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Lawfinding's Dilemma: Legal Formalism, or Judicial Neutrality

Judges wield enormous power. What justifies their exercise of that power? A familiar view is that their legitimacy lies in finding, not making, law. The Supreme Court has recently invoked this view to justify politically charged decisions, presenting itself as a neutral lawfinder. But this defense depends on two incompatible legal epistemologies: one where lawfinding is politically neutral because it rests on shared criteria and another where the law never runs out, even in very contested cases. These two theories of lawfinding are incompatible because shared criteria don't exist where we run into certain kinds of disagreements. Either lawfinding is always neutral, or the law never runs out. Both can't be true. The Court's self-image as a neutral "lawfinder" ignores this dilemma. I expose it, calling for a better account of judicial reasoning and its justification.

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INTRODUCTION

The Supreme Court wields enormous power. Its decisions interpret the scope of individual rights, the division of power among the federal branches, and the limits of government action under the Constitution. It is therefore crucial to understand what justifies those decisions.

A familiar and intuitive thought is that judicial decisions are justified because judges apply preexisting law. The law, after all, claims authority to direct the conduct of its subjects. Judges transmit these authoritative directives to the subjects and situations they govern. They find existing law. They don't issue new directives. Judges are neutral lawfinders, not political lawmakers.

Originalism has been an influential expositor of this image of judges as neutral lawfinders. Some versions of originalism emphasize the lawfinding role of the judiciary: Judges are required to identify and apply the original intent of the Framers, or the public meaning of their enactments, rather than "substitut[ing] their own values for the

Constitution's meaning."[1] Other versions emphasize the legal status of originalism. If judges are lawfinders, they ought to be originalists, because originalism is a theory of "what counts as law."[2]

In this Article, I draw attention to an overlooked tension between these strands of originalism. It is not simply that these are different ways of justifying originalist methods of lawfinding. It is that they represent incompatible views of what "lawfinding" *is*.

The broader lesson is that it is unhelpful to associate judicial decision-making, and its justification with lawfinding. If lawfinding describes all that judges do, it isn't sharply distinguishable from lawmaking. And if lawfinding *is* sharply distinguishable from lawmaking, judges do much more than that. It all depends on what we mean by lawfinding.

By "lawfinding," we might mean one of two ideas. We might mean that we come to acquire knowledge of the facts that make statements of law true. Or we might mean that we come to grasp the considerations that make intelligible and coherent the contents of those statements. These are two different ways of thinking about legal knowledge and the process of acquiring it. I call the former a "criterialist" model of lawfinding, and the latter a "coherentist" model.

A criterialist model of lawfinding vindicates a sharp distinction between lawfinding and lawmaking—it explains how judges could be transmitting preexisting law. But on a criterialist model of lawfinding, the law often runs out, and judges are required to do much else besides finding law.

A coherentist model of lawfinding vindicates the thought that the law might never, or only very rarely, run out. It explains how judicial reasoning can always be aimed at one objective: finding law. But on a coherentist model of lawfinding, it requires moral and political judgment. It isn't necessarily the neutral transmission of preexisting legal norms.

Two conclusions follow. The first is that the idea of judges as neutral lawfinders is unhelpful if we are to understand judicial reasoning and its justification. Lawfinding is either not neutral or not all that judges do. We need a much more textured and complicated picture of judicial

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1 John O. McGinnis et al., *The Legal Turn in Originalism: A Discussion*, 18–350 U. SAN DIEGO LEGAL STUD. RSCH. PAPER SERIES 3 (2018).

2 Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 559 (2013) (quoting Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994)).

reasoning. It is likely to be a politically contested picture. We won't be able to win debates by invoking the idea of lawfinding.

The second is that originalist theories might either be theories of a limited subpart of judicial reasoning or they might be normative theories in favor of particular moral and political judgments. But they can't be morally and politically neutral theories of judicial reasoning writ large.

Though this involves quite a bit of generalization, originalist theorists defend the Court's deployment of originalist methods in one of two ways. Public Meaning Originalists insist that originalism is justified because of the very nature of authoritative lawmaking, especially by way of textual enactment.[3] Original Law Originalism, by contrast, argues that originalism is *legally* required of judges.[4] The former relies on a firm distinction between the reasoning involved in lawmaking and that of lawfinding. The latter relies on the idea that there is (almost) always law to be found in the cases before the Court.

The divide between these strands of originalism is deeper than commonly assumed. It is not simply that they offer different ways of defending originalist methods. It is that they are offering sharply different accounts of judicial reasoning and its justification.

We should address this dilemma head-on. As things stand, the idea of neutral lawfinding is being offered up to do justificatory work it cannot perform. The idea shows up, for example, when criticism of the Court boils down to an assertion that the Court is abandoning its

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[3] *E.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 630–36 (1999); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 7 (2015) [hereinafter Solum, *Fixation Thesis*]; Lawrence B. Solum, *Originalist Theory and Precedent: A Public Meaning Approach*, 33 CONST. COMMENT. 451, 453–54 (2018); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. L. REV. 1371, 1375 (2019). *See generally* Lawrence B. Solum, *Original Public Meaning*, 2023 MICH. ST. L. REV. 807 (2023) [hereinafter Solum, *Original Public Meaning*] (clarifying the nature of public meaning originalism).

[4] *E.g.*, William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2391 (2015) [hereinafter Baude, *Is Originalism Our Law?*]; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 818, 833 (2015) [hereinafter Sachs, *Originalism as a Theory of Legal Change*]; William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1147 (2017) [hereinafter Baude & Sachs, *The Law of Interpretation*]; Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 548 (2019) [hereinafter Sachs, *Finding Law*]; William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. L. REV. 1455, 1457–58 (2018) [hereinafter Baude & Sachs, *Grounding Originalism*].

"solemn duty"[5] to neutrally find law by exercising political judgment, thereby *making* the law. For example, in *Dobbs*, the Court suggested that, because the reasoning in *Roe* reached beyond text and history, that Court had wielded "'raw judicial power' [and thereby] usurped the power . . . that the Constitution unequivocally leaves for the people."[6] Of course, the *Dobbs* decision has similarly been characterized as "a smokescreen to cover the Court's politically influenced decision-making . . . a brand of opportunism unconcerned with a moral principle."[7] To name another example, in the *Loper Bright* dissent, Justice Kagan dismissed the majority's purportedly legal reasoning as a politically motivated power grab: "The majority disdains restraint, and grasps for power."[8] All this might be right if judges are supposed to transmit power that has been allocated to others. But it would entail that the law often runs out.

It cannot then also be the case, as the Court suggests in *Loper Bright*, that the law almost never runs out. There, the Court said that even if a statute seems "impenetrable," it is still possible to ascertain its legal content by "exercising independent legal judgment."[9] Even in difficult or controversial cases, as the Court said in *Kisor*, judges have access to an "interpretive toolkit" that allows them to "reach a decision about the best and fairest reading of the law."[10] And it is this—the "single, best meaning"[11]—which guides and constrains the exercise of judicial power in most, if not all, cases and controversies before the Court.

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[5] Loper Bright Enters. v. Raimondo, Nos. 22-451, slip op. at 8 (U.S. June 15, 2024) (citing United States v. Dickson 15 Pet. 141, 162 (1841)).

[6] Dobbs v. Jackson Women's Health, 597 U.S. 215, 231, 268–69 (2022) (quoting Roe v. Wade, 410 U.S. 179, 222 (White, J., dissenting)).

[7] Michelle Goodwin, *Opportunistic Originalism:* Dobbs v. Jackson Women's Health Organization, 1 SUP. CT. REV. 2022 111, 187 (2023).

[8] Loper Bright Enters. v. Raimondo, Nos. 22-451 and 22-1219, slip op. at 4 (U.S. June 28, 2024) ("The majority disdains restraint, and grasps for power.") (Kagan, J., dissenting); *see also* Trump v. United States No. 23-939, slip op. at 12 (U.S. July 1, 2024) ("[T]he Court has unilaterally altered the balance of power between the three coordinate branches of our Government as it relates to the Rule of Law, aggrandizing power in the Judiciary and the Executive. . . .") (Jackson J., dissenting); and *Dobbs*, 597 U.S. at 215, 424 (quoting Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting) ("Power, not reason, is the new currency of this Court's decisionmaking.")).

[9] Loper Bright Enters. v. Raimondo, Nos. 22-451 and 22-1219, slip op. at 22–23 (U.S. June 28, 2024) (citing James Wilson).

[10] Kisor v. Wilkie, 588 U.S. 558, 600 (2019) (Gorsuch, J., concurring) (dismissing the idea that the law might run out where a statute is subject to two equally persuasive readings as "fantasy").

[11] Loper Bright Enters. v. Raimondo, Nos. 22-451 and 22-1219, slip op. at 23 (U.S. June 28, 2024) ("It therefore makes no sense to speak of a 'permissible' interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best.").

These two lines of reasoning don't hold up together. Either we give up on the idea that judges only find law, or we give up on the idea that law can always be found without recourse to political and moral judgment. Regardless of the route we take, we must conceptualize judicial reasoning in richer and more value-laden terms than simply calling judges "neutral lawfinders." That is where the important work lies.

This Article proceeds as follows. Part I sets out the two models of lawfinding in greater detail. Part II illustrates the one context where the idea of neutral lawfinding is most comfortably at home: interpreting enacted statutes. Part II also argues that judicial reasoning involves much more than the interpretation of statutes. The arguments in Part II set up the dilemma at the heart of this Article, which is discussed in Part III. Part IV concludes.

I
TWO ACCOUNTS OF LAWFINDING

It is a familiar idea that "lawfinding" marks legitimate judicial reasoning, while "lawmaking" represents an illegitimate usurpation of legislative or constitutional power beyond the province of the courts. As Chief Justice Roberts reminds us in the opening lines of *Loper Bright*, quoting Hamilton, "[T]he final 'interpretation of the laws' would be 'the proper and peculiar province of the courts.' Unlike the political branches, the courts would by design exercise 'neither Force nor Will, but merely judgment.'"[12] Legal judgment is described as neutral, impersonal, and apolitical. As Chief Justice Marshall famously wrote in *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is," a duty, Roberts reminds us, the Court is not at liberty to waive or surrender.[13]

Stephen Sachs has crisply formulated this idea: "What we ought to do, according to law, isn't always what we ought to do, given the existence of law."[14] The Court is merely telling us what the law is. It is not in the business of offering moral or political judgments. *That* is the province of the legislature, or the Framers, or "the People." The Court merely finds and applies the law these bodies have made. We also see this idea echoed in Justice Gorsuch's concurrence in *Loper Bright*. He

[12] Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 8–9 (U.S. June 15, 2024) (citations omitted).

[13] *Id.*

[14] Stephen E. Sachs, *According to Law*, 46 HARV. J.L. & PUB. POL'Y 1271, 1271 (2023).

writes that federal courts are in the business of "offer[ing] independent judgments about 'what the law *is*,'"[15] not of making new law. The federal judicial oath demands that judges remain constrained to a "lawfinding *rather than* [a] lawmaking role."[16]

The image of the judge as a neutral lawfinder is a soothing one. It offers a straightforward way of understanding and explaining the nature and limits of judicial power. Judges find and apply the law; they are not lawmakers.

But unfortunately, we are not entitled to this easy answer. The image of the judge as a neutral lawfinder is unworkable, because it depends on two inconsistent assumptions, each drawing plausibility from a different model of lawfinding. The first assumption is that lawfinding can be neutral (neutrality), and the second is that there is almost always law to be found (formalism).

The neutrality assumption is that there is a meaningful distinction between lawfinding and lawmaking, which turns on how legal content can come to be known. It is crucial to the Court's argument in *Loper Bright*. After all, if saying what the law is required something akin to lawmaking, the usurpation charge would be out of place. The neutrality assumption is that the reasoning involved in interpreting the law is distinct from moral and political reasoning because it does not depend on a judge's moral or political judgment. Justices and scholars tend to assume that there is such a meaningful difference. Often, the difference is explained by saying that judicial reasoning is "impersonal,"[17] or "artificial."[18] On this view, lawfinding does not require recourse to personal moral or political judgment. Judges interpreting the law don't do so on the basis of "policy preferences that [have] not made it into [the law]."[19] This is an assumption that the politically neutral nature of lawfinding distinguishes it from lawmaking. That's the *neutrality* assumption.

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[15] Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 1 (U.S. June 15, 2024) (Gorsuch J., concurring) (emphasis added) (Internal citations omitted).

[16] *Id.* at 19 (emphasis added).

[17] Bill Watson, *Did the Court in SFFA Overrule Grutter?*, 99 NOTRE DAME L. REV. REFLECTION 113, 134 (2023) (referring to the "impersonal decisionmaking that judges ordinarily aspire to").

[18] Baude & Sachs, *Law of Interpretation*, *supra* note 4, at 1096. ("The 'artificial reason' of the law, as Coke famously put it, offers artificial solutions to many questions in life.") (internal citations omitted).

[19] Loper Bright Enters. v. Raimondo, Nos. 22-451 and 22-1219, slip op. at 27 (U.S. June 28, 2024) (citing to James Wilson).

The *formalist* assumption is that "the law directs the judge to an outcome in all or nearly all cases."[20] Legal formalism, in the sense I use the term here, claims that there are always *legal* grounds for judicial decisions. Here's one way to explain what that means. We can distinguish between three kinds of norms relevant to judicial reasoning[21]: (1) source-based norms—norms that are legally valid because they conform to criteria of legal validity; (2) norms of legal reasoning—norms that guide us in interpreting our sources and applying the law to the cases before us; and (3) norms of legitimate adjudication—norms that regulate the exercise of judicial power. The first set comprises the content of existing law. The second set tells us how we should reason according to existing law. The third set tells us how judges ought to decide cases in light of the existing law and all other relevant moral and political considerations. Formalism claims that all three kinds of norms are part of the law: The law tells us how we ought to interpret the law, reason about the law, resolve controversies about the law, settle cases according to the law, and what the limits of judges' powers to do so are. So, even when we disagree deeply about the law, how it should be interpreted, or how a case should be decided, there are legal norms telling us how to proceed.[22]

The two assumptions are inconsistent because they draw on incompatible legal epistemologies, or models of lawfinding. The former neutrality assumption rests on a model of lawfinding wherein legal knowledge is knowledge of the facts that make statements of law true. The latter formalist assumption depends on a model of lawfinding

[20] Charles F. Capps, *Does the Law Ever Run Out?*, 100 NOTRE DAME L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4908863 (on file with the Oregon Law Review).

[21] For related (but not entirely equivalent) distinctions, see Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS. 1, 5 n.1 (1993); Bill Watson, *In What Sense Is Law a Moral Practice?*, 17 WASH. U. JURIS. REV. 87, 96–97 (2024).

[22] Capps, *supra* note 20.

wherein legal knowledge is knowledge of those considerations that explain the content of our statements of law.[23] Let me explain.[24]

Lawfinding is the acquisition of legal knowledge.[25] There are two views on how that acquisition works. On one view, knowledge of the law is ultimately grounded in discoverable features of our shared world, which make our statements of the law true. We can make true or false statements about those features because, in principle, other people can check the truth or falsity of our statements by examining our shared reality for themselves. On such a view, the truth of a statement such as "the Constitution confers capacious Presidential immunities" is grounded similarly to the truth of the statement "this painting is from the 18th century." Both are claims about the facts that make the content of our statements true. Now, the facts might be social, or natural, or perhaps even moral (depending on one's metaethics), but the crucial thing is that, on this view, legal knowledge is knowledge of certain kinds of interpersonally accessible and recognized *facts*. The grounds of legal knowledge are the facts that make statements about existing law true. *Lawfinding is finding such facts.*

But on another view, our knowledge of the law is ultimately grounded in the considerations that explain *why* these facts play this truth-making role in our legal practices. Knowledge of the law is grounded in the considerations that make legal content intelligible and coherent to us as *law*. To know what the law is, we don't have to know only what facts make statements of law true. More fundamentally, we

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23 "Explain" in a constitutive, rather than causal sense. It might strike jurisprudential readers that I am tracking a distinction here between the truth-makers of external statements of law and the justifications for internal statements of law. That's right, but I have a more specific debate in mind about the ultimate grounds of internal statements of law. Can there be sound internal statements of law when we have run out of the possibility of true external statements of law? Criterialists think no, whereas coherentists think yes. For an illustration of the former view, see Brian Leiter, *Theoretical Disagreements in Law: Another Look*, *in* ETHICAL NORMS, LEGAL NORMS: NEW ESSAYS IN METAETHICS AND JURISPRUDENCE 249 (2019). An example of the latter view is Luís Duarte D'Almeida, *The Grounds of Law*, *in* THE LEGACY OF RONALD DWORKIN 165–202 (2016).

24 On one model, lawfinding is reasoning about the modal determinants of legal content. On another, lawfinding is reasoning about the constitutive determinants of legal content. For this distinction between modal and constitutive determinants, see Mark Greenberg, *A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories*, *in* PHILOSOPHICAL ISSUES VOL. 15 299, 300 (2005).

25 Here I mean knowledge of legal content. By legal content, I mean legal rights, liberties, immunities, powers, and their correlatives. Legal statements such as "it is the law that . . ." are statements of legal content. We might roughly think that where a statement of law is *true*, our coming to believe its content in the right way amounts to acquiring legal knowledge. (But in saying this, I am glossing over much nuance).

need to know *why* those facts make statements of law true, so that we can understand what it is for content to be legal. Legal knowledge is grounded in this mastery of the idea of legality, similar to how we learn to master ideas like beauty or justice. We learn to organize and make legal sense of facts about our practices. On such a view, the soundness of a statement such as "the Constitution confers capacious Presidential immunities" is grounded similarly to the soundness of a statement like "the form of this ceramic vase blends function with artistic expression."[26] In both cases, the statement's soundness depends on considerations that explain, justify, and make *intelligible* its content. *Lawfinding is reasoning from these considerations toward appropriate legal explanations (or justifications) for the content of our statements of law.*

The difference between these two theories is not between positivist and antipositivist theories of law.[27] Rather, it is the difference between two perspectives one might take on the relationship between legal inference and the law—*legal reasoning* and *legal facts*. On what I will call a "criterial" model,[28] existing law is what makes our legal inferences correct.[29] On this view, we gain knowledge of the law, ultimately, in the way we gain knowledge of our shared world. Our legal knowledge is vindicated by facts that serve as publicly accessible and interpersonally verifiable criteria of validity.[30] Legal content is a fixed and discoverable feature of our shared world. *The law* is explanatorily prior to *legal inference*—legal judgment tracks

[26] For a recent criticism of progressive's use of originalism that draws on just this latter kind of theory of legal knowledge, see Farah Peterson, *The Fourteenth Amendment and the Vénus Noire*, 66 WM. & MARY L. REV. 191, 191–214 (2024).

[27] And despite the overly rash way in which this debate is often reduced to one about the grounds of law, the precise disagreement between positivism and antipositivism is not all that easy to pin down. For a detailed discussion, see generally Giorgio Pino, *Positivism, Legal Validity, and the Separation of Law and Morals*, 27 RATIO JURIS. 190 (2014).

[28] The criterial view has in mind the grounds of law: those facts that serve as truth-makers of legal statements.

[29] I borrow the terms "criterial" and "coherentist" from Meir Yarom, whose excellent work exposes this tension in Raz and Kelsen's work. *See generally* Meir H. Yarom, *Positivism and Unity*, 36 CAN. J.L. & JURIS. 241 (2023) (Can.); Meir H. Yarom, Validity Undone? (Feb. 2025) (unpublished manuscript) (on file with author).

[30] The shared world need not only be physical, depending on how solicitous one's ontology is of *abstracta*. But the very notion of facticity depends on interpersonal accessibility, and this is the focus for criterial theories of legal knowledge.

preexisting legal content. Such a view can be positivist,[31] or it can be antipositivist.[32]

By contrast, on what I will call a "coherentist" view,[33] law becomes intelligible through the exercise of legal judgment. Legality is much like beauty or justice: We grasp these phenomena only through the ongoing process of honing and applying distinctively legal, prudential, or aesthetic judgment. Legal knowledge is competence in administering the idea of legality. Statements of law are justified when their content renders coherent the law's demands considering a range of facts about our practices and the higher-level principles implicit within them. Legal judgments organize existing facts into a coherent framework that makes legal demands intelligible to us. Just as aesthetic judgment makes a vase intelligible as artistically expressive, the appropriate exercise of legal judgment reveals how facts, principles, and practices fit together in *legal* terms. In this way, legal inference is explanatorily prior to the law: The law and its criteria of validity are always becoming intelligible and accessible through the ongoing process of legal justification and explanation. Legal content does not exist in virtue of a fixed set of discoverable facts but as a justification (or explanation) that renders those facts legally intelligible. Such a view can be positivist,[34] or it can be antipositivist.[35]

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31 *E.g.*, John Austin and Joseph Raz.

32 *E.g.*, John Finnis and Aquinas. Giorgio Pino rightly notes that, in principle, *any* fact can be a criterion of legal validity—even moral facts. For the criterialist, the law exists in virtue of facts of whatever kind. For the criterialist, the point is the *facticity* of criteria of validity. *See* Giorgio Pino, *Sources of Law*, *in* OXFORD STUDIES IN PHILOSOPHY OF LAW 58, 63–64 (John Gardner et al. eds., Oxford Univ. Press 2021) (A source of law is a fact. In principle, it can be any kind of fact, though legal positivism insists that sources are always human or social facts "pertaining to human actions and decisions (as opposed to, say, facts about human nature)."); Mathieu Carpentier, *Sources and Validity*, *in* LEG. VALIDITY SOFT LAW 75, 76 (Springer Int'l Pub. 2018) (citing an influential 1939 article by Mircea Djuvara stating, "Every source of law is a fact. It is a fact from which norms that are to be applied to social activities stem.").

33 The coherentist view has in mind with the grounds of law those facts or considerations that *explain* the relationship between the content of law and its truth-makers.

34 *E.g.*, Hans Kelsen. Kelsen insists that a pure theory of law must be purged of facts.

35 *E.g.*, Ronald Dworkin. The distinction between criterial and coherentist models of lawfinding is related to what David Dyzenhaus has identified as the crucial fault line in legal theory: between dynamic and static theories of law. Criterial theories of law offer static pictures of law: the law exists as a state of affairs. Coherentist theories of law offer dynamic pictures of law: the law exists as a process that generates legal content. Crucially, positivism is divided between these two theories, with Raz and Austin offering static theories and Kelsen offering a dynamic theory. *See* DAVID DYZENHAUS, THE LONG ARC OF LEGALITY: HOBBES, KELSEN, HART (Cambridge University Press 2021); *see also* Hans Kelsen, *Pure*

If we were to ignore the distinction between these two epistemologies, we would fall into the trap of using lawfinding to justify judicial reasoning without noticing that we are, in fact, invoking two very different accounts of that reasoning. The result would be a discourse that both runs with the hares and hunts with the hounds, equivocating between an understanding of judicial reasoning as limited to lawfinding on the one hand, and an understanding of that reasoning as clearly demarcated from moral and political judgment on the other. I believe this is what we see in our judicial discourse broadly, but more narrowly in some strands of originalist theory.

First, let's consider our broader judicial discourse. The Supreme Court seems to have adopted both the formality and neutrality assumptions together. In addition to insisting that constitutional law flows from a preexisting and historically situated legal enactment,[36] the content of which judges discern via neutral lawfinding,[37] judges have *also* been insisting that they find the law by drawing on the justificatory materials implicit in the following: history and tradition,[38] common law methods,[39] definitions[40] and doctrines,[41] constitutional

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Theory of Law and Analytic Jurisprudence 55 HARV. L. REV. 44, 70–71 (1941) (discussing the tension between dynamic versus static theories of law).

36 *E.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022) ("The Second Amendment 'is the very product of an interest balancing by the people.'"); D.C. v. Heller, 554 U.S. 570, 628 n.27 (2008) (referring to the Court's task as that of "evaluating laws under constitutional commands"); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 537, 543 (2022) (interpreting the First Amendment in light of the Framers' intentions, and referring to the content thus interpreted as "constitutional commands"); Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 8 (U.S. June 28, 2024) (Gorsuch J., concurring) ("[T]he Constitution promises, the American people are sovereign and they alone may, through democratically responsive processes, amend our foundational charter or revise federal legislation.").

37 Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 346 (2022) (Kavanaugh, J., concurring) ("The *Roe* Court took sides on a consequential moral and policy issue that this Court had no constitutional authority to decide. By taking sides, the *Roe* Court distorted the Nation's understanding of this Court's proper role in the American constitutional system and thereby damaged the Court as an institution.").

38 *See generally* Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477 (2023) (discussing the Court's history and tradition jurisprudence).

39 *See, e.g.*, *Loper Bright Enters.*, slip op. at 21–22 (Gorsuch, J., concurring).

40 *See generally* Owen B. Smitherman, *History, Public Rights, and Article III Standing*, 47 HARV. J.L. & PUB. POL'Y 168 (2024) (discussing Justice Thomas's suggestion that the Court rely on the founding era distinction between private and public rights in standing doctrine).

41 *See, e.g.*, *Loper Bright Enters.*, slip op. at 3–5 (Gorsuch, J., concurring) (referring to the practices of "common law judges" and the writings of Lord Mansfield in *Rust v. Cooper* to determine the legal content of Article III § 1).

liquidation,[42] an implicit law of interpretation,[43] and, consequently, that the law almost never runs out.[44]

Second, some originalist scholars also seem to adopt both assumptions together. William Baude and Stephen Sachs, for instance, argue that the law is found through impersonal or artificial reason[45] and that it forms a "seamless web,"[46] often incorporating "unwritten law."[47] This suggests that, in most cases before the Court, there is law to be found (formalism) in a neutral manner (neutrality). To be sure, they acknowledge the "in principle"[48] possibility that the law may run out. When "the law is off the table,"[49] they say, judges must decide cases by making all-things-considered normative judgments, just like all other moral agents.[50] But this acknowledgement plays a surprisingly limited role in their theory. They argue that impartial legal reasoning, especially about the law of interpretation, provides answers in many more cases than commonly assumed. "[L]awyers ought to be looking for them,"[51] they write. Whether Baude and Sachs embrace both neutrality and formalism together depends on how capacious one believes the law of interpretation, and the broader corpus of unwritten

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42 *See generally* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (discussing this concept and the Court's "reintroduction" of it in *NLRB v. Noel Canning*).

43 *Loper Bright Enters.*, slip op. at 26 ("Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences."). On the unwritten law of interpretation generally, see generally Baude & Sachs, *The Law of Interpretation*, *supra* note 4.

44 *Loper Bright Enters.*, slip op. at 22–23 ("[S]tatutes, no matter how impenetrable, do—in fact, must—have a single, best meaning. That is the whole point of having written statutes; 'every statute's meaning is fixed at the time of enactment.' So instead of declaring a particular party's reading 'permissible' in such a case, courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity. . . . In the business of statutory interpretation, if it is not the best, it is not permissible." (quoting Wis. Cent. Ltd. v. United States, 585 U.S. 274, 278 (2018))).

45 Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1096 (referring to law offering "artificial" answers to deeper questions, as helping us arrive at "contingent legal settlements of . . . normative debates." One of the most important functions of a legal system is "to replace real answers with fake ones"); *see* Sachs, *supra* note 14.

46 Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1101.

47 Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1803 (2013) [hereinafter Sachs, *The "Unwritten Constitution"*]; Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1822 (2012) [hereinafter Sachs, *Constitutional Backdrops*]; Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1084; Sachs, *Finding Law*, *supra* note 4, at 536; Baude & Sachs, *Grounding Originalism*, *supra* note 4, at 1460.

48 Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1146.

49 *Id.*

50 *Id.*

51 *Id.* at 1147.

law, to be. At minimum, it seems to me, their view is that the law very *rarely* runs out.

These lines of argument are threatened by an internal inconsistency. Either we can insist, along with the majority in *Dobbs*, that the law is subverted whenever the Justices discern legal content through reasoning that requires moral or political discretion.[52] Or we can argue, along with the majority in *Loper Bright*, that the Justices find the law by looking beyond particular criteria of validity toward background principles and considerations that yield a "best reading" of the law.[53] But we can't do both.

Most immediately, this means that originalism *really* is a "they" and not an "it": *They* are not theories of one idea. Some originalist theories are about the explanations for statements of law, and others are about the facts that might make such statements true. The former theories are entitled to say that the law doesn't run out, but not that judicial reasoning is clearly demarcated from moral and political judgment. The latter theories are entitled to insist on that demarcation, but they must acknowledge that judges must be more than originalist.

More broadly, I believe this points to the need for a much richer and more complicated account of judicial reasoning and its justification. Saying that judges are lawfinders is not saying enough to understand what it is that judges do or when they are justified in doing so.

But to see this more clearly, we need to grapple with the dilemma: Why, exactly, are coherentist and criterial models of lawfinding incompatible? Part II engages in theoretical stage-setting before Part III sets out the dilemma.

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[52] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239–40 (2022) (defending the Court's reliance on "history and tradition" as a corrective to past substantive due process decisions that "led the Court to usurp authority that the Constitution entrusts to the people's elected representatives."); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (cautioning against allowing "the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court").

[53] Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 5 (U.S. June 28, 2024) ("[W]hen courts confront statutory ambiguities . . . they are not somehow relieved of their obligation to independently interpret the statutes. Instead . . . courts use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity. . . . [I]n an agency case as in any other, there is a best reading all the same—'the reading the court would have reached' if no agency were involved." (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 n.11 (1984)).

II
LAWFINDING AND LEGAL SOURCES

Judges are lawfinders, and *not* lawmakers, precisely where someone else is supposed to be the lawmaker. The thought is that someone else with legal authority has made law that the judiciary is then tasked with finding. In other words, neutral lawfinding depends on an image of law as enacted statute—law as legally valid command.[54]

That image is a familiar one. It is of "the [N]ation,"[55] or "the people"[56] having issued a sovereign "command"[57] at a particular moment in time, which allocates the authority to make law between the branches of government (and imposes procedural and substantive limits on that power).[58] On this image, some of us, at some point in time, were endowed with the authority to "come up with norms in order

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54 *E.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022) ("The Second Amendment 'is the very product of an interest balancing by the people.'" (quoting District of Columbia v. Heller, 554 U.S. 570, 635 (2008))); *Heller*, 554 U.S. at 628 n.27 (2008) (referring to the Court's task as that of "evaluating laws under constitutional commands"); Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 543 (2022) (interpreting the First Amendment in light of the Framers' intentions, and referring to the content thus interpreted as "constitutional commands"); *Loper Bright Enters.*, slip op. at 8 (Gorsuch, J., concurring) ("[T]he Constitution promises[] the American people are sovereign and they alone may, through democratically responsive processes, amend our foundational charter or revise federal legislation.").

55 *E.g.*, Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 557 (2014) (citing Edwin Meese III, U.S. Attorney Gen., Speech Before the American Bar Association (July 9, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47, 54 (Steven G. Calabresi ed., 2007)) (defending originalism as the only way to discover the Constitution which was "accepted and ratified by the nation").

56 *E.g.*, *Bruen*, 597 U.S. at 17 ("The Second Amendment 'is the very product of an interest balancing by the people' . . . . It is this balance—struck by the traditions of the American people—that demands our unqualified deference." (quoting *Heller*, 554 U.S. at 635)). Of course, it is not clear that "traditions" do any sort of "commanding," which leads to new questions about the Court's historical-analogical reasoning in *Bruen*. *See generally* Joseph Blocher & Eric Ruben, *Originalism-by-Analogy and Second Amendment Adjudication*, 133 YALE L.J. 99 (2023).

57 The Court sometimes talks of law resulting from the "commands" of the Constitution. *E.g.*, *Heller*, 554 U.S. at 628 n.27 (referring to the Court's task as that of "evaluating laws under constitutional commands"); Jack Daniel's Props., Inc. v. VIP Prods., LLC, 599 U.S. 140, 165 (2023) (Gorsuch, J., concurring) ("It is not entirely clear where the *Rogers* test comes from—is it commanded by the First Amendment . . . ."); *Bruen*, 597 U.S. at 8 (citing Konigsberg v. State Bar of Cal., 336 U.S. 36, 50, n.10 (1961)) (referring to the Second Amendment's "unqualified command").

58 For a careful criticism of this image, see Andrew Coan & David S. Schwartz, *The Original Meaning of Enumerated Powers*, 109 IOWA L. REV. 971 (2024).

to settle what is to be done."[59] On an originalist theory, for example, that moment is the Founding, and the Constitution "a legal command enacted by people in authority hundreds of years ago."[60] These legal commands, in turn, determine who gets to make new laws, by what procedures, and sets some substantive limits on legal content. To know what the law is, we ask what someone with the authority to make the law "commanded." And we trace that authority to some ultimate, highest, sovereign command.[61] This draws on a familiar jurisprudential association between the very *concept* of law and intentional exercises of lawmaking authority.[62] Even if it is, abstractly, merely the law that claims authority to command us, the image is there: a preexisting command that bears authority.

The image of law as command is an especially powerful force supporting originalist thought. It is powerful because originalism is centered on the twin ideas of (1) an intentional communicative act, by (2) someone with the authority to command us. The two ideas are already visible in Brest's early definition of originalism: "the familiar approach to constitutional adjudication that accords *binding authority* to the text of the Constitution [and] the *intentions* of its adopters."[63] These two ideas—of an intentional act of textual communication, and the authority of the actor—are captured in the fixation thesis and constraint principle, respectively. This forms the core of common ground in originalist thought in its many varieties.[64]

Despite ongoing disagreement about the nature of "public meaning," public meaning originalists conceive of it as "the meaning of a text at

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59 Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 539 (2013).

60 Baude, *Is Originalism Our Law?*, *supra* note 4, at 2366.

61 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852–54 (1989); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143 (1990).

62 This is perhaps most famously associated with Austin's command theory of law, or to be more precise, with H. L. A. Hart's rendition of it in H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594–606 (1958). But the close association between law and exercises of authority survives in Raz, who primarily conceptualizes authority by considering discrete intentional *exercises* of normative powers, such as promising. *See* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 3–27 (Oxford University Press 2nd ed. 2009). For an analysis of the close affiliations between Austin and Raz's theories of law, see DYZENHAUS, *supra* note 35, at 423–29.

63 Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 204 (1980) (emphasis added).

64 Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV 1953, 1964 (2021).

enactment."[65] They focus on the moment of enactment because they believe the meaning of the constitutional text "is fixed at the time each provision is framed and ratified," *and* "that fixed meaning ought to constrain constitutional practice."[66] This draws on the idea that the Constitution is, essentially, a form of statutory command.

The fixation thesis holds that the communicative content of the Constitution was fixed at the time it was ratified.[67] This thesis gets its plausibility from the idea that the Constitution is produced by an *intentional act of will*, an institutional speech act like asserting, directing, declaring, expressing, etc. Indeed, this is visible in Edwin Meese's early description of originalism as "a jurisprudence of original *intention*."[68] Now, to be sure, originalism has since moved from a focus on the *intention* of the Framers toward the objective original meaning of their enactments.[69] But that shift is still consistent with, and draws its currency from, the focus on the communication as intentional human activity.[70]

The constraint principle is that the communicative content of the constitution "should *constrain* constitutional practice": that judges (and

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[65] John O. McGinnis & Michael B. Rappaport, *What Is Original Public Meaning?*, U.S.D. Legal Stud. Rsch. Paper Series 24-017 (2024) (emphasis added), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4948825 [https://perma.cc/C6PC-6Y78]. *See also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 121 (rev. ed. 2014) (discussing the "objective meaning of 'arms' in the Second Amendment *at the time of its enactment*") (emphasis added).

[66] Solum, *supra* note 64, at 1958.

[67] *See generally* Solum, *Fixation Thesis*, *supra* note 3 (analyzing the fixation thesis).

[68] Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455, 464–66 (1986) (emphasis omitted).

[69] *See, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. WASH. L.J. 713, 720–22 (2011).

[70] *See* Saul Cornell, *Reading the Constitution, 1787–91: History, Originalism, and Constitutional Meaning*, 37 LAW & HIST. REV. 821, 825 (2019) (discussing Solum's focus on Gricean semantics and its presupposition of institutional intentionality). *See generally* Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945 (1989) (setting out the difficulties with Gricean semantics in these institutional contexts). The firm focus on intentionality is also seen, for example, in Barnett's analogy between contracts and constitutions. He notes that we don't undermine a contract's grounding in individual intent—consent—by interpreting it in objective terms. Barnett does not trace constitutional legitimacy to consent, but his justification for formality is similarly tied to the idea of intentional lawmaking: The evidentiary, cautionary and channeling functions all depend on there being some intentionally made *thing*, an enactment, which is evidenced, which ought to be enacted with caution, and which can be channeled. *See* Barnett, *supra* note 3, at 630–36. So even when the focus is not squarely on intentions, originalism treats the Constitution "as though it was written by [a] group called 'We the People.'" Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 60 (2006) (emphasis omitted).

legal subjects) "owe a duty of fidelity" to that meaning.[71] The constraint principle holds that the fixed meaning of the Constitution has *authority* over judges:[72] that it is binding on them. Many originalist theorists believe this is a binding duty of "political morality."[73] Original law originalists would argue that it is a binding *legal* duty.[74] Regardless of the shape the authority and our duties toward it, the crucial animating idea is that an intentional communicative act makes authoritative demands of us. In other words, the speech act is like an imperative: a command issued by someone with authority over us.[75] This is the imagery that makes it natural to write of "the *law*" as, simply, "the communicative content of the commands given . . . .[76]

So here, we have the central paradigm case animating the idea of judges as neutral lawfinders: a legally valid enactment operating as a command.

In this Part, I discuss the paradigm case of a statutory command in more detail and explain why enacted commands enable neutral lawfinding (Section II.A). I then show that lawfinding must necessarily encompass much more than finding statutory commands (Section II.B). This gives rise to our dilemma: These other activities could be understood in a way that preserves the neutrality assumption, or the formalist assumption, but not both. That is the topic of Part III. First up, however: statutory commands.

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[71] Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 6–8 (April 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 (on file with the Oregon Law Review).

[72] *Id.* at 41.

[73] *Id.* at 5. For Sachs's account of a moral duty of candor which binds those who make claims of what the law is, see generally Stephen E. Sachs, *According to Law*, 46 HARV. J.L. & PUB. POL'Y 1271 (2023).

[74] Baude, *Is Originalism Our Law?*, *supra* note 4, at 2392–97.

[75] Solum, *supra* note 64, at 1970. It is *like* an imperative because its directive might not be directly action-guiding; it may also be power-conferring (and thereby liability-imposing) or liberty-conferring (and thereby disability-imposing). But in each of these cases, the *reason* for the validity of the power or liberty is assumed to be the authority of the intentional communicator of such powers or liberties.

[76] Ilan Wurman, *The Meaning of Meaning*, *in* A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 38 (2017). Of course nothing turns on terminology as such, but it is telling how often the idea of a command seems to fit naturally with the arguments these authors put forward. For other instances where authors rely on the imagery of command, see Solum, *Fixation Thesis*, *supra* note 3, at 33; RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 129 (rev. ed. 2014); Baude, *Is Originalism Our Law?*, *supra* note 4, at 2366; Sachs, *supra* note 14, at 1292.

A. The Paradigm: Statutory Commands

We recognize, rightly, that many of our legal norms are valid *simply because* they were validly enacted by someone with the legal authority to do so. When (i) a duly authorized legislature (ii) enacts a statute according to the legally required procedure, that enactment brings new valid law into existence.[77] Suppose, for instance, the Illinois Legislature passes a new Vehicle Code. That resulting law regulates speed limits, driving licenses, rules of the road, and so on. The law is legally valid *just because* of the legal norms that empower the Legislature to enact it. We recognize, in other words, legally valid enactment as a *reason* for legal validity. If a law requiring that I keep my speed under fifty-five miles per hour was validly enacted, that means it is true that the law requires me to keep under fifty-five miles per hour.

When I say this law is valid, I mean it exists: Our statements of the law regulating traffic in Illinois have objective meaning. Our statements of this law are true or false. We can be wrong about what the law in Illinois requires of drivers and for this reason, we can be *right*. In the case of a legally valid enacted statute, the new law has this objective existence *just because* of an institutional act of will: the Legislature's say-so. Legally valid enactments are one kind of legal source.

1. One Kind of Legal Source: A Legally Valid Enactment

Legal sources are facts from which we derive legal norms—facts that contribute to the truth of statements of law.[78] If legal norms exist, statements about the content of the law can be *true* or *false*. Sources are part of what make them true or false. It can be *true* that the law requires

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[77] One might want to insist that there is a further condition: that the enacted norm not contravene higher-level norms or contradict other norms. But this trades on a conflation of formal and material validity. For a recent discussion of just this conflation, see Thomas Adams, *Criteria of Validity*, Sept. 9 2024 (forthcoming in The Modern Law Review), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4950716 (on file with the Oregon Law Review). For a thorough discussion of the important, but neglected, distinction between formal and material validity, see Paolo Sandro, *Unlocking Legal Validity: Some Remarks on the Artificial Ontology of Law*, *in* LEGAL VALIDITY AND SOFT LAW 99, 110–12 (Pauline Westerman et al. eds., Springer Int'l Publ'g 2018).

[78] There is a recent meme in jurisprudential literature that positivism is committed to the view that legal sources are the sole, constitutive, truth-makers of statements of law. That's not the positivist view. *See* Brian Leiter, Critical Remarks on Shapiro's *Legality* and the "Grounding Turn" in Recent Jurisprudence (Sept. 16, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3700513 (on file with the Oregon Law Review).

that I drive below fifty-five miles per hour, for example. Many things must be the case for this to be true, and we call some of those things sources of law.

More technically, then, legal sources are facts with a particular normative-institutional standing: facts that *justify* our conclusions about the legal validity of particular norms.[79] While we refer to statute as a legal source, that object is not the source by itself. It is more precise to say that the legal source is a complex set of facts about how the text was produced and its content: how it came to be and what it means.[80]

Here is a simple example to illustrate. Suppose someone asserts that I am legally prohibited from driving faster than fifty-five miles per hour on highways outside urban districts unless otherwise posted. Their statement would be true if a norm imposing this prohibition is valid. And the norm is valid, at least at first glance, because the Illinois Vehicle Code contains text with that meaning.[81] The text of the Illinois Vehicle Code is a legal source.[82]

What makes the text of the Illinois Vehicle Code a legal source? Put differently, what confers on this fact its normative-institutional standing *qua* legal source? The answer is that there is a further, higher, legally valid norm that empowers the General Assembly to produce, change, and extinguish legal sources via certain procedures. Plausibly, that is the norm vesting legislative power in the Illinois General Assembly. And this higher legal norm is valid because of the text of

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[79] Pino, *supra* note 32, at 64–65. "Justify" as I have used the term here is ambiguous between *legal* justification and something like *social-institutional* justification. I disambiguate the two senses of justification below, when I draw a distinction between socially efficacious norms and legally valid norms. Many legal theorists don't distinguish between the two senses. But I think the distinction is important. Legal justification depends on valid law. Social-institutional justification depends on social and political acceptance. The crucial point is that at least some justifications in our legal system will be social and political, rather than legal in this narrow sense. That is what I turn to in Part III.

[80] *Id.* at 67 ("A source of law . . . is a fact, or a complex set of facts. In the most paradigmatic cases, such facts are procedurally organized in order to produce a text. In these cases, 'source' denotes both some facts (a procedure), and the product of these facts (a text).") (internal citation omitted).

[81] 625 ILL. COMP. STATS. 5/11-601(b), (d) (2024). How closely its semantic content corresponds to the legal content it validates is, of course, still an open question at this stage of my discussion. I turn to that momentarily.

[82] Here, I am talking of token sources—a specific statute—rather than type sources. Pino would talk of the source being valid, and would confine such validity to validly enacted sources. This means that, for Pino, there are formal legal sources that cannot be legally valid. This is correct, but it draws on a specific notion of validity—formal validity. *See* Pino, *supra* note 32, at 68.

Article IV, Section 1, of the Illinois Constitution, an even higher source.[83]

Here, with legally valid enactments, the image of a "legal command" is most appropriate. Law is produced by exercises of legally conferred lawmaking power, and each exercise of power depends on an even higher legal norm for its authority. H.L.A. Hart called these higher-level legal norms *rules of change*: They empower some of us to make and change the law that applies to the rest of us.[84] Hart did not clearly distinguish, however, between rules of change that are legally valid and those that are socially accepted.[85]

The paradigmatic case I am exploring here relies, crucially, on rules of change that are *legally* valid. It depends on the idea that a legal source can be validated by a further, higher, legal source. It is in this context that it makes sense to think of law as produced by a chain of hierarchically ordered lawmaking activity: law governing its own production.[86] When we model all legal sources on statutory enactments, we implicitly assume that all law is the product of legally conferred lawmaking power. We assume, in other words, that all law draws validity from *legally valid* rules of change.

Stephen Sachs has explicitly recognized the close relationship between originalist theory and the Hartian notion of rules of change. And though he does not say so explicitly, his focus seems to be on *legally valid*, rather than *socially accepted*, rules of change. That is key to his insistence that we can be *mistaken* about our rules of change: Our rules of change are legally valid—they depend on what the law is, not on what we politically accept.[87] His originalist position (original law originalism) is, simply, that "[o]ur law is still the Founders' law, as it's been lawfully changed."[88] The emphasis on *lawful* change is this: that

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83 ILL. CONST. art. IV, § 1.

84 H.L.A. HART, THE CONCEPT OF LAW 95 (3d ed., Oxford Univ. Press 2012); *see, e.g.*, Sachs, *Originalism as a Theory of Legal Change*, *supra* note 4, at 838.

85 It is precisely the thought that rules of change can be socially accepted, rather than legally valid, that has led some to argue we don't need rules of recognition in addition to rules of change in our theory of law. *See, e.g.*, Jeremy Waldron, *Who Needs Rules of Recognition?*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 327 (Matthew Adler & Kenneth Einar Himma eds., Oxford Univ. Press 2009).

86 In this context, "[l]aw validates law and becomes in this sense a kind of self-making or 'autopoietic' system . . . ." NEIL MACCORMICK, H.L.A. HART 140 (Stanford Univ. Press 2nd ed. 2008).

87 *See* Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2268–78 (2014).

88 Sachs, *Originalism as a Theory of Legal Change*, *supra* note 4, at 838–39. (Sachs's argument is that "[a]lleged changes made since the Founding" need "*legal* justification":

the Founders' law does not change except through exercises of lawmaking power that are, at the time they occur, authorized by legally valid rules of change.[89]

That is also how Justice Scalia believed Chief Justice Marshall understood constitutional law in *Marbury v. Madison*: as the product of a legally valid exercise of lawmaking power. For Scalia, it is "central" to Marshall's analysis of the Constitution as "paramount" law that it is "an *enactment* that has a fixed meaning."[90] This is the paradigm case: a text produced by someone with the legal authority to change the law, who can therefore, by their mere say-so, make the law. The reason for the validity of the law they make is their lawmaking authority, not the merit or morality or political wisdom of the law they made. That vindicates the neutrality assumption, as the next Section shows.

2. Neutral Lawfinding in Statutory Commands

Suppose we are judges, tasked with finding out what the legislature enacted. Whatever they enacted *is* the law, *just because they enacted it*.[91] In other words, lawfinding would require replacing our own say-so with that of the legislature. The statute functions like a command, analogous to when a superior officer commands me to run across a field.[92] When we encounter justified commands, they require that we replace our personal judgment with the commander's judgment. If I am

We should be able to point to legally valid grounds for accepting those changes as valid.) (emphasis added).

[89] Sachs, *Originalism as a Theory of Legal Change*, *supra* note 4, at 839.

[90] Scalia, *supra* note 61, at 854 (William Howard Taft Constitutional Law Lecture, 1988) (emphasis added).

[91] This is the Standard Picture as identified by Mark Greenberg. *See generally* Mark Greenberg, *The Standard Picture and Its Discontents*, 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39 (2011) (setting out the Standard Picture) (I thank Bill Watson for inviting me to make this connection clearer.). For further discussion of the Standard Picture, see Aaron Graham, *The Standard Picture and Statutory Interpretation*, 36 CAN. J.L. & JURIS. 341, 342–45 (2023); Bill Watson, *In Defense of the Standard Picture: What the Standard Picture Explains That the Moral Impact Theory Cannot*, 28 LEGAL THEORY 59, 76–88 (2022); Larry Alexander, *In Defense of the Standard Picture: The Basic Challenge*, 34 RATIO JURIS 187, 187–88 (2021).

[92] Joseph Raz has done much to explain the authority of law in terms of intentional *exercises* of authority, like command. He models legal authority on normative powers, like that of promising, and focuses his analysis on the moment of exercising that power. RAZ, *supra* note 62, at 3–27. This has generated a large literature analyzing intentional exercises of authority, such as commands, to explain legal authority in terms of practical reason. *See generally, e.g.*, David Enoch, *Authority and Reason-Giving*, 89 PHIL. & PHENOMENOLOGICAL RSCH. 296 (2014).

commanded to run across the field and then start reasoning from first principles about whether I have good reasons to run across the field, I have misunderstood what it is to be commanded.[93]

Commands, by their very nature, require that the commanded reason impartially or, we might say, neutrally. If a superior officer commands me to run across a field, that purports to give me a reason to do so *independent* of the reasons I might have for running across the field. My own reasons are preempted, and replaced, by the commander's command. When statutes operate like commands, lawfinding is impartial in just the way the neutrality assumption suggests.

When we are dealing with validly enacted statutes, the underlying reason for the validity of the new law is the lawmaking authority of the institution that produced it, not the content of the law produced. When we say the new law is valid, we simply mean that it was produced in accordance with preexisting, legally valid, authorizing laws (legally valid rules of change). This is exactly the kind of observation we might make about the validity of a contract or a will: We are not saying anything about the *content* of these instruments; we are saying something about their provenance and its legal significance.[94] This is why the metaphor of "command" is so apt. Commands are binding not because of *what* they demand but because *of the authority by which* they are issued.

This basic point can be stated in more technical terms as follows. Legally valid enactments are authoritative legal reasons to use their norm formulations when determining what the law is.[95] Such

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93 JOSEPH RAZ, PRACTICAL REASON AND NORMS 37–39 (2d ed., Princeton Univ. Press 1999).

94 Alf Ross, *Validity and the Conflict Between Legal Positivism and Natural Law*, *in* NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES 147, 158 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., Oxford Univ. Press 1999).

95 Pino, *supra* note 32, at 82. Its norm-formulations are often contained in texts, but might be expressed in other forms, such as verbal commands.

I follow Hart here, who in turn acknowledges his debt to Raz and Hobbes. In THE CONCEPT OF LAW, Hart argued that understanding the "general idea" of obligation is a "necessary preliminary to understanding it in its legal form." HART, *supra* note 84, at 85. In ESSAYS ON BENTHAM, he expanded on the more general idea of obligation by providing some more detail about that legal form. He discusses how "settled practice" is "acknowledged as determining the central duties of the office of a judge": "not to follow the practice would be regarded as a breach of duty . . . ." H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 158 (Oxford Univ. Press 1984). Later, Hart writes in the context of the rule of recognition: "Satisfaction of such a [criterion of legal validity] . . . constitutes for a judge who accepts in common with other judges this rule of recognition a specific kind of reason which I shall call an authoritative legal reason for himself conforming to such laws . . . and treat[ing] them as standards [of]

authoritative legal reasons are peremptory and content independent.[96] Peremptory, because they *cut off* further deliberation: that a norm closely corresponds[97] to a norm formulation contained in a legally valid enactment *settles* the matter of that norm's validity. Peremptoriness is often an implicit feature of discussions of judicial *constraint*: "narrow[ing] the discretion of judges."[98]

And authoritative legal reasons are validated content independently,[99] because the existence of the authoritative legal reason does not depend on the content of the norm formulations, only on the authority by which they were produced. As long as the source was appropriately produced, it serves as an authoritative legal reason. This is usually captured as *restraint*: deference to the enactors of valid legal texts.[100] The belief is that judges are duty-bound to validate norms just because of the authority of their enactors, quite independently of how they'd substantively evaluate the norms.[101]

When we deal with legally valid enactments, legal *commands*, lawfinding is impartial in the sense of being restrained and constrained. In this kind of interpretive context, the neutrality assumption is quite at home.

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evaluation . . . ." *Id.* at 160. And in Chapter 10, he expands on the idea of an "authoritative legal reason" as a content-independent and peremptory reason for action. *Id.* at 265. By peremptory, Hart has in mind reasons that "preclude or cut off any independent deliberation [about] the merits pro and con of doing the act [the reasons count in favor of]." *Id.* at 253. And by content-independent, Hart has in mind that the reason functions *qua* reason "independently of the nature or character of the actions to be done." *Id.* at 254.

96 In the context I am talking of here, these are doxastic reasons to determine the content of the law appropriately, not reasons for action or decision necessarily (once we've determined what the valid law is, we face a further question: How ought this case be decided according to law?—and potentially also the different question—how ought this case be decided, all things considered?). *See* Joseph Raz, *On the Autonomy of Legal Reasoning*, 6 RATIO JURIS 1, 3 (1993).

97 What counts as close correspondence raises an interpretive question. It is precisely because that question arises that the neutrality assumption can only hold for a limited subpart of legal reasoning. I turn to this in Part III.

98 Colby, *supra* note 69, at 751.

99 It might be more accurate to say that we validate law in content-insensitive, rather than content-independent, ways. For a discussion of the idea on content insensitivity, see Laura Valentini, *The Content-Independence of Political Obligation: What It Is and How to Test It*, 24 LEGAL THEORY 135, 135–37 (2018). And on the significance of constitutional democracy for legal validation, see Pino, *supra* note 27, at 190.

100 Colby, *supra* note 69, at 751.

101 Clearly, constraint and restraint can come apart. Deference to the will of an enactor might require discretionary judgment if the enacted materials are open-ended or require discretion.

B. Limits to the Paradigm Case

But determining the legal validity of an enactment is only a subpart of lawfinding for three reasons. First, validating an enactment requires more than identifying a single command. To determine the validity of an enactment, we also need to know how different lawmaking moments, different "commands," *fit together*. Second, once we've found a validly enacted law, we know that law is valid only in the sense of having been authoritatively produced. That does not necessarily settle the question of its *content*: what rights, liberties, powers, or immunities do we have after this statute has been added to our legal order? That depends on how we determine whether a legal norm is closely related to the norm formulation in the enactment. Here, the interpretive debates start. Third, even if we know what legal content an enactment produced, that still does not tell us how different contents, different laws, fit together—it does not tell us what *ought to be done* according to law.[102] These three complications draw us away from the paradigm case of neutral lawfinding.

They demand that we look upward toward the origin of lawmaking authority. They also demand that we look *around us*, so to speak, toward the rest of the legal system. We need to make sense of the *force*, or efficacy, of our laws: their capacity to (legally speaking) guide the actions of those subject to them.[103] Looking upward and looking around us requires content-based reasoning. I'll say a word on each of the ways in which judges are drawn away from the paradigm case of neutral lawfinding.

First, judges need to look upward to determine whether an enactment was legally valid in the first place. A valid enactment is found by

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102 *See generally* Raz, *supra* note 21 (distinguishing between reasoning about what the law is and reasoning about what ought to be done according to the law).

103 Here, I move from "validity" in the sense of being enacted according to the appropriate empowering procedure toward "validity" in the sense of being *in force*—of having normative *effect* in the sense of guiding action. This requires that we can be guided by the relevant commands: that we can make coherent sense of a practical demand. The two senses of validity are sometimes used interchangeably in legal and constitutional theory, and sometimes also conflated with a third sense of validity: moral bindingness, or all-things-considered justification. Much confusion in contemporary constitutional discourse comes from equivocation between these senses of validity. Alf Ross noticed just this confusion in his disagreement with H.L.A. Hart about legal validity. To clarify, he articulated the distinction between validity (in Danish or German *gyldig* or *güldig* respectively), meaning "in accordance with" a procedural (i.e., power-conferring) norm; and validity (in Danish or German *gældende* or *geltend*, respectively), meaning "norms actually in force" or "in application." He also notes that validity is sometimes used to refer to the "binding force" of a norm, its giving rise to a moral obligation. Ross, *supra* note 94, at 158–59.

looking toward a lawmaking moment that draws its validity from a higher legal rule, that in turn draws its validity from a higher and prior lawmaking moment, and so on. We find law by looking toward a chain of hierarchically ordered lawmaking moments. We look upward and backward in time until, at some point, we reach our fundamental law, our constitutional law.

When we look upward (and backward in time) at how different lawmaking moments fit together, it makes sense to think of "chains of validity."[104] Here, "the validity of each legal norm . . . derives from a higher legal norm, and the resulting line (or lines) of law within the system may be traced back to an ultimate . . . originating point."[105] This is how the links on chains of validity are interconnected: Legally valid rules of change produce legally valid sources that produce legally valid norms, including further rules of change. But chains of validity must run out.[106]

Returning to the Illinois Vehicle Code, we traced the chain of validity to the text of Article IV, Section 1 of the Illinois Constitution. Here, at what looks like the top of our chain of validity, we might ask, what makes the text of Article IV and the process that produced it a legally valid enactment? We *might* look to an even higher legal rule of change. For example, it might be that Article IV is a legal source because there is a further rule of change empowering citizens of Illinois to adopt, by convention and public referendum, a new Constitution. And that rule of change might be *legally* valid because it is drawn from the text of the Illinois Constitution of 1870.[107]

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104 This is not, to be sure, the only place where the image is used, nor the only place where it can be fruitfully deployed. For most positivists, *all law* is validated within chains of validity. But the imagery, from Hobbes to Austin to Hart to Raz, draws on that of a commander, in a moment in time, *making* law. The paradigm for that way of thinking about law is most at home here, with legally valid enactments as sources. *See, e.g.*, H.L.A. HART, ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY 243–68 (Oxford Univ. Press 1984).

105 Mark D. Walters, *The Unwritten Constitution as a Legal Concept*, *in* PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW 33, 39–40 (David Dyzenhaus & Malcolm Thorburn eds., 2016); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 98 (2d ed., Oxford Univ. Press 1980).

106 Even for Kelsen. For a useful overview of Kelsen's thought in this regard (even if one disagrees with the exegetical conclusion), see generally Alexandre Travessoni Gomes Trivisonno, *On the Continuity of the Doctrine of the Basic Norm in Kelsen's Pure Theory of Law*, 12 JURIS. 321 (2021).

107 ILL. CONST. art. XIV (outlining the procedures for constitutional amendments and conventions).

But at some point, we are going to run into an enactment that is valid not because it was *legally authorized* but because it is *socially and politically accepted* as valid. And *crucially*, a socially accepted enactment is not a legally valid enactment. We can't determine its validity by looking at further legal rules. Our conclusion that it is valid rests on different kinds of considerations. Those considerations might be moral, they might be political, they might be pragmatic, they might be ill-conceived or sound. There can be a wide variety of different considerations. But they are *not* legally valid in the sense that statutory commands are. If someone were to ask why this enactment is valid, we won't be able to say, "because its production was legally authorized." We'd have to say something else. We might say because those enacting it were wise, or because we have a social rule of treating their enactments as valid, or that we'd be better off treating their enactments as valid, but we can't say it is because we are legally *obligated* to regard their enactments as valid by further legally valid rules of change.

Second, once judges have found a validly enacted statute, they have an authoritative legal reason to treat close correspondence to its norm formulation as settling the question of legal validity. That a validly enacted statutory text says we are prohibited from driving more than fifty-five miles per hour *settles* the matter: It is *true* that we are legally prohibited from driving faster just because the statute says so. But close correspondence is often contestable. In these cases, determining what a statute says requires interpretation. To interpret is not to ask whether law was appropriately produced. It is to ask what was produced, to evaluate different possible answers, and choose to among them. To answer *that*, we can't point to legally valid rules of change; we would have to point to something else.

Relatedly, and finally, determining what a statute produced is not yet to have made sense of the legal demands that come to bear upon judges and individuals. If one valid enactment tells me to drive slower than fifty-five miles per hour and another tells me to drive faster than that, I'm not confronted with a coherent legal demand, unless someone can tell me what *the law* requires. Knowing what *the law* requires is different from determining the legal content of one enactment. To find the content of coherent legal demands, we need to make sense of how many legal contents *hang together* in a normatively intelligible way.

So, for these three reasons, judges need to look upward and around them at rules that are not legally valid rules of change. They need to justify their conclusions about what the law is on grounds other than the authority by which a certain enactment was produced.

Now, none of this is to say that those other grounds can't still be meaningfully *legal*, rather than moral or political.[108] Grounds for judicial decisions might be *legal* in a sense other than "being produced in accordance with a legally valid rule of change." Judges might have legal grounds for concluding that our chains of validity run out at the Founding. They might have legal grounds for saying that the appropriate notion of "close correspondence" is between original public meaning and legal content,[109] or between communicative content and legal content,[110] between legal content and original intention,[111] legal content and hypothetical meaning,[112] or between legal content and historical context.[113]

But if these grounds are legally valid, they are not valid in the sense of being validly enacted by someone with the legal authority to make the law. Of course, a lawmaker can validly enact a law of interpretation, but that too must be interpreted, and validated, by looking toward more than the legally valid rules of change authorizing the lawmaker to do so.

In other words, some subpart of lawfinding consists of finding legally valid enactments. That can be done in a peculiarly neutral manner. But much of lawfinding requires something else: looking up at our chains of validity, determining legal content when communicative content is indeterminate, and making coherent sense of different bits of legal content. These activities might also be lawfinding: We can have legal grounds for our conclusions about chains of validity, legal interpretation, and legal coherence. But if we do, we are using the term "legal grounds" in a different sense.

We don't mean these grounds are valid because they were authoritatively enacted. We mean they are legally valid in the sense of existing within the legal order: having force and effect within it. And

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108 For an overview of how the relevant grounds which originalists deemed appropriate has shifted, see Colby, *supra* note 69.

109 Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1081 (2005).

110 Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 479 (2013) (noting that the relationship will depend on context: "different kinds of legal texts produce different relationships between linguistic meaning and legal rules.").

111 RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 4 (2d ed., Liberty Fund 1997) ("[T]he 'original intent[]' of the Framers . . . is binding on the Court. . . .").

112 Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48–49 (2006).

113 *See, e.g.*, Cornell, *supra* note 70, at 823–24.

there are two incompatible ways in which we might think our knowledge about existing law is justified: We might take a criterial or a coherentist view. Here we run into the challenge that gives rise to our dilemma.

III
DILEMMA

The impartiality and impersonality of lawfinding is easily discernable when we are in the business of finding legally valid enactments. But lawfinding requires more. We need to find law at the top of our chains of legally valid enactments. We need to interpret valid enactments to find their content. And we need to make sense of the content of many different enactments *together* if the law is to be meaningfully in force—capable of guiding its subjects and judges. For all these aspects of lawfinding, we need to reach legal conclusions based on considerations other than "because it was produced in accordance with a legally valid rule of change." How can reasoning about those considerations still be impartial in a way that clearly distinguishes lawfinding from lawmaking? How can those grounds be legal, rather than moral or political?

Our answer to this question depends on what we believe it takes for a particular consideration to *be* legal (rather than moral or political or personal, say). It depends on what we think it is for content to be legal content, or put differently, it depends on what we think it takes for a consideration to have legal existence.

We might take a criterial view of lawfinding. If we do, we'd say those considerations are legal because they conform to criteria of legal validity: They are validated by legal sources. But we'd have to accept that those criteria run out, and judges do more than reason about legal sources (Section III.A). Or we can take a coherentist view. If we do, we'd say those considerations are legal because they render intelligible, make meaningful and actionable sense of, the demands of law that confront judges and subjects (Section III.B). But we'd have to accept that determining *this* requires a species of moral and political reasoning that no longer resembles the neutral and impartial reasoning of lawfinding in valid statutes.

A. Response 1: A Criterial Model of Lawfinding

On a criterial model of lawfinding, we acquire knowledge of the law when we gain knowledge of considerations that are legally valid

because they conform to sources of law: criteria of validity. The criterial model points out that we can have legal sources that are not valid enactments. Other kinds of facts can have normative-institutional standing just in the same way that legally valid commands have normative-institutional standing in the paradigm case we explored above. Facts about the text of the Constitution, or about our history and tradition,[114] or about linguistic conventions and public meaning: These kinds of facts are sources of law, or criteria of validity, just in the same way that "being validly enacted" is a criterion of validity. Norms are legal when certain facts hold (facts like history, tradition, text, dictionaries, treatises, etc.). Lawfinding is finding those facts.

The Justices seem to have a criterial model of lawfinding in mind when they treat facts about history and tradition as a source of law, as they have done in the Second Amendment context. In *Bruen*, the majority referred to the "traditions of the American people" as demanding the Court's "unqualified deference" when determining the content of the Constitution.[115] And in *Rahimi*, the Court relied on facts about the Nation's historical firearm laws to conclude that the Constitution is not violated by 18 U.S.C. § 922(g)(8).[116] This is to treat facts about our traditions as markers of validity in the way that the fact of being validly enacted might be a marker of validity: authoritative legal reasons for conclusions about the content of our law.

Originalist scholars also display a commitment to a criterial view of lawfinding at times. Originalism is, after all, a theory about the normative significance (or guiding force, if you will) of certain kinds of facts. At the most general level, originalists argue that judges ought to base their judgments about what the law is on facts about original public meaning,[117] original methods,[118] original law,[119] and so on.

Now, some originalists claim that it would be, morally and politically, a *good idea* to settle legal questions with reference to these

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[114] *See, e.g.*, Girgis, *supra* note 38, at 1477; Blocher & Ruben, *supra* note 56, at 99; Michael L. Smith, *History as Precedent: Common Law Reasoning in Historical Investigation*, 27 U. PA. J. CONST. L. 587, 599–608 (2025).

[115] N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26 (2022).

[116] U.S. v. Zackey Rahimi, 602 U.S. 680, 690 (2024).

[117] Solum, *Original Public Meaning*, *supra* note 3, at 830–34 (surveying the different ways in which original public meaning might be relevant to constitutional interpretation).

[118] *E.g.*, McGinnis & Rappaport, *supra* note 3, at 1374 (advocating reliance on facts about "what conventional interpretive rules a reasonable observer would have deemed applicable to the Constitution" to settle debates about our methods of interpretation).

[119] Baude & Sachs, *Grounding Originalism*, *supra* note 4, at 1455.

facts.[120] And at other times, the claim is that these facts settle questions of law as a *conceptual* matter, just because of how texts work,[121] or because of what communication is.[122] Neither of these two claims suggest that the facts in question are sources of law. But both claims have been criticized. The former can, and has, been challenged on substantive grounds of political morality.[123] And the latter has been accused of conflating semantic and legal content.[124]

Precisely in response to these challenges,[125] some originalists have come to argue that these kinds of facts are not simply useful or valuable reference points for legal reasoning, but *sources of law*. Instead of claiming that judges have good reasons to rely on facts about history or plain meaning to settle cases before them, they argue that these facts are what make statements of law *true*.[126]

In this guise, originalists claim that some content is legally valid *just because* of facts about original public meaning, or original methods, or original law, or history and tradition. Here, originalists treat these facts as authoritative legal reasons for conclusions about the content of law. Just as we might say I am legally required to drive below fifty-five miles per hour *just because* the Illinois legislature said so, these scholars contend that statements of law are true *just because* of facts about original public meaning, plain textual meaning, history, tradition, etc.

Illustrative of this kind of claim, Calabresi and Prakash have written that facts about the plain dictionary meaning of the Constitution are what make statements of law true,[127] or that "the public meaning of the

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120 Solum explicitly treats the constraint principle as a *normative* ideal. *See generally* Solum, *Original Public Meaning*, *supra* note 3.

121 Barnett, *supra* note 3, at 644–45.

122 Wurman, *supra* note 76, at 38.

123 There are many different varieties of this argument, but an influential one centers on the dead hand of the past and the objectionable political morality of the Founding. *See generally* Reva B. Siegel, Heller *& Originalism's Dead Hand—in Theory and Practice*, 56 UCLA L. REV. 1399 (2009).

124 Berman & Toh, *supra* note 2, at 548.

125 Baude and Sachs explicitly frame their original law theory of law as one capable of avoiding political and conceptual disagreement about originalism. *See* Baude, *Is Originalism Our Law?*, *supra* note 4, at 2351; Sachs, *Originalism as a Theory of Legal Change*, *supra* note 4, at 819–20.

126 For some discussions of the move toward treating history as a source of law, see Dov Fox & Mary Ziegler, *The Lost History of "History and Tradition*,*"* 98 S. CAL. L. REV. 1, 6–14 (2024); Girgis, *supra* note 38, at 1541; Blocher & Ruben, *supra* note 56, at 99; Smith, *supra* note 114, at 618.

127 Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994). To be precise, they write that the dictionary meaning

constitutional text *was its legal* meaning[.]"[128] Originalism in this guise is a theory about the status of facts about history and original meaning, methods, or law as "determinants of our constitutional law[.]"[129] Here, originalism trades on a criterial model of lawfinding.

On this criterial model, we gain knowledge of law by gaining knowledge about the facts that validate law. The grounds for our judgments are legal because of such facts: Their legalness can be verified by looking at criteria of legalness—legal validity. Perhaps an analogy is helpful here. A vase is ceramic when it has been shaped and then hardened by heat. These are criteria of "ceramicness." Just like we verify a vase being ceramic by looking toward facts about it being shaped and hardened by heat, we verify a norm being legal by looking toward facts that are criteria of legal validity: sources of law.

We've already encountered one kind of legal source: being validly enacted. And we've seen that legal reasoning requires much more than identifying facts about valid enactments. On the criterial model of lawfinding, there are other sources of law that work in just the same way as valid enactments, providing judges with authoritative legal reasons that guide them in reasoning impartially and neutrally. What other kinds of sources of law are there?

We can identify them by distinguishing them from valid enactments on two dimensions.[130] First: To what do they owe their status as sources of law? And second: How did they come into existence? A valid enactment owes its status to a legally valid rule of change and comes into existence through an authoritative exercise of will.

But we can have, and do have, sources of law that owe their status not to valid law but to practices (Section III.A.1). And we also have sources of law that come into existence not through an exercise of authority but simply by being designated as sources by other legal norms (Section III.A.2). In what follows, I'll briefly explore each of these sources of law. In Section III.A.3, I explain why, if *this* is how we understand lawfinding, judges *must* be doing more than finding law. On a criterial model of lawfinding, the formalist assumption is false.

"*is law*." (emphasis added). This is equivalent, Hart suggests, to one saying "what the Queen in Parliament enacts is law . . . ." HART, *supra* note 84, at 107. Berman and Toh use this citation to explain originalism as a theory of law. Berman & Toh, *supra* note 2, at 558–59.

128 McGinnis & Rappaport, *supra* note 65, at 5 (analyzing this claim and discussing its development) (emphasis added).

129 Berman & Toh, *supra* note 2, at 559.

130 Pino, *supra* note 32, at 63.

1. Practice-Based Sources of Law

We saw in the previous Section that there is inevitably some point where our chains of legal validity run into an enactment that is valid, not because it was authorized by an even higher enactment, but simply because we socially and politically recognize it as valid. The Illinois Constitution is perhaps such an enactment. It is a valid enactment not because of a higher enactment but because our practices recognize it as such. Now, this need not mean that our reasoning about the Illinois Constitution is any less legal. It might simply mean that the Illinois Constitution is valid because of a source that we recognize in *practice*, rather than one we are legally commanded to recognize by a legally valid rule of change that in turn comes from a higher enactment, and so on. If so, there are some sources that owe their status as sources to our practices, rather than to further law.

Practice-based sources of law have their status as sources of law not because of legal rules drawn from higher points in a chain of validity. Instead, they are sources only because *we treat them as sources* in our practices. This is familiar from the work of H.L.A. Hart, and also forms the basis for the so-called positive turn in originalism.[131] Usually, the analysis of that idea goes as follows: A practice treats a fact as a criterion of validity (a legal source) if it uses that fact to settle, conclusively and authoritatively,[132] questions about what counts as valid law.[133] Such facts are then sources of law.

131 Baude, *Is Originalism Our Law?*, *supra* note 4, at 2351 n.5, 2354 n.13 (describing the positive turn as "evok[ing] the basic tenets of legal positivism" and later defining the "positive question" as one about "what constitutes our constitutional law"); Sachs, *Originalism as a Theory of Legal Change*, *supra* note 4, at 819 (advocating a move toward treating "originalism as a claim about law, not just interpretation"); Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1082–85 (proposing to treat questions about how the law ought to be interpreted as questions about the *content* of law, to be settled via a constitutive account of unwritten law); Sachs, *The "Unwritten Constitution," supra* note 47, at 1826 ("What our social conventions identify as law is an empirical question about how our legal system works and what its participants believe."); Baude, *supra* note 42, at 3 (referring to historical practice as "a source of constitutional meaning"); Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1325 (2017) (discussing "the core idea" of the positivist turn as holding that "debates about how to properly interpret statutes and the Constitution ought to be settled . . . [by] figuring out what those facts [about our legal system] tell us about how to interpret our legal materials.").

132 Hart expresses this in different ways: if a norm is appropriately related to a legal source, that serves as "conclusive affirmative indication" of its validity, as an "authoritative" mark of validity. HART, *supra* note 84, at 94, 98, 105, 109. ("[T]he status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition.").

133 Pino, *supra* note 32, at 64.

In such a practice, participants, as a rule, refer to the relevant fact as a dispositive and conclusive criterion of legal validity. And they don't simply do this as a matter of habit, or because they think it wise or prudent or convenient. Instead, they regard it as everyone's *duty* to use the fact as a determinant of legal validity. This is evidenced in a practice if participants *sanction* and *criticize* one another for failing to determine legal validity in this way, and such sanctions and criticisms are regarded by other participants as legitimate.[134] Such a practice manifests an obligation-imposing social norm: a norm imposing on all participants a (doxastic) obligation to treat a particular fact as a criterion of legal validity.[135] Returning to our example, it seems plausible to say that the text of the Illinois Constitution is a source of law because there is an institutional practice among legal officials of treating it as such. In this practice, participants recognize and accept a social *obligation* to treat the text of the Constitution as a legal source.[136] Hart called this obligation-imposing rule a "rule of recognition."[137]

We can now notice a distinction between sources of law that rest on *legal* norms and sources of law that rest on *social* norms. This means that, when lawfinders use a particular fact as a source of law, they might do so in two very different ways. They might do it because they have legally valid grounds for doing so. But they need not run out of law when they run out of enactments at the tops of chains of validity, because there is also another way to use a fact as a source of law. Lawfinders might do it because they recognize they have a social obligation to do so. In that case, we have a criterion of validity that rests on social norms rather than legal rules.

134 H.L.A. Hart, *Answers to Eight Questions (1988)*, *in* READING HLA HART'S *THE CONCEPT OF LAW* 279, 283 (Luís Duarte D'Almeida et al. eds., Hart Publishing 2013) ("I now think that this idea of a legitimate response to deviation in the form of demands and pressure for conformity is the central component of obligation.").

135 I take the proposal of conceiving of the social duty as a doxastic one from Giovanni Sartor, *Legal Validity as Doxastic Obligation: From Definition to Normativity*, 19 LAW & PHIL. 585 (2000).

136 Pino would say this is not a social obligation, but a legal one, because "criticism and praise . . . are levelled on *legal* bases, not just on moral, political, or opportunistic considerations." Pino, *supra* note 32, at 65. He is right that this is a distinctively legal practice, and that it manifests in the institutional forms of law. But I think the idea of "*legal* bases" is misleading—participants don't have further legal norms or justifications to draw on to justify these obligations. They bottom out in practice.

137 HART, *supra* note 84, at 100.

2. Autonomous Sources of Law

There is also a further way in which legal sources might deviate from the paradigmatic "being validly enacted" criterion. A source of law might be designated as such by legal norms without being produced by an authoritative enactment. The paradigm case of such a source is custom. Custom might be recognized as a source of law without the law regulating the conditions of custom's production.[138] These sources owe their status as criteria of validity to norms that are duty-imposing, not power-conferring. Nobody has the power to change these sources in legally valid ways; we simply have an obligation to use them in determining what the law is.

William Baude and Stephen Sachs recognize law validated by such sources as "unwritten law." The distinction between written and unwritten law is not between those laws that are reduced to writing and those that are not. The difference lies with the criteria that validate these forms of law. Written law traces its validity to authoritative enactment: It traces back to a source of law that depends on an underlying rule of change. Unwritten law, by contrast, is valid in virtue of our practices or legal traditions.[139] It traces back to a source of law that depends on an underlying norm that imposes a duty on us to treat and recognize that source, without empowering anybody to change or eliminate the source.

3. On a Criterial Model, the Formalist Assumption Is False.

The criterial model of lawfinding is perfectly plausible. It provides us with an intuitive account of why statements of law can be true or false: how law can have objective existence, and so how lawfinding can be an impartial and politically neutral endeavor. We find law by

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[138] These are *autonomous* sources in Pino's analysis. Pino, *supra* note 32, at 74.

[139] It is what Sachs calls the "external social practice" rather than official decision, which makes a judgment about unwritten law right or wrong. Sachs, *Finding Law*, *supra* note 4, at 537; *see also* Sachs, *The "Unwritten Constitution*,*" supra* note 47, at 1801 (What makes laws unwritten is that they "have no single and authoritative textual *source*, no pedigree tracing their validity back to a written ancestor."); Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1138 (discussing unwritten rules of interpretation as "features of an existing legal tradition, as opposed to deliberate acts of lawmaking"). Judges "*find* common law rules[,]" they don't make these rules. *See id.* at 1138. On the general idea of finding unwritten rules, see Stephen E. Sachs, Antonin Scalia Professor of Law, Harvard L. Sch., Appointment Lecture on Life After *Erie* 1, 5–6 (Nov. 1, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4633575 (on file with the Oregon Law Review) [hereinafter Sachs, Life After *Erie*]; Sachs, *Finding Law*, *supra* note 4 *passim*. Notably, though, *Finding Law* concludes: "Unwritten law can be found, as well as made . . . ." *Id.* at 581. I assume this is meant to refer to common law more narrowly.

attending to the appropriate facts, *quite apart* from what we'd prefer the law to be, or what we think it morally ought to be. Lawfinding is artificial and impersonal and, in its own distinctive way, scientific: It operates upon considerations that are legally valid rather than on judges' personal moral convictions.

But all this is possible only where there are legally valid considerations at hand for judges to rely on. Judges can defer to legally valid considerations only if they exist in the first place. And, crucially, on a criterial model of lawfinding, finding legally valid considerations requires finding certain kinds of facts: facts with a recognized social-institutional standing. But these facts run out when we run out of consensus about them. Sources of law are facts that have a certain kind of uncontroversial normative-institutional standing: They must be, in a sense I will explain in this Section, interpersonally accessible facts.

Statements of law are not true in the way statements about the composition of water might be true. Water would exist even if we did not. Law exists only where we do and where we have certain kinds of practices and concepts. Statements of law are true because of how things are with *us*.[140] Sources of law are facts that have a certain kind of accepted presence in our practices, in our shared understandings. They are facts with a certain kind of uncontroversial normative-institutional standing. I like Philip Pettit's term for this kind of shared understanding: criteria of validity must be "commonable"[141]—capable of being claimed common possession. If we are politically divided *about* our criteria of validity, we no longer have criteria of validity. Where recognitional practices are contested or controversial, we run out of sources of law.

This is precisely where the distinction between legally valid criteria of validity and socially accepted criteria of validity becomes so crucial. Legally valid sources of law can survive our disagreements about them because they get their normative-institutional standing from *the law*. But at the top of our chains of validity, our legal sources rest on our practices. Where our practices are controversial, these sources stop

140 That is, law is at least concept-dependent social kind. There are some interesting issues around the idea that it might be an application-dependent social kind, but I leave that aside. *See generally* Muhammad Ali Khalidi, *Three Kinds of Social Kinds*, 90 PHIL. & PHENOMENOLOGICAL RSCH. 96 (2015) (distinguishing between concept-dependent, application-dependent, and concept-independent social kinds).

141 PHILIP PETTIT, THE COMMON MIND: AN ESSAY ON PSYCHOLOGY, SOCIETY, AND POLITICS 115 (1996).

existing *qua* criteria of validity. Instead, they might have persuasive or rhetorical force, but not as dispositive markers of legal validity.

Both social and legal norms can be indeterminate in several ways: They might be ambiguous, vague, or contestable.[142] When legal obligations are indeterminate, this need not (depending on one's view) affect their *existence* per se. We can have reasonable and perhaps irresolvable epistemic disagreements about what precisely that obligation is without that going to its existence *qua* legal obligation.[143] This is why it is possible for the correct law to diverge from the law we recognize and enforce: We can be mistaken about the law. This is what Sachs has in mind when he talks about the Constitution in exile[144]: Official practices can get the law wrong, at least for some time and at least to some extent.

But the same is not true for social obligations. Social obligations don't exist separately from our practices and attitudes. The existence of social obligations, their social validity—if we want to call it that—consists in their being reflexively caught up in what we *in fact* do, how we *in fact* understand and evaluate what we do, and how we respond to one another's actions and understandings. A social obligation is in application in the same sense as a legal obligation only where we recognize and socially enforce an *uncontroversial obligation* in unambiguous and uncontested terms. As soon as those obligations become controversial, they no longer designate criteria of validity. Where we run into certain kinds of controversies, we run out of sources of law.

Now, I don't mean to suggest that these obligations are reducible to facts about our behavior and attitudes. This is a common misapprehension perpetuated by Dworkin and those who adopted his

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142 *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509, 512–14 (1994). Here are three examples to illustrate the difference. A rule imposing an obligation to treat the Constitution as a legal source is ambiguous: It might require that we refer to the text of the Constitution, or to a body of political and institutional practices, or something else. A rule imposing an obligation to treat judicial custom as a legal source is vague: Some practices are *clearly* customs (stare decisis, say), some practices are *obviously* not customs (hiring clerks that come recommended by members of one's professional network), and many practices fall somewhere in a grey area in between. Finally, a rule imposing an obligation to treat legislative intent as a source of law is contested: Some would say it requires that we look toward the objective purpose of the legislation, others that we look toward the subjective intention of the legislators. This is a disagreement about the standards that are or ought to be embodied in the relevant obligation-imposing norm.

143 Sandro, *supra* note 77, at 99.

144 Sachs, *supra* note 87, at 2254.

reading of Hart.[145] We can be mistaken about our social norms, and we can disagree about them. But *settling* such disagreement and *correcting* these mistakes is not like engaging in legal argument. We don't get to point to facts about our practices and insist that others have obligations to treat those facts as sources of social norms. Settling such disagreement and correcting these mistakes *just is* to participate in a political practice: Where we run into controversy, we settle disagreement on *political* and *moral* grounds. This is the crucial point: Controversy about socially recognized sources of law cannot be resolved on legal grounds if we understand "legal grounds" to rest on sources of law. (That is, if we are criterialists about lawfinding.)

Here's one way of illustrating this. If I were to travel back to the thirteenth century and tell astronomers that, contrary to what they believe, the earth rotates around the sun, my statement would be true. I would be teaching them something they had not known about their world. It would be true because of how things are with our solar system. But if the rush of being right got the better of me and I added that it was illegal to use trials by ordeal when legal evidence is lacking, my statement would be false on a criterial understanding of lawfinding. And this is because of how things are with them, namely the common ground they share about legal procedure and evidence. Criteria of validity are features of shared social and institutional understandings. We can't challenge or change our ultimate criteria of validity on legal grounds: We'd have to rely on moral or political argument.

In other words, sources of law are facts that have a certain kind of uncontroversial uptake in our institutions and practices: facts that are recognized as authoritative, *conclusive*, legal reasons.[146] Sources of law provide public measure of legal validity: They are facts with

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[145] The misapprehension is that Hart set out the existence conditions of social rules, instead of describing the practices involved in recognizing and accepting social rules. Dworkin makes that mistake in Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1971). It is repeated, for example, in SCOTT SHAPIRO, LEGALITY 95 (Harvard Univ. Press 2011). Raz at one point expressed a similar view of the practice theory, suggesting that its core thesis holds that "[s]ocial rules are the practices of the groups whose rules they are." RAZ, *supra* note 93, at 52. For recent discussions of the theory and its critics, see generally Thomas Adams, *Practice and Theory in* The Concept of Law, *in* 4 OXFORD STUDIES IN PHILOSOPHY OF LAW 1 (John Gardner ed., Oxford Univ. Press 2021); Jeffrey Kaplan, *In Defense of Hart's Supposedly Refuted Theory of Rules*, 34 RATIO JURIS 331 (2021); Adam Perry, *The Internal Aspect of Social Rules*, 35 OXFORD J. LEGAL STUD. 283 (2015); Kevin Toh, *Four Neglected Prescriptions of Hartian Legal Philosophy*, 33 LAW & PHIL. 689, 691–93 (2014).

[146] *See generally* Bill Watson, *Explaining Legal Agreement*, 14 JURIS. 221 (2023) (discussing the striking extent of such uncontroversial uptake in our legal practices).

reference to which we can verify others' conclusions about law.[147] This is precisely what makes it possible for lawfinding to be scientific: We can verify that others got it right because we also have access to the same sources. We can come to see they are right even while we disagree with them morally and politically. We can tell the difference between their personal preference and their legal conclusion because we have, in shared criteria of validity, shared ways of validating legal conclusions.

On a criterial model of lawfinding, law can only be found *downstream* of such publicly shared factual reference points. Any statement of law that rests on grounds that are "inherently unconventional, inherently controversial"[148] *cannot* be resting on legally valid grounds, if we understand legally valid grounds in criterial terms. Lawfinding is possible only where we *have* consensus about our ultimate criteria: It can't give us those criteria in the first place.

In other words, at some point, we run into disagreements about criteria that are no longer resolvable on legal grounds. This is entailed by the idea that criteria are authoritative legal reasons. For a fact to serve as an authoritative reason that displaces our personal evaluation, it must be identifiable without relying on personal evaluation.

Raz put the point quite strongly:

> Since it is of the very essence of . . . authority that it issues rulings which are binding regardless of any other justification, it follows that it must be possible to identify those rulings without engaging in a justificatory argument, i.e. as issuing from certain activities and interpreted in the light of publicly ascertainable standards not involving moral argument.[149]

But, arguably, at least, Raz put the point too strongly.[150] There is surely a lot of evaluative reasoning in law that is still recognizably legal. That is, we can evaluate and argue about law and legally valid criteria of validity without having thereby slipped into moral and political disagreement. There is certainly room for disagreement and controversy about constitutional meaning within originalism, without that having to mean that there is no such meaning. The fact that "there is disagreement about what originalist interpretation entails"[151] need

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[147] RAZ, *supra* note 62, at 51.

[148] E. Philip Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473, 488 (1977).

[149] RAZ, *supra* note 62, at 51–52.

[150] I am grateful to Erin Miller for inviting me to clarify this point.

[151] Eric Berger, *Originalism's Pretenses*, 16 J. CONST. L. 329, 332 (2013).

not mean that there is nothing objective to interpret, nor that originalism isn't still the best way to interpret despite its occasional malleability. Within bounds, these kinds of disagreements might still be resolvable on the basis of legally valid considerations.

But there is a limit. Sources of law are interpersonally shared factual reference points for determining legal validity. An argument that is recognizably legal, on this view, must be justified on grounds that can be recognized by others as legal even while they disagree with that argument, morally and politically. Simply put, on a criterial model of lawfinding, "we could only *know* that a case involving conflicting or doubtfully applicable legal standards has a uniquely correct result by knowing that the experts do or would agree on some particular result for that case."[152]

In some kinds of disagreements, we've run out of interpersonally shared ways of verifying the correctness of a particular result. In these cases, it becomes possible "for a judge to obtain either of two contrary results from the materials he has to work with . . . to render *the* legally correct decision."[153] Here, because we have no interpersonally shared way of verifying legal correctness, we've run out of sources of law. We have run out of law if by that we mean considerations we can validate in shared ways independently of moral and political disagreement.

Many of the cases that make it to the Supreme Court are precisely cases where we are morally and politically divided about our ultimate criteria of validity. In these cases, if we hold a criterial view of lawfinding, our disagreements cannot be settled on legal grounds.[154] Judges must be doing something other than lawfinding when they decide these controversial cases.[155]

This follows from the model of lawfinding. A criterial theory of lawfinding ties the existence of the grounds of legal knowledge to the existence of "interpersonal checks on the substantive correctness of one's argument and result."[156] And in sufficiently controversial cases, there are no such interpersonal checks.

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152 Thomas D. Perry, *Judicial Method and the Concept of Reasoning*, 80 ETHICS 1, 5–6 (1969).

153 *Id.* at 1.

154 We might *think* that they are still finding the content of law in these cases, but we are mistaken. Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1224 (2009); Leiter, *supra* note 23, at 249.

155 Brian Leiter, *Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature*, 66 HASTINGS L.J. 1601, 1610–11 (2015).

156 Perry, *supra* note 152, at 14–15.

To summarize, if we find law by finding interpersonally shared criteria of validity, some of our disagreements about those criteria won't be resolvable on legal grounds. Sometimes, often for the Supreme Court, there will be no legally valid grounds for a decision. Judges must necessarily do more than find law. This should not be surprising. On a criterial model of lawfinding, law is a downstream result of shared sources of law; it does not provide us with our ultimate sources. The criterial model of lawfinding is incompatible with legal formalism. On a criterial model, judges do much more than finding law.

B. Response 2: A Coherentist Model of Lawfinding

We can resist this conclusion. We can mount an argument that legal formalism is true: that "the law directs the judge to an outcome in all or nearly all cases."[157] We can say that the previous Section *misunderstands* what we mean by the grounds of legal knowledge and the objectivity of legal reasoning. Our argument would go as follows: When we say the law (nearly) always provides answers, we don't mean those answers are interpersonally verifiable with reference to shared criteria of validity. We mean that a judge never runs out of justificatory and explanatory materials that can make her decision a "competent" one: a legally justified one.

This is how I read Charles Capps's argument for legal formalism.[158] As he writes, legal answers are always "estimable"[159] by competent legal reasoners. Even when our answers aren't interpersonally verifiable, our reasoning can be competent and justified on that basis. The law is never "so obscure as to leave a competent judge utterly at a loss as to how to proceed."[160] This is what we mean by the existence of law and the objectivity of legal reasoning. Even when we have no way of interpersonally verifying the substantive correctness of a legal answer, we can distinguish between legal competence and incompetence in judicial reasoning. We know when an answer is a sound "educated guess,"[161] and we know when it is not.

And this is also the Court's response, I believe, in cases like *Kisor* and *Loper Bright*.[162] Even when we run into deep uncertainty, it is

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[157] Capps, *supra* note 20, at 1.

[158] *Id.* at 53.

[159] *Id.*

[160] *Id.* at 52.

[161] *Id.* at 53.

[162] *See generally* Loper Bright Enters. v. Raimondo, No. 22-451 (U.S. June 28, 2024); Kisor v. Wilkie, 588 U.S. 558 (2019).

possible for judges to "exercise independent judgment."[163] Even without interpersonally verifiable answers, we are still able to "reach a decision about the best and fairest reading of the law."[164] Baude and Sachs similarly write that a legal system has a "structure of justification"[165] that allows for a process of "reasoning and inference about which everyone can be wrong."[166] A result needn't be recognized as correct for it to be supported by legally valid considerations.

I will flesh out this argument here. It is a perfectly sensible argument. But, importantly, it relies on a different model of lawfinding from the one we encountered in the previous Section. There, we said we find law by finding institutionally recognized criteria of validity. In this Section, we will be saying that we find law by distinguishing between competence and incompetence in legal reasoning about those criteria. In the previous Section, legal knowledge was knowledge about facts picked out by our institutional practices. Here, legal knowledge is knowledge about the appropriate justifications and explanations for the role those facts play in our practices. The grounds of our legal knowledge are the considerations that render our practices intelligible and coherent to us *as legal practices*.

The grounds of legal knowledge, on this view, are the justificatory materials that feature in an answer to the question, "But, how [could this] be law for me?"[167] What makes this answer's claim to being a legal one intelligible to me? What considerations justify its status as a legal rather than a nakedly partisan answer? These considerations are *legal considerations* on this view: When we find these considerations, we find law. These considerations are legally valid[168] because they feature in our best explanations and justifications of our legal practices. Dworkin is closely associated with this view of law: He argued that we

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163 *Loper Bright*, slip op. at 22–23.

164 *Kisor*, 588 U.S. at 600 (Gorsuch, J., concurring) (dismissing the idea that the law might run out where a statute is subject to two equally persuasive readings as "fantasy").

165 Baude & Sachs, *Grounding Originalism*, *supra* note 4, at 1472.

166 *Id.* at 1473 (emphasis omitted).

167 DYZENHAUS, *supra* note 35, at 162.

168 Now I am using valid in the sense of forming part of a normative system which is meaningfully in force within the population it purports to govern: a sense that relies on judgments about normative efficacy. *See generally* Thomas Adams, *The Efficacy Condition*, 25 LEGAL THEORY 225 (2019) (discussing the efficacy condition); Michael Sevel, *Obeying the Law*, 24 LEGAL THEORY 191 (2018) (discussing the efficacy condition); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982) (distinguishing between what I call here normative efficacy and the broader idea of law's efficiency in securing certain patterns of behavior).

find law by finding *justifications for* legal practice.[169] But this view need not be antipositivist: Hans Kelsen also held this view of lawfinding.[170] It is what I have labelled a *coherentist* view of lawfinding. Let me explain what I mean by that.

We should start by noticing, with Gary Lawson and Guy Seidman, that the law "works best when it finds answers."[171] We can make their argument more forcefully: The whole *point* of law is to give us shared answers. And this is valuable precisely where we run out of shared moral and political answers. Legal practice is an ongoing tradition of offering and demanding answers that can be justified in ways that distinguish law from brute political domination. It "rests on shared understandings about the domain of acceptable arguments."[172] And those shared understandings are always evolving as we publicly justify, and challenge, controversial legal answers.

The law we find, on a coherentist model, consists of the duties, rights, liberties, powers, and privileges that make these justifications and challenges *intelligible to us*. It is this material that allows us to make sense of our legal practices and the arguments that feature in it. Rights and powers are *legal* when they "[generate] the greatest degree of [coherence]" with the rest of the legal order.[173] Content is legal when it is "systematic[ally] connected[]"[174] to the uncontroversial understandings of our law that we do share. More specifically, content is legal when "an epistemically responsible legal decision-maker might accept it as justified by virtue of its coherence"[175] with other accepted legal answers.

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169 RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 76 (Bloomsbury Acad. 2013) (1977). On Dworkin's shift from a phenomenological point about the role of principles in adjudicative practices toward an ontological point about the existence of law, see Adams, *supra* note 77, at 28.

170 For Kelsen, the relevant explanation and justification always take the form of authorizing, or power-conferring, formal norms. For Dworkin, they take the form of substantive principles. So, their theories are very different but structurally similar in their focus on the justificatory materials that make our practices intelligible to us *as legal practices*. *See, e.g.*, Kelsen, *supra* note 35, at 46–49.

171 Lawson & Seidman, *supra* note 112, at 66.

172 Felipe Jiménez, *Principles, Law, and Tradition*, 33 YALE J.L. & HUMAN. 59, 83 (2022).

173 Rolf Sartorius, *The Justification of the Judicial Decision*, 78 ETHICS 171, 171–74, 183 (1968).

174 *Id.* at 184.

175 Amalia Amaya, *Legal Justification by Optimal Coherence*, 24 RATIO JURIS 304, 306 (2011).

Here is the difference between this coherentist view of lawfinding and the criterial one we explored in the previous Section. On a criterial view of lawfinding, we gain knowledge about fundamental legal truths deductively. We reason *from* criteria of validity toward our fundamental law. On a coherentist view of lawfinding, we gain knowledge of our fundamental legal truths via inference from the best explanation. We reason from our best explanations *toward* our highest criteria of validity. We ask, What justifies our practice of treating this Constitution, this history, these Founders, as sources of law? And we take our best explanations to be *legally valid* ones, just because they make our law coherent and intelligible to us.

Barnett relies on this model of lawfinding when he argues that we are legally "bound" to original meaning *because* we "profess our commitment to a written constitution."[176] Sachs relies on this model of lawfinding when he suggests that we can find, beyond our written sources, "the rest of the law," doing the "gap-filling and stabilizing work" required to arrive at legal answers.[177] And Baude and Sachs's account of the law of interpretation relies on this model of lawfinding when they argue *from* the fact that we rely on much more than written texts to resolve legal disputes *toward* the conclusion that the things we rely on must be *legally valid*—part of "the law."[178]

A coherentist model of lawfinding is not focused on the truth-conditions for statements of law, but on the justifications that make the practice of enforcing the content of such statements intelligible to us. The coherentist says that the principles and normative statuses that feature in those justifications are *legal* because they explain our legal answers to controversial questions. I will explore the coherentist response in more detail in Section III.B.1. Coherentists about lawfinding quite correctly conclude that the law (almost) never runs out: Just as the Court said in *Loper Bright*, there are always legal justifications available, even in controversial cases.[179] This is a plausible way of saving the formalist assumption.

But if we are coherentists about lawfinding, we have given up on the neutrality assumption. We are no longer engaged in lawfinding that is ultimately vindicated by interpersonally shared criteria of validity. If we are coherentists, we can't accept Justice Gorsuch's statement that

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[176] Barnett, *supra* note 3, at 636.

[177] Sachs, *The "Unwritten Constitution," supra* note 47, at 1798.

[178] Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1088–92.

[179] Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 22 (U.S. June 28, 2024).

the Court is "neutral" in finding the law.[180] A coherentist about lawfinding cannot draw a firm distinction between making and finding law, because they associate lawfinding not with finding facts about our practices but instead with identifying the justifications we have for treating those facts as legally significant. Justifications are not "fixed in time"; they shift as our practices shift. And they are always open for substantive, moral, and political contestation. If we adopt a coherentist model of lawfinding, judges are always engaged in (re)making our legal justifications and so, for that reason, our law. That's the argument in Section III.B.2.

1. Coherence and Legal Justification

A coherentist legal epistemology associates legal knowledge with a grasp of the explanations that make our statements of law intelligible. Legal statements are intelligible if we can understand them as *law*, rather than something else. In what follows, I offer a rational reconstruction of this model of lawfinding.

Law is a social technique of public justification: We demand and offer reasons for the impositions we collectively impose on one another. The reasons we demand and offer are not just any reasons: They are systematically interconnected.[181] This is what makes our answers and challenges *legal*: We have them in common just because we have a legal order in common. In other words, "[l]aw is a way of making our collective and individual experience [as legal subjects] intelligible."[182] Whatever makes sense of our legal answers and demands is, for that reason, *law*. Law is a web of interconnected justificatory considerations.

This means that the law doesn't run out where we run into disagreement about our criteria of validity. Instead, the law is what we reach toward to argue about our criteria of validity, and justify our conclusions about the law they validate. It is in this spirit, for instance, that Baude and Sachs look toward our legal practices and conclude that originalism is our law. The best explanation for our legal practices, they argue, is that "our original law" has "binding force."[183] The point

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[180] *Id.* at 6 (Gorsuch, N., concurring).

[181] Sartorius, *supra* note 173, at 184.

[182] Jiménez, *supra* note 172, at 90.

[183] Baude & Sachs, *Grounding Originalism*, *supra* note 4, at 1458, 1491.

is this: Whatever best justifies and explains our legal practices is, *for that reason*, law.[184]

I believe Baude and Sachs are coherentists about lawfinding in their analysis of "unwritten law." They associate unwritten law with parts of our law of interpretation,[185] (federal) common law,[186] general law,[187] admiralty,[188] equity,[189] etc. They argue that unwritten law is valid in virtue of our practices or legal traditions.[190] Sachs acknowledges that practiced norms "can sometimes be contested, changeable, controversial, political, or morally fraught."[191] But, he continues, this does not mean they cannot be legally valid.[192] The crucial issue is not simply "whatever members of the legal community do" but the "*reasons* they cite for doing it."[193] These reasons make our answers to legal controversies intelligible, make sense of our practices, and so, are *legal*.[194] Both Sachs and Baude rely on this kind of argument to suggest

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184 Baude and Sachs argue that whatever best explains and justifies our legal practices are, for that reason, unwritten law. This traces back to their view about normative social practices. *See generally* Baude & Sachs, *Grounding Originalism*, *supra* note 4, at 1465–70, 1477–78.

185 *See generally* Baude & Sachs, *The Law of Interpretation*, *supra* note 4 (discussing the grounds and content of our law of interpretation).

186 *Id.* at 1142.

187 William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1209–10 (2024).

188 Sachs, *Constitutional Backdrops*, *supra* note 47, at 1883; Sachs, *The "Unwritten Constitution*,*" supra* note 47, at 1798.

189 Sachs, *The "Unwritten Constitution*,*" supra* note 47, at 1798.

190 It is what Sachs calls the "external social practice," rather than an official decision, which makes a judgment about unwritten law right or wrong. Sachs, *Finding Law*, *supra* note 4, at 537; *see* Baude & Sachs, *The Law of Interpretation*, *supra* note 4 at 1139 (Judges *find* common law rules, they don't make these rules); Sachs, Life After *Erie*, *supra* note 139, at 5–6 (On the general idea of finding unwritten rules); Sachs *Finding Law*, *supra* note 4 at 581 (Although, notably, that article concludes: "Unwritten law can be found, as well as made." I assume this is meant to refer to common law more narrowly and not to the constitutional custom.); *see also* Sachs, *The "Unwritten Constitution*,*" supra* note 47, at 1798, 1801 (What makes laws unwritten is that they "have no single and authoritative textual *source*, no pedigree tracing their validity back to a written ancestor."); Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1138 (discussing unwritten rules of interpretation as "features of an existing legal tradition, as opposed to deliberate acts of lawmaking").

191 Sachs, *Finding Law*, *supra* note 4, at 531.

192 Baude & Sachs, *Grounding Originalism*, *supra* note 4, at 1465–70.

193 *Id.* at 1468.

194 They also allow that some of these reasons might be socially binding rather than legally valid, but crucially, they don't distinguish between social normativity and legal normativity. That is, they don't treat the impact of controversy and disagreement—and uncertainty—about social norms upon the bindingness of social obligations differently from the impact that disagreement about legal norms might have on legal bindingness. In *The Official Story of the Law*, Baude and Sachs suggest that where our publicly observable

that our practices might be, *really*, originalist, even if we don't seem to agree on this point.[195] Other originalists have similarly taken the interpretive principles that best explain and justify our legal practices as being, for that reason, legally valid.[196]

For these originalists, the law does not run out when we run out of shared criteria. The law is whatever makes the best sense of the criteria we *do* share. We don't derive law from shared criteria; we look at how we use shared criteria to discover what the law is. In other words, the law does not run out "when cases fail to fall within the scope of application of a [criterially validated] rule, for there are reasons from coherence on the basis of which judges must justify legal decisions even in hard cases."[197]

You might notice that on this view, lawfinding starts to look quite different from the content-independent search for valid enactments we saw in the previous Section. Now, we are searching for principles that justify and make sense of how we treat a valid enactment and the relationship between different enactments. Whether we have found law depends on our sense of what counts as competence within our legal tradition.[198] And *this* is no longer a fact we can discover in the world: It is a political value judgment.

Other originalists have recognized and acknowledged the political nature of this search for legal justification. Whittington has written, for instance, that constitutional construction—what we do when we run out of common criteria of validity—is "essentially political."[199] Others, like Barnett, have been more cautious: Even where we have to choose between rules that make the best sense of our practices, "the choice of

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practices diverge from our private justifications, our socially valid norms are those that are publicly made manifest, and the private justifications and assessments are "subversions" of those socially valid norms. *See* William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178, 181 (2022).

195 Sachs, *Originalism as a Theory of Legal Change*, *supra* note 4, at 819 (advocating a move toward treating "originalism as a claim about law, not just interpretation").

196 Lawson & Seidman, *supra* note 112, at 59; McGinnis & Rappaport, *supra* note 65, at 7 (concluding from the "best readings" of our originalist Justices' opinions that the appropriate notion of original public meaning is "legal").

197 Amalia Amaya Navarro, An Inquiry into the Nature of Coherence and its Role in Legal Argument 5 (2006) (Thesis, European University Institute Department of Law) (on file with the Oregon Law Review).

198 On the close link between coherentism and judgments about competence and virtue, see *id.*

199 KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 5 (1999).

rules" is still guided by "abstract or general principles."[200] So, Barnett believes, it is not true that principles are "completely unconstrained by the determinable original meaning."[201]

The point is that there is still a choice between possible constructions and interpretive methodologies, and that these choices can be justified and challenged. This is not a legally unconstrained exercise. Legal justification isn't false ideology, even when it asks us to weigh different explanations and make educated guesses. Our legal justifications are never "*wholly* 'political' nor *wholly* 'extraconstitutional.'"[202]

I agree with Barnett. I think we can point to a distinctively *legalistic* explanation and justification that allows us to distinguish lawfinding from brute political power, even in controversial cases. I believe the only way to flesh out such an account is to provide a detailed account of what it is about our constitutional practices that make the contests within them *legalistic* rather than purely (or merely) political. We must give an account of the values and justifications that constitutional practices draw upon. And we must explain what makes these values and justification legal in nature. I put forward a more detailed analysis of these practices elsewhere, but the main outlines can be sketched as follows.

Hart thought that law fulfills three social functions.[203] And these insights are echoed among constitutional theorists. First, law enables *certainty*.[204] It allows for an epistemology that is more tractable than that of political morality. It asks only that we look at our criteria of validity and to the practices that some of those criteria rest on. Second, it enables *public autonomy*.[205] It allows for inevitable and ultimately necessary exercises of power within society to obtain, under certain circumstances, a distinctive character: public authorization. This enables a distinct kind of relationship between the governed and their government. And third, it enables *efficacy*. It allows for a body of norms to acquire a presence within diverse, plural, and otherwise truly

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200 BARNETT, *supra* note 65, at 124.

201 *Id.* at 126.

202 *Id.*

203 Alma Diamond, The Practice and Normativity of Law 35-43 (2023) (J.S.D. dissertation, N.Y.U. School of Law) (on file with N.Y.U. Law Library).

204 David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 588 (1999).

205 *Id.* ("[I]f society is to function, some of those [contested moral] matters must be authoritatively resolved, and everyone must live with the resolution; and . . . we understand that the institutions we establish to resolve those disagreements might sometimes reach the result we do not favor.").

separate practices, communities, associations, and activities. It gives normative common ground for moving forward and looking back. It is aimed at drawing ever-changing and infinitely variable circumstances under a single normative framework.[206] It is not a way of governing a community; it is a way of *being* a community.

This is made possible by law's character as a source-based system of norms resting on recognitional practices. Because its criteria of validity are determined by recognitional practices, legal justification has a distinctive formality and publicity that is absent from moral and political justification. Formality has to do with a distinctive mode of justification—rules and actions are justified with reference to their relation to *criteria of validity* rather than (only) with reference to their content or effects. This relatively more content-insensitive mode of justification allows us to settle questions and decide on courses of action on grounds other than our views on the merits of the issues at hand.[207] It allows for a kind of shared plural reasoning that remains available to us even when we don't have the common ground to share in more substantive reasoning.[208] That brings me to publicity.

Legal reasoning is plural reasoning about our criteria of validity. Rather than an abstract, normative argument about what is best, legal argument is about arriving at a shared plural perspective on a publicly discoverable situation. It also allows for relatively easier (and much thinner) justification: Public facts are what we have *in common*. When we are unable to rely on our common moral beliefs, or our common political ideals, we might have only our common *situation*, our shared recognitional practices, to fall back on. Legal justification is practice-

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[206] Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2052 (2012) ("A common vocabulary permits people with different life experiences and values to speak to one another. It can be a valuable tool for taming social conflict. To put the point in terms that would have appealed to Burke, it sends the People into salons armed with pamphlets rather than to the barricades armed with bayonets.").

[207] Richard H. Fallon, *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 561–65 (1999) ("As a matter of ideal, constitutional theory would furnish grounds for the exercise or non-exercise of judicial power that all affected parties could reasonably be expected to respect. In practice, the demand that everyone should actually coalesce on a constitutional theory, and accept it as justifying constitutional outcomes, is too stringent to be realistic . . . . Nonetheless, agreement and even consensus should remain as defining aspirations for those engaged in constitutional argument." If that is the aspiration, Fallon writes later, "it may appear more promising to focus on relatively formal methodologies than to enter directly into a debate about substantive ends.") (internal citations omitted).

[208] Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1096 ("As a society, we have contingent legal settlements of these normative debates.").

based justification.[209] Legal justification is, in this sense, the opposite of immanent critique: It is immanent justification.[210]

A few paragraphs ago, I said that law is a distinctive way of being a community. Here's another way of putting that thought. Law instantiates common subjection:[211] shared answerability to a formal system of norms drawn from public sources. The liberal tradition tends to conceive of the legal community as concomitant with the political community. But we often *contest* our political community in legal terms.[212] And we shape and reshape our legal communities politically (and even sometimes violently).[213] Law is constitutive of a distinctive kind of community, often but not always coextensive with political community.[214] A legal community is characterized by shared

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209 Strauss, *supra* note 204, at 582 ("Constitutional theory is prescriptive—it purports to tell people what to do—but it is also descriptive, because it cannot call for a wholesale departure from existing practices.").

210 *Id.* (explaining that it "draw[s] on the bases of agreement that exist within the legal culture.").

211 This is, in a nutshell, the difference between law and what Fuller calls managerial direction and Hart at times discusses as scorer's discretion. LON L. FULLER, THE MORALITY OF LAW 215–16 (1968); H.L.A. HART, CONCEPT OF LAW, *supra* note 84, at 142. In managerial direction, there is no further source of authoritative norms which managers have *in common* with those they manage. Or rather, to be more precise, the *only* further authoritative norm is that whatever the manager says is binding, and in this regard it resembles a game of scorer's discretion. *See generally* James C. Ketchen, *Revisiting Fuller's Critique of Hart: Managerial Control and the Pathology of Legal Systems: The Hart-Weber Nexus*, 53 U. TORO. L.J. 1 (2003) (discussing the affinities between Fuller's discussion of managerial control and Weber's analysis of bureaucracy and rationalization).

212 This is how I read Maggie Blackhawk's argument, in Maggie Blackhawk, *The Constitution of American Colonialism*, 137 HARV. L. REV. 1 (2023). It is also how I read the legal claims made by so-called Colored Conventions (many of these claims sounded in moral terms, too). *See* Victoria L. Harrison, *We Are Here Assembled: Illinois Colored Conventions, 1853-1873*, 108 J. ILL. STATE HIST. SOC'Y 322, 330 (2015). *Black Organizing in Pre-Civil War Illinois: Creating Community, Demanding Justice*, COLORED CONVENTIONS PROJECT, https://coloredconventions.org/black-illinois-organizing/ [https://perma.cc/727R-QDVS] (last visited Aug. 20, 2025).

213 Farah Peterson, *Our Constitutionalism of Force*, 122 COLUM. L. REV. 1539, 1552 (2022).

214 Salient examples of cases where legal communities and political communities are not coextensive include Apartheid states, occupied territories, and the kind of situation described by Ernst Fraenkl as a dual state.

subjection.[215] Law is a political achievement of community characterized by shared subjection to common norms.[216]

This has been a short summary of my view about the distinctiveness of legal justification. It is one possible way of explaining how legal argument and justification might still be meaningfully *legalistic* even if not ultimately grounded in fundamental truths deduced in interpersonally verifiable ways from criteria of validity with recognized institutional standing. There might be other ways of explaining this, too.

But here is the rub: On this view, the distinction between lawfinding and lawmaking can no longer be lawfinding's neutrality. Lawfinding and judicial lawmaking are intertwined on this kind of view. To find law *just* is to participate in this ongoing tradition of making sense of shared subjection. Lawfinding and lawmaking are closely related: We find law by making coherent sense of our practices. There is no final fundamental truth about law—a truth about the Founding, or about the Constitutional text, or anything else—from which we can deductively reason about the content of law. There is no final truth about which we can conclusively say, as Justice Gorsuch did about the written word in *Bostock*, "it is the law."[217] Instead, law is always up for grabs; we can always ask, "but *why* is it the law?" and our answers would be legal. This is what a coherentist model of lawfinding implies.

We can see this in the structure of the debate around *Roe v. Wade*, for example. Ely's criticism of *Roe* was that the right to privacy "lacks connection with any value the Constitution marks as special."[218] The legal right to abortion does not seem vindicated by an uncontroversially shared criterion of validity—the text of the Constitution.

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215 Of course, I am speaking in very formalist terms. In reality, legal orders usually tend to create and sustain classes of second-class citizens, and function to oppress some for the benefit of others. But all I want to point out here is that there is a difference between the legal order acting upon someone it claims as a subject, in which case there is an implicit invocation of background commonable authorizing norms; and treating that person as an object, in which case there is no shared subjection to commonable norms being claimed. David Dyzenhaus has written extensively on the legal experience of injustice; I draw on his work and thought in this line of analysis. *See generally* David Dyzenhaus, *The Juristic Force of Injustice*, *in* JURISTIC FORCE INJUSTICE 256 (2005).

216 As Balkin puts it, this is what explains "why the Constitution is more than the dead hand of the past, but is a continuing project that each generation takes on. It is a great work that spans many lifetimes." Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 303 (2007).

217 Bostock v. Clayton Cnty., 590 U.S. 644, 667 (2020).

218 John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973).

Balkin's criticism of Ely and defense of *Roe* rest on the idea that we should look toward "*text and principle*."[219] Why? Because that's the only way we can make sense of our evolving political ideals, such as equal rights for women, freedom of speech, etc., as "genuine achievements."[220] Because these ideals feature in our explanation of our constitutional tradition, and must be regarded as such, they are "plausible constructions of constitutional principles that underlie the constitutional text."[221] And that, for Balkin, makes these principles *legal*.

This is a coherentist view of lawfinding, and I believe it is intelligible. But it depends, deeply, on how we see ourselves and what we count as achievements. It depends, also, on what we judge as competence in reasoning about these questions. None of this can be done neutrally in the sense we explored in the previous part. If we take a coherentist view of lawfinding, lawfinding isn't the neutral transmission of preexisting standards. It demands our moral and political judgment. We might be able to explain what makes that moral and political judgment distinctively legalistic, as I have sketched here. But we won't be able to identify the legalism of judicial reasoning with the neutral transmission of preexisting norms.

2. On a Coherentist Model, the Neutrality Assumption Is False

The coherentist view of legal content rescues the formalist assumption. If lawfinding is to make sense of our shared subjection to a coherent system of interrelated norms, law forms, as Baude and Sachs write, a "seamless web."[222] Just as the Court wrote in *Loper Bright*: Our best justifications don't stop existing when they become controversial. There is always an educated, competent guess to be made, always a best reading available.[223]

But the coherentist does this by sacrificing the neutrality assumption. *That* assumption was vindicated by the fact that lawfinding operated upon authoritative legal reasons. And those reasons exist only to the extent that they are interpersonally verifiable. Where we run out of common ground, we run out of those reasons. Neutral lawfinding is unavailable when we reach disagreement about our criteria of validity.

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[219] Balkin, *supra* note 216, at 293.

[220] *Id.* at 299.

[221] *Id.*

[222] Baude & Sachs, *The Law of Interpretation*, *supra* note 4, at 1101.

[223] Loper Bright Enters. v. Raimondo, No. 22-451, slip op. at 22–23 (U.S. June 28, 2024).

Legal answers derivable from authoritative legal reasons "*underdetermine*" the Court's decision in most cases.[224]

This does not mean that there are no "best" answers available. But it means that the activity of offering and contesting them *is just* to participate in an ongoing political recognitional practice. It is to take a substantive position on what counts as legal competence, as judicial responsibility, and as judicial virtue. It is to distinguish good answers from bad ones on the basis of judgments about the "intelligibility" and "coherence" that those answers add to our understanding of ourselves as a legal community. And this is to take a stand on what kind of a community we are.

The coherentist cannot point toward ultimate facts about a particular enactment or moment in time to vindicate the stand they wish to take. If we *are* supposed to understand ourselves as a legal community continuous with the one founded in 1787, that is not a neutrally ascertainable fact about the legal significance of a valid enactment. It can't be, precisely because legally valid enactments rest on institutional practices that shift as our justificatory practices shift.

We can make legal sense of those practices, but to do so is to *make* (coherentist) *law*. If law is the best explanation and justification for our practices, explaining and justifying our practices *is* making it. Lawmaking and lawfinding bleed into one another. We make law as we make sense of ourselves. And we find law as we find meaning in this process. Lawfinding and lawmaking can't be cleaved apart. And whenever we do find law, we have found a competent justification for our practices. Nothing about this can be done neutrally and impartially. We will have to delineate the contours of the judicial power in other terms. For a coherentist, lawfinding is a process of justifying shared subjection. This can be legalistic, but it cannot be neutral.

We must choose: Either judicial judgment is neutral, or the judiciary never makes law. Both can't be true. Either way, the idea of lawfinding itself isn't much help for understanding judicial power and its justification. Either judges do much more than find law, or lawfinding is a species of moral and political reasoning. What we need is a much more fine-grained analysis of what makes for distinctively legalistic moral and political reasoning. "Finding law" isn't it.

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[224] Leiter, *supra* note 155, at 1601.

CONCLUSION

Originalist theory has unfolded on the twin assumptions (i) that judicial power is limited to finding and applying the law, and (ii) that lawfinding involves impartiality—replacing one's own judgment with that of the law. But originalism is not entitled to both assumptions. And neither is our broader constitutional discourse.

It is possible to argue that the judiciary is always finding and applying the law. That there is, as the Court insists in *Loper Bright*, always a best reading of the law available. If law is a seamless web of justificatory materials, there are always legal grounds for judicial decisions.

But this is to associate law with the justifications we offer for legal judgments. To find law in *this* sense requires value judgments about what counts as a sound legal judgment, a good legal explanation, and a satisfactory legal justification. It requires political judgment.

It is possible to deny this and insist that judges find law by replacing their political judgments with the social judgment of law. We can argue that law provides judges with its own standards for sound judgments, good explanations, and satisfactory justifications. Their job is to find that legal answer and give effect to it.

But this is to associate law with social judgment, which depends for its existence on shared interpersonal criteria for determining the content of that judgment. We have social judgments only where we have uncontroversial common ground about its determinants. When judges run into controversial and novel questions, social judgment runs out. Law *has* no answers in these cases.

Either judges do more than find law, or lawfinding often demands political judgment. Originalism, and the Court, can't run with the hares and hunt with the hounds. They must choose.

And constitutional theory must abandon its association between lawmaking and political judgment, whether because judges do more than find law, or because lawfinding demands political judgment. We must understand judicial reasoning as a distinctive species of moral and political judgment. I have sketched one way we might explain what makes it distinctively "juristic." There might be other ways of doing so. But that is where the important work lies.

The division between lawmaking and lawfinding is a distraction from the much more difficult and pressing task of theorizing a distinctively juristic species of moral and political reasoning. This more fruitful and long-overdue inquiry emerges from the shadows once we

abandon the fugitive thought that there is always law to be found in politically neutral ways.