejected them for the short term because it is heedless of the inconsistency between the particular measure and the long-term values, or because of a breakdown in the democratic process."[128] Professor Tribe has similarly suggested that courts are generally able to discern the requisite "signals [from] the zeitgeist."[129] Others are less sanguine. "What is it that the judge must consult to determine when, and in what direction, evolution has occurred?," Justice Scalia wondered. "Is it the will of the majority, discerned from newspapers, radio talk shows, public opinion polls, and chats at the country club?"[130] Scalia asks a good question. We should take it seriously—but not, thankfully, when engaged in constructing a theory of constitutional content. It's a question for a normative theory of adjudication, the subject of our next chapter.

CHAPTER 7. ADJUDICATION IN THE REAL WORLD

> "My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. . . . If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself."
>
> -- Justice Benjamin Cardozo (1921)

The last two chapters have presented the organic pluralist theory of constitutional content. It is not yet a theory of adjudication. It's an account of what makes it the case that our constitutional rights, duties, powers, and immunities are whatever they are—that "the law is" what it is—at any slice of time. Many think, however, that at the end of the day all we care about is adjudication. Indeed, as we have seen, some theorists insist that adjudication should be our sole concern from the start of the day too. "All serious constitutional theory," Bork proclaimed, "comes down to the question: What should the judge decide in the case now before him?"[131] Bork was an originalist and a positivist, but his single-minded focus on judging is widely shared. In the estimation of Professor Andrew Jordan, a nonoriginalist and anti-positivist, "[c]onstitutional theories aim to tell us how a judge ought to decide a case."[132]

Not everybody agrees. Professor Gary Lawson has doggedly championed a contrary view for decades. "Any claim that the Constitution's meaning should guide adjudication, like any other claim about what people 'should' do, must be justified by sound moral arguments," Lawson explains. "And that is a tall order."[133] It's a tall order, first, because there's little reason to think that law professors have expertise in first-order political morality. "The chances of a good [theorist of content] also being a good normative political theorist does not seem large," Lawson observes; "they are different tasks calling for different skill sets."[134] Furthermore, to be useful, a theory of

adjudication must descend from ideal theory to engage with the messy complexity of life that judges actually confront. Because "[a]djudication takes place in real time, with limited resources," Lawson emphasizes, "[t]he practical demands of adjudication are not something that [a theory of adjudication], as opposed to [a theory of content], can wave aside."[135] While "scholars will do what we can," he concludes, when it comes to theories of adjudication, "expectations need to be realistic," for much of legal practice "consists of the fine art of muddling through."[136] Professor Sachs likewise stumps firmly for theories of content over adjudication. "The point of constitutional theory is to identify our constitutional law," he asserts. "All the professors can do, and all they should have to do, is offer a good account of what the Constitution requires."[137]

No reader who has made it this far will be surprised to hear that I lean toward Lawson and Sachs. A normative theory of adjudication is a matter of applied ethics, and one that must take account of resource constraints, institutional dynamics, and countervailing moral considerations. Justice Felix Frankfurter had this complexity in view when setting forth his own theory of adjudication, such as it was. Constitutional adjudication, he rhapsodized, demanded a judge's "loyalty and allegiance to nothing except the effort to find their path through precedent, through policy, through history, through their own gifts of insight to the best judgement that poor fallible creatures can arrive at in that most difficult of all tasks."[138] If that is remotely what sound adjudication calls for, all the more reason for a constitutional scholar to devote more energy toward understanding content than toward advising or instructing judges.

That is not to say, however, that a theory of adjudication can be ignored or is not worth the theorist's time. From the scholarly perspective, a theory of content may be the main course, not an appetizer, but shouldn't be the only course. It would be beyond disappointing if the right theory of constitutional content taught us nothing of value about how justices of our Supreme Court

should adjudicate constitutional disputes. Fortunately, the organic pluralist theory of content unpacked in the last two chapters bears profound lessons for judges, even as it does not come close to delivering a decision procedure.

Where to begin? Given the topic's complexity, we do well to organize our thinking around propositions in which we already have high confidence. I announced one relevant proposition in Chapter 4: presumptively, judges should try to find and enforce the law. That initial (and necessarily rebuttable) conviction is not unique to me. I'm quite confident that it is widely held. It's a good place to start.

From this animating premise, four questions suggest themselves: (1) *Why*, presumptively, should judges enforce the law? (2) *How* should judges find the law? (3) *When*, if at all, should judges not enforce the law they find? (4) *What* should judges do if they believe that they cannot find the law, perhaps because they conclude that there is no law on point to find? Thorough answers to these four questions would collectively approximate a complete normative theory of constitutional adjudication. This chapter addresses each in order, but purports to resolve none. Given how multi-factored and value-laden the enterprise is, I do not aim to be exhaustive or conclusive and, for the most part, cannot even claim to be original. My principal goals are to organize the issues, identify and sharpen the most commonly offered options, and offer critical but partial assessments.[139] That said, I do have what I think is one new idea to place on the table, a thought that emerges distinctively from the organic pluralist theory of constitutional content. I will not summarize the thought for you just now, however, for fear that any two-sentence summary will strike more than a few readers, not only as misguided, but as possibly crackpot. I hope to buy

myself somewhat better odds by delaying your first encounter with my suggestion until its full presentation, at chapter's end.

* * *

Summary

That was a whirlwind of theories, arguments, and cautions. It's easy to have lost one's bearings. Let's summarize. We're assuming in this chapter that organic aggregative pluralism is (broadly speaking) the right account of constitutional content and are investigating its possible implications for a theory of adjudication. Presumptively, judges should try to find and enforce the existing law—the legal rules that are constituted in the manner that organic pluralism describes. They do that by trying to figure out what our principles are (a matter with which judges are already intimately familiar by osmosis, having been long immersed in legal practice) and how those principles apply to the facts of the case. Sometimes judges will be confident about what the law requires on the facts. Then, unless some of the reasons briefly examined in the last section (or others that I missed) apply, the judge should rule in accordance with that law. But sometimes, possibly often, judges will be uncertain about what the law is. We have been examining existing scholarly theories regarding what they should do then.

Here's a simplified menu of the possibilities we've canvassed: (1) Judges adjudicating constitutional cases should adopt, as the correct rule of law, whichever rule they believe is more probable than the alternative(s). They should declare that the law is whatever they think it is, more likely than not. (2) No, the more-likely-than-not standard is insufficiently deferential to the constitutional judgments reached by the elected branches (at least at the national level). Judges should override the presumption that challenged (federal?) action is constitutional only if persuaded of its unconstitutionality to a very high level of confidence. (3) Although judges should

generally defer to constitutional judgments reached by others, deference is inappropriate when the avenues for peaceful popular change are blocked. Judges should actively ensure that the mechanisms of representative self-government are protected or promoted. (4) Instead of indulging a bias in favor either of the government or of the challengers, judges should adjudicate hard cases against whichever party could better protect itself against an adverse decision or could have more easily or cheaply avoided the conflict in the first place. (5) Why make things so complicated? When in doubt, judges should decide cases in whatever way is calculated to best promote long-term systemic net good consequences. (6) Judges are not policy makers. When the law is open, they should promote justice and sound policy as common law judges, proceeding incrementally and guided by the need to accommodate the core social interests in sovereignty, adaptation, and settlement. (7) Constitutional law is not common law and judges engaged in constitutional adjudication should not do common law judging. Even if our current law is pluralist, judges should decide uncertain cases in accord with the original meaning (or intentions), thereby, over time, bringing our law closer into conformity with what originalist theories of content claim it is now. (8) Judges in constitutional cases aren't policy makers, in either a legislative or common law sense. But nor are they mere agents of a constitution's drafters. Judges are partners. As partners, they should strive, wisely and unapologetically, to advance the project of securing justice under law. (9) Judges are not partners. They are agents of the living people and should give voice to their constitutional values. When in doubt about the law, they should rule in accord with the spirit of the age. (10) No, not this age. Judges should try to channel the spirit of the age to come, thus accelerating society's progress to it. (11) Not this age and not the age to come. Judges should try to effectuate the spirit that was baked into the text at ratification and amendment.

That's a lot of varied possibilities. Many have some merit, perhaps a great deal. None is unproblematic. And the list is not exhaustive. There will be very many theories to choose from, each calling for at least some refinement. But the situation is vastly messier if the numbered items (and others that could be added) do not each represent an independent full-blown normative theory of adjudication but something closer to a factor for judges to take into meaningful consideration. And that's likely to be the truth. As Justice Cardozo explained, unlike the legislator, the judge "legislates only [within] gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art."[140] Insofar as a judge operates within the domain of judicial discretion, Cardozo continued, its proper exercise is shaped "by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law."[141] That's why I cautioned at chapter's start that wise adjudication is too complex and context-sensitive to make it very probable that a constitutional scholar (or, really, anybody) can craft forward-looking guidance that has the coherence and structure needed to qualify as a genuine theory. It's why Professor Tribe, in his comments on Justice Scalia's Tanner lectures, acknowledged unapologetically that he had "no genuine 'theory' of [his] own . . . defining precisely how the task of textual interpretation should proceed."[142] He didn't have one because he doubted "that any defensible set of ultimate 'rules' exists. Insights and perspectives, yes; rules, no."[143]

* * *

Coda

Whatever merit you might find in my last suggestion [omitted], there's no doubt that, from the perspective supplied by an organic pluralist theory of content, constitutional adjudication will always be something of a morass. A judge whose eyes are open will have to make a wide range of decisions not captured by the directive to find and enforce the law: when to compromise or to overrule precedent, when to craft or abandon implementing doctrines, how to rule when current law is unclear, as it often will be, and many others (say, whether to grant cert.).[144] No decision procedure exists to walk the ethical judge through these options; wisdom must come, as Cardozo said: "from experience and study and reflection; in brief, from life itself."[145] But that doesn't mean that no overarching guidance is possible. To the contrary, it points to what the judge's fundamental adjudicatory commitments must be: to consistency in reasoning through these many choice points, and to candor in communicating one's reasoning. Shorn of distracting terminology and one large self-inflicted wound, this was Wechsler's central teaching in his lecture on neutral principles: that candor and consistency are the essence of the judicial task. And while many contemporaries thought Wechsler's teaching platitudinous, few denied that it was true and of the first importance.[146]

As central and long-established as this standard may be, it is difficult for judges to live up to. It is hard to be consistent because, well, consistency is just hard. And candor is hard for judges because, among other things, they must see the large pockets of discretion open to them and are understandably anxious about the subjectivity that the exercise of discretion inevitably calls upon. If judges are taught to believe that any injection of one's own values into constitutional adjudication is anathema and avoidable, they will, because they are being taught falsely, feel compelled to obfuscate and dissemble. Broader grasp and acceptance of organic pluralism would

facilitate judicial candor because judges would understand that they could write frankly of the pluralistic considerations that actually drive their decisionmaking. They can describe their reasoning forthrightly because it is true to law's nature. And candor conduces to consistency because if you explain yourself honestly it is easier for you to police yourself and for others to help. If originalism is Scalia's "librarian who talks too softly,"[147] organic pluralism, it seems to me, is the advisor with freedom to speak truly.

ENDNOTES

[1] CHRISTOPHER GUSTAVUS TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES: A PHILOSOPHICAL INQUIRY INTO THE FUNDAMENTALS OF AMERICAN CONSTITUTIONAL LAW 44-45 (1890).

[2] Walter L. Moll, *Review of* Fritz Schulz, Principles of Roman Law, 23 VIRGINIA L. REV. 858, 858 (1936-37).

[3] Not all legal philosophers sign on to this kind of talk. The prominent legal positivist Brian Leiter is the foremost opponent of "the metaphysical turn" in jurisprudence. *See* BRIAN LEITER, FROM A REALIST POINT OF VIEW ch. 9 (2026). As Leiter sees things, positivists have never been interested in metaphysical questions about law's content and have no reason for such interest. "[T]he actual topic of general jurisprudence," in Leiter's view, can be understood as follows:

> Everyone knows that there are many norms governing human conduct in any society: do not talk with your mouth full at the table; do not drive faster than a certain speed limit on the highway; do consider how your actions affect the interests of others; do say "please" and "thank you"; do not cheat on exams; do not assault other people; and so on. Some of these norms are legal norms ("legally valid," i.e., they exist as norms of the legal system), and some are not. Ordinary people familiar with a modern municipal legal system, as Hart observed, know that there are differences: they know (this is my example, not Hart's) that norms of etiquette are not legally required, and that assaulting another person is legally prohibited. What explains the differences? Why are some norms legally valid, and some are not (and some are both)? What is it for norms to exist as norms of a legal system (i.e., to be valid)? In this much more conventional formulation of the topic there is no question about the metaphysical determinants of "legal content." The content (the norms) are taken for granted. (ms., p.5)

Exactly so. But that is precisely the problem: on Leiter's picture of what concerns the legal philosopher, the norm's contents "are taken for granted." We know the norm's content—what, say, is permitted or prohibited—and are wondering only about whether this norm of uncontroverted content is or is not a legal norm, a norm of the legal system. For this type of inquiry, the language of "validity" seems perfectly apt. But most legal disputes are not like that. Very often we're not asking whether a norm of known content is legal. We're asking about the content of the legal norm. Our law has *something* to say, we might think, about whether a public high school may permit its varsity football coach to lead sectarian prayers on the fifty-yard line immediately after the game's conclusion. But *what* does our law say about it? Are schools constitutionally *required* to allow such prayers, *prohibited* from allowing them, or *permitted* to allow them or to disallow them? When we are interested in the content of legal norms that, pretheoretically, are not pre-existing extra-legal norms, the language of validity seems unhelpful and grounding language seems just what is called for. *See* Mitchell N. Berman, *How Practices Make Principles, and How Principles Make Rules*, 28 J. ETHICS & SOC. PHIL. 283, 306 (2024).

[4] Of course, as we will see, anti-positivists do not deny that contingent, messy social facts matter to what the law is. We might say that principles "turn on" what the facts are. The claim in text is only that anti-positivist principles are not themselves grounded in contingent social facts.

[5] Sanford Levinson, *How Many Times Has the United States Constitution Been Amendment? (A) < 26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change, in* SANFORD LEVINSON ED., RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 13, 13 (1995).

[6] Bruce Allen Murphy, *Justice Antonin Scalia and the 'Dead' Constitution*, N.Y. TIMES, (February 14, 2016), https://www.nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constitution.html (quoting Justice Scalia).

[7] Arthur Selwyn Miller, *Notes on the Concept of the Living Constitution*, 31 GEO. WASH. L. REV. 881, 884 (1963).

[8] *See, e.g., Al Gore*, PBS NEWS HOUR, https://web.archive.org/web/20000816025151/http:/www.pbs.org/newshour/election2000/candidates/gore_3-14c.html; Janet Reno, *The Cleveland-Marshall Inaugural Centennial Address,* 44 CLEV. ST. L. REV. 267, 269 (1996); Ellen Yaroshefsky, *Aspiring to the Model of the Engaged Judge,* 74 N.Y.U. ANN. SURV. AM. L. 393, 400 (2019).

[9] Richard W. Garnett, *Chief Justice Rehnquist's Enduring, Democratic Constitution,* 29 HARV. J.L. & PUB. POL'Y 395, 396 (2006).

[10] See, as often, the invaluable Stanford Encyclopedia of Philosophy. Luca Gasparri & Diego Marconi, *Word Meaning*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 2, 2015), https://plato.stanford.edu/entries/word-meaning/.

[11] I aim to remain as noncommittal as possible on controversial issues in metaphysical grounding. That said, I will generally take the grounding relata to be entities such as speech acts, practices and artificial norms, not *facts about* speech acts, practices, or artificial norms. *Compare, e.g.,* Gideon Rosen, *Metaphysical Dependence: Grounding and Reduction*, in MODALITY: METAPHYSICS, LOGIC, AND EPISTEMOLOGY 126 (Bob Hale & Aviv Hoffmann eds., Oxford Univ. Press 2010) (facts) *with* Jonathan Schaffer, *On What Grounds What*, in METAMETAPHYSICS: NEW ESSAYS ON THE FOUNDATIONS OF ONTOLOGY 347 (David Manley, David Chalmers & Ryan Wasserman eds., Oxford Univ. Press 2009) (not facts). But I am not doctrinaire about this. When it facilitates exposition, I will sometimes speak about the grounding facts. I trust that nothing of substance in my argument depends on adopting one or another position on this intramural controversy. I am also taking liberties in describing grounding as a determination relationship across levels or domains. It is that, but few if any grounding-friendly philosophers would limit it in this way.

[12] *See, e.g.,* BRENNAN ET AL., EXPLAINING NORMS 35 (2013) ("norms . . . are clusters of normative attitudes plus knowledge of those attitudes"); BICCHIERI, THE GRAMMAR OF SOCIETY, ix. ("norms are supported by and in some sense consist of a cluster of self-fulfilling expectations").

[13] Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155, 156, 166 (2002).

[14] Rolf Sartorius, *Social Policy and Judicial Legislation*, 8 AM. PHILOS. Q. 151, 154-55 (1971). *See also* Rolf Sartorius, *Individual Conduct and Social Norms*, 86 PHILOS. REV. 573 (1975) ("[A] principle is relevant if and only if, *and to the degree to which*, it enjoys what Dworkin aptly calls 'institutional support.'").

[15] *Trump v. United States*, 603 U.S. 593, 614 (2024).

[16] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 364 (2010).

[17] ROBERT MOOR, ON TRAILS: AN EXPLORATION 17 (2016).

[18] MATT RIDLEY, THE EVOLUTION OF EVERYTHING 2 (2015).

[19] HART, A CONCEPT OF LAW 100-10 (1961). Roughly: q is a norm of legal system S if C1 or C2 or C3 or . . . Cn, where each condition C can itself be a complex combination of conjuncts and disjuncts and is grounded in the practices that make out the rule of recognition of S.

[20] Whether Hart was even trying to provide an account of legal *content*, not only legal *sources*, is a matter of dispute. I assume for sake of argument that he was. In any event, the theory of content sketched in the text is recognizably *Hartian* whether or not it was Hart's. *See* Berman, *How Practices Make Principles*, at 305-07.

[21] Charles L. Barzun, *The Positive U-Turn*, 69 STANFORD LAW REVIEW 1323, 1355 (2017).

[22] *See* Larry Alexander & Ken Kress, *Against Legal Principles*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 279 (Andrei Marmor ed., 1995), reprinted in 82 IOWA L. REV. 739, 767-68 (1997).

[23] C. L. Ten, *The Soundest Theory of Law*, 88 MIND 522, 530 (1979).

[24] Kent Greenawalt came also to reject "Hart's assumption that in ordinary circumstances a consensus will support all the elements of a rule of recognition." Kent Greenawalt, *How To Understand the Rule of Recognition and the American Constitution, in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 145, 146 (Matthew D. Adler & Kenneth Einar Himma eds. 2009).

[25] For one useful overview, see Diana Raffman, *Sorites Paradox*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Jan 17, 1997), https://plato.stanford.edu/entries/sorites-paradox/.

[26] MATT RIDLEY, THE EVOLUTION OF EVERYTHING: HOW NEW IDEAS EMERGE 4 (2015).

[27] For a summary of, and citation to, much of the historical scholarship and amicus briefs see McDonald v. Chicago, 561 U.S. 742, 914-16 (2010) (Breyer, J., dissenting) (noting that "[s]ince *Heller,* historians, scholars, and judges have continued to express the view that the Court's historical account was flawed," and suggesting that *Heller* "would lose a poll taken among professional historians of this period, say, by a vote of 8 to 1").

[28] Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants,* 130 HARV. L. REV. F. 105, 116 (2017). *See also, e.g.,* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1117 (2008) ("As a matter of social fact, the Constitution that is accepted as the supreme law sometimes permits deviations from the original understanding and even from the superficially plain meaning of its language.").

[29] Stephen E. Sachs, *Originalism as a Theory of Legal Change,* 38 HARV. J.L. & PUB. POL'Y 817, 874 (2015). *See also* William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1455 (abstract) (2019) ("[O]ur system's official story is that we follow the law of the Founding, plus all lawful changes made since."); Stephen E. Sachs, Dobbs *and the Originalists*, 57 HARV. J.L. & PUB. POL'Y 539, 541 (2024) ("[W]e have to distinguish specific questions of original meaning from more general (and, here, more relevant) questions of original law—that is, the law of the United States as it stood at the Founding, and as it's been lawfully changed to the present day."); William Baude & Stephen E. Sachs, *Yes, the Founders Were Originalists*, 36 YALE J.L. & HUMANITIES (forthcoming 2025) (manuscript at 25-26) (book review) ("A basic assumption of our current legal system is that it has to be possible to say how we got from there to here—that our law is the Founders' law, as lawfully changed."); Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156, 158 (2017) ("A number of scholars, this author among them, have argued for shifting focus from original meaning to our original law: the law of the United States as it stood at the Founding, and as it's been lawfully amended since."); William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 103, 107 (2016) ("Originalism is a commitment to follow our original law, as lawfully altered.").

[30] Sachs, *Originalism as a Theory of Legal Change*, at 875.

[31] *See, e.g.,* Stephen E. Sachs, Dobbs *and the Originalists*, 47 HARV. J.L. & PUB. POL'Y 539, 544 (2024) (arguing that *Dobbs* is not supported by public meaning originalism but is consistent with original-law originalism, "because originalism isn't exhausted by the original meaning of words"); William Baude & Robert Leider, *The General-Law Right to Bear Arms*, 99 NOTRE DAME L. REV. 1467 (2024) (contrasting the original-law approach with *Heller's* original-meaning approach to gun rights); William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment,* 76 STAN. L. REV. 1185, 1190 (2024) (arguing that the content of Fourteenth Amendment rights is determined by a "shared body of unwritten law . . . not derived from any enactment by a single sovereign"); William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment,* 169 U. PA. L. REV. 609 (2021) (arguing that the law of state sovereign immunity is determined by both the original meaning of the Eleventh Amendment's text and unwritten common law principles the Amendment left in place).

[32] See Sachs *Originalism as a Theory of Legal Change*, at 857 ("If you want to argue that some novel method of legal change was part of the Founders' law, go ahead; originalism is a big tent. But your argument only makes a difference if it's *true*. Someone trying to assert an unusual Founding-era rule has to be ready to show that it was actually *law* back then, not just political theory or social custom, in a way that'd satisfy a positivist's demands.").

[33] *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2354-63 (2015). Notice that, although Baude opines 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," *id.* at 2352, he is not endorsing public meaning originalism. By "original meaning," Baude does not mean original communicative content, which would be an input to original law, but original law itself, however it's constructed. *See id.* at 2355 n.16 (quoting Sachs, *Originalism as a Theory of Legal Change*).

[34] Sachs, *Originalism as a Theory of Legal Change*, at 880.

[35] William Baude & Stephen E. Sachs, *Grounding Originalism,* 113 NW. U. L. REV. 1455, 1459 (2019).

[36] Sachs, *Originalism as a Theory of Legal Change,* at 822. *See also, e.g.,* Baude, *Is Originalism Our Law?,* at 2353 (contending that "judges have a duty to apply the law, and our current law, in this time and place, is this form of originalism").

[37] Sachs, *Originalism as a Theory of Legal Change*, at 849.

[38] Kent Greenawalt, *The Rule of Recognition and the Constitution,* 85 MICH. L. REV. 621 (1987)

[39] Greenawalt, *The Rule of Recognition and the Constitution,* at 657.

[40] William Baude & Stephen E. Sachs, *The Official Story of the Law,* 43 OXFORD J. LEGAL STUD. 178, 179 (2023).

[41] Sachs, *Originalism as a Theory of Legal Change*, at 870.

[42] Sachs, *Originalism as a Theory of Legal Change*, at 820-21.

[43] Baude, *Is Originalism Our Law?*, at 2365-67.

[44] Baude & Sachs, *Grounding Originalism,* at 1477.

[45] Sachs, *Originalism as a Theory of Legal Change*, at 845.

[46] Baude & Sachs, *Grounding Originalism,* at 1455 (abstract).

[47] Baude & Sachs, *Grounding Originalism,* at 1457.

[48] CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 446 (2024) (Jackson, J., concurring).

[49] Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 486 (1982).

[50] Bush v. Vera, 517 U.S. 952, 1073 (1996) (Souter, J., dissenting).

[51] Walton v. Arizona, 497 U.S. 639, 675 (1990) (Brennan, J., dissenting), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002).

[52] FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992).

[53] Sachs, *Originalism as a Theory of Legal Change*, at 870.

[54] *See* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019); KERMIT ROOSEVELT III, THE NATION THAT NEVER WAS: RECONSTRUCTING AMERICA'S STORY (2022).

[55] On the lawfulness of the reconstruction amendments see the aptly titled John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001). Of course, if the scholarly consensus that Harrison expresses is wrong, organic pluralists and original-law originalists are in the same boat.

[56] Sachs, *Originalism as a Theory of Legal Change*, at 820.

[57] Sachs, *Originalism as a Theory of Legal Change*, at 839.

[58] Sachs, *Originalism as a Theory of Legal Change*, at 840.

[59] Much depends on whether the "judicial power" that Article III vested in the federal courts encompassed courts' powers, in the course of adjudicating cases, to drive the evolution of fundamental principles and to recognize the evolution of principles driven by other actors. If judges possessed the (original) lawful power to drive gradual change in principles (and thus in what principles collectively entail), then original law originalism and organic pluralism would likely amount to very nearly the same thing, albeit via somewhat different explanatory routes. Now, most members of the founding generation probably believed that courts did not have this power, that judicial decisions did not effect any changes in the principles but only allowed unchanging principles to reveal themselves more clearly (or something of this sort). But if positivism is true, that widespread belief was mistaken, and the traditional powers exercised by English courts of law did include the power to evolve fundamental legal principles, even if their doing so was unacknowledged or denied. And it is originalist orthodoxy that if original meanings or intentions (here, that federal courts would possess traditional judicial powers) conflict with original beliefs or expectations (that those traditional powers didn't include this or that), the former take precedence over the latter. (Supra cite to Dworkin's response to Berger, Chapter 3, pp. 138-39.)

[60] JOHN GARDNER, *Can There be a Written Constitution?,* in LAW AS A LEAP OF FAITH 89, 107 (2012).

[61] GARDNER, *Can There be a Written Constitution?,* at 107.

[62] Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45, 55 (1994).

[63] Schauer, *The Necessary Externality of Constitutional Norms,* at 54.

[64] Sachs, *Originalism as a Theory of Legal Change*, at 840.

[65] Sachs, *Originalism as a Theory of Legal Change*, at 844.

[66] JONATHAN GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM: A HISTORICAL CRITIQUE 234 (2024).

[67] GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM, at 235.

[68] Schauer, *The Necessary Externality of Constitutional Norms*, at 55.

[69] Baude & Sachs, *Yes, the Founders Were Originalists,* at 26.

[70] Sachs, *Originalism as a Theory of Legal Change*, at 841.

[71] Sachs, *Originalism as a Theory of Legal Change*, at 839.

[72] [Cite to this Chapter, "The Objection from Uncertainty."]

[73] Baude and Sachs anticipated something like this. They once speculated that "the more enduring dispute between us and many of our critics" is not about "deep issues of legal theory," but is instead "a simple empirical disagreement." Baude & Sachs, *Grounding Originalism*, at 1477. I wouldn't describe our disagreement as "simple empirical," but, yes, I think organic pluralism doesn't depend on the denial of original-law originalism.

[74] Baude, Campbell & Sachs, *General Law,* at 1248; *see also* Stephen E. Sachs, Pennoyer *Was Right*, 95 TEX. L. REV. 1249, 1314 (2017) ("The practices that constitute general and international law can change over time.").

[75] Sachs, *Originalism as a Theory of Legal Change*, at 837 (citing Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV 2253, 2273–76 (2014)).

[76] The top-down metaphor conceives of higher as prior to lower, as generating and governing what falls underneath it. The bottom-up metaphor conceives of lower as prior to higher, as grounding and supporting what sits atop it. (For the classic philosophical analysis of metaphor see George Lakoff and Mark Johnson, Metaphors We Live By (1980).) One might think that the two metaphorical orientations are interchangeable and that the choice between them is chiefly a matter of taste or whim. I'm not so sure. Top-down reasoning is naturally visualizable as a syllogistic inference; bottom-up reasoning is naturally visualizable as sedimentary strata. While the two modes of thought and talk can be made to do the same work, I suspect that persons who think of law as a system that exists in social reality and calls for explanation tend to think in metaphysical terms and to reason bottom-up. In contrast, people who think of law mostly as a set of propositions or norms that need to be justified or validated are apt to think in inferential or logical terms and to reason top-down. Choice of directional metaphor is therefore likely not to be arbitrary. It may signal where one locates the key philosophical work: in justification or in grounding.

[77] Baude & Sachs, *The Official Story*, at 179.

[78] Sachs*, Constitution in Exile,* at 2274.

[79] Baude & Sachs, *Grounding Originalism,* at 1470.

[80] Sachs *Constitution in Exile*, at 2274.

[81] Baude & Sachs, *The Official Story*, at 180. For thoughtful criticisms, see, e.g., Charles L. Barzun, *The Positive U-Turn,* 69 STAN. L. REV. 1323 (2017); Richard Primus, *Is Theocracy Our Politics?,* 116 COLUM. L. REV. ONLINE 44 (2016); GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM, at 227-38.

[82] *See supra* Chapter 5 (discussing Fallon).

[83] MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 836 (2009) (internal citation omitted) (quoted in Aaron Tang, *Second-Order Constitutional Theories,* U. CHI. L. REV. __, ___ (2026)).

[84] Butler v. McKellar, 494 U.S. 407, 430 n.12 (1990) (Brennan, J., dissenting).

[85] *See, e.g.,* Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 669 (1981) (Commerce Clause principles subject to "evolution"); Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 447–48 (1974) (free speech principles "have evolved"); Fortson v. Morris, 385 U.S. 231, 251 (1966) (Fortas, J., dissenting) (principles of individual liberty "proudly developed" in caselaw); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 505–06 (1977) (Burger, C.J., dissenting) (principles of separation of powers have "developed in the decisions of this Court"); Puerto Rico v. Branstad, 483 U.S. 219, 230 (1987) ("conception of the relation between the States and the Federal Government" has been subject to "more than a century of constitutional development"); Miranda v. Arizona, 384 U.S. 436, 509 (1966) (Harlan, J., dissenting) ("constitutional principles" frequently subject to a "developing process").

[86] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring in part and dissenting in part).

[87] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[88] Missouri v. Holland, 252 U.S. 416, 433 (1920). As Holmes put it forty years earlier in perhaps his most famous aphorism, "The life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW __ (1881). "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed," he declared. "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." *Id.*

[89] [supra cite to footnote in Chapter 5 that acknowledges this possibility.]

[90] U.S. Steel Corp. v. Multistate Tax Comm'n., 434 U.S. 452, 459 (1978).

[91] U.S. CONST. art. III, § 2.

[92] U.S. CONST. amend. XI.

[93] Principality of Monaco v. Mississippi, 292 U.S. 313, 322 (1934). A decade ago, Professor Baude argued, against *Principality of Monaco,* that the key judicial precedents on state sovereign immunity from suit were consistent with the original meaning of the constitutional text, relying on Professor Sachs's theory of "constitutional backdrops." William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 8 (2017) (citing Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813 (2012)). Since then, Baude has slightly changed his tune, at least to my ears, arguing more recently, with Sachs, that the Court's doctrine is largely consistent with the law after the Eleventh Amendment, in virtue of principles of general law, even if not according with what most originalists would recognize as the original public meaning. Baude & Sachs, *The Misunderstood Eleventh Amendment* (2021). I find their second argument, which vindicates *Principality of Monaco'*s dictum, more persuasive than Baude's first, which undermined it.

[94] U.S. CONST. Art. III, § 2, cl. 3.

[95] *See* Stephen A. Siegel, *The Constitution on Trial: Article III's Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 374-75 & n.4 (2012).

[96] Stephen A. Siegel, *Textualism on Trial: Article III's Jury Trial Provision, the "Petty Offense" Exception, and Other Departures from Clear Constitutional Text,* 51 HOUS. L. REV. 89, 93 (2013).

[97] Abraham Lincoln, *Speech on the Dred Scott Decision at Springfield, Illinois* (June 28, 1857), reprinted in ABRAHAM LINCOLN, SELECTED SPEECHES AND WRITINGS 117 (Don E. Fehrenbacher, ed., 1992).

[98] *See, e.g.,* Trump v. Hawaii, 585 U.S. __, __ (2018) (purporting to "make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution'") (quoting Korematsu v. United States, 323 U. S. 214, 248 (Jackson, J., dissenting)).

[99] Lexical determination requires that any condition sufficient to confer legal status must enjoy clear majority endorsement or acceptance, else two contradictory rules could both be valid law. Were acceptance by a (substantial) minority of judges sufficient to ground the rule that p is the law if C1, and acceptance by a different (substantial) minority sufficient to ground the rule that q is the law if C2, then p and q would both be the law if C1 and C2 jointly obtain, even if p are q are mutually incompatible. That would be untenable. Non-lexical determination by weighted principles can deliver law when practices are less uniform. If a minority of judges take up and thus ground principle P1, and a different minority of judges take up and thus ground a conflicting or inconsistent principle P2, the consequence is only that the two principles might cancel each other out in a given case, each rendering the other constitutively inert. The conflicting principles would not thereby determine conflicting normative verdicts, as lexical determination would.

[100] Dworkin, *Hart's Posthumous Reply*, 130 HARV. L. REV. 2096 at 2116 (2017); *see also* DWORKIN, LAW'S EMPIRE, at 10; DWORKIN, TAKING RIGHTS SERIOUSLY, at 350 (1978).

[101] Baude & Sachs, *Grounding Originalism,* at 1475.

[102] STORY, COMMENTARIES § 398 at 294-95 (Thomas M. Cooley, ed., 4th ed. 1873) ("Very different doctrines on this point have been adopted by different commentators; and not unfrequently very different language held by the same parties at different periods.").

[103] Yes, and conceivably even of monograph writers.

[104] GIENAPP, AGAINST CONSTITUTIONAL ORIGINALISM, at 232, 234.

[105] Saul Cornell, *Learning to Read Like an Eighteenth-Century Lawyer: The Historical Critique of Originalism Revisited*, 33 WM. & MARY BILL RTS. J. 439, 459 (2024).

[106] Cornell, *Learning to Read,* at 460. *See also, e.g.,* JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 245-53 (2024). For their response, see William Baude & Stephen E. Sachs, *Yes, the Founders Were Originalists,* (July 2025) (ms. at 13) (acknowledging that "the Founding was anything but an era of interpretive consensus," while reiterating that "there were better and worse answers back then, and the same remains true today").

[107] NICHOLAS RESCHER, PLURALISM: AGAINST THE DEMAND FOR CONSENSUS 4 (1993).

[108] HART, THE CONCEPT OF LAW, at 116-17.

[109] HART, THE CONCEPT OF LAW, at 256.

[110] Baude & Sachs, *The Official Story of the Law*, at 189.

[111] Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?,* 100 NW. U. L. REV. 719, 727 (2006).

[112] Adler, *Popular Constitutionalism and the Rule of Recognition,* at 727.

[113] In counseling that we have reason to seek a positivist account of legal content that does not deliver Adler's unsettling conclusion, I do not mean to suggest that that conclusion is facially absurd or should be dismissed out of hand. It isn't and shouldn't. But if Adler's picture of multiple overlapping legal systems is correct, organic pluralism and its many principles fit wonderfully. The thought in text is that if Adler's picture is wrong, then we have reason to favor an account, like organic pluralism, that does not bottom out in social consensus over one, like Hart's, that does.

[114] This is why the proto-popular constitutionalist, Bruce Ackerman, is drawn to a theory ("dualist democracy") in which popular elections play a special role (he thinks that they effectively ratify "informal" constitutional amendments) when and only when narrowly defined triggering conditions are satisfied. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

[115] The most canonical works in the field are LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); and RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994). Other leading contributors to the literature include, without limitation, Jack Balkin, Willy Forbath, Barry Friedman, Robert Post, and Reva Siegel.

[116] I am suggesting that an intelligible version of popular constitutionalism would locate the people's "central and pivotal role in implementing their Constitution," KRAMER, THE PEOPLE THEMSELVES, at 8, in their status as privileged grounders of our constitutional principles, even if it allows judges to retain *their* privileged role both as finders of the legal rules—"the law"—that those principles determine and as appliers of the law to concrete disputes. On this account, even insofar as judges will, and perhaps even should, continue to be supreme in declaring "what the law is," in the sense of what the legal rules are and whether those rules are complied with on any particular occasion, their duty is to announce the rules that are determined by *the People's* constitutional principles, not those that are determined by the Judges' principles.

[117] *See, e.g.,* KRAMER, THE PEOPLE THEMSELVES, at 24-29.

[118] *See, e.g.,* SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN (2005)

[119] Boston Tea Party - Wikipedia; Boston Tea Party | Facts, Summary, & Significance | Britannica

[120] Farah Peterson, *Constitutionalism in Unexpected Places,* 106 VA. L. REV. 559, 562 (2020).

[121] Peterson, *Constitutionalism in Unexpected Places,* at 561-62.

[122] Peterson, *Constitutionalism in Unexpected Places,* at 567.

[123] Another way the people contribute to our constitutional law is via judge-made or judge-announced tests that turn upon popular beliefs or attitudes. For example, the Court's Eighth Amendment doctrine turns in part on "evolving standards of decency," Roper v. Simmons, 543 U.S. 551, 561 (2005), and its First Amendment obscenity doctrine depends on "contemporary community standards." Miller v. California, 413 U.S. 15, 24 (1972). In these situations, popular views enter into constitutional law far downstream in the making and applying of constitutional norms. In contrast, our inquiry into the people's role in grounding constitutional principles looks far upstream, to the source.

[124] Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1038 (2004).

[125] Post & Siegel, *Popular Constitutionalism,* at 1038. For broadly similar views, see BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

[126] Post & Siegel, *Popular Constitutionalism,* at 1039.

[127] Michael J. Perry, *Review of* Government by Judiciary: The Transformation of the Fourteenth Amendment, 78 COLUM. L. REV. 685, 701 (1978).

[128] Archibald Cox, *Review of* Democracy and Distrust, 94 HARV. L. REV. 700, 715 (1981).

[129] Laurence H. Tribe, "The People's Court," N.Y. TIMES (Oct. 24, 2004).

[130] SCALIA, A MATTER OF INTERPRETATION, at 45.

CHAPTER 7

[131] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155 (1990).

[132] Andrew Jordan, *The (Ir)relevance of Positivist Arguments for Originalism,* 56 LOY. L.A. L. REV. 937, 939 (2023).

[133] Gary Lawson, *On Reading Recipes . . . and Constitutions,* 85 GEO. L.J. 1823, 1833 (1997).

[134] Gary Lawson, *Equivocal Originalism,* 27 TEX. REV. L. & POL. 309, 336 (2022).

[135] Lawson, *Equivocal Originalism,* at 333.

[136] Lawson, *Equivocal Originalism,* at 337.

[137] Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2259 (2014). In the quoted passage, Sachs is raising this claim at arm's length, to motivate what he calls "the jurisprudential objection." But he then rejects that objection, thereby largely accepting this job description.

[138] Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 905 (1953).

[139] *Accord* Aaron Tang, *Second-Order Constitutional Theory,* 93 U. CHI. L. REV. (forthcoming 2026) (manuscript at 41) (endeavoring "not to definitively advance" one approach to adjudication, "but rather to offer some important normative considerations that a legal thinker may wish to take into account").

[140] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, at 113-14.

[141] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, at 114.

[142] Tribe, Comment, in SCALIA, A MATTER OF INTERPRETATION, at 72-73 (emphasis omitted). The elided text reads "(at least no global, unified theory that can be reduced to a sound bite)". It's a red herring, the "sound bite" part especially. Tribe had nothing that would count as a reasonably comprehensive theory of adjudication no matter how much space he might have been allotted for recording it. And there's no shame in that. That's the nature of this beast.

[143] Tribe, Comment, in SCALIA, A MATTER OF INTERPRETATION, at 73.

[144] *See* JON O. NEWMAN & MARIN K. LEVY, WRITTEN AND UNWRITTEN: THE RULES, INTERNAL PROCEDURES, AND CUSTOMS OF THE UNITED STATES COURTS OF APPEALS 78-89, 181 (2024) (surveying "surprising" circuit-specific

differences regarding the criteria for designating an opinion as precedential, what opinions should include and general principles about how they should be fashioned, and the internal voting procedures governing en banc hearings, many of which "reflect different values or interests" among the circuits).

[145] CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, at 113.

[146] *See, e.g.,* Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 32 (1959); Louis Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 653 (1961); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 57 (2d ed. 1986).

[147] Scalia, *Originalism: The Lesser Evil*, at 864.