THE UNCERTAIN FOUNDATIONS OF PUBLIC LAW THEORY

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Recently, public law scholarship has taken a "jurisprudential turn." Scholars have argued for controversial public law conclusions—concerning how to interpret the Constitution, the powers of administrative agencies, and the responsibilities of judges—based on assumptions about the fundamental grounds of legal validity. Some use this jurisprudential move to denounce opposing views as not merely mistaken, but denying or defying the law, thus raising the stakes in public law disputes. A surprising feature of this development in public law theory is that those who lean on jurisprudential assumptions either dismiss as irrelevant or pass over in silence persistent disagreement in general jurisprudence about the nature of law.

We argue that tracing our public law convictions to contested assumptions about law's nature should make us less (not more) confident in the rightness of our conclusions and the wrongness of the opposing side. Our case for confidence-lowering begins with a close examination of prominent examples of the jurisprudential turn, including arguments for broadly originalist conclusions. After highlighting the unargued-for assumptions about the nature of law on which these works rely, we develop a general challenge for this mode of advocacy based on the epistemology of "peer disagreement." Our challenge invokes intellectual reasons for withholding judgment on questions that inspire persistent disagreement among good-faith reasoners. The upshot is that controversial claims about public law should be approached with ambivalence on all sides, and an awareness of the general reasons for ambivalence should significantly alter the tenor of public law debates.

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INTRODUCTION

Disagreement about the law is pervasive. In fact, it is the lifeblood of legal practice. Take a case—just about any case. Opposing parties appear before a court, each claiming that the law entitles them to the outcome they seek. The parties make arguments, and the court hands down a decision: someone wins, someone loses. The disagreement does not always end with the case. If the issue is important, scholars and others may relitigate it for years, and, in the process, discover that their differences stem from competing general theories of what law is and what it should be.

In the heat of our arguments, we do not usually attend to disagreement itself as a form of evidence for what one should believe. But there are circumstances in which persistent disagreement has evidential import. The fact that good-faith reasoners cannot converge on a unique answer to a question can supply reasons for lowering one's confidence in one's own view.[1] An important and undertheorized question is whether persistent legal disagreements ever supply such reasons for entertaining doubt. We argue that they do, and in ways that challenge a style of public law advocacy presently in vogue.

This Article raises a challenge rooted in the epistemology of peer disagreement against some prominent lines of argument in recent public law scholarship. These arguments share a particular combination of features. One shared feature is a "jurisprudential turn," which involves arguing from assumptions about the nature of law—or what fundamentally determines whether a rule counts as a rule of *law*—to controversial public law conclusions.[2] In recent years, scholars have advocated for views on

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[1] *See infra* Part III. There are at least two explanations for why "peer" disagreements in general provide reasons for doubting one's preferred take. First, they raise the likelihood that one might have made a mistake in assessing the evidence. Second, when peer disagreements are persistent, they suggest that the available evidence that bears on the issue is likely inconclusive.

[2] We consider several examples. As discussed below, the most significant development in originalist scholarship in recent years has been the so-called "positive turn," or a series of arguments seeking to establish that originalism is entailed by our positive law. *See generally* Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1325 (2017) (describing the "positive turn" in recent theories of interpretation); *see also* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351 (2015) (arguing that the positive turn may "reorient the debates in constitutional interpretation and allow both sides to move forward.") (citing Larry Alexander, *Constitutional Theories: A Taxonomy and (Implicit) Critique*, 51 SAN DIEGO L. REV. 623, 642 (2014)); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1082–85 (2017); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 819 (2015) (arguing that "originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law"). The term "jurisprudential turn" similarly captures efforts to root legal arguments in fundamental propositions about the nature of law, but it is broader in that it accommodates anti-positivist as well as positivist theories of law. As discussed below, *see infra* Part II, it is not obvious to us that all of the works we discuss rely on positivist conceptions of law. *See generally* PHILIP HAMBURGER, IS

how to interpret the Constitution, the powers of administrative agencies, and the responsibilities of judges based on foundations, express or implied, in general jurisprudence.[3] According to these theorists, once we appreciate the truth about what law fundamentally is, we discover that a controversial public law theory (say, originalism) is required by law. Notably, this jurisprudential move raises the stakes in public law debates since it portrays the opposing side (the non-originalist) as not following the law. And that is a heftier critique to levy than, for example, that the opposing side's view (on how to interpret the Constitution) is impractical or imprudent.[4] Scholars have embraced the raised stakes, stressing the fundamental unlawfulness of competing positions.[5]

A second distinguishing feature of this development in public law theory is that those who lean on jurisprudential assumptions fail to fully acknowledge the contested nature of their starting premises, some of which turn out to be strikingly idiosyncratic (just how idiosyncratic is one of the questions we explore in this Article). This oversight is surprising given that questions about the fundamental grounds of legal validity have been contested by jurists throughout legal history. The controversial nature of their starting assumptions does not seem to undermine the levels of confidence theorists evince in their derived conclusions. As an initial

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ADMINISTRATIVE LAW UNLAWFUL? (2014) (arguing for a foundation in something akin to natural law theory, the idea that there are substantive, jurisdiction-independent constraints on law). *See also* LEE STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) (suggesting a natural law defense of originalism); *see also* Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism,* 105 GEO. L.J. 97, 99, 108–16 (2016) (characterizing the positive turn as "one of the most important and promising developments in originalist theory in recent years" but criticizing it for its lack of normative foundations); *id*. at 98–110 (offering a "natural law" defense of originalism); Mark Greenberg, *Natural Law Colloquium: Legal Interpretation and Natural Law*, 89 FORDHAM L. REV. 109, 110 (2020) (arguing that non-positivist or natural law theories—and, in particular, the "Moral Impact Theory of Law"—can make sense of debates about interpretive methodology); Katherine Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 496 (2011).

[3] *See infra* Parts I and II. Ronald Dworkin famously distinguished between, on the one hand, an ordinary disagreement about the legality of some rule, which might ultimately be based on a non-legal disagreement concerning what a judge in the past said or what the empirical evidence suggests; and, on the other hand, "theoretical disagreement" about the very grounds of legal validity or what fundamentally determines whether a rule counts as law. RONALD DWORKIN, LAW'S EMPIRE 4–10 (1986). A "fundamental legal disagreement" in our sense is a disagreement about the grounds of legality that appears basic—that is, it is based on unargued-for intuitions. Unargued-for claims about the grounds of legality have figured prominently in recent public law scholarship, particularly scholarship on constitutional interpretation.

[4] *See infra* Part I.

[5] *See, e.g.*, Sachs, *supra* note 2, at 822–26 (arguing that non-originalist changes to the law are not lawful); HAMBURGER, *supra* note 2, at 4, 10 (arguing that modern administrative law is unlawful); William Baude & Ryan Doerfler, *Arguing with Friends*, 117 MICH. L. REV. 319, 326 (2018) (suggesting that judges who differ on basic questions of legal methodology are entitled to question the legal rationality of the opposing side).

observation, this approach to disagreement seems out of step with norms of inquiry embraced in other intellectual domains. For instance, in the natural and social sciences, the discovery that a question turns on more fundamental issues that are unsettled is widely treated as a reason for pause and reconsideration.[6] Contemporaneous work in the philosophy of law has taken precisely this turn based on a lack of convergence in general jurisprudence.[7] Recent public law theory, by contrast, seems to have brushed disagreement aside.

It is hard not to view this development through the lens of a broader escalation in political debates—albeit a somewhat asymmetric escalation, concentrated within the family of (broadly speaking) originalist views.[8] Notably, there is burgeoning support among conservative thinkers for the idea that judges violate their oaths of office when they decide cases on

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[6] *See infra* Section III.A.1.

[7] *See, e.g.*, Francois Schroeter, Laura Schroeter, & Kevin Toh, *A New Interpretivist Metasemantics for Fundamental Legal Disagreements*, 26 LEGAL THEORY 62, 66–67, 89 (2020) (taking "fundamental legal disagreement" to be the core explanandum for a general theory of law); *see also* David Plunkett & Timothy Sundell, *Dworkin's Interpretivism and the Pragmatic of Legal Disputes*, 19 LEGAL THEORY 242, 242, 248 (2013) (arguing that theoretical disagreement in law should be understood as "metalinguistic" negotiation over the meaning of "law"); David Plunkett, *Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute Over Legal Positivism*, 22 LEGAL THEORY 205, 205–06 (2016) (arguing that the dispute over legal positivism is a dispute in "conceptual ethics"); Stephen Finlay & David Plunkett, *Quasi-expressivism about Statements of Law: A Hartian Theory,* 3 OXFORD STUDIES IN PHIL. OF L. 49, 50, 63–4 (2018) (observing that a "complete metalegal theory" must account for persistent disagreement); Liam Murphy, *Concepts of Law* 30 AUSTL. J. LEG. PHIL. 8, 15 (2005) (explaining the fact that most people who have thought about the debate between positivists and anti-positivists "feel the pull of both ways of thinking"); Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1162–63 (2015) (arguing that persistent disagreement in general jurisprudence is due to faulty assumptions about law's nature); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1217–18 (2012) (exploring positivist friendly accounts of theoretical disagreement); Emad H. Atiq, *There are No Easy Counterexamples to Legal Anti-positivism*, 17 J. ETHICS & SOC. PHIL. 17, 22 (2020) (observing that a general theory of law needs to explain persistent disagreement concerning hard questions of law); Emad H. Atiq, *Legal Obligation & Its Limits*, 38 L. & PHIL. 109, 121 (2019) ("[O]ne needs an explanation for persistent theoretical disagreement amongst epistemic peers [about the concept of law], and the elusive character of the relevant conceptual constraints looks to be the only one available."); Genoveva Marti and Lorena Ramirez-Ledena, *Legal Disagreements and Theories of Reference*, 7 PRAGMATICS AND LAW 121 (2016) (exploring competing accounts of legal disagreement). *See also infra* Section III.A.2.

[8] The phenomenon we describe is similar but not identical to what Joseph Fishkin and David Pozen term "asymmetric constitutional hardball" (building on Mark Tushnet's term "constitutional hardball"). *See* Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 943 (2018); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004). These scholars focus on the growing willingness of political actors to challenge implicit constitutional and legal norms in pursuit of their policy goals. Our Article tracks a form of constitutional hardball that plays out, in the first instance, in scholarly discourse: a family of hard-edged legal claims (e.g., the law itself demands originalism) rooted in jurisprudential assumptions whose contested nature is not fully acknowledged.

non-originalist grounds.[9] Recent years have also seen an increase in scholarly (and also judicial)[10] challenges to *stare decisis*, a norm that speaks to the respect owed to courts as institutions, and to judges, past and present, with divergent theories of law.[11] The hardliners may hope to draw

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[9] *See, e.g.*, Christopher R. Green, *"This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism*, 84 NOTRE DAME L. REV. 1607, 1624 (2009) ("Those who swear the Article VI oath should therefore be textualist semi-originalists who take the historic textually expressed sense as interpretively paramount."); Lee Strang, *State Court Judges Are Not Bound by Nonoriginalist Supreme Court Interpretations*, 11 FLA. INT'L U. L. Rev. 327, 337 (2016) ("State judges take an oath to 'support' the Constitution's original meaning and are 'bound' by it"); Evan Bernick & Christopher Green, *What is the Object of the Constitutional Oath?* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441234. *See* Philip Hamburger, *Chevron Bias,* 84 GEO. WASH. L. REV. 1187, 1248 (2016) (suggesting that judges violate their oath of office insofar as they apply Chevron deference to agency interpretations of statutes) ("Ultimately, if judges do not want to exercise their own independent judgment, but instead want to exercise systematic bias, they should resign. Judges take an oath of office, in which they swear to serve as judge. . . If . . . they are unwilling to adhere to these most basic requirements, they have no business pretending to be judges and should get off the bench.").

Consider the practical import of the claim that non-originalist judges violate their oath of office. The claim, if true, would seem to suggest that only originalist judges should be appointed to the federal bench. What would this mean for sitting judges (and Justices)? We are unaware of any proponents of the oath-breaking charge who have suggested anything like the impeachment of non-originalist judges. But if a judge (repeatedly) engages in a practice that violates their oath of office, surely that provides adequate grounds for impeachment. Proponents of the oath-breaking charge might deny any interest in impeachment, but their accusations have troubling implications. Cass Sunstein (@CassSunstein), https://twitter.com/CassSunstein/status/1260180036528869376. ("An implausible claim is getting traction these days: the oath of office requires judges to embrace 'originalism.' The claim converts good-faith disagreement into an accusation of a near-crime (an academic analogue to 'lock her up.')).")

[10] Most notably, Justice Thomas criticized at length the Court's existing *stare decisis* practice in his 2019 *Gamble v. United* States concurrence. 139 S. Ct. 1960 (2019).

[11] Debates about stare decisis are, of course, not new. *See, e.g.*, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1176 n.16 (1988) (describing eighteenth- and nineteenth-century criticisms of the practice). But in recent years, an increasing number of originalist scholars have questioned *stare decisis* norms. Gary Lawson was among the first to build a detailed case against precedent. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 27–28 (1994) ("If the Constitution says *X* and a prior judicial decision says *Y*, a court has not merely the power, but the obligation, to prefer the Constitution."). For more recent arguments critical of *stare decisis*, see, for example, Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289–91 (2005) ("[S]*tare decisis*. . . is completely irreconcilable with originalism. . . . [*S]tare decisis* is *unconstitutional* .") (emphasis in original); *see also* Strang, *supra* note 9, at 333; Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 269 (2005) ("Where a determinate original meaning can be ascertained and is inconsistent with previous judicial decisions, these precedents should be reversed and the original meaning adopted in their place."). Other scholars have taken a more measured, if still questioning, approach to precedent. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 805 (2009) ("We . . . balance these benefits of following the original meaning with the

support from the jurisprudential turn. However, there are reasons internal to the jurisprudential perspective (i.e., a perspective sensitive to the fact that any account of what the law requires, here or elsewhere, must rely on some basic assumptions about the nature of law) for harboring doubts about one's preferred public law theory. Indeed, what we counsel in the following pages is confidence-lowering: the embrace of what we call a jurisprudence of doubt. We argue that the unsettled nature of jurisprudence should make us all less confident about our preferred public law theories; or, at the very least, it should make those theorists less confident who acknowledge that their theories depend on contested jurisprudential starting points.[12]

Our case for confidence-lowering begins with a close examination of a compelling set of examples of the jurisprudential turn. In Part I, we discuss arguments for originalism developed by Professors William Baude and Stephen Sachs.[13] They argue that an originalist approach to constitutional interpretation is a requirement of law, and that this fact follows from the correct first principles about law—roughly, the positivistic claims of H.L.A. Hart. In fact, it takes work to clarify the controversial variation on Hart's theory that underwrites their defense of originalism.[14] In addition to clarifying the nature of their jurisprudential starting points, we examine Baude's claims, in recent work co-authored with Professor Ryan Doerfler, that persistent disagreement on matters of constitutional interpretation is no reason to question one's starting points, and that judges are entitled to treat the fact that the opposing side holds the wrong view on questions of interpretative methodology as evidence of legal "irrationality."[15]

In Part II, we examine Professor Philip Hamburger's recent broadside

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benefits of following precedent—in particular, predictability, judicial constraint, and protection of reliance interests."); *see also* Baude, *supra* note 2, at 2391; Stephen E. Sachs, *Precedent and the Semblance of Law: Settled Versus Right: A Theory of Precedent*, 33 CONST. COMMENT. 417 (2018) (book review).

[12] The phrase "jurisprudence of doubt" is associated with the plurality opinion in *Planned Parenthood v. Casey*, which opens with the line, "Liberty finds no refuge in a jurisprudence of doubt." 505 U.S. 833, 846 (1992). In what follows, we use the phrase in a very different sense, specifically referring to disagreement-based reasons for doubting one's preferred first principles in jurisprudence and the public law claims that follow from those principles.

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

[14] Unlike prior critics, we grant Baude and Sachs their unique brand of positivism and explore what follows from it. *Cf.* Barzun, *supra* note 2, at 1330–31, 1342–80 (arguing that Baude and Sachs' originalist conclusions do not follow from standard versions of positivism defended by Hart, Raz, and Shapiro); *id.* at 1342 ("Although each of these approaches fits certain aspects of Baude and Sachs's arguments quite well, not one of them enables the positive turn to fulfill its potential.").

[15] Baude & Doerfler, *supra* note 5, at 326.

against the administrative state.[16] Hamburger argues that administrative law is "unlawful" and not "real law" principally because it has features deemed incompatible with seventeenth-century British assumptions about law's nature.[17] Although Hamburger is not entirely explicit about the reasons why this purported incompatibility entails that the rules and regulations established by administrative agencies cannot be law here and now, we clarify the implicit premises at work in the argument, which amount to deeply controversial jurisprudential assumptions. We also consider Hamburger's claim that judges who embrace the deference norms of contemporary administrative law doctrine betray their oath of office.

Baude, Sachs, and Hamburger are by no means the only scholars working in public law today who have embraced the jurisprudential turn, and we go on to give several other examples.[18] However, we have examined the work of these theorists in greater detail because of their sophistication and influence, on the way to making a larger and more general point in the second half of this Article. The works we have highlighted to illustrate our broader point have already generated substantial scholarly engagement, though no scholarship to date has explored what persistent jurisprudential disagreement means for this mode of public law advocacy.[19] Our critique is distinctive in that it appeals to

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16 *See* HAMBURGER, *supra* note 2.

17 *Id.* at 496.

18 *See, e.g.*, *supra* note 2. See Richard H. Fallon, *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION (Matthew Adler & Kenneth Himma eds., 2009) (defending precedential reasoning "by invoking and applying H. L. A. Hart's famous assertion that the ultimate foundation for all legal claims lies in a 'rule of recognition.'") for an example of a non-originalist view defended on positivist grounds.

19 *See, e.g.*, Barzun *supra* note 2, at 1330–31 (arguing that Baude and Sachs' originalist conclusions do not follow from standard versions of positivism defended by Hart, Raz, and Shapiro); *id.* at 1357–59 (considering legal disagreement for the limited purpose of questioning whether there is enough determinacy in law to resolve questions of interpretation); *id*. at 1387–88 (arguing that judges cannot apply Baude and Sachs' methodology without deciding difficult "empirical, normative, and conceptual questions of all sorts"). *But see* Baude & Sachs *supra* note 13 (responding to Barzun's critique with a distinctive positivist account); discussion *infra* Part 1. *See also* Guha Krishnamurthi, *False Positivism: The Failure of the Newest Originalism*, 46 BYU L. REV. 401 (2021) (offering a general critique of Baude & Sachs' arguments, including their assumptions about Hart); *see also* Eric J. Segall, *Originalism off the Ground: A Response to Professors Baude and Sachs*, 34 CONST. COMMENT. 313, 313 (2019) (arguing, contra Baude and Sachs, that "[f]ar from being our law, originalism is used by judges mainly as a rhetorical device to justify decisions reached on other grounds"). We grant Baude and Sachs their controversial brand of positivism and empirical assumptions only to ask how much confidence they should have in their own view given peer disagreement. The scholarship on Hamburger's jurisprudential assumptions has, likewise, neglected to press the issue of disagreement and its evidential significance. *See, e.g.*, Gary Lawson, *The Return of the King: The Unsavory Origins of Administrative Law*, 93 TEX. L. REV. 1521, 1526 (2015) (faulting Hamburger for not clearly defining what "unlawful" means); *see also* Adrian Vermeule, *No. Book Review: Is Administrative Law Unlawful?*, 93 TEX. L. REV. 1547

reasons for scaling back our public law convictions made visible by the jurisprudential turn itself, while granting theorists a (qualified) right to their assumptions. Rather than basing our case for skepticism in some contested standpoint within public law theory—for example, legal realism or living constitutionalism or wealth-maximizing consequentialism—we aim to meet the jurisprudential turn on its own terms.[20]

Accordingly, Part III begins with other examples of public law claims inspired by jurisprudence (including arguments for non-originalist conclusions), before developing a generalized version of our challenge: a novel case for ambivalence towards theory-driven conclusions about public law. We argue on entirely general grounds that tracing our public law convictions to controversial assumptions about the nature of law should make us less (not more) confident in the rightness of our conclusions (and the wrongness of the opposing side). We observe similar patterns of reasoning in other domains of human inquiry, including the natural sciences and, ironically, in general jurisprudence. And we argue that these patterns find a rational basis in the epistemology of "peer disagreement." Questions that are contested among similarly situated reasoners are appropriately treated with a measure of uncertainty unless we have special reason to discount dissent (and no such special reasons obtain in the jurisprudential case, though they might in more ordinary legal disputes). While the core of our case is intellectual—it is not about "playing nice" but about apportioning one's beliefs to the evidence—we conclude this section with the observation that intellectual norms militate in the same direction as institutional and ethical norms of toleration vital to a pluralist democracy.

In Part IV, we conclude with practical recommendations regarding the changes in public law advocacy suggested by our argument. To be clear, the jurisprudential turn represents to us genuine progress, insofar as it signals convergence on a truth that united H.L.A. Hart and Ronald Dworkin—namely, that "[j]urisprudence is the general part of adjudication, silent prologue to any decision at law."[21] But the turn is incomplete if it consists in using controversial general jurisprudential theses to prop up practically consequential legal claims without grappling

(2015) (arguing that Hamburger misunderstands administrative agency power and administrative law); Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight*, Oxford Legal Studs. Rsch. Paper No. 44/2016 (2016) (questioning Hamburger's historical account of seventeenth-century English conceptions of law). *See also infra* note 144.

[20] See *infra* Part III, for further discussion, especially concerning how the view we defend avoids the pessimism of legal realism.

[21] DWORKIN, *supra* note 3, at 90. *See also* H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 158–59 (1st ed. Clarendon Press, 1982) (observing that general jurisprudence clarifies the judicial ideal of fidelity to law).

with what lack of convergence about the precise nature of law means for how we should reason with others about law. In other words, the jurisprudential turn in public law scholarship needs to be a turn towards greater uncertainty about our preferred answers to hard and contested legal questions, and greater charity in the way we regard those with whom we disagree.

I. ORIGINALISM AND GOLDILOCKS POSITIVISM

Though the term "originalism" was coined by a critic,[22] adherents have proudly embraced the label for more than forty years. Versions of originalism have proliferated, such that the term "originalism" today does not denote a single method of constitutional interpretation so much as a family of similar methods.[23] Lawrence Solum has argued that the core of originalism is defined by two key theses that he terms fixation and constraint.[24] The fixation thesis is the claim that the meaning of each constitutional provision is fixed at the time of its ratification, and the constraint thesis is the claim that the original meaning of the constitutional text should constrain constitutional practice.[25] Not all originalists accept these propositions as either necessary or sufficient for originalism,[26] but they capture the essence of originalism well enough for present purposes, and probably as well as any other formula.[27]

Not only have different versions of originalism been offered, but different ways to defend originalism have been proposed over time. The

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[22] Paul Brest introduced the term in a 1980 article. *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980).

[23] Some of these different versions include original methods originalism. *See* John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751–52 (2009); and framework originalism, *see generally* JACK BALKIN, LIVING ORIGINALISM 201 (2011).

[24] *See* Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

[25] *See id*.

[26] *See, e.g.*, Stephen E. Sachs, *Originalism Without Text*, 127 YALE L.J. 156 (2017) (rejecting the fixation thesis). Critics have argued that the thinness of originalism's core commitments undermines any claim that originalism represents a coherent approach to constitutional interpretation, *see* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009), although the same could surely be said for, say, living constitutionalism.

[27] For a similar formulation, *see* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377 (2013) ("At its most basic, originalism argues that the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation."). *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann, ed.) (1997); Baude & Sachs, *supra* note 13.

first generation of modern originalist scholarship, emerging in the 1970s, offered originalism as a corrective to the perceived judicial activism of the Warren Court without fully articulating an affirmative case for originalism specifically.[28] As originalism further crystalized in the 1980s, both the method and the justification for it came into somewhat sharper focus. The case for originalism, as articulated, for instance, in Justice Scalia's influential 1989 article *Originalism: The Lesser Evil*,[29] was at its heart a prudential case. Justice Scalia tots up the pros and cons of originalism and nonoriginalism, and ultimately concludes that originalism comes out ahead, largely because it constrains judges, preventing them from imposing their own value judgments through their rulings.[30]

The 1990s saw the rise of "the new originalism."[31] One of the things that distinguished the new originalism from what came before is a change

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[28] Key touchstones are RAOUL BERGER, GOVERNMENT BY JUDICIARY (2d ed. 1977) and Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). Solum characterizes Berger, Bork, and then-Associate Justice William Rehnquist in the 1970s as "proto-originalists." *See* Solum, *supra* note 24, at 3–4. While self-conscious efforts to define originalism as a distinctive interpretative methodology are of comparatively recent vintage, broadly originalist ideas have long roots in American legal history. *See, e.g.*, Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 599 (2004).

[29] *See* Scalia, *supra* note 27.

[30] *See id*. at 863–64 ("Now the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law. . . . Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."). In the same article (as well as in other writings), Justice Scalia pronounces himself a "faint-hearted originalist": he could not imagine, for instance, upholding a statute imposing flogging as a penalty. *Id.* at 864. Scalia's originalism can be faint-hearted precisely because it is grounded on prudential considerations: when an originalist result would be beyond the pale, a judge is free to choose a different result. *Id.* at 861 ("I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow . . . . What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge-even among the many who consider themselves originalists-would sustain them against an eighth amendment challenge. It may well be, as Professor Henry Monaghan persuasively argues, that this cannot legitimately be reconciled with originalist philosophy . . . . Even so, I am confident that public flogging and hand-branding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.").

[31] Randy Barnett used the term in his influential 1999 article *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999), but as Lawrence Solum notes, the first use of the phrase captured in the Westlaw Journals and Law Reviews database dates to 1996 from a piece by Evan Nadel, *The Amended Federal Rule of Civil Procedure 11 on Appeal: Reconsidering Cooter & Gell v. Hartmarx Corporation*, 1996 ANN. SURV. AM. L. 665, 691 n.191 (1996). Lawrence B. Solum, *Cooley's Constitutional Limitations and Constitutional Originalism*, 18 GEO. J.L. & PUB. POL'Y 49, 52 n.7 (2020).

in how originalism is defended. In this newer wave of scholarship, originalism figures less as a convenient device for restraining wayward judges and more as a discovered truth about language and the interpretation of legal texts. As framed, among other places, in influential articles by Randy Barnett[32] and Gary Lawson,[33] interpreting a legal text simply meant attempting to recover its original public meaning.[34] On this view, originalism was not simply a more prudent way to approach constitutional interpretation than its competitors: originalism was *entailed* by a proper understanding of the nature of texts and the practice of interpretation. This new defense lent originalism a more compulsory character relative to its earlier incarnation: if the theorists were correct, interpreting texts just meant being an originalist.

Over time, elements of the new originalism attracted criticism both from inside and outside of the originalist camp.[35] A younger generation of scholars has offered a new way to defend originalism by taking a positive turn, and casting originalism not as a method for understanding the meaning of texts so much as a legally required method for discerning the true content of the law. As with originalism more generally, positive turn scholarship has different strands, but the common thread is the idea that originalism is itself a part of our law.

If positive turn originalism were able to fully substantiate that claim, then the positive turn would arguably represent a further raising of the stakes in the debates over constitutional law. The new originalism already pitched originalism not as "the lesser evil" but as what it means to interpret a legal text. Even so, one could in principle accept the new originalist argument and still choose a "noninterpretivist" approach to constitutional law.[36] The positive turn, by contrast, offers no quarter to adherents of other approaches: if the argument is correct, to choose nonoriginalism is to reject our law. To be sure, it is possible to overstate the contrast between the character of the claims made by positive turn originalism and its predecessors. Certainly, there are passages from Justice Scalia and other originalist pioneers suggesting that the originalist position is legally

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[32] *See* Barnett, *supra* note 31.

[33] Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823–25 (1996).

[34] Lawson observes that the proper interpretation of documents intended for a private audience might require a different analysis. *See id*. at 1826–27.

[35] The debates touched off by new originalist scholarship were rich and long-running. For a critical take, see Mitchell Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009).

[36] Indeed, John Hart Ely proudly embraced the noninterpretivist label in the early phases of the originalism wars. *See* John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 445 (1978). *See also* Thomas Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703, 705–07 (1975) (critiquing what he terms "the pure interpretive model").

required,[37] and close readers saw glimmers of a jurisprudential turn already in new originalist scholarship.[38] But the positive turn draws an unmistakably hard line against nonoriginalism and nonoriginalists.

No scholars have done more to advance the positive turn in originalist scholarship than Professors William Baude and Steven Sachs. In a series of articles, authored singly[39] and with each other,[40] Baude and Sachs have made the case that originalism enjoys the status of being law itself. In assessing the constitutionality of any given rule of law today, they argue, there is a legal obligation to trace its legality to laws established at the Founding, including the Founders' laws for making new law or for changing the law.[41] Baude and Sachs' confidence that originalism is the "law of the land" is more than just theoretical. It is a *practical* confidence, as they have advocated that judges should decide cases on originalist grounds.[42] Moreover, as committed originalists, Baude and Sachs mostly ignore the views of non-originalists. Commenting on disagreement about interpretive matters, Baude, writing with Professor Ryan Doerfler, suggests that disagreement between "methodological foes"[43]—for instance, originalists and living constitutionalists—is "'old news' and so provides neither camp additional reason for pause."[44] According to Baude and Doerfler:

> disagreements between methodological foes are unsurprising, the rediscovery of such disagreements reveals little information to the parties involved and *so provides little reason for those parties to change their beliefs*.[45]

In other words, judges should not treat persistent disagreement on foundational methodological questions as a reason to rethink either their

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[37] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) ("Since it is entirely clear that the Constitution of the United States—the old one—takes no sides in this educational debate, I dissent.").

[38] Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism From Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545 (2013).

[39] *See* Baude, *supra* note 23; Sachs, *supra* note 233.

[40] *See* Baude & Sachs, *supra* note 3; Baude & Sachs, *supra* note 13.

[41] *See* Baude & Sachs, *supra* note 13, at 1461–62.

[42] *Id.* at 1455 ("How should we interpret the Constitution? The 'positive turn' . . . [finds] legal rules grounded in actual practice. In our legal system, that practice requires a certain form of originalism . . . ."). There is a difference between accepting a speculative claim as a working hypothesis in order to explore the logic and implications of a view that depends on it and presenting the claim to others as a basis for controversial decision-making. 'Practical' confidence requires more than theoretical confidence. See discussion *infra* Part III.

[43] Baude & Doerfler, *supra* note 5, at 327.

[44] *Id.* at 319.

[45] Baude & Doerfler, *supra* note 5, at 328 (emphasis added).

starting points or the nature of the subject matter about which they disagree. Going further, Baude and Doerfler suggest that a judge is entitled to question an opposing judge's "legal rationality" if the latter fails to embrace a particular methodology:

> [T]he most important factor when considering whether one's peers are "equally rational" is whether they are applying a similar framework of reasoning to the problem—i.e., a similar interpretive methodology.[46]

And elsewhere in the same paper:

> [W]e think that two judges ought to consider one another "epistemic peers" only to the extent that they share the same judicial outlook or methodology. This shared approach to judging is what marks the judges as "equally rational" from each other's point of view and committed to looking to the "same evidence." The philosophical label may be slightly unfortunate, because it seems impolitic to label another judge "irrational" in the colloquial sense, but the substance is a square match.[47]

In fact, the "substance" of the charge of irrationality, whether in the standard philosophical sense or a colloquial one, is far from a square match, but that is a point for later.[48] For now, our goal is to juxtapose this general attitude towards interpretive disagreement with an examination of the starting points for originalism. A careful examination of the assumptions underpinning originalism might clarify what sort of proposition it is whose denial calls the non-originalist's legal rationality (or basic credibility about legal matters) into question.

According to Baude and Sachs, the starting point for originalism is Hartian positivism—roughly, the view that what the law is around here (or anywhere) is ultimately determined by jurisdiction-specific social facts. As we discuss below, Baude and Sachs' arguments for originalism presuppose a version of Hartian positivism that is freighted with assumptions that have not been defended by any positivist. Their version of legal positivism *might* give us the result that originalism is our law, but that would not answer the question of why anyone should accept it.[49] The

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[46] *Id*. at 341.

[47] *Id.* at 326.

[48] *See* Section III.A.3. Their article never defines what it means for a judge to be "legally irrational" in the philosophical sense, which is surprising, given how rhetorically weighty charges of irrationality can be.

[49] Whether their view does entail originalism is eminently doubtable, but we won't be pressing the point here since our aim is not a general takedown of their view. See Krishnamurthi, *supra* note 19, for an overall critique.

underlying jurisprudential assumptions need to be stated precisely in order to raise the broader question that animates this piece: whether their unargued-for legal starting points could justify high levels of confidence on matters of interpretation.

A. "Grounding Originalism"

In "Grounding Originalism," Baude and Sachs' argument, stated at a high level of generality, proceeds in two steps. First, it is a fundamental fact about the nature of law that the laws of a jurisdiction are ultimately determined by its "Rule of Recognition," a concept they borrow from Hart.[50] Second, the Rule of Recognition in our jurisdiction entails that originalism is our law.[51]

What is a Rule of Recognition? Hart famously argued that legal systems are systems of hierarchically structured rules, and that every legal system includes a kind of higher-order rule that determines the legality of all other rules.[52] This higher-order rule specifies what counts as law and why. Followers of Hart have conceived of the content and structure of a Rule of Recognition in different ways—for instance, as a rule that specifies how the term "law" is to be applied by officials; or as a rule that specifies who the officials are whose prescriptions are to be followed around here.[53] But the key sticking point for Hartian positivists—on which followers of Hart agree—is that the content and legality of the Rule of Recognition is wholly determined by empirical social facts: roughly, what we do around here. The Rule of Recognition is a rule for determining the law that is regularly followed or endorsed by officials and other members of the community. In embracing this concept of a socially embraced rule of recognition, Baude and Sachs identify unequivocally as Hartian positivists: "positivists like us figure out today's law based on today's social facts."[54]

According to Baude and Sachs, Hartian positivism has an unnoticed implication for American law. The rule of recognition around here—the

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[50] Baude & Sachs, *supra* note 13, at 1464–65.

[51] *See id.*

[52] *See* H.L.A. HART, THE CONCEPT OF LAW 94–110 (2nd ed. 1994); *see infra* Section I.A.2.

[53] *See e.g.*, Scott Shapiro, *What is a Rule of Recognition (And Does it Exist)?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 235, 235 (Yale Law School, Public Law Working Paper No ("I try to state Hart's doctrine of the rule of recognition with some precision. As we will see, his position on this crucial topic is often frustratingly unclear. Hart never tell us, for example, what kind of rule the rule of recognition is: is it a duty imposing or power conferring rule? Nor does he identify the rule of recognition's audience: is it a rule practiced only by judges or by all legal officials?"); MATTHEW H. KRAMER, H.L.A. HART 70–85 (1st ed. 2018).

[54] Baude & Sachs, *supra* note 13, at 1491.

rule for determining what the law is that is more or less regularly followed by officials in our system today—traces the legality of every contemporary law to Founders' law.[55] Founders' law consists of the laws the Founders established, including legal procedures for changing the law (for instance, the Article V amendment procedures). So, if Hartian positivism is true generally—that is, true of law, *sub specie aeternetatis*—then originalism is *our* law: every law owes its legality to Founders' law. Accordingly, the judge's job is to ensure that contemporary laws pass the originalist's test of pedigree—for any given law today, we should be able to derive it, at least in principle (setting aside practical challenges associated with figuring out Founders' intent and the like), from Founders' law applying Founders' principles for legal change; if we can't, then the candidate "law" must be no law at all.

1. The "Just Right" Rule of Recognition

As it turns out, Baude and Sachs are not merely assuming Hartian positivism (though even here, one might ask: why "merely," since Baude and Sachs are entirely transparent that they do not have any new arguments on offer for the truth of Hartian positivism[56]). Baude and Sachs are assuming a species of Hartian positivism that, as far as we can tell, has never been defended in print.[57] The best way to see this is to start by considering the second premise of their argument: the empirical claim that the socially embraced rule of recognition around here happens to be friendly to originalism. A mundane fact which Baude and Sachs acknowledge is that plenty of judges deviate from originalist methods in their legal judgments as well as in their expressly articulated methodological commitments.[58] As Mark Greenberg points out:

> [if] the rule of recognition is determined by the convergent practice of judges, nothing that is uncertain or controversial can be part of the rule of recognition. Thus, to the extent that a consensus among judges is lacking

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[55] *Id*.

[56] *See* discussion *infra* Section I.A.2.

[57] Several commentators have criticized Baude and Sachs for misdescribing legal positivism. *See, e.g.,* Barzun *supra* note 2, at 1330, 1342; Mark Greenberg, *What Makes A Method of Legal Interpretation Correct? Legal Standards vs Fundamental Determinants*, 130 HARV. L. REV. 105, 114–16 (2017). Our critique is different. We ask: what species of legal positivism would have to be true for Baude and Sachs argument to have a fighting chance of being sound? *Cf.* Sachs, *supra* note 2, at 864 (noting that the defense of originalism requires "a much more detailed positivist theory"). By answering this question, we aim to show how controversial, unargued-for, and recherché the starting points for positive-turn originalism turn out to be. This is the context against which originalist adamancy and the dismissal of "methodological foes" as "irrational" must be evaluated.

[58] *See* Greenberg, *supra* note 57, at 115–16.

> with respect to whether a theory of legal interpretation is correct, that theory is not part of the rule of recognition. In other words, no theory of legal interpretation that is not widely accepted can be part of the rule of recognition.[59]

Commentators on "The Originalism Blog" have similarly asked with understandable bewilderment if "judges are already deciding cases in an originalist fashion . . . then why the huge political and academic cry [on the right] . . . to appoint originalist judges?"[60] In response, Baude and Sachs argue that the rule of recognition does not require complete convergence among officials. The rule of recognition is determined by a complex kind of behavioral regularity. It is a "deep" fact about our practice.[61] Here is how they characterize the nature of this deep empirical fact:

> Hart's legal rules depend on social practice, but in a complicated and indirect way. Legal rules ultimately derive from society's ultimate 'criteria for identifying the law'—a 'complex, but normally concordant, practice of the courts, officials, and private persons.' This rule-based practice is not only something external observers can see and predict; it's also something people can accept and use from the internal perspective, along with the 'characteristic vocabulary' that goes with it (e.g., 'it is the law that . . . ').[62]

They add:

> We think that our legal system reflects a deep commitment to our original law, publicly displayed in our legal practice. Indeed, originalism could aptly be called the 'deep structure' of our constitutional law, present in our frequent practices of identifying, justifying, and debating the content of our law.[63]

This refinement on the concept of a Rule of Recognition is critical.[64]

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[59] *Id*. at 115.

[60] The Originalism Blog, https://originalismblog.typepad.com/the-originalism-blog/2019/08/page/3/. *See also* Eric Segall, *Mending Fences With a Question: Is Originalism Theory Mostly Normative or Descriptive?*, DORF ON LAW (May 30, 2018, 7:00 AM) http://www.dorfonlaw.org/2018/05/mending-fences-with-question-is.html.

[61] Baude & Sachs, *supra* note 13, at 1476 ("The deep structure of our legal system is a question of present law, not a prediction of future behavior.").

[62] *Id.* at 1466 (internal citation omitted).

[63] *Id.* at 1458.

[64] Barzun similarly observes:

The most serious potential problem with [Baude & Sachs'] Argument is its (first) major

Without it the view is, as Guha Krishnamurthi and others have pointed out (and as they seem to agree), a non-starter.[65] But the refinement invites several worries.

The most obvious worry is that the refinement is vague. We are told that some kind of "complex" commitment to originalist methodology that is "normally concordant" with the views of sufficiently many officials and private persons makes it our unique Rule of Recognition. In fairness to Baude and Sachs, Hart himself was quite vague in describing the sort of behavioral regularity that grounds a Rule of Recognition.[66] But in fairness to Hart, *his* project did not require greater precision. Hart's aim was not to derive surprising jurisdiction-specific laws from his theory. Hart's project was to show that using social facts alone, we can account for some very general and more or less uncontroversial features of laws that invite philosophical explanation—for example, the fact that laws are discovered and experienced as binding.[67] Baude and Sachs are forced to be much more specific than Hart ever was because theirs is a much more specific project: to establish an entirely non-obvious and controversial conclusion about the content of the laws of the United States.

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premise, MP, which states that "the law is whatever is supported by the right kind of social facts." Plainly, much hangs on defining the "right kind of social facts." For unless or until that phrase is given concrete meaning, the Core Argument is empty. So how do we know which social facts require attending to? . . . Remarkably, Baude and Sachs provide no clear answers to these questions.

Barzun, *supra* note 23 at 1330, 1341. Baude and Sachs respond to Barzun's complaint in the Article we are presently critiquing, by clarifying some of their assumption about the social facts that determine the legal facts. *See* Baude & Sachs, *supra* note 13. We argue here that the theory they presuppose depends on controversial assumptions, which matters not just for purposes of evaluating their argument but also their definitive conclusions and attitudes towards disagreement. And it takes some work to state precisely what it is that they are implicitly assuming.

[65] Guha Krishnamurthi notes that:

Baude and Sachs's method of only looking to judicial results, opinion language, resulting lawyer behavior, and the like to determine our law does not arise from legal positivism. It is a separate and distinct claim that, to determine what a consensus of legal officials will do and thus what the law is, it is enough to look at judicial results, opinion language, and lawyer behavior. It amounts to a type of bespoke Legal Formalism.

Krishnamurthi, *supra* note 19, at 436. Our concern is principally with this "separate and distinct claim" on which the argument rests and what it suggests about the appropriate level of confidence Baude and Sachs should have in their view.

[66] *See* HART, *supra* note 52, at 110 (describing the rule of recognition as the "complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."); Kramer, *supra* note 53, at 84 (describing Hart's lack of clarity on the precise social facts that determine the rule of recognition).

[67] Philosophical theories rarely set out to explain fine-grained phenomenon. For instance, a metaphysics of causation might try to give an account of the concept of cause that fits how that concept is used by physicists. But metaphysicians are careful not to artificially restrict the general account in ways that would resolve contested questions in science about what causes what.

Suppose we surveyed judges and the general public (note it is not just officials but also "private persons" whose behavioral commitments allegedly determine the content of the Rule of Recognition) whether they are committed to originalism in every case. One would expect a lot of "nays."[68] Would this refute Baude and Sachs on their own terms? No, because they think the express commitments of persons are not decisive in determining our Rule of Recognition. Officials may be committed to originalism implicitly. But how might we discern these implicit commitments, and how many people must agree at the end of considered reflection on legal methodology for originalism to be our rule of recognition? That these questions are left open by their characterization of the "deep fact" that determines the Rule of Recognition, suggests that whether originalism is our law must be an open question as well. If that is the case, then we (along with every originalist judge, including those on the Supreme Court) should suspend judgment on whether originalism is *our law*, as opposed to, say, merely the best or wisest approach to law by my or your lights. But that is not the spirit of open-endedness with which their project concludes.

Moreover, for all Baude and Sachs tell us, we could discover more or less identical behavioral regularities that are in tension with originalism—for example, a fairly robust pattern among judges and private persons in a certain range of cases of deciding what the law is based on its compatibility with considerations of justice, or contemporary standards of decency.[69] It is a fact of practical life, after all, that we often find ourselves with competing evaluative commitments in different circumstances or times, drawn to conflicting conclusions about what one morally or legally ought to do. Most of us do not live our lives in obedience to some master principle. If it is a mundane fact about ordinary practical life, then why assume that the behavior of legal officials and the relevant social facts will necessarily reveal a robust behavioral pattern that is uniquely committed

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[68] As noted earlier, *even* Scalia dubbed himself a "faint-hearted" originalist unwilling to uphold flogging, quite apart from his originalism. *See supra* note 30.

[69] *See, e.g.*, Scalia *supra* note 27, at 861. Recent experimental work on the "folk" concept of law finds evidence against positivism among undergraduates. Flanagan & Hannikainen surveyed 218 students for their intuitions regarding the legality of immoral laws, and report results consistent with what they describe as a "natural law" concept of law:

[C]onsistently with a natural law view, the more that participants believed the marriage ban to be wrong, the more likely they were to deny that it was truly law. . . . Studies 1 and 2 demonstrated that people tend to deny the lawfulness of gravely immoral statutes, as predicted by natural law theorists. . . . non-descriptivist intuitions about law were found to dominate. A large majority (64.4%) rejected the view that, ultimately, law is just a matter of concrete social facts.

Brian Flanagan & Ivar R. Hannikainen, *The Folk Concept of Law: Law is Intrinsically Moral*, AUSTRALASIAN J. PHIL. 1, 14–20 (forthcoming).

to originalism? Curiously, Baude and Sachs refer throughout to *the* rule of recognition and *the* ultimate basis for determining the law[70] when Hart spoke regularly about potentially multiple "unstated rules of recognition" in complex legal systems:

> In a developed legal system, the *rules* of recognition are of course more complex. . . such complexity may make the *rules* of recognition in a modern legal system seem very different from the simple acceptance of an authoritative text.[71]

Hart was, likewise, quite explicit that in complex modern societies the content of the rules of recognition will often be vague.[72] The point isn't that Hart must be right and Baude and Sachs wrong. The point is that Baude and Sachs cannot simply lean on arguments Hart may or may not have provided in defense of his jurisprudential starting points in support of their own distinctive view, a point we return to below.[73]

Setting aside these larger worries, we can focus on clarifying precisely what it would take for Baude and Sachs' argument to be sound. It would mean that in addition to some generic Hartian statement about the positive nature of law being true (law is grounded in our practices), it must be a fundamental truth about law that the legality of the Rule of

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[70] *See, e.g.*, Baude & Sachs, *supra* note 13, at 1471 ("On Hart's account, this chain of authority eventually terminates in an ultimate rule of recognition, one that requires no further legal validation and that's grounded directly on social facts").

[71] HART, *supra* note 52, at 95 (emphasis added). Hart also writes that "[t]he use of unstated *rules* of recognition, by courts and others, in identifying particular rules of the system is characteristic of the internal point of view." *Id.* at 102(emphasis added). *See also* KRAMER, *supra* note 53, at 84 (2018) (interpreting Hart's view as entailing that "there need not be and typically will not be a wholly univocal Rule of Recognition in any particular system of law. Typically, the officials in such a system do not all adhere to exactly the same set of criteria for ascertaining the law."); *see also* JOSEPH RAZ, THE AUTHORITY OF LAW 95–96 (1979) (arguing that a legal system typically consists of multiple rules of recognition, each of which specifies an ultimate source of law). Other theorists seem to interpret Hart differently, as committed to only one rule of recognition per legal system. *See* Shapiro, *supra* note 53.

[72] *See* HART, *supra* note 52, at 109 ("No doubt the practice of judges, officials, and others, in which the actual existence of a rule of recognitions consists, is a complex matter. . . . There are certainly situations in which questions as to the precise content and scope of this kind of rule, and even as to its existence, may not admit of a clear or determinate answer.").

[73] *See* Baude & Sachs, *supra* note 13, at 1459 ("It's true that at least some of our claims involve theoretical assumptions about what law is and how it works. . . . In our view, this positivist premise fits within an overlapping consensus among American legal scholars, largely centered on the theories of Professor H.L.A. Hart—a consensus that appeals to the broadest possible audience without requiring too many controversial assumptions."); *id.* at 1476–77. ("If originalism is consistent with *the most commonly accepted theory of jurisprudence in the American academy*, that's a significant finding on its own.") (emphasis added).

Recognition is determined by a special kind of behavioral regularity among officials and the general public to which originalism *and only originalism* happens to conform in the United States. If the degree of social convergence that is sufficient for a rule of recognition is set too low, then one would expect lots of non-originalist rules of recognition in our jurisdiction in conflict with an originalist rule of recognition. If positivism sets a high bar for convergence (as Greenberg suggests in the quote above),[74] then originalism is highly unlikely to be our Rule of Recognition; in fact, our Rule of Recognition would turn out to be insufficiently determinate to resolve the politically contested legal issues of our time. In short, Hartian positivism, which does not say anything about the degree of convergence required for a Rule of Recognition, does not entail that originalism is American law. A version of positivism that insists on certain "just right" facts about *which* behavioral regularities determine the unique rule of recognition *may* entail that originalism is our law. We can call it "Goldilocks positivism":

> There is some behavioral regularity to which originalism (and only originalism) conforms in the United States and *that* is the type of regularity that uniquely determines a rule of recognition.

In fact, Goldilocks positivism is not just unique in its specificity *vis-à-vis* the social fact that grounds the rule of recognition. Goldilocks positivism is committed to a further jurisprudential premise that, as far as we can tell, Hart was not himself committed to; nor has it ever been defended in jurisprudence. Suppose that a complex behavioral regularity reveals originalism *and only originalism* to be our governing law—that ours is the most originalist-friendly of all possible worlds, both in terms of the truths that hold about the nature of law and empirical facts about our social practices. One might ask: why would this entail that any departures from originalist methodology would betray the ideal of fidelity to law? Here is another way to pose the question. There are many laws of our system, and no one thinks that when judges and other legal actors decide to reject a law on, say, public policy grounds, that they are necessarily violating their oath of office. Consider the common law doctrine of desuetude on which laws that have lost their practical justification are viewed as having lost their validity. Why couldn't the same be true of our customary Rule of Recognition? Why assume it to be any more "legal" and inviolable *from an internal to law point of view* than a law which prosecutes those who pretend to work for the postal service on Halloween? Customary meta-laws that tell judges how to decide cases do not enjoy any obviously

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[74] *See supra* note 59 and accompanying text.

privileged status, even if they determine laws downstream.

Perhaps we can ignore a meta-law in some qualified and principled way in a particular case without doing violence to the ideal of the rule of law, as one of us has independently argued.[75] But we need not rehearse the argument here to make the point that Baude and Sachs are implicitly relying on a further jurisprudential assumption. Hartian positivism does not tell us whether departures from the Rule of Recognition amount to legally sanctionable or criticizable departures from the core values of a legal system. Goldilocks positivism, by contrast, purports to tell us precisely that, though without arguing for its core premise.[76] However, we'll ignore this additional jurisprudential assumption in the discussion to follow, since we judge it to be at least more intuitive-seeming (even if ultimately questionable) than the claim that the laws of a jurisdiction are ultimately determined by the "Just Right Rule of Recognition."

2. Why Accept Goldilocks Positivism?

To recap what we've noted so far, Baude and Sachs' argument for originalism rests on an unusually precise jurisprudential thesis. There is some legally significant pattern of behavior within our legal community that favors originalism and only originalism. In other words, there is some disposition that officials and others have to rely on originalism—and only originalism—in a certain range of cases. It should not be hard to come up with some precise pattern to which only originalism conforms by working backwards from all originalist-friendly decisions. Baude and Sachs presuppose that *this* originalist-friendly disposition among judges is what determines the Rule of Recognition.[77] So, the critical question is why anyone should accept their fundamental claim about the nature of law—namely, that:

> Necessarily, the laws of a jurisdiction are determined by the Just Right Rule of Recognition (the rule that officials in a community follow in precisely the same way that officials in the United States happen to follow originalism)

It should be obvious that this jurisprudential claim is not a self-evident

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[75] *See* Atiq, *Legal Obligation*, *supra* note 7.

[76] "The legal status of originalism is important for how judges decide cases. It is generally agreed that judges have some kind of prima facie obligation to remain within the bounds of the law— whatever those bounds might be." Baude, *supra* note 2, at 2392.

[77] As noted above, for Baude and Sachs, the Rule of Recognition is determined by the commitments not only of judges, and indeed, not only of officials generally, but of private persons as well. But as it is principally judges who are called upon regularly to decide constitutional questions and explain their reasoning, it makes sense to focus on judicial decisions in searching for the Rule of Recognition.

truth like *all bachelors are unmarried*. It does not appear to be a claim about law that no reasonable person could deny, at least on its surface. But if the claim is not self-evidently true, then why should anyone accept it? Obviously, we should accept it only if there are reasons and valid arguments for accepting it. But Baude and Sachs don't claim to be arguing for their jurisprudential starting points. Instead, they claim to be deferring to Hart and an alleged consensus:

> It's true that at least some of our claims involve theoretical assumptions about what law is and how it works. Thus far, we've generally worked from the conventional assumption that "what counts as law in any society is fundamentally a matter of social fact." In our view, this positivist premise fits within an overlapping consensus among American legal scholars, largely centered on the theories of Professor H.L.A. Hart—a consensus that appeals to the broadest possible audience without requiring too many controversial assumptions. (We also think it has the further virtue of being true.) But we haven't yet attempted to defend positivism writ large or to rest our theory on any particular version thereof.[78]

The problem with this move is that Baude and Sachs are assuming an extremely contestable precisification of Hartian positivism that does not follow from any of Hart's own arguments for positivism. It is a view with a precise account of the "complex social fact" that determines the rule of recognition. In other words, even if we suppose that Hart gave us excellent reasons for embracing legal positivism in general, which, let us suppose for the moment, might entitle Baude and Sachs to a "see H.L.A. Hart" citation in defense of their strictly Hartian assumptions, Hartian arguments do not justify their precise conjectures about the rule of recognition.

In fact, there are deep disagreements among followers of Hart about what the relevant social facts look like that determine the Rule of Recognition. Some think that the rule of recognition requires a high degree of convergence among officials.[79] These theorists doubt that there is enough content to rules of recognition in modern jurisdictions to adjudicate fine-grained disputes over correct legal methodology.[80] Others

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[78] Baude & Sachs, *supra* note 13, at 1459.

[79] Brian Leiter, *Legal Positivism As A Realist Theory of Law, in* CAMBRIDGE COMPANION TO LEGAL POSITIVISM 1, 1 (forthcoming) ("[A] rule of recognition is nothing more than a complex psychosocial artifact constituted by the practice of officials, in particular, the criteria of legal validity they converge upon and which they treat as obligatory (in Hartian lingo: that they accept from 'an internal point of view')"). *See also* Brian Leiter, *Legal Indeterminacy*, 1 LEGAL THEORY 481–92 (1995).

[80] *See* Leiter, *Legal Indeterminacy*, *supra* note 79 . *See also* Greenberg, *supra* note

think that the degree of consensus that is sufficient for a Rule of Recognition is minimal, so that there are many potentially conflicting rules of recognition to be found in individual jurisdictions.[81] So, Baude and Sachs' starting premise, stated at the appropriate level of specificity, is deeply controversial even among positivists. In fact, there are practically endless possibilities on the question of how much consensus among officials and others is required for a jurisdiction to count as having a Rule of Recognition. Baude and Sachs favor one of these possibilities—a degree of consensus that is not so high as to rule out originalism being the Rule of Recognition given the prevalence of non-originalist judges, and not so low as to generate multiple competing Rules of Recognition. But they do not show why *legal rationality* itself demands that anyone accept their unusually precise assumption.

The problem is not even just that Goldilocks positivism cannot lay claim to being part of an "overlapping consensus" in the legal academy. It is not even clear that Hartian positivism, the view that *only* social facts always and everywhere determine the law, is the consensus view. Baude and Sachs' support for this empirical claim about Hart's theory—that it "fits an overlapping consensus among American legal scholars" is the following footnote:

> *See* H.L.A. HART, THE CONCEPT OF LAW (3d ed. 2012); *see also infra* Section II.A (describing Hart's theory); *cf*. Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1298 n.23 (2014) (describing "Hart's version of legal positivism" as "the most influential position in contemporary philosophy of law").[82]

The footnote is jarring, given that Baude and Sachs clearly appreciate that figuring out the theoretical commitments of a large and diverse body of individuals requires complex empirical study.[83] After all, that is what we are told we must do to figure out whether judges are sufficiently committed to originalism for originalism to be our law.[84] Why, then,

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[81] *See* JOSEPH RAZ, THE AUTHORITY OF LAW 95–96 (1979). John Gardner observes that "a legal system's ultimate rules of recognition, change, and adjudication . . . cannot but cross-refer, and hence depend on each other for their intelligibility, yet each has its own normative force." JOHN GARDNER, LAW AS A LEAP OF FAITH 106 (2012). As Gardner adds: "Each regulates different actions, or different agents, or the same actions of the same agent in a different way. Each is therefore a distinct rule." *Id*.

[82] Baude & Sachs, *supra* note 13, at 1459 n.19.

[83] *See id*. at 1481–82 ("Alas, legal history is hard. . . . In this world, the problem is not so much that the Founding-era *Codex of Legal Methods of Interpretation* has been temporarily mislaid but rather that *we need to reorient our minds toward doing carefully and explicitly what's often done casually or implicitly*.") (emphasis added).

[84] *See id*.

should we be so casual in conjecturing about our collective jurisprudential commitments? Would a survey of the legal academy reveal that everyone is a Hartian positivist? What about a survey that invites respondents to reflect on positivism's truth after "ideal reflection" on all arguments offered by anti-positivists, including Dworkin, Finnis, Greenberg, and others, in general jurisprudence? One suspects that the vast majority of legal academics do not give much thought to general jurisprudence to have a consistent take on the question. After all, many legal academics purport to be "realists" who question legal determinacy and harbor suspicions that the Hart-Dworkin debates rests on some kind of confusion.[85] Even contemporary scholars of jurisprudence appear to be trending in that direction.[86]

To summarize: Baude and Sachs' argument relies on an unargued-for, contested assumption about the nature of law: that all law is determined by a rule that officials follow in precisely the way that officials in our community follow originalism. In doing so, the argument fills out contested details of a general jurisprudential thesis that is itself highly controversial. The filled-out detail are not shown to be supported by arguments for positivism or evidence of consensus.

To be clear, there is nothing wrong, in principle, with arguing on the basis of presupposition or unargued-for conjecture, especially if one finds the relevant conjecture intuitive. But one expects such speculative arguments to conclude in conditional form: *if* one accepts this admittedly controversial and non-obvious conjecture about the nature of law, *then* originalism is our law. Baude and Sachs do not present their conclusions about law as highly speculative for relying on jurisprudential (and empirical) conjectures that have yet be substantiated by independent investigation. Their project rings in a more confident register.[87] And at

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[85] *See, e.g.*, Richard Posner, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 2–5 (expressing skepticism that the concept of law is determinate enough to justify the general jurisprudential enterprise) (1996). *See also* Murphy, *supra* note 7, at 4–5 ("We can say that the issue of the nature of law, its boundary with morality, need have no impact on the outcome of legal cases. . . .If the issue of the nature of law did affect the outcome of legal cases, more people, especially more lawyers, would be interested in the topic and continuing disagreement about it would be considered a problem.").

[86] *See e.g.*, Scott Hershovitz, *The End of Jurisprudence*, 123 YALE L.J. 1160 (2015); *see* sources cited *supra* note 7 on disagreement in general jurisprudence.

[87] Recall Baude's observations about the confidence originalist judges should have in their own starting points and in relation to non-originalist judges. Baude & Doerfler, *supra* note 5, at 327 (suggesting that disagreement on matters of interpretation calls into question the other side's legal rationality). Consider the summative thesis of his paper with

> Stripped of their jurisprudential confusion, though, the best competing accounts of our law seem to have far less supporting evidence than our own account. Focusing on social practice as it stands today turns out to direct our attention to the Founders and to the changes over time that their law has recognized.

Baude & Sachs, *supra* note 13, at 1455.

least one of them counsels originalist judges in print to not worry about methodological disagreements, to regard opposition to originalism as evidence of "legal irrationality." In Part III we explain why the general rhetoric and practical ambition surrounding the originalist project is questionable even if Baude and Sachs are right about the nature of originalist starting points.[88]

B. "Originalism as a Theory of Legal Change"

To make doubly sure we're examining the best version of the argument, we consider an alternative, earlier formulation offered by Sachs in "Originalism as a Theory of Legal Change." Sachs' argument starts with a familiar positivistic assumption:

> If we want to know what the law is, whether in a foreign country or the United States, we have to see how that society operates; 'what counts as law in any society is fundamentally a matter of social fact.'[89]

To be clear, Sachs' positivistic assumption is that what counts as law is fundamentally a matter of social facts *alone*, and not, for example, the social facts plus the moral facts, as Dworkin and others would invite us to suppose. So far, so familiar. Next, Sachs makes an empirical claim about the relevant law-determining social facts: "We are committed to rule-governed changes in our law since the Founding." Sachs observes, borrowing again from Hart, that our legal system includes a Rule of Change—a legally principled way of modifying the law. According to

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They also suggest that a reason to accept their view is that "[i]t takes a theory to beat a theory." *Id.* at 1491. The problem with this oft-quoted yet frequently misunderstood line is that its application is limited to cases where the slate of theories meets a minimal bar of adequacy. Sometimes, when the information available to us is limited and contested, the best thing to do is to suspend judgment on the competing theories since they all have problems, or to adopt a more meta-theoretical stance, which involves thinking about methodology to render the theoretical subject matter more tractable so that it can be more effectively theorized. In other words, there is no glory in accepting a weak theory when one can simply withhold judgment. *See* discussion *infra* Part III.

[88] Baude and Sachs do try a weaker version of premise 1, suggesting that even if Hartian positivism is false, the rule reflected in our "complex deep practice" could still be law: "Indeed, one needn't be a positivist to see social practices as "crucial, even if they are not sufficient," in determining the law. . . .That American law reflects American legal practice, all else being equal, is an assumption we're willing to make." *Id.* at 1463. Here, they appear to rely on an uncontroversial premise, but only because they describe it at a misleading level of generality. We all might think practice facts are legally significant. But we don't necessarily think that the precise practice fact that the authors are interested in (a) is legal significant, or that (b) its legal significance trumps the legal significance of all other legally relevant social facts.

[89] Sachs, *supra* note 2, at 825. *See also id*. at 835 ("(P1) Whatever is supported by the right kind of social facts is part of our law.").

Sachs, the Founders themselves established rules of change (very roughly, the Article V amendment process, with some caveats), and these have never been changed based on the Founders' rules for change:

> Like everything else in law, this claim has to be based on contingent social facts. Not every legal system has to work this way, and many don't. But in our system, explaining when something became the law is an important part of establishing how it became the law, and in turn to showing that it became the law. This practice, and our choice of the Founding as a unique starting point, makes it plausible that originalism is part of our law.[90]

In short, we're committed, as a matter of social fact, to the principle that laws can only be changed in a rule-governed way based on our legal rules of change. And since the Founders established rules for changing the law which haven't been altered based on the Founders' principles, Founders' law remains valid. On the resulting view:

> (1) All legal rules that were valid as of 1788, including rules of change, are presumptively valid today.
> (2) If a particular rule of change was valid at a given time, any change made by it then—whether creating a new rule, or amending or repealing some prior rule—is presumptively valid too.
> (3) No rules are valid except by operation of (1) and (2).[91]

Thus, Sachs concludes:

> [T]he best understanding of originalism is the far stronger position in the definition above: that no rule is valid unless it can be rooted in the Founders' law. The claim isn't just that the Founders' law (when we can determine what it is) has priority over other law that's developed independently. *The claim is that there is no other law—that no other legal rules are actually part of our legal system*.[92]

As discussed above, if the argument is to escape obvious objection, it needs a very fine-grained account of the kind of social facts that determine

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[90] *Id.* at 839.

[91] *Id.* at 820 ("Almost every legal system distinguishes authorized changes like these from the unauthorized changes that happen when society simply abandons or departs from some preexisting rule of law. But a distinctive feature of the American legal system is that it fixes a particular starting date—an origin, a Founding—separating the changes that don't need legal authorization from those that do.").

[92] *Id.* at 864 (emphasis added).

a rule of change. Even if plenty of judges take the Article V amendment process as a serious and exclusive constraint on legal change, it is also true that many legal officials do not follow Founders' law exclusively. Sachs admits as much.[93] Sachs concedes that plenty of legal officials base their conclusions about what the law is, or their conclusions about how the law has changed, based on moral or prudential considerations, supplemented by facts about prevailing attitudes in the community, that bear no obvious connection to Founders' law.[94] Still, he expresses empirical confidence that we are more or less committed to originalism.[95]

1. The "Just Right" Rule of Change

Consider a possibility that Sachs neglects. Let us suppose that the Founders established Article V as the exclusive mechanism for changing the law, and that they did not think shifts in custom alone could modify the law. Suppose also that a survey of the social facts today reveals that sufficiently many officials do think that all laws must be changed in a principled way based on the regime's legal rules of change. Isn't it possible that our rule of change itself changed in a manner that was unlawful relative to the Founders' rule of change but is now an entrenched feature of our legal system? Sachs concedes that there are lots of unlawful changes, due to juridical error of oversight, that can become part of our law, and that it is an important principle of our legal system that entrenched legal errors become law, through stare decisis principles, principles of deference, and various other legal norms. This is an important point of agreement between us, and Sachs' observation is worth quoting in full:

> In any real-world legal system, the law is a product of both authorized and unauthorized changes . . .Our law requires us, at one and the same time, to overlook past violations and to commit to being rule-governed in the

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93 *See id.* at 835 ("worse, there's a lot of nonoriginalism in our everyday practice.").

94 *See id.* at 834 ("As Judge Frank Easterbrook once put it, believing in nonoriginalist interpretation is like believing in infant baptism: 'Hell yes, I've seen it done!'"); *id*. at 858 ("No matter how flexible the Founders' rules were, though, they haven't been inviolably observed.").

95 *See id*. at 836 ("Without having solved all of jurisprudence, we can make some plausible guesses about which social facts matter—plausible enough for ordinary lawyers to make accurate legal judgments on a routine basis. And without conducting sociological studies or opinion polls, plenty of legal practices are familiar enough to be seen from the armchair, some of which may support originalist claims."). But if the entire argument rests on a "plausible guess" as Sachs notes in passing (even conceding *arguendo* that the guesses are plausible) how could it possibly justify the strong convictions and definitive conclusions of originalists? *See* Part III for an extended treatment of this question (answer: it doesn't).

> future; to go, and sin no more. To put it another way: to adhere to our current law, from the internal perspective of a faithful participant, means accepting the past changes that it accepts, wherever they came from. But it also means recognizing, from now on, only the future changes that are authorized by our rules of change.[96]

So, consider the possible scenario that the Founders' Rule of Change, R1, was unlawfully changed to R2 at some point in our history and R2 is now embedded in our social practices (or we can imagine R2 was unlawfully introduced into the legal system and became embedded alongside R1 with different judges following different rules at different times, or some weighted combination of both rules). The commitment to being rule-governed in relation to legal change after the shift from R1 to R2 naturally does not require compliance with R1. If, as Sachs observes, it is and always has been a principle of our legal system to "to overlook past violations . . . to accept past changes, wherever they came from," then a new rule of change that was unlawfully introduced relative to the old Founders' rule of change might nevertheless become an accepted legal rule in our system, changing what it means for us to be 'rule-governed' today in how we change the law.

To make the point concrete, consider Bruce Ackerman's vision of American legal history.[97] Over the course of American history, Ackerman argues that certain informal or extraconstitutional amendment procedures have become part of our practice.[98] When there comes to be a degree of consensus around important questions of policy and morality—a "constitutional moment"—the constitutional law itself changes. It might be hard to pinpoint exactly when that happens, but as a positivist that shouldn't be a big problem. Rules grounded in custom often have vague identity conditions, as Hart frequently reminds us.[99] At some hard-to-define point in time, a new rule can emerge from evolving practices, but the fact that the line is invisible presents no reason to doubt the phenomenon of change. Now, Sachs is right to observe that people do not generally conceive of these constitutional moments as legal breaks with the past,[100] but that is compatible with the observation here: constitutional moments do not constitute breaks with the past precisely because our rules of change *today* are no longer the Founders' formal rules of change.

In fact, the possibility of legal change of the sort that Ackerman posits

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96 *Id.* at 843–44.

97 *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

98 *See.*

99 *See supra* note 71 and accompanying text.

100 *See* Sachs, *supra* note 2, at 869.

seems to follow almost irresistibly from the truth of legal positivism.[101] According to the positivist, legal systems are an instance of a larger family of artificial normative systems, consisting of rules that are more or less conventionally followed. An artificial normative system on the scale of a legal system will no doubt include many potentially conflicting rules given that social customs are unlikely to be perfectly concordant, whether at a given time or diachronically.

What might Sachs say in response to this worry—namely, that we no longer follow Founders' rules of change exclusively in light of our social practices, and that we have our own principled ways of changing the law that have long been entrenched in our legal system? Sachs would have to defend a claim of the following sort:

> For any legal system, it is impossible for the rule of change itself to change through changing social conventions unless such a shift is authorized relative to the old rule of change. No amount of customary entrenchment would render legally valid the new rule of change.

No positivist to our knowledge has ever defended this claim. For positivists, legal facts are grounded in social facts—what people do around here. And if people slowly and "unlawfully" shift their customs for modifying the law, there is no reason in positivism that prevents these new customs from grounding a bona fide "unlawfully introduced" yet legally valid rule of change. In fact, there is not even consensus among positivists on such questions as: (1) how many rules of change can a legal system have, or (2) what kinds of changes in the law count as such dramatic and irregular breaks with the past that they give rise to a new legal system. The positivistic identity criteria for legal systems are intentionally left vague because it is not the job of legal philosophy to give more precise answers to questions than philosophical considerations could possibly justify. And so, it is a risky business recruiting philosophy of law in a defense of a highly specific and politically contested conclusion in legal theory.

C. Closing Remarks

In Sachs' defense, his conclusions in the earlier Article are considerably more qualified than in the more recent Article with Baude. He observes:

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[101] To be clear, we are not arguing that Ackerman's account of American constitutional history follows from legal positivism. Rather, what seems to follow from positivism is the possibility that rules of change may themselves change as the social facts on which they depend change.

> This Article won't present anything like a full defense of this Claim [that originalism is our law]. To be complete, that defense would need a much more detailed positivist theory—which social conventions determine the law, who has to hold them, how we identify them, and so on. Instead, this Article merely suggests, via armchair sociology, some reasons to find the claim plausible.[102]

It would have been better yet to note that the view that originalism is our law, one that has an enormous practical effect on real-world legal outcomes, might be true only if certain speculative assumptions about the nature of law and about our social practices turn out to be true. It would remind the reader that legal conclusions about politically contested matters are often grounded in recherché, non-obvious considerations. It would rightly caution against premature and unconditional acceptance of a consequential legal ideology before the speculative assumptions that undergird it are examined more closely and critically. At any rate, there is a mismatch between the humility reflected in the above paragraph and the practical confidence of the positive turn more broadly (and more recently). The idea that originalist jurists should ignore non-originalist perspectives does not make much sense, if the jurisprudential claims on which originalism relies are conjectural as well as deeply and perennially contested, a point we shall defend more systematically in Part III.

II. ADMINISTRATIVE LAW AND VINTAGE UNLAWFULNESS

Disagreeing about administrative law is practically a national pastime.[103] Although central elements of administrative law date back to the earliest days of the Republic,[104] the increasing and evolving role of administrative agencies has long been a source of controversy. For more than a century,[105] critics have charged that lodging robust legal powers in agencies threatens freedom, represents a departure from our national

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102 Sachs, *supra* note 2, at 864.

103 And not only an American national pastime: some of the arguments made by U.S. scholars against administrative law echo charges levied by England's Albert Venn Dicey in the late nineteenth century. *See generally* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885). Dicey famously declared that "[i]n England, and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are in truth unknown." *Id*. at 182.

104 *See generally* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012).

105 For instance, James M. Beck's criticisms of the growth of government as encroaching on essential American freedoms date to the time of World War I and anticipate many later arguments. *See generally* JAMES M. BECK, THE PASSING OF THE NEW FREEDOM (1920).

traditions, and violates constitutional doctrines.[106] And in every generation, defenders of administrative law have risen up to answer the charges.[107] The debates around administrative law have often generated more heat than light: already in 1938, Louis Jaffe noted the prominence of invective in these particular back-and-forths.[108]

The most ambitious critique of administrative law in recent years is Philip Hamburger's 2014 book *Is Administrative Law Unlawful?*[109] On Hamburger's view, our vast body of administrative law is, in truth, not law at all:

> Administrative law is said to have statutory authority. This, however, does not alter the fact that administrative law confines Americans, not through law, but outside it, thus displacing liberty under law with a subjugation to administrative command.[110]

Hamburger maintains that administrative agencies establish "an alternative parallel system of law, *which is not law*, but mere command, and which increasingly crowds out *real law*."[111] Hamburger's claims echo a similarly paradoxical-sounding assertion famously associated with Aquinas—that an "unjust law is not law."[112] The basic idea underlying the work is that administrative law bears the same relation to genuine law as fool's gold (iron pyrite) does to real gold. As he puts it, "not everything that mimics law is really law."[113] By contrasting genuine law with "mere commands," Hamburger directly opposes the classical positivists, whom he blames for the modern administrative state—in particular, John Austin

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106 *See, e.g.*, ROSCOE POUND, ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE, AND SIGNIFICANCE (1942). For an overview of some of the arguments, see JAMES O. FREEDMAN, CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT (1978).

107 Perhaps the most indefatigable defender of the emerging administrative state of the New Deal was James Landis. *See generally* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938).

108 Louis L. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201 (1938). *See also* LOUIS L. JAFFE, ADMINISTRATIVE LAW: ITS GROWTH, PROCEDURE AND SIGNIFICANCE. (1942). The tenor of some early critiques of administrative law is reflected in their titles. *See, e.g.*, JAMES M. BECK, OUR WONDERLAND OF BUREAUCRACY (1932); *see also* GORDON HEWART, THE NEW DESPOTISM (1929).

109 *See* HAMBURGER, *supra* note 2. Hamburger has also developed other arguments against administrative law that ring in a more conventional register—for example, a doctrinal critique of judicial deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837 (1984). *See* Hamburger, *supra* note 9, at 1248. In what follows, we focus mainly on the arguments presented in the book.

110 HAMBURGER, *supra* note 2, at 496.

111 *Id.*

112 THOMAS AQUINAS, SUMMA THEOLOGIAE II-I, Q. 96, a. 1 (Fathers of the English Dominican Province trans., 2d ed. 1920).

113 HAMBURGER, *supra* note 2, at 23.

who famously held that any command can count as law so long as it issued by a sovereign who is regularly obeyed.[114] On Hamburger's view, certain commands, even if issued by a sovereign or socially accepted, cannot be law if they lack certain essential features of law.

Hamburger's thesis is thus paradigmatically jurisprudential—it is a claim about the nature of law or what fundamentally determines whether a directive counts as law or not.[115] The problems with administrative law go deeper than 'mere' unconstitutionality: "[a]lthough administrative power presents itself in the legitimizing vocabulary of law, scholars and judges should not dignify extralegal power, they should eschew words suggestive of law."[116] In fact, not only is administrative "power" unable to be law, "it is the very antithesis of law"[117] for it "runs contrary not only to the Constitution but also to the nature of lawful and especially constitutional government in Anglo-American society."[118] In short, the "law-like" system of norms established by the bureaucratic elite (for example, the Federal Trade Commission and the Environmental Protection Agency) impairs legal systems by crowding out real law and

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[114] *See id.* at 445 ("Probably inspired by the Continental codes and the underlying German legal literature, Jeremy Bentham espoused his vision of codification [of absolute power] . . . . Already on the Continent civilian-derived theory rejected the natural law theory of sovereignty and legal obligation; *it reduced law to the sovereign's command* . . . Adaptation of these elements appeared in Bentham's philosophy, and especially as transmitted by his student John Austin, this "positivism" would prepare the way for administrative power in common law countries."). *Cf.* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Cambridge University Press 1995).

[115] Although some readers have faulted Hamburger for not being fully precise about what it means for administrative power to be "unlawful," we think the text is clear enough. Hamburger thinks "not everything that mimics law is really law" and that some "law-like" systems of norms (norms established by "mere commands") crowd out and undermine law. HAMBURGER, *supra* note 2, at 496. *Cf.* Lawson, *supra* note 19, at 1526 ("Conceptually, the book's biggest defect is its failure to define precisely what it means by the term 'unlawful.'"); see also Vermeule, *supra* note 19, at 1551 ("What exactly does Hamburger's title mean? Patently, he must be using the word law in two different senses to say that a body of "law" is "unlawful."). In fact, Hamburger's assertion that administrative law is unlawful is best interpreted along the lines of "Fool's gold is not gold" or Aquinas' "an unjust law is not law." Administrative power might look like law and be called "law" but given a proper understanding of law's nature, could not be law. That's the lens through which the book is best understood, as we argue below.

[116] HAMBURGER, *supra* note 2, at 509. *See also id.* at 510 ("administrative power should not be graced with the vocabulary of law").

[117] *Id.* at 417.

[118] HAMBURGER, *supra* note 2, at 411. As he puts it, "[a]dministrative law thus is more deeply unlawful than has hitherto been understood: Not only does it violate the law, but it also departs from the ideal of government through and under the law." *Id*. at 9. Hamburger also quotes with approval Gary Lawson's characterization of administrative law as "*anti*-constitutional." *Id.* at 16 (citing Lawson, *supra* note 11, at 55). Critically, it is not enough for Hamburger that administrative law be deemed unconstitutional. *Id.* at 15 ("[T]he legal critique of administrative law focuses on the flat question of unconstitutionality, and . . . this is not enough. Such an approach reduces administrative law to a question of law. . . .").

law-based governance.

Hamburger's account of administrative power's essential unlawfulness would seem to justify all of the opprobrium heaped on administrative law over the years by its harshest critics. Hamburger suggests that scorn is appropriately directed at the people—who on his view represent a class—forcing administrative power on us.[119] He writes that it is "necessary to consider the possibility that administrative law was an instrument of a class that took a dim view of popularly elected legislatures and a high view of its own rationality and specialized knowledge."[120] Administrative power, he concludes, "is a means of class power—a mechanism by which a class wrests power from the people and their representatives in order to secure it in the hands of persons like themselves."[121] In a subsequent article, Hamburger argues that judges willing to defer to agency interpretations of statutes per the *Chevron* deference doctrine[122] are exercising "systematic bias" in violation of their oath of office: "they have no business pretending to be judges and should get off the bench."[123]

Strong stuff. And Hamburger is by no means the only critic of the modern administrative state to take the gloves off.[124] But what distinguishes Hamburger from earlier critics, and what is surely in part responsible for the attention his work has received,[125] is the unique jurisprudential assumptions that undergird his opposition—that law necessarily has certain substantive features that administrative regulations and rulings lack.[126] But what are those features and why are they essential

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119 *See id.* at 9.

120 *Id*.

121 *Id.*

122 *See generally* Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

123 *See* Hamburger, *supra* note 9, at 1247–49.

124 *See, e.g.*, DEAN REUTER & JOHN YOO, LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 370 (Dean Reuter & John Yoo eds., 2016) (describing administrative agencies as "liberty's nemesis"); *see also* D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 89 (2017) ("The logical outgrowth of faith in the administrative process is disgust with and eventual rejection of separation of powers—leading to government by one great leader: an elected dictator."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

125 Several judges and Justices have referenced the work. Justice Thomas has cited *Is Administrative Law Unlawful?* repeatedly, *see, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 71, 73–74 (2015) (Thomas, J., concurring); see also Baldwin v. United States, 140 S. Ct. 690, 691–92 (2020) (Thomas, J., dissenting), and the work has been cited numerous times by state and federal circuit court judges, including then-Judge Neil Gorsuch.

126 James Beck already claimed parts of administrative law were unconstitutional in 1920. *See* BECK, *supra* note 105. Hamburger's claims go beyond unconstitutionality.

to legality?

Hamburger more or less addresses the first question but is very unclear on the second. As we discuss below, Hamburger highlights several features of royal commands that seventeenth-century English jurists came to believe were inconsistent with law and law-based governance; features, he argues, administrative power also exhibits.[127] And the bulk of the argument involves meticulously cataloging early modern English legal practices and views about law. However, Hamburger does not really tell us why we should follow seventeenth-century English opinions on the nature of law. As we discuss below, there are sections where Hamburger writes as if the English were simply right about the nature of law; and other sections where he writes as an unprecedented type of positivist, suggesting that English assumptions about the nature of law were embraced by the Founders and are binding on us by way of their acceptance at the Founding. We give both theoretical possibilities a fair hearing in what follows, after first considering the details of the account of law's nature that Hamburger favors.

A. Administrative "Law" as "Not Real Law"

Administrative law[128] has at least three features that prevent it from being *bona fide* law: it is "extralegal," "supralegal," and "consolidated."[129]

Administrative law is "extralegal" insofar as administrative actors purport to impose binding obligations on Americans despite bypassing both the legislative and judicial processes. Endorsing the "Lockean reasoning" that, according to Hamburger, lies at the heart of the U.S. Constitution, "legal obligation rests on consent and. . . binding laws have to be made by the society's representative legislature."[130] Because "administrative rule" bypasses the legislature it is "mere state power."[131] "[R]egular law" is that "by which Americans govern themselves" whereas "irregular administrative commands" are mechanisms "by which the government imposes its will on them."[132] In short, legislatures and courts are the only actors in the legal system who have the authority to impose legal obligations, so when agencies impose general rules[133] or decide

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[127] We use "seventeenth-century" as a shorthand; some of the developments that Hamburger discusses date to the sixteenth century. *See, e.g.*, *infra* note 146.

[128] Henceforth we drop the scare quotes but should not be read as begging the question against Hamburger.

[129] HAMBURGER, *supra* note 2, at 22–26.

[130] *Id.* at 23.

[131] *Id.* at 24.

[132] *Id.*

[133] *See id.* at 111–28.

individuals' cases,[134] they exercise "irregular or extraordinary" power.[135]

Administrative law is "supralegal" inasmuch as agencies evade a measure of accountability in court.[136] The obvious culprit here is deference doctrines, and in particular, *Chevron* deference, which sets agencies' interpretations of law above courts, and thereby undercuts the supremacy of law.[137] But the Administrative Procedure Act itself short-circuits the judicial supervision of agencies, by establishing limited grounds for courts to set aside agency action, such as arbitrary and capricious review and substantial evidence review. By watering down judicial review in this way, Congress effectively insulates administrative power from being held fully accountable under established law and via the independent judgment of courts.[138]

Administrative law is also "consolidated," in that it yokes together forms of power that should instead be differentiated and divided. Administrative power is "unspecialized, undivided, unrepresentative, subdelegated, and unfederal."[139] Echoing Locke, Hamburger argues that in a pre-modern state of nature, individuals were "judges in their own case" and had the "executive power of the law of nature" by virtue of having the right to punish and enforce their will.[140] But as civil society emerged, the legislative, executive, and judicial powers were delegated to different individuals and bodies. This principle of the separation of powers is violated by administrative agencies: "[w]hen those who exercise the government's force also can make its laws and adjudicate violations, they come to enjoy a nearly freestanding coercive power. . . ."[141]

Ultimately, Hamburger concludes, administrative power is "a sort of absolute power. Its unlawfulness therefore is profound."[142] Here, "absolute power" is a term of art—a designation (the traditional one, according to Hamburger) for power that is extralegal, supra-legal, and consolidated. And extralegal, supra-legal, and consolidated power cannot be law. Administrative directives, as discussed, hit the trifecta, and therefore

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134 *See id.* at 227–76.

135 *Id.* at 21.

136 *Id.* at 24.

137 *See id.* at 283–321.

138 *See* HAMBURGER, *supra* note 2, at 312 (citing to PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008)). *See* Vermeule *supra* note 19, at 1555–57, for a critique of Hamburger's interpretation of deference doctrines.

139 HAMBURGER, *supra* note 2, at 324.

140 *Id.* at 330.

141 *Id.* at 335. This is framed not merely as a separation of powers problem, as even within the three branches of government, the Constitution divides power among separate organs of government: the legislative power is divided among two houses and a President with veto power, and the judicial power is split among grand juries, petit juries, and courts. *See id.* at 347–54.

142 *Id.* at 409.

cannot rise to the level of law or give rise to valid legal obligations.[143] Making peace with administrative law is for Hamburger, as for Roscoe Pound (whom he quotes), a "give-it-up philosophy of law" where "law is to disappear in the society of the future . . . in which an omnicompetent and benevolent government will provide for the satisfaction of material wants. . . ."[144]

Of course, the idea that accepting administrative law means "law would disappear" simply begs the question against opposing legal philosophies. So, one might ask, why should anyone accept that the administrative process cannot possibly generate or be consistent with genuine law? Why should we side with Hamburger (and seventeenth-century English jurists) rather than Austin (or Hart or Dworkin)? Despite advancing a straightforwardly jurisprudential claim, Hamburger does not defend his thesis as philosophers of law usually do—by way of arguments and analysis. The focus, instead, is historical, and Hamburger emphasizes that English public lawyers and, in some cases, previous generations of American public lawyers embraced the articulated jurisprudence. Since our purpose here is not to quarrel with the history,[145] we limit ourselves to providing a few examples of the historical evidence before critically evaluating the distinctly jurisprudential thesis at the heart of the book.

1. A Seventeenth-Century English Consensus

Hamburger points out that the English came to reject the legality of the King's efforts to oblige his subjects via "proclamations." The Royal prerogative was deemed supralegal, extralegal, and consolidated.[146]

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143 *Id.* at 25.

144 *Id.* at 415.

145 Other scholars have challenged the historical account. Hamburger and Professor Paul Craig have traded views of the historical evidence, among other subjects. *See* Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight*, Oxford Legal. Stud. Rsch. Paper No. 44/2016 (2016); *see also* Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939 (2016); *see also* Paul Craig, *English Foundations of US Administrative Law: Four Central Errors*, Oxford Legal Stud., Rsch. Paper No. 3/2017, 2016. *See also* Nicholas R. Parrillo, *Supplemental Paper To: "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s"*, at 6–7 n.11 (available at https://perma.cc/V52X-SWK4). *See also* Vermeule, *supra* note 19, at 1553 (suggesting that Hamburger's account of English history is over-simplified). *Cf.* ADAM TOMKINS, OUR REPUBLICAN CONSTITUTION 69–87 (2005) (arguing that common law jurists failed in their resistance to the royal prerogative).

146 English kings used a variety of tools, including proclamations, to impose binding obligations on their subjects. Other tools included prerogative interpretations, regulations, and taxes. HAMBURGER, *supra* note 2, at 51. The Crown's power to impose binding duties by proclamation was long a source of controversy, with opponents finding opposition in common law authorities and proponents finding support in civilian authorities. *Id*. at 34,

Hamburger cites approvingly Chief Justice Edward Coke, who famously espoused a "natural law theory" of law[147]: "the king by his proclamation, or other ways, cannot change any part of the common law, or statute law, or the customs of the realm."[148] Coke's view won out in the end: the Royal prerogative was ultimately rejected as inconsistent with law.[149] Hamburger offers similar accounts of other royal efforts to impose obligations (through interpretations, regulations, and taxes) and nullify obligations (through suspending and dispensing powers), and the eventual rejection of such efforts.[150]

Likewise, Hamburger points to the English rejection of "prerogative adjudication."[151] In addition to the law courts, England was home to prerogative courts, most notably the Court of Star Chamber and the Court of High Commission. Although both courts were vested with jurisdiction by Parliament, the Tudor and Stuart monarchs expanded the tribunals' reach over time and increasingly used them to bypass the ordinary courts. Both bodies became notorious for imposing the king or queen's prerogative in a masquerade of justice.[152] Prerogative courts were also increasingly faulted in the seventeenth century for their use of inquisitorial procedures, which compromised the right against self-incrimination.[153] In the run-up to the English Civil War, Parliament passed two statutes abolishing the Star Chamber and the High Commission. Hamburger argues that the statutes should be read to go further, as expressing a theory of law on which prerogative adjudication cannot be legal.[154]

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40. In the 1539 Act of Proclamations, Parliament authorized prerogative lawmaking subject to some limitations. *Id*. at 35–38. The statute was repealed after the death of Henry VIII. *Id*. at 38.

147 *See* Edward Corwin, *Higher Law and Constitutional Law*, *in* CORWIN ON THE CONSTITUTION 111; *see also* Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 859–65 (1978); sources cited *infra* note 171.

148 HAMBURGER, *supra* note 2, at 47 (quoting *Case of Proclamations* (Sept. 20, 1610), Sir Edward Coke, *Reports*, 12: 74–75). On Hamburger's admiration of Coke's theory of law, *see infra* note 159 and accompanying text.

149 The issue came to a head in 1610, after aggressive use of proclamations during the reign of James I. The House of Commons protested that English subjects should not face punishment "unless they shall offend against some law or statute of this realm in force at the time of their offense committed." HAMBURGER, *supra* note 2, at 43 (quoting House of Commons, Petition of Temporal Grievances (July 7, 1610), *in* PROCEEDINGS IN PARLIAMENT 1610 at 2: 258–59, ed. Elizabeth Read Foster (1966)).

150 *Id*. at 51–82.

151 HAMBURGER, *supra* note 2, at 136.

152 See *id*. for an illustration.

153 *Id*. at 158–65.

154 The statute provided that "the property of any subject "ought to be tried and determined in the ordinary courts of justice and by the ordinary course of law." *Id*. at 139 (quoting The Act for the Abolition of the Court of Star Chamber, 16 Charles I, c. 10 (1641)). Hamburger notes that the High Commission was, in fact, reconstituted in the later

To reiterate, for present purposes we can simply assume that Hamburger gets the history right. We can also assume something that Hamburger does not expend much effort establishing, but that might be relevant to a claim about U.S. law—namely, that the understanding of law forged in Britain' Stuart-Era constitutional struggles was in its essentials the same understanding of law that was shared by Americans of the framing generation in the following century.[155] Still, the question arises: why accept seventeenth-century assumptions about the nature (and limits) of law? Bear in mind that *Is Administrative Law Unlawful?* is not just a work of history. Getting the history right is not its final goal. The book's core thesis is a jurisprudential one, one that purports to upend the modern administrative state. We must evaluate the work in that light.

B. Why Accept Edward Coke's View on Law's Nature?

Hamburger is not entirely explicit on why anyone should accept seventeenth-century English assumptions about the nature of law—for example, that law must run through legislatures and be fully reviewable by courts. But two possibilities suggest themselves: (a) we should accept seventeenth-century English assumptions because they are true; (b) we should accept seventeenth-century English assumptions because the unarticulated acceptance of those assumptions at the Founding constrains us today. We consider each possibility in turn.

1. Theory #1: Anti-positivism à la Albion

If seventeenth-century Britons were right about the nature of law, then a form of anti-positivism must be true. A positivist would have no trouble acknowledging that rules and directives that do not run through legislatures or courts could still be law—for example, through social acceptance.[156] Likewise, positivists readily acknowledge the existence of even radically corrupt or pointless laws.[157] Anti-positivists, by contrast, deny that any old rule or command can count as law. The fact that a legal system purports to clothe a command in the guise of law does not

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seventeenth century, but he further notes that its second life was short. *Id*. at 547 n.16.

155 Hamburger makes no sustained effort to demonstrate this. *See also* Parrillo, *supra* note 144. The meaning of key categories such as "law," "republic" and "liberty" might have shifted substantially in the eleven years separating the American revolution and the drafting of the Constitution. *See, e.g.*, GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1998). It is extraordinary to suppose that the concepts Hamburger discusses survived transplantation across the Atlantic, the passage of more than a century, a revolution, and the creation of a new constitution. Even if they did survive transplantation, that would not entail the concepts are legal constraints (not without extraordinary jurisprudential assumptions), as we argue below.

156 *See* discussion *supra* Part I.

157 *See* discussion in Atiq, *supra* note 7.

necessarily make it law. The idea that there are substantive and "content-dependent" constraints on the legality of rules that are independent of the social facts is most famously associated with "natural law theory."[158]

Indeed, there is a basis for attributing to Hamburger the claim that we should accept a seventeenth-century natural law view simply because it is true. Some of the famous English jurists Hamburger repeatedly cites with great admiration—in particular, Chief Justice Edward Coke—explicitly embraced a natural law theory, according to which there are trans-jurisdictional normative constraints on the content of law.[159] In addition to quoting these jurists approvingly, Hamburger explicitly blames positivist opposition to natural law theory for the rise of administrative power. Rejecting those who think that social acceptance or enforceability are sufficient for law, Hamburger writes:

Probably inspired by the Continental codes and the underlying German legal literature, Jeremy Bentham espoused his vision of codification. . . . Already on the Continent civilian-derived theory rejected the natural law theory of sovereignty and legal obligation; it reduced law to the sovereign's command. . . . Adaptation of these elements appeared in Bentham's philosophy, and especially as transmitted by his student John Austin, this 'positivism' would prepare the way for administrative power

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158 *See, e.g.*, JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011). For a more recent proposal, *see* JONATHAN CROWE, NATURAL LAW AND THE NATURE OF LAW (2019).

159 On Coke's natural law view, *see infra* note 171. Hamburger frequently cites Coke approvingly. *See, e.g.*, HAMBURGER, *supra* note 2, at 45–47 (describing approvingly Coke's opposition to Royal proclamations); *id.* at 54 ("Coke answered that the king outside Parliament could not create any new offense or otherwise 'change the law,' thus puncturing Ellesmere's inflated hopes of prerogative lawmaking . . . ."); *id.* at 98 ("Although the power of the commissioners [of sewers] could easily have become a legislative power, Chief Justice Coke admonished them to exercise discretion in the sense of discernment . . . the point being that they had to avoid discretion in the sense of legislative will."); *id.* at 145 (describing James I's resistance to Coke as an "attack on the law itself" and "the most eminent judge who had refused to defer"); *id.* at 169 (endorsing Coke's opposition to adjudicative proceedings outside of the regular courts); *id.* at 173 (describing Coke's definition of "due process of law"); *id.* at 249 ("Long ago, Coke warned of the danger of doing justice in chambers, or other private places."); *id.* at 277 (describing Coke's conception of law); *id.* at 278–79 ("Whether as expressed by Coke, Hale, or Twysden, the constitutional assumption was that there was no room for prerogative or administrative power constraining subjects outside the law and the adjudication of the courts."); *id.* at 289 (echoing "Coke's point . . . that "'the common law will control acts of Parliament'"); *id.* at 316 ("Legislation belongs to Congress, but the exposition of law belongs to the judges. And (as Chief Justice Coke made clear already in the *Case of Proclamations* and in *Bonham's Case*), the judges cannot give up this power in deference to prerogative or administrative interpretation."); *id.* at 319–20 ("But even when Chief Justice Coke had to get down on his knees before his king, he refused to defer. . . . [H]e and his colleagues repudiated the king's fantasies that the judges should defer to the rules and interpretations put forward by prerogative tribunals. . . . Nowadays, however, the judges speak not of duty, but of deference.").

in common law countries.[160]

Hamburger writes as if positivism's falsity should be obvious to the reader without telling us why. And this is especially surprising given Baude and Sachs's claim discussed earlier—namely, that some form of positivism is widely accepted in the legal academy today.[161]

Additionally, Hamburger suggests that other legal systems that do not fit the seventeenth-century English model, especially on the European continent, do not properly deserve to be called "systems of law" or "legal systems." Commenting on the use of administrative bureaucracies in Germany, Hamburger writes:

> Scholars on both sides of the Atlantic . . . have tended to understand the *Rechsstaat* as the "rule of law," and on this basis have assumed that there is little significant difference between administrative rule and the traditional Anglo-American rule through and under law. In fact, the *Rechtsstaat* was merely an elevated version of administrative power, one designed to *mimic law* but still based on state power outside regular law.[162]

Likewise:

> Even in this weak version of the *Rechtstaat*, with appeals only to administrative courts, these tribunals did their best to assimilate the administrative system to a legal system. . . . The *Rechtstaat* thus was profoundly valuable in its German context, for it allowed Germans to enjoy a law-like version of absolute power and thereby to *come as close to law as was possible under extralegal rule*.[163]

Hamburger offers other examples of systems of rule-based governance that are allegedly not fit to be called legal systems.[164] More generally, Hamburger views Continental legal thought as a source of bad ideas that tempt some English figures in the sixteenth and seventeenth centuries and ultimately ensnare some American thinkers in the late nineteenth and early twentieth.[165] And in prior work, he has written favorably of Founding-era

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160 *See* HAMBURGER, *supra* note 2, at 445.

161 *See supra* note 78 and accompanying text.

162 HAMBURGER, *supra* note 2, at 472 (emphasis added).

163 *Id*. (emphasis added).

164 *Id.* at 505 ("Whereas Americans once enjoyed liberty and had duties only under their own laws, enforced in independent courts, Prussians traditionally lived under the regime's administrative commands, enforced by administrative courts. Thus, although Americans were bound by law because it came from below, Prussians were bound by administrative power because it came from above.").

165 *See, e.g.*, HAMBURGER, *supra* note 2, at 157–74 (describing the inquisitorial

conceptions of natural rights and natural law.[166]

Yet we are not aware of any contemporary defense of what we might call "Anti-positivism à la Albion"— the view that the substantive claims about law favored in early modern England represent conceptual truths about law.[167] There are sophisticated and creditable arguments advanced by natural lawyers over the centuries that law necessarily has certain substantive and even moral features.[168] Of course, these anti-positivist views (much like Hart's view discussed earlier) are contestable. But the biggest challenge for Hamburger is that the *specific* constraints on the legality of rules that the early English brand of anti-positivism assumes (e.g., that law must be subject to judicial oversight, and law must be made by popularly elected officials) are simply extraordinary by the lights of contemporary anti-positivism. While some modern natural law theorists *do* defend small government,[169] none to our knowledge have defended the view that the very nature of law precludes administrative law. That is, we are unaware of any arguments for the claim that commands issued by a king (or president or an administrative agency), no matter how just or benevolent or socially accepted, cannot be law, in contrast to commands issued by legislatures and judicial orders issued by courts.

Hamburger does not defend Anti-positivism à la Albion himself.[170] While he devotes great effort to establishing what early modern English jurists thought about law, he devotes essentially no effort to establishing

process and its reception in England and the United States); *id.* at 441–78 (describing continental and especially German ideas about administrative law and their reception by American administrative lawyers and American institutions).

166 *See* Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 YALE L.J. 907 (1993).

167 "Albion" as a name for the island of Britain dates back to Roman writings. *See,* PLINY THE ELDER, NATURALIS HISTORIA BOOK IV. CHAPTER XLI.

168 Leading anti-positivist thinkers of the post-World War II era include Lon Fuller, *see, e.g.*, LON L. FULLER, THE MORALITY OF LAW (2d ed. 1969); Ronald Dworkin, *see, e.g.*, DWORKIN, *supra* note 3; and John Finnis, *see, e.g.*, FINNIS, *supra* note 157. For more recent views, *see, e.g.*, Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1118 (2014); JONATHAN CROWE, NATURAL LAW AND THE NATURE OF LAW (2019).

169 *See, e.g.*, CROWE, *supra* note 167, chapter 5. For a summary of Crowe's view, *see* Emad H. Atiq, *Review of Natural Law & the Nature of Law, by Jonathan Crowe*, NOTRE DAME PHIL. REV. (2020).

170 There are many sections where Hamburger claims that administrative power is a threat to liberty. *See, e.g.*, HAMBURGER, *supra* note 2, at 496–498 (observing that "[a]t stake is nothing less than liberty under law" and that administrative power "threatens the liberty demarcated by law"). Perhaps the alleged injustice of administrative power could be interpreted as an argument for its non-legality (since, at least on some anti-positivist views, an "unjust law is not law"). *See id.* at 498. But there is far too little in the book by way of moral theory (and an actual demonstration of the harms of administrative power) to amount to an argument that administrative power is too unjust to be law. Even if Hamburger offers reasons for thinking administrative power is unjust, our argument based on disagreement in Part III would still apply, since the question of whether modern administrative agencies do more harm than good is deeply contested, as is the claim that an "unjust law is not law."

that they were right. And, unfortunately, the English jurists he cites, like Edward Coke, did very little to elaborate on why they believed their own theories, so much so that historians have had trouble identifying precisely what jurists like Coke thought, let alone why they thought it.[171] So, a "see E. Coke" citation would not be very helpful either. While it is conceivable that seventeenth-century English ideas about the nature of law are timelessly true, Hamburger has given the reader precious little to support that claim.

2. Theory #2: Procrustean Positivism

But perhaps we are mistaken in assuming that Hamburger thinks Coke and like-minded contemporaries were right about the nature of law. Perhaps Hamburger thinks we should embrace seventeenth-century English beliefs not because they are true (or not only) but because they are somehow binding on us through social acceptance. Recall that positivists think social facts are the ultimate grounds of legality[172], and, despite his expressed reservations about positivism (as the philosophy of law responsible for the modern administrative state[173]), there is a basis for interpreting Hamburger as a distinctive kind of positivist. Hamburger writes:

In evaluating the unconstitutionality of a government act, judges must ask whether there is a conflict between the act and *an act of greater obligation*. Far from being statutory, *this question about contradiction arises from assumptions about the nature of law*, which *were taken for granted* in the Constitution.[174]

In fact, the idea that seventeenth-century English assumptions about law's nature "were taken for granted" by the Framers is an empirical claim

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171 *See, e.g.*, Charles M. Gray, *Bonham's Case Reviewed*, 116 PROC. AM. PHIL. SOC'Y 35, 51 (1972); see also D.E.C. Yale, *Iudex in Propria Causa: An Historical Excursus*, 33 CAMBRIDGE L.J. 80, 92 (1974); see also Frederick Pollock, *History of the Law of Nature*, in his ESSAYS IN THE LAW 157 (1922); see also LOWELL, GOVERNMENT OF ENGLAND 480–488 (1908); Edward Corwin, *Higher Law and Constitutional Law*, *in* CORWIN ON THE CONSTITUTION 111 (Richard Loss ed. 2019) ("One thing seems to be assured at the outset—Coke was not asserting simply a rule of statutory construction which owed its force to the assumed intention of Parliament as it would today, although the statute involved in Bonham's Case was also construed from that point of view. . . . Coke was enforcing a rule of higher law deemed by him to be binding on Parliament and the ordinary courts alike."). *See also* Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 120 (1997). Perhaps the most detailed statement of Coke's view comes from *Calvin v. Smith*, 77 Eng. Rep. 377, 392 (K.B. 1608). Coke invokes the "Lex aeterna, the moral law, called also the law of nature." He observes that "the law of nature is immutable, and cannot be changed. . .the law of nature is part of the laws of England," and "the law of nature was before any judicial or municipal law in the world." *Id.*

172 *See supra* notes 52–54 and accompanying text.

173 *See supra* note 114 and accompanying text.

174 HAMBURGER, *supra* note 2, at 310 (emphasis added).

that Hamburger does not spend much time establishing.[175] But let us grant the claim anyway. Even if the Framers did assume Coke's view of law, it still requires an extraordinary jurisprudential leap to get to the view that their assumptions about the nature of law constrain us today. One would have to suppose that during the establishment of the U.S. legal order, assumptions about the nature of law that were widely shared at the Founding somehow became part of our legal order simply because they were widely shared. On this view, the relevant social fact in virtue of which seventeenth-century assumptions about law's nature bind us legally is that they were implicitly assumed at the Founding.

This view might seem less sweeping than the former, in that it advances a claim about *our* law, rather than a claim about law *sub specie aeternitatis*; but it is no less idiosyncratic. While positivist legal theories uncover the criteria of legal validity based on what is socially accepted *today*,[176] the form of positivism under consideration looks to what was accepted at the time of the founding of a legal system. Indeed, Hamburger's central point is that officials today are wrong about the criteria for legality. The assumptions about the nature of law that the historical reconstruction unearths have long been rejected in practice, which Hamburger admits. If Hamburger is right, then ideas about the nature of law implicitly accepted by the Founding generation, including ideas that were never clearly articulated in any document or other source of law (the Constitution never defines "law"), constrain the laws we can produce today simply by virtue of the Founding generation's implicit acceptance of those ideas.[177] Call this view "Procrustean Positivism" on account of the rigid legal authority it grants historical social facts.

It is worth noting how Procrustean Positivism differs from the positivism (and originalism) of Baude and Sachs. More conventionally (but by no means uncontroversially[178]), Baude and Sachs argue that originalism is our law based on a specific pattern of social acceptance of originalism *today*. Procrustean Positivism is different also from the view

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175 *See supra* note 155 and accompanying text. *Cf.* Vermuele, *supra* note 19, at 1551 ("If Hamburger were an originalist in the conventional American sense, he would spend far more time on the ordinary meaning of the text as of 1789 and on the ratification debates, and far less time on subterranean connections between the Stuart monarchs and German legal theory. His main interest, his intellectual center of gravity, is elsewhere.").

176 *See supra* Part I; *see also* Barzun, *supra* note 2, at 1330–31.

177 Incidentally, there is a difference between the Framers assuming that "law" means thus and so and the Framers intending for those assumptions to constrain future generations. Hamburger does not provide any evidence that the Framers intended for all their jurisprudential assumptions about "law" to constrain future generations. For example, some might have thought law is God's command. It is hardly obvious that such assumptions were supposed to be baked into the meaning of "law," as the word is used in the Constitution.

178 *See* Baude & Sachs, *supra* note 13; *see supra* Section I.A.

outlined by Professor Sachs in *Originalism as A Theory of Legal Change*, that our law is the Founders' law, unless validly changed based on our socially accepted rules of change.[179] On the view under consideration, a diaphanous conception of law—not described in any Founding document and rejected in modern practice—was permanently fixed at the Founding. *Is Administrative Law Unlawful?* is not concerned ultimately with the conventional norms of positive law, which might be changed through statutory or constitutional amendment or changing customs. Rather, as Hamburger regularly emphasizes, the assumptions about the nature of law at the heart of the project go deeper than the Constitution.[180]

There is no formal or informal process for changing historical assumptions about law's nature. Likewise, there is no process for changing historical assumptions about the nature of morality or religion or science. But Procrustean Positivism assimilates unarticulated assumptions about law at the founding of a legal system to the law itself. And since there is no mechanism for revisiting those old assumptions about the nature of law, we are stuck with them. The Article V procedures for amending the Constitution are not designed to revisit "assumptions about the nature of law . . . taken for granted in the Constitution,"[181] in ways that might permit administrative law. We are left with an extraordinary theory: a positivist account of law according to which the *apparent* law that prevails—the body of rules actually followed by officials and private citizens—is, in important respects, invalid and incapable of ever being valid law. A theory so radical and seemingly inconsistent with norms of democratic self-government has never been systematically defended, to the best of our

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[179] *See* Sachs, *supra* note 2; *see supra* Section I.B. *Cf.* Vermuele, *supra* note 19, at 1551 ("If Hamburger were an originalist in the conventional American sense, he would spend far more time on the ordinary meaning of the text as of 1789 and on the ratification debates, and far less time on subterranean connections between the Stuart monarchs and German legal theory. His main interest, his intellectual center of gravity, is elsewhere.").

[180] *See supra* note 174 and accompanying text. Note that Procrustean Positivism goes beyond some of the most far-reaching judicial efforts to read legal ideas associated with the Founding era into particular constitutional provisions and into our constitutional law. *Alden v. Maine*, 527 U.S. 706 (1999), helps illustrate the point. Writing for a five-Justice majority, Justice Kennedy held that the provisions of federal law authorizing suits against states in state courts for violations of federal labor standards contravene the constitutional principle of state sovereign immunity, which he found "confirm[ed]" in the Tenth Amendment. *Id*. at 714. Justice Souter's dissenting opinion faults the majority's analysis on multiple points, and notably for present purposes, characterizes the majority's approach in terms resembling Procrustean Positivism. Justice Souter frames the majority's question as whether "the natural law conception of sovereign immunity . . . [was] widely held" in Founding-era America. *Id*. at 763 (Souter, J., dissenting). Justice Souter goes on to answer this question in the negative, but Justice Kennedy rejects the framing entirely and the idea that the Founders' natural law conception constrains us today; instead, framing the question as the narrower one of whether the Framers intended the Constitution to permit suits against the states. *Id*. at 734.

[181] HAMBURGER, *supra* note 2, at 310.

knowledge.

C. Closing Remarks

In this part, we have taken seriously Hamburger's jurisprudential claim that administrative law is not real law. Hamburger's defense of this claim mainly involves reference to seventeenth-century jurists, who held views about law's nature that are not widely shared today. Either these jurists were simply right about the nature of law, contemporary trends notwithstanding, or their assumptions constrain us regardless because those assumptions were implicitly accepted at the Founding. Either way, Hamburger's view relies on an exceptionally unique jurisprudence.

Legal scholars are, of course, entitled to their controversial assumptions. But, as we argue further below, it seems appropriate in such circumstances to acknowledge the controversy at the core of one's view. Here, instead, *Is Administrative Law Unlawful?* simply assumes the correctness of one or another unusual jurisprudence. What is more, Hamburger issues unsparing judgments of those holding opposing views. The growth of administrative law is depicted as a coup perpetrated by "a new class" that "cordoned off for themselves a sort of legislative power that they could exercise without representation."[182] In a follow-up article, Hamburger claims that judges who follow the Supreme Court's most generous deference doctrines are violating their oaths of office and should resign.[183] If it had been established that administrative officials and judges are engaging in flagrantly, unquestionably lawless behavior (lawless by any reasonable definition), such charged allegations of legal malfeasance might be justified; but as we have suggested, Hamburger's claims of unlawfulness rest on one or another set of recherché (and undefended) ideas about law's nature. Given such foundations, the charges are

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[182] *Id*. at 374; *see also id.* at 376 ("The history of government is largely a story of elite power and popular subservience. Americans, however, turned this old model upside down. . . . [H]owever, another government has arisen, in which new masters again assert themselves, issuing commands as if they were members of a ruling class, and as if the people were merely their servants. Self-government thus has given way to a system of submission.").

[183] *See* Hamburger, *supra* note 9, at 1247–48 ("Ultimately, if judges do not want to exercise their own independent judgment, but instead want to exercise systematic bias, they should resign. Judges take an oath of office, in which they swear to serve as judges—that is, to exercise their own independent judgment in accord with the law of the land, including Article III and the Fifth Amendment. . . . It therefore is not too much to expect that, if they are to stay on the bench, they should avoid systematic bias and should exercise their own independent judgment. If, on the other hand, they are unwilling to adhere to these most basic requirements, they have no business pretending to be judges and should get off the bench."). Hamburger even faults some of the most assertive and influential administrative law critics of previous generations, among them A.V. Dicey, HAMBURGER, *supra* note 2, at 280–81, and Roscoe Pound, *id.* at 414–16, for not fully understanding administrative power's unlawfulness.

astonishing.

III. THE CASE FOR AMBIVALENCE IN PUBLIC LAW THEORY: A JURISPRUDENCE OF DOUBT

The first half of this Article has examined in detail arguments in recent public law scholarship that exhibit several distinguishing features. First, these arguments are built on assumptions concerning the fundamental nature of law. Second, proponents of such arguments tend not to fully acknowledge that their assumptions about the nature of law are contestable and atypical; our engagement has focused on bringing fully into view the controversial nature of the relevant starting points. And third, the arguments escalate, whether directly or indirectly, the stakes in public law disputes, offering ammunition to those who think the opposing side denies or defies what the law requires.

The jurisprudential turn in public law theory is not limited to the examples we have discussed. There are other theorists who have relied on jurisprudential assumptions to defend claims about American law, but who have been more transparent about their conclusions resting on contested starting points. For example, in a recent volume exploring Hart's view and the American Constitution, Professor Richard Fallon argues that originalist attempts to delegitimize judicial precedents inconsistent with original meaning run afoul of our law.[184] Fallon largely "assume[s] that Hart successfully demonstrated 'the social facts' thesis to be true,"[185] though he does make some effort to show that alternative jurisprudential assumptions might similarly cast doubt on the lawfulness of attempts to overturn 'non-originalist' precedent.[186] In the same volume, Professor Michael Dorf suggests that Hart's view on the nature of law, precisified in some significant ways, entails that the American legal order includes various unwritten, extraconstitutional, customary legal norms that constrain the legislature—for example, on the subject of court packing.[187]

In this Part, we offer a generalized version of our case for why we should all be ambivalent towards contentious public law claims. This case should challenge, to varying degrees, the various attempts to defend

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184 *See* Fallon, *supra* note 18, at 121 ("[I]f positivism is correct, then a correct description of the relevant validity criterion must acknowledge both the fact that the Court has some discretionary authority to shape the content of the Constitution *and* the fact that there are limits to this authority").

185 *Id.* at 51. *See also id.* at 51 ("I shall assume for purposes of this chapter that Hartian positivism survives Dworkin's attackFalse Scholars of analytical jurisprudence appear increasingly to believe that [Dworkin's] general attack on Hartian positivism was flawed and unpersuasive.").

186 *See id.* at 64–66 (exploring the implications of Dworkin's 'interpretivist' view, while admitting that this line of argument is more exploratory and tentative).

187 *See id.* at 69.

controversial public law conclusions based on jurisprudential assumptions, especially where the conclusions are unqualified. Our main claim is that when a public law theory rests on assumptions about law's nature that are denied by good-faith reasoners, it should undercut one's confidence in the theory. Moreover, this reason for confidence-lowering should be accessible even to those who initially found the relevant starting points intuitive.

Our argument does not assume a contested standpoint within public law theory. For example, we do not approach debates in public law or general jurisprudence as "legal realists." [188] A legal realist might deny that there are any determinate facts about the nature of law that could help us decide contested legal questions—for example, concerning how to interpret the Constitution.[189] By contrast, our view is that *if* there are such facts, we must view those facts, at best, through a glass darkly; and, moreover, that the reasons for questioning one's ability to apprehend such facts should be generally accessible. Our central thesis is, thus, principally *epistemic*.[190] It is about apportioning one's beliefs to the evidence on matters of jurisprudence.

We leverage persistent disagreement in general jurisprudence as higher-order evidence that people's intuitions about law's nature are unlikely to be very reliable. We observe, first, that successful truth-seeking enterprises, like the natural sciences, tend to withhold judgment on matters that are contested among good-faith reasoners; and, moreover, that there is considerable ambivalence among contemporary philosophers of law,

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[188] A legal realist might explain the mismatch between the starting points for recent public law theory (highly conjectural propositions about the nature of law) and the end points (sweeping, definitive, and sometimes scathing conclusions) along the following lines: claims about the nature of law serve as window dressing for evaluative preferences over legal outcomes. We flag the realist explanation but we do not endorse it for two reasons. First, the principle of charity requires that we assume the most favorable interpretation of an argument, and a realist view that a legal argument is nothing more than a stalking horse for a hidden agenda is distinctly uncharitable (as a broad generalization). Realist cynicism requires individualized justification, or so it seems to us. Second, if it turns out that legal realism really does offer the best explanation for recent public law theory, then our observations in this Article suggest a novel argument for legal realism. A neglected feature of legal argumentation—the mismatch between theorists' convictions about practically consequential legal claims and the speculative nature of the assumptions about law that undergird those convictions—turns out to be evidence for legal realism. That said, for present purposes, we suspend judgment on the prospects of legal realism.

[189] *See, e.g.*, Leiter, *supra* note 7.

[190] Philosophers often distinguish metaphysical from epistemic arguments for uncertainty. For example, a metaphysical theory of vague predicates might hold that there is simply no fact of the matter concerning how a predicate like "bald" applies in hard cases. An epistemic theory of vagueness grants that there *are* facts about how "bald" applies in hard cases but maintains that it is hard (even impossible) to figure out those facts given our evidence. On epistemic theories of vagueness, *see, e.g.*, TIMOTHY WILLIAMSON, VAGUENESS (1994); *see also* ROY SORENSEN, VAGUENESS AND CONTRADICTION (2001). For an application of this distinction to the concept of law, see Atiq, *supra* note 7, at 121.

who by all accounts are reasoning in good faith, towards the standard views in jurisprudence. Next, we argue that being uncertain in the face of non-convergence finds a rational justification in the epistemology of "peer disagreement." Although the core of our case is intellectual, we conclude with the observation that epistemic norms of doxastic humility militate in the same direction as institutional and ethical norms vital to a pluralist democracy.

A. Disagreement in the Sciences

Our case for confidence-lowering begins with a simple observation: most successful truth-seeking enterprises treat lack of convergence on foundational questions as a reason to withhold judgment or otherwise maintain doubt. In the natural sciences, persistent disagreement is widely acknowledged as a reason to treat the disputed questions as unsettled. To take just one example, there are enduring disagreements among physicists about the correct interpretation of the mathematics used in some of our best physical theories—most famously, quantum field theory. These fundamental interpretive disagreements between, say, proponents of the Many Worlds interpretation and the Bohmian, turn out to be highly consequential.[191] The competing interpretations have radically different implications for physical ontology (the question of what exists), the character of the laws of nature, and even the practical question of what new avenues scientists should be investigating. Yet physicists tend to cabin such disagreements when doing general physics; and when they do adopt some contested interpretive scheme in speculative work, they take care to mark the contested nature of their assumptions.[192] Moreover, in their public-facing work, most physicists do not generally treat the foundational questions as settled; nor do they dismiss opposition to their

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[191] *See, e.g.*, George R. Williams, *Quantum Mechanics, Metaphysics, and Bohm's Implicate Order*, 17 MIND & MATTER 155, 155 (2019) (discussing the "persistent interpretation problem for quantum mechanics" and comparing Everettian and Bohmian approaches); *see also* Ana-Maria Cretu, *Diagnosing Disagreements: The Authentication of the Positron 1931–1934*, 70 STUD. IN HIST. & PHIL. OF MOD. PHYSICS 28, 28–38 (2020); Michela Massimi, *Realism, Perspectivism, and Disagreement in Science*, 198 SYNTHESE, S6115–S6141 (2019).

[192] *See* Williams, *supra* note 190, at 156 (describing the "pragmatic attitude of 'shut up and calculate'" among physicists hoping to avoid interpretative disagreements about the mathematics); *see also* Max Tegmark, *The Mathematical Universe*, 38 FOUND. PHYSICS 101, 101–50 (2008); PHILIP KITCHER, THE ADVANCEMENT OF SCIENCE: SCIENCE WITHOUT LEGEND, OBJECTIVITY WITHOUT ILLUSIONS 344 (Oxford Univ. Press 1993) ("[A] community that is prepared to hedge its bets when the situation is unclear is likely to do better than a community that moves quickly to a state of uniform opinion"); MIRIAM SOLOMON, SOCIAL EMPIRICISM 186 (1st prtg. MIT Press 2001) (describing healthy dissent and pluralism in the sciences).

preferred view as evidence of irrationality.[193] Physics is hardly exceptional in this regard; in the natural and social sciences more broadly, foundational disagreements entail efforts to argue based on common ground and to place within a special category exploratory or "speculative" research that relies on contested assumptions.[194]

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[193] *See* Sophie Juliane Veigl*, Notes on a Complicated Relationship: Scientific Pluralism, Epistemic Relativism, and Stances,* SYNTHESE 1, at 1–2, (Nov. 9, 2020), https://link.springer.com/content/pdf/10.1007/s11229-020-02943-2.pdf (observing that "scientific pluralism enjoys widespread popularity within the philosophy of science"); Stephen H. Kellert et al., *The Pluralist Stance*, *in* XIX SCIENTIFIC PLURALISM vii–xxvii. (S. Kellert, H. Longino, & C. K. Waters eds., 2006); Massimi, *supra* note 190; SANDRA D. MITCHELL, BIOLOGICAL COMPLEXITY AND INTEGRATIVE PLURALISM (Michael Ruse ed. 2003). The strongest statement of pluralism in the sciences is perhaps Paul Feyerabend's:

> We have to realize that no element of our knowledge, physical or otherwise, can be held to be absolutely certain and that in our search for satisfactory explanations we are at liberty to change any part of our existing known, however "fundamental" it may seem to be, to those who are either unable to imagine or to comprehend alternatives.

Neils Bohr's Interpretation of the Quantum Theory, *in* 4 PHYSICS AND PHILOSOPHY, PHILISOPHICAL PAPERS, 74, 94 (Stefano Gattei & Joseph Agassi eds., 2015)*; see also* Paul Feyerabend, *How to be a Good Empiricist: A Plea for Tolerance in Matters Epistemological*, *in* 3 Knowledge, Science and Relativism, Philisophical Papers, 78, 78–103 (John Preston ed. 2008). On Feyerbend's view, see generally Jamie Shaw, *Feyerabend and Manufactured Disagreement: Reflections on Expertise, Consensus, and Science Policy*, SYNTHESE, at 1 (Jan. 22, 2020), https://doi.org/10.1007/s11229-020-02538-x. For some important cases where disagreement in science leads to charges of "science denialism," see David M. Frank, *Disagreement or Denialism: "Invasive Species Denialism" and Ethical Disagreement in Science,* SYNTHESE 1, 1–2 (May 21, 2019), https://link.springer.com/content/pdf/10.1007/s11229-019-02259-w.pdf.

[194] *See, e.g.*, David Anzola, *Disagreement in Discipline-building Processes,* 198 SYNTHESE S6201, S6220-21 (2019) (describing a case of respectful disagreement within the computational social sciences: whether agent-based modelling should be minimalist and abstract or concrete and empirically calibrated). On the role of speculation in the sciences, see KARL POPPER, CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE (Routledge 2d ed. 2002); *see also* Adrian Currie, *Epistemic Optimism, Speculation, and the Historical Sciences*, 11 PHIL. THEORY AND PRAC. IN BIOLOGY 7 (2019); see also Frank Cabrera, *String Theory, Non-Empirical Theory Assessment, and the Context of Pursuit*, 198 SYNTHESE S3671, S3671 (2018); Mario Bunge, *Speculation: Wild and Sound*, 1 NEW IDEAS IN PSYCH. 3 at 3 (1983); PETER ACHINSTEIN, SPECULATION: WITHIN AND ABOUT SCIENCE ix–xiv (2018); Adrian Currie, *Science & Speculation*, ERKENNTNIS, at 1, (2021), https://link.springer.com/content/pdf/10.1007/s10670-020-00370-w.pdf. Speculative work in the sciences is often subject to critique. Adrian Curie, *id.* at sec. III, offers several examples from different areas, such as: medicine, *see* Max Wiznitzer, *Dravet Syndrome and Vaccination: When Science Prevails Over Speculation*, 9 THE LANCET NEUROLOGY 559, 559–60 (2010), https://www.thelancet.com/journals/laneur/article/PIIS1474-4422(10)70109-5/fulltext; cosmology, *see* V. Weidmann, *Cosmology: Science or Speculation*, 116th World Congress of Philosophy 683, at 683 (1983); evolutionary biology, *see* Anthony Poole & David Penny*, Eukaryote Evolution: Engulfed by Speculation*, 447 NATURE 913, at 913 (2007); economic approaches to environmental science, *see* Caitlin et al., *Valuing Individual Animals Through Tourism: Science or Speculation?* 157 BIOLOGICAL CONSERVATION 93, at 93 (2013); and string theory, *see* Burton Richtor*, Theory in Particle Physics: Theological Speculation Versus Practical Knowledge*, 59 PHYSICS TODAY 8, at 8 (2006) https://physicstoday.scitation.org/doi/pdf/10.1063/1.2387062

Such practices reflect a willingness among scientists to hedge one's bets when questions are disputed as well as a recognition that inter-subjective confirmation represents a crucial countermeasure to human fallibility. The obvious question such practices raise is why legal theorists should conduct their beliefs differently. Doubting their jurisprudential assumptions would not prevent scholars from advancing arguments that rest on speculative claims about the nature of law, including arguments leading to sweeping conclusions (for instance, that all administrative law is unlawful, or that a law is valid only if endorsed by Founders' law). But it *would* entail qualifying conclusions drawn from uncertain assumptions and presenting one's conclusions with appropriate ambivalence.

It could be that law is different from science so that an argument by analogy to scientific fields of inquiry and their approach to disagreement misses the mark. Law *is* different, of course, but the question is whether it is different in ways that should make a difference to how we should conduct our legal beliefs. And it is not obvious to us what the relevant dissimilarity would be.[195] In our view, those who would resist habits of belief-formation that seem conducive to truth-seeking generally bear the burden of explaining why legal facts are so unique as to render such habits irrelevant.

B. Disagreement in General Jurisprudence

Even if public law theory needn't take its cues from how the sciences approach fundamental disagreements, we can look to truth-seeking practices closer to home. The works in Parts I and II are crossovers in that they draw on general jurisprudential ideas to make claims about American constitutional and administrative law. It is only fitting for such works to consider how general jurisprudence regards its enduring controversies.

Contemporary philosophers of law widely recognize that an adequate theory of law needs to address and explain persistent jurisprudential disagreement. Although classic arguments for the significance of

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[195] We noted above the legal realist's approach to arguments in law. *See supra* note 187. Jurists and our primary interlocutors are unlikely to embrace legal realism as a reason why norms of scientific disagreement do not apply to legal disagreement, as few would be willing to endorse the claim that arguments in law are post hoc rationalizations, reverse-engineered from favored outcomes. It is also worth noting that the problem cannot be waved away with ideas of law being an "essentially contested" or "interpretive" concept, admitting constant re-definition and metalinguistic negotiation. On meta-linguistic negotiation, *see* David Plunkett & Timothy Sundell, *Dworkin's Interpretivism and The Pragmatics of Legal Disputes*, 19 LEGAL THEORY 242, 257–66 (2013). Even if law is an essentially contested concept, that would not explain why anyone is entitled to be *certain* about their preferred conception of law. On the contrary, once it is acknowledged that the grounds of law are reasonably contested, certainty and dismissiveness towards others seem out of place.

theoretical disagreement are associated with Dworkin,[196] recent work in jurisprudence (including by positivists) is very much concerned with exploring what persistent disagreement reveals about the nature of law.[197] And what is distinctive about the contemporary explanations is that they do not straightforwardly vindicate one side of the disagreement between positivists and anti-positivists (let alone any specific member of the family of positivist or anti-positivist views). For instance, David Plunkett and Timothy Sundell use persistent disagreement to motivate a distinctive meta-semantics for legal terms.[198] On their view, surface-level disagreements about the fundamental grounds of legal validity involve competing efforts to re-define the term "law" that are often politically motivated and not always with full consciousness of the fact that the disagreement is meta-semantic. Schroeter, Schroeter, and Toh take explaining "fundamental legal disagreement" to be a core desideratum for a general theory of law.[199] And the meta-semantics for legal terms they go on to offer as an explanation for persistent disagreement, is, by their own lights, neutral between positivism and anti-positivism.[200] Scott Hershovitz argues that persistent disagreement about the nature of law is due to faulty assumptions about legality—in particular, the assumption that a rule's being law gives it a normative weight that it would have lacked otherwise.[201]

Crucially, most legal philosophers writing in this area do not treat the fundamental questions of jurisprudence as settled. On the contrary, they treat the unsettled nature of such questions as calling for an explanation (for example, in terms of conceptual indeterminacy or vagueness or whatever else).[202] Our point is not that these theorists must be right, but that their stance reflects a more widely shared attitude of ambivalence towards jurisprudential questions.[203]And given such ambivalence among

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196 *See* DWORKIN, *supra* note 3.

197 *See supra* note 7.

198 *See* Plunkett & Sundell, *supra* note 7.

199 Schroeter et al., *supra* note 7, at 65–67.

200 One of their key points is that there are no "easy" conceptual arguments for the truth of anti-positivism or positivism.

> Roughly, legal positivists highlight our interest in keeping track of objective social commitments, whereas natural law theorists highlight the role of moral soundness of our legal practices. Which of these interpretations (or more accurately, any member of the two families of interpretation) better captures the interests at stake in our legal practices cannot be adjudicated at the level of semantic theorizing . . . . [W]e do not see an easy or short way to them from the theory of concepts we have outlined here."

Id. at 93.

201 Hershovitz, *supra* note 7. There is no small measure of irony in the fact that Hershovitz declared the "The End of Jurisprudence" just as the jurisprudential turn gathered steam in public law theory.

202 *See supra* note 7.

203 As one of us has written elsewhere:

experts, it is unclear why anyone would be justified in defending a public law theory as if jurisprudential questions were settled for all practical purposes (recall, from earlier sections, the invocation of the judicial oath of office based on contested jurisprudential assumptions). To ground the point in an example, it is not clear why an originalist should have much confidence in her preferred view if originalism's truth turns on questions in the philosophy of law that have generated no consensus among good-faith reasoners (e.g., questions concerning whether social facts alone determine legal facts; or which social facts determine the legal facts).

C. Peer Disagreement, Generally, and its Evidential Import

Ambivalence in the face of non-consensus finds a rational justification in the epistemology of "peer disagreement." There is an extensive literature on how peer disagreements provide evidence for what one should believe, but there has been very little work on its significance for legal theory.[204] Drawing on this literature, we present our main case for

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There might be grounds for a pessimistic meta-induction from the fact that no account of the necessary and sufficient conditions for the [legal] concept's application has persuaded all competent users of legal terms to the conclusion that there are no such conditions. But, more plausibly, persistent disagreement about the concept [of law] may be explained *not* by its indeterminacy but by the non-obviousness of facts that govern its application in hard cases. Indeed, anyone who takes the concept of law to be sufficiently regimented for there to be a fact of the matter as to whether positivists or anti-positivists are right about law . . . is under pressure to admit the hardness of cases where the theories come apart. For one needs an explanation for persistent theoretical disagreement amongst epistemic peers, and the elusive character of the relevant conceptual constraints looks to be the only one available. Atiq, *Legal Obligation*, *supra* note 7, at 121.

[204] *See generally* Bryan Frances & Jonathan Matheson, *Disagreement*, *in* STAN. ENCYC. OF PHIL. (Edward N. Zalta ed., Winter 2019), https://plato.stanford.edu/archives/win2019/entries/disagreement; sources cited *infra* notes 206–209. As noted above and discussed further below, Baude and Doerfler have written about the significance of peer disagreement for constitutional interpretation, while taking the opposite stance to us. *See* Baude & Doerfler, *supra* note 5; discussion *supra* Part I. We critique their arguments below. *See infra* note 214–215 and accompanying text. Eric Posner and Adrian Vermeule have argued that judges have reasons to be humble in the face of disagreement. *See* Eric A. Posner & Adrian Vermeule, *The Votes of Other Judges*, 105 GEO. L. J. 159, 163 (2016) (arguing that in the face of competing claims about the clear meaning of a statute, "all nine Justices need a stiff dose of epistemic humility."); *id.* at 166 ("On our view, epistemic humility should extend to the metalevel as well, at least presumptively. All nine Justices should recognize that reasonable minds can disagree about the proper approach to interpretation, ... It would be unpardonably sectarian to single out some particular theory and then brand all others unreasonable"). Posner and Vermuele focus on judges, but we think the argument can be generalized and is even stronger when applied to public law theory. Moreover, they do not explain *why* it would be "unpardonably sectarian" to brand opposing views "unreasonable." *Id.* As we argue below, what matters is the nature of the evidence for jurisprudential claims. For an application of the epistemology of disagreement to standards of proof in law, *see* Alex Stein, *Law and the Epistemology of Disagreements*, 96 WASH. UNIV. L. REV. 51 (2018) (arguing that decision rules for multi-member tribunals are in tension with the epistemology of disagreement).

jurisprudential confidence-lowering. The argument relies on four key claims:

> There is pervasive disagreement about the fundamental grounds of legal validity.
>
> These disagreements appear to be "peer" disagreements.
>
> There are reasons for lowering one's confidence in a claim about which *prima facie* peers disagree unless special reasons for discounting dissent apply.
>
> There are no special reasons for discounting *prima facie* peer disagreement in the jurisprudential case.

The first premise is common knowledge. It is not just Hart and Dworkin who disagree about the nature of law; fundamental jurisprudential disagreement is pervasive and a central feature of legal practice.[205]

The second premise should not be too controversial either. Many jurisprudential disagreements appear to be "peer" disagreements. Thomas Kelly defines epistemic peerhood in terms of two conditions:

> [equality] with respect to. . . familiarity with the evidence and arguments which bear on the question, and [equality] with respect to general epistemic virtues such as intelligence, thoughtfulness, and freedom from bias.*206*

Given such demanding criteria for epistemic peerhood, one might be tempted to suppose that peer disagreements are rare. After all, when we encounter dissent on matters of importance to us, we are often aware that our dissenters are in different evidential and dispositional circumstances. Still, as Nathan King points out, while we may be aware of differences, it is not always clear in the face of dissent whose evidence is more extensive or representative of the total available evidence, or who is better disposed to respond to the evidence in a rational way.[207] In other words, we are not always in a position to say whether we ourselves are more likely to have

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205 *See* DWORKIN, *supra* note 3.

206 Thomas Kelly, *The Epistemic Significance of Disagreement*, 1 OXFORD STUDIES IN EPISTEMOLOGY 167, 174–75 (2005). *See also* BRYAN FRANCES, DISAGREEMENT (2014) (delineating a set of factors that determine epistemic peerhood).

207 Nathan King, *Disagreement: What's the Problem? or A Good Peer is Hard to Find,* 85 PHIL. AND PHENOMENOLOGICAL RESEARCH 249, 250–51 (2011) ("[I]t would be a mistake to infer from the rarity of peerhood that disagreement poses no threat to our beliefs. For suppose that epistemic peerhood is rare. . . . It is nevertheless plausible that in a wide range of cases, it is to some degree *unclear* whether we are in a better epistemic position than our dissenters").

glommed on to the truth of the matter rather than the dissenter. So, even if genuine peers are in fact rare, we can just as easily speak of the epistemic import of *prima facie* (or apparent) peer disagreement. And, at a minimum, jurisprudential disagreements among philosophers and jurists count as *prima facie* peer disagreements.

Our third premise is the key epistemic principle on which we rely and warrants unpacking. The principle is moderate: it favors "confidence-lowering" in a peer-contested proposition, and not, say, withholding judgment altogether. How much doubt does our principle demand? Enough doubt to make a *practical* difference. When a proposition is peer-contested, at the very least it should not be treated as though it were part of the common ground among reasonable thinkers, especially in arguments with others. If practical conclusions must be drawn on the basis of the contested proposition, then it must be with explicit recognition that the justification for one's practical choice is reasonably contestable. Doubt of this kind makes a difference to how scholars and judges should argue with one another, as we suggest in Part IV.

The justification for moderating our convictions in the face of peer disagreement is intuitive. When we encounter dissent from those who seem generally adept at reasoning, who apportion their beliefs to the evidence and are otherwise rational, it raises the likelihood that we might be mistaken ourselves. Moreover, *persistent* peer disagreement suggests that the evidence that might decide the issue is likely inconclusive and perhaps impoverished, for poor evidence would explain why peer disagreement on the subject persists. And certainty cannot be a reasonable response to incomplete or impoverished evidence.

Notably, our principle is neutral with respect to contested questions in the epistemology of peer disagreement.[208] Some epistemologists argue that parties to peer disagreements should "split the difference" and suspend judgment on the matter entirely.[209] Others disagree, treating the

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[208] Michele Palmira argues that "peers ought to respond to their disagreement by re-opening the question of the truth of the relevant matter at hand. This requirement is normatively compatible with two types of doxastic revision: revising by suspending, and revising by hypothesizing." *How to Solve the Puzzle of Peer Disagreement*, 56 AM. PHIL. Q. 83, 95 (2019). Our suggestion in the legal context is perhaps closest to Palmira's general response to the problem:

To re-open the question whether a given proposition p is true is to perform certain tasks, such as going over the shared body of evidence by re-evaluating its extension (i.e. whether a given item counts as a piece of evidence or not), carefully re-assessing its probative force, double-checking the reasoning by means of which one put all the evidential items together to get to a conclusion about its support for a specific attitude, and making sure that one's general epistemic and cognitive conditions were normal. Alternatively, re-opening the question whether p may require looking for new evidence and arguments in order to come to a verdict about p's truth-value.

Id., at 87.

[209] *Cf.* Richard Feldman, *Epistemological Puzzles About Disagreement, in*

fact of peer disagreement as just more "higher-order" evidence against the truth of what one believes, evidence that must be weighed with all the other evidence which, on net, might ultimately support one's belief, notwithstanding peer disagreement.[210] A recent review article states:

Most contributors to the debate defend some version of the view that one should move closer to one's peers' opinion, e.g., by suspending judgment or by adopting an intermediate level of confidence between the disagreeing peer and one's former self . . . This family of views is known as *conciliationism*. In contrast, *steadfastness* holds that one should "stand one's ground" in the face of peer disagreement, i.e., continue to have the same beliefs and levels of confidence as one did before the disagreement. Although this is certainly a minority view in the literature, it does have its proponents (citations omitted).[211]

There are, in fact, a wide range of attitudes one can take towards a peer-contested proposition, between suspending judgment and being utterly convinced by it. But there is relative consensus in epistemology that, at a minimum, peer disagreements raise a serious question about what one should believe. There may not be much consensus about the degree to which peer disagreement should influence one's beliefs. But no one, as far as we can tell, endorses what David Enoch calls the "I Don't Care" view according to which peer disagreement is epistemically irrelevant.[212]

Furthermore, our epistemic principle is compatible with special cases, where there are grounds for discounting the epistemic import of apparent peer disagreement.[213] Sometimes the fact of disagreement is itself *per se* evidence that the opposing side could not be an epistemic peer. The big question is whether such *per se* reasons for discounting dissent obtain in jurisprudence.

EPISTEMOLOGY FUTURES 216 (Stephen Hethington ed. 2006); Adam Elga, *Reflection and Disagreement*, 41 NOÛS 478 (2007); David Christensen, *Epistemology of Disagreement: the Good News*, 116 PHIL. REV. 187 (2007).

210 Kelly, *supra* note 205, at 191.

211 Finnur Dellésn & Maria Baghramian, *Disagreement in Science: Introduction to the Special Issue*, SYNTHESE 1, 2 (2020).

212 David Enoch, *Not Just a Truthometer: Taking Oneself Seriously (but not Too Seriously) in Cases of Peer Disagreement,* 119 MIND 953, 966 (2010). Christensen, *supra* note 208, at 215, suggests that there might be *practical* reasons for disagreeing peers to stand their ground in certain contexts. For instance, perhaps truth-seeking in philosophy is best promoted via a kind of epistemic division of labor generated by entrenchment and insensitivity to higher-order evidence against one's preferred position. But we're aware of no epistemologist who thinks peer disagreement is epistemically irrelevant, even if there might be practical reasons for ignoring its epistemic import in special cases.

213 *See e.g.*, Peter van Inwagen, *It is Wrong, Everywhere, Always, and for Anyone, to Believe Anything upon Insufficient Evidence*, *in* FAITH, FREEDOM, AND RATIONALITY 137–54 (J. Jordan & D. Howard-Snyder, eds., 1996) (arguing that in cases of peer disagreement one side might have an incommunicable insight or special evidence that the other side lacks).

Our fourth and final premise is that there are no such special reasons for discounting jurisprudential dissent. The best way to approach this premise is by considering an opposing view. Baude and Doerfler suggest that judges with fundamentally different interpretive methodologies have no reason to rethink their starting points on the basis of their disagreements because embracing the "wrong" legal methodology disqualifies a judge from being seen as an "epistemic peer" or "legally rational."[214] While they claim to be using "rational" in a "philosophical" sense, they never define the term.[215] The philosophical concept of rationality usually refers to such general capacities as the disposition to apportion one's beliefs to the evidence.[216] Alternatively, notions of practical rationality implicate an agent's capacity for means-ends reasoning.[217] In order to make sense of the "irrationality" charge in the case of jurisprudential disagreements, we would have to suppose that there are basic capacities for figuring out the truth about law that a person is revealed to lack if she rejects some methodological principle or general claim about the nature of law.

But no one, as far as we are aware, seriously argues that there are such capacities. If the justification for legal certainty rests on showing that some, but not all of us, have a "law-detector" inside our heads by means of which the lucky few have veridical intuitions about the nature of law (or interpretative methodology), then the legally certain ought to be more open about it. It would be a surprising view, to put it mildly. "Rationality" when localized to a domain, such as the moral or the mathematical or the empirical, is usually defined in terms of dispositions that reliably lead one to the truth about the relevant domain. So, while it is true that sometimes dissent from a proposition is grounds for doubting the dissenter's "local" rationality, it is a mistake to assume that this phenomenon generalizes to every case where we cannot explain why a dissenter disagrees with us. The inference of *per se* irrationality is defensible only when paired with an account of *why* particular starting points for the domain in question—say originalist leanings in law—are constitutive of being (locally) rational.

In the moral case, for example, the moralist might rely on her unique moral epistemology to explain why it is permissible to discount those who

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214 Baude & Doerfler, *supra* note 5, at 326–27.

215 *Id.*

216 *See, e.g.*, John Broome, *Is Rationality Normative?*, 2 DISPUTATIO 161 (2007); see also Ralph Wedgwood*, Rationality as a Virtue*, 55 ANALYTIC PHIL. 319, 319–20 (2014). ("There seems to be a concept, which can be expressed in philosophical English by the term 'rationality', that plays a particularly central role both in epistemology and in ethics. . . . It has seemed plausible to many formal epistemologists and decision theorists that rationality involves having mental states with certain formal features—such as consistency or probabilistic coherence in one's beliefs, or preferences that meet certain so-called "axioms" like transitivity, monotonicity, stochastic dominance, and the like.").

217 *See* Broome, *supra* note 215, at 165.

deny reasons to care about the interests of others. For example, she might argue that the capacity for empathic understanding is constitutive of being morally rational, and those who defend selfishness reveal that they lack the necessary capacity. Comparable explanations do not seem plausible in the legal case, and, in any case, we are not aware of any serious defense of the idea that basic intuitions about the nature of law involve the possession of basic capacities for legal rationality. In short, it is difficult to find a viable legal epistemology that would justify the cursory classification of differing starting points in law as irrational.[218]

If our basic intuitions about the nature of law—our jurisprudential starting points—are not the product of some faculty for legal insight that generates spontaneous and reliably correct convictions about the fundamental nature of law or the correct legal methodology, what might their source be? Well, presumably our intuitions about law are acquired in the usual mundane ways—testimony, reliance on people we trust, and exposure to empirical facts, such as common features of widely recognized laws that favor an inference to some general claim about law. After all, the kinds of claims most theorists take as their jurisprudential starting points—the claims of legal positivism, Dworkinian anti-positivism, natural law theory, legal realism, and so on—are ones that theorists have *argued for* based on complex considerations about laws, language, morality, and whatever else. But if jurisprudential theses are inferred on the basis of complex evidence, then we lack justification for dismissing peer disagreement in jurisprudence as *per se* evidence of irrationality.

There is a final observation worth making about the implications of our argument. Baude and Doerfler suggest that jurisprudential foes have nothing to learn from each other because positivists and non-positivists or originalists and living constitutionalists disagreeing with one another is "old news."[219] In one sense, pervasive disagreement about foundational legal matters is indeed old news—the fact of disagreement is common knowledge. But characterizing persistent disagreement as "old news" conveys the impression that there is nothing left to learn from this widely appreciated phenomenon. And that is a misimpression (as well as question-begging). It presupposes that the parties to such disagreements have already properly taken into account the significance of the fact that *prima facie* peers persistently disagree.[220] And there is no reason to

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[218] To put the point differently, one must *earn the right* to dismiss dissent as evidence of local irrationality, not necessarily with independent proof that any particular dissenter *is* locally irrational, but at the very least with general theoretical commitments concerning the means for discovering domain-specific truths that might support the charge of irrationality.

[219] Baude & Doerfler, *supra* note 5, at 319, 327, 330.

[220] At points, Baude and Doerfler suggest that judges have nothing to learn from one another when they have differing starting points. *See id.* at 326. That may be true in terms

suppose that they have, and reason to suppose otherwise given that the certainty that animates much public law advocacy seems to flout widely-embraced principles of belief-formation in the face of peer disagreement (consider, again, the contrast with science as well as with the philosophy of law). If the argument of this section is sound, then every encounter with a disagreeing legal official represents yet another opportunity to take disagreement more seriously.

This concludes our main argument for lowering one's confidence in contested theories of jurisprudence, and, derivatively, in contested public law theories. To summarize: since there is no available reason to suppose that dissent concerning jurisprudential matters is *per se* evidence of legal irrationality, these disagreements are epistemically significant; they cannot be reasonably ignored or given no evidential weight. And since *persistent* peer disagreement in jurisprudence suggests that there is a high risk of error concerning jurisprudential questions and that the evidence that would decide such questions is likely impoverished, certainty or a high degree of confidence concerning jurisprudential matters seems epistemically irresponsible.

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The core of our case for confidence-lowering is epistemic—it is about apportioning one's beliefs to the evidence. But doubt influences our choices; and an important question the discussion raises is whether the practical or institutional reasons that bear on how legal actors should conduct their disagreements point in the same direction as, or are otherwise compatible with, the epistemic reasons which favor uncertainty about contested questions of public law. A serious treatment of this issue (and the ethics of disagreement more broadly) would take us well beyond the scope of this Article. However, it is worth noting, briefly, that intellectual humility about jurisprudential questions should make conforming to key civic or political virtues easier.

Consider, for example, the virtue of political toleration.[221] Given that

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of the reasons for or against embracing any particular jurisprudence. Peer disagreement cannot always be "mined for information" that helps settle whether a proposition one cares about is true or not. *Id.* at 335. But peer disagreement does suggest that the evidence available to all sides is likely incomplete and that there is a serious risk of error. In other words, what judges can learn from the fact that generally rational individuals arrive at competing legal starting points is that certainty is unlikely to be a reasonable response to the available evidence.

[221] Landmark historical works on the virtue include JOHN LOCKE, A LETTER CONCERNING TOLERATION (1990) and JOHN STUART Mill, ON LIBERTY (1859). Among contemporary theorists, some ground the case for tolerance in the importance of reciprocal respect among citizens who differ fundamentally about the good and the true. *See, e.g.*, Albert Weale, *Toleration, Individual Differences, and Respect for Persons*, *in* ASPECTS OF TOLERATION (J. Horton & S. Mendus, eds., 1985); T.M. Scanlon, *The Difficulty of Tolerance*, *in* TOLERANCE: AN ELUSIVE VIRTUE (D. Heyd, ed., 1996). Others ground it in constraints on the kinds of political arguments that can legitimately be offered in a pluralist

individuals in a pluralistic society come to the project of collective self-governance with a broad range of competing views on law and public policy, it seems important for citizens to tolerate good-faith disagreements on legal questions—to accept that there will be such disagreements and to acknowledge that those who disagree are members in good standing in the legal community. Such acceptance should come more easily to those who appreciate the unsettled nature of fundamental jurisprudential questions.

Additionally, jurisprudential humility should reinforce some of the best traditions of our judiciary. To be clear, vigorous disagreement is an important part of that tradition. Yet our courts function best when even forceful judicial disagreement occurs within the bounds of widely recognized ethical norms.[222] Judges in America historically have tended to accept that their colleagues come to the bench with competing ideas about the nature of law and have tended not to question one another's judicial bona fides on the basis of those differences. After all, judges with disparate views have to work together to maintain a functioning judicial system, and the system's well-functioning depends on judges avoiding charges of lawless behavior. Judges sometimes go so far as to offer arguments based on jurisprudential theories that they themselves do not embrace, if only to show that their colleagues should come to a different conclusion by their

democracy. *See* JOHN RAWLS, POLITICAL LIBERALISM chapter 2 (1993). Still others find in tolerance a means of achieving social and political equality as well as integration. *See* CHARLES LARMORE, THE MORALS OF MODERNITY 165–90 (1996). To be sure, there are limits to toleration, but those limits do not undercut the importance of the virtue. *See generally* JOHN RAWLS, POLITICAL LIBERALISM (2005) (articulating a conception of political virtue that precludes the possibility of a compromise with unreasonable views that would oppose the basic principles of justice). *See also* Marilyn Friedman, *John Rawls and the Political Coercion of Unreasonable People*, *in* THE IDEA OF POLITICAL LIBERALISM 16 (Victoria Davion & Clark Wolf eds., 2000); JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION (2011); RICHARD BELLAMY, LIBERALISM AND PLURALISM: TOWARDS A POLITICS OF COMPROMISE (1999).

222 On norms of humility in judging, *see* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997) ("[A]n essential element of responsible judging is a respect for the opinions and judgments of others, and a willingness to suspend belief, at least provisionally, in the correctness of one's own opinions, especially when they conflict with the decisions of others who have, no less than judges, sworn an oath to uphold and defend the Constitution. We have heard a lot about "principle" and "the correct standard" and "integrity." I think we need to hear more about judicial humility."); see also Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS. L. REV. 127 (1998) (arguing that practical wisdom requires humility); see also Paul Caron & Rafael Gely, *Affirmative Refraction: Grutter v Bollinger through the Lens of the Case of the Speluncean Explorer*, 21 CONST. COMMENT. 65, 85–88 (2004) (using affirmative action cases to explore humility in judging). These writers do not make a case for judicial humility based on the epistemology of peer disagreement.

own lights.[223] Judicial humility manifests in other ways.[224] But the key point is that disagreement on the bench can coexist with acceptance and even mutual esteem.[225] In our view, the jurisprudential turn should properly reinforce norms of judicial comity, once we understand the epistemic reasons that counsel self-doubt in the face of fundamental legal disagreement.

IV. A MODEST PROPOSAL

We conclude with a modest proposal—or rather, a proposal for more modesty in legal argumentation that rests on contested first principles. In 1994, theoretical physicist Miguel Alcubierre published a paper demonstrating that faster-than-light travel was consistent with Einstein's field equations in general relativity . . . *if* a controversial assumption could be made, concerning the possibility of "negative mass" (or a negative energy density).[226] The paper concluded:

> A propulsion mechanism based on such a local distortion of spacetime just begs to be given the familiar name of the 'warp drive' of science fiction. . . . The metric I have just described has one important drawback, however: it violates all three energy conditions (weak, dominant and strong [3]). . . . We see then that, just as happens with wormholes, one needs exotic matter to travel faster than the speed of light. However, even if one believes that exotic matter is forbidden classically, it is well known that quantum field theory permits the existence of regions with negative energy densities in some special circumstances (as, for example, in the Casimir effect.)[227]

Alcubierre argues for a remarkable conclusion—the possibility of "the 'warp drive' of science fiction"—while being explicit about his non-standard assumptions falling outside of general acceptance. In our view, the Alcubierre approach is a good model for speculative legal theory. The works we have discussed do not propose something so radical as negative mass, but they do argue outward from controversial and non-standard first principles about law and legal validity, not all of which are explicitly identified or defended. These works are sophisticated and thought-provoking contributions by any measure. But their conclusions, with

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223 *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 610–26 (1987) (Scalia, J., dissenting) (making an argument from legislative history to counter the majority's argument from legislative history).

224 Arguably, respect for precedent and judicial restraint find a foundation in intellectual humility.

225 On the role of collegiality in judicial decision-making, see *Harry T. Edwards*, *The Effects of Collegiality on Judicial Decision Making*, 151 PENN L. REV. 1639 (2003).

226 Miguel Alcubierre, *The Warp Drive: Hyper-Fast Travel Within General Relativity*, 11 CLASSICAL AND QUANTUM GRAVITY L73–L77 (1994).

227 *Id*. at L17–L19.

sweeping implications for contemporary public law, follow only if one accepts their unargued-for starting points.

What would it mean for speculative legal theory to proceed on the Alcubierre model? Perhaps most centrally it would mean spelling out the conditional nature of the conclusions drawn. It would mean stating, in so many words, "this result follows only if one accepts starting premises *x*, *y*, and *z*, premises that are speculative and highly controversial." Such qualifications would go some distance towards conveying reasonable doubt and ambivalence concerning questions of public law. And it would encourage greater reflection on the assumptions about law working in the background of our arguments, and on the degree to which those assumptions are contested.

We would argue, further, that legal scholars bear a special responsibility to explain the character and degree of controversy that attends their fundamental assumptions. This kind of disclosure is especially important when the assumptions have an alluring *prima facie* plausibility that masks hard underlying questions,[228] and where the legal conclusions at issue are proximate to political controversies, heightening from the start some readers' receptibility to conclusions they might be motivated to prefer.[229] In other words, legal scholars should be attentive to the risks of motivated reasoning concerning politically charged questions, and caution readers against unqualified acceptance of underexamined assumptions.[230]

Ultimately, our case for a modest public law theory is an invitation to deescalate our legal disagreements.[231] On its face, the jurisprudential turn promised a firmer foundation for public law conclusions—a foundation in the very nature of law and legal validity. Instead, the jurisprudential turn reminds us that public law theories are eminently doubtable for being based on starting points that are deeply contested. Doubt might seem like an unwelcome payoff. Yet it serves the valuable function of promoting tolerance for dissent among those who share a legal system but are sharply

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[228] *See* Anya Bernstein & Glen Staszewski, *Judicial Populism,* 109 MINN. L. REV. (forthcoming) (highlighting the risks involved in judges pretending that "there are clear, correct answers to complex, debatable problems, treating reasonable disagreement as illegitimate").

[229] One need not be a legal realist or a cynic to acknowledge the great potential for motivated reasoning about law. *See* Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANNU. REV. LAW SOC. SCI. 307 (2013).

[230] This is especially true since political actors are often willing to opportunistically embrace a theory like originalism to promote their own agenda. On this point, see Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2021–23 (2012); *see also* Michael C. Dorf & Neil. H. Buchanan, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 291 (2021).

[231] On the considerable heat generated by legal disagreement in recent years, see *supra* notes 9-11, and 183 and accompanying text.

divided on questions of public law.[232] And tolerance paired with a healthy skepticism about one's ability to intuit what law, fundamentally, is may well be a precondition for the advancement of legal knowledge.

[232] Unchecked self-confidence contributes to polarization. Recall the charges discussed earlier, regarding non-originalist judges breaking their oaths of office simply for following their own good-faith assessment of what law, fundamentally, requires. *See supra* note 9.