IN PRAISE OF IGNORING FACTS

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INTRODUCTION

Contracts students may remember the old chestnut of *Cotnam v. Wisdom*, in which a Mr. A.M. Harrison "was thrown from a street car" and, while unconscious, treated by doctors who couldn't revive him.[1] The Arkansas courts saw the case as one of quasi-contract,[2] asking whether the doctors were due a reasonable fee,[3] and also whether their award should be reduced for their lack of success or increased given the estate's ability to pay.[4] When my wife and I were in law school, though, a classmate of hers raised a different question: whether Harrison, rather than having been "thrown" from the car, might actually have committed suicide. Rather well-insured for a bachelor, might he have leapt from the car on purpose, hoping his nieces and nephews might benefit by his death?[5]

To normal people actually concerned with these actual events, this question might seem far more interesting. Even lawyers (a distinct category) might, in their spare time, enjoy looking beyond the casebooks to find out what really happened.[6] But when they're "on the job," so to speak, a question like this might seem the worst sort of irrelevance—illuminating nothing of importance, neither the measure of damages owed nor the general principles of quasi-contract. Among weirdos like us, who cares whether Harry James Tompkins lied about being struck by something protruding from an Erie Railroad car,[7] if we can instead argue about when federal judges should defer to state court opinions?[8] Who cares about the unfairness to a

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[1] 104 S.W. 164, 165 (Ark. 1907).

[2] *See id.*

[3] *See id.*

[4] *See id.* at 165–67.

[5] *See id.* at 166 (describing Harrison's insurance policies and family situation). To be clear, I know of no evidence that Harrison's death was anything but accidental.

[6] *Cf.* CONTRACTS STORIES: AN IN-DEPTH LOOK AT THE LEADING CONTRACT CASES (Douglas G. Baird ed., 2007) (describing the background of famous contracts cases).

[7] *See* Brian L. Frye, *The Ballad of Harry James Tompkins*, 52 AKRON L. REV. 531, 582–90 (2018).

[8] *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 71 (1938).

defendant that the light was actually green, once a properly instructed jury, on sufficient evidence, has returned a verdict that it was red?

This ordinary-person's sense of priorities is part of what we brutally beat out of first-year law students in training them to "think like a lawyer": not (or not just) for the reproduction of hierarchy,[9] but because the particular corner of human culture known as law cares more about some facts than others. "Quasi-contract," "corporation," "collateral estoppel," and all our other rules and doctrines are *designed* to produce a simplified, machine-readable picture of the world, a picture that can sometimes treat like cases alike only because it little resembles the tangled way the world really is. And a fundamental part of lawyering is knowing which of these facts matter when—practically or legally, in the conference room or the courtroom, before the jury or the bench, at trial or on appeal.

So one might expect lawyers and legal theorists to appreciate efforts at theoretical clarity, attaching significance to certain facts over others and defending these choices on straightforward theoretical grounds. Yet much modern con-law literature takes precisely the opposite tack—treating the very act of throwing away information as suspicious and criticizing the abstraction necessary for clear thought as a form of intellectual blinders.

To Jack Balkin, to whose book *Memory and Authority* this Symposium is dedicated, "[c]onservative originalism is a practice of erasure," so stingy in its use of historical facts that it "finds large portions of the American experience (and the American population) irrelevant" to the Constitution's proper understanding.[10] Its focus on Founding-era law treats "all other uses of history, all other periods of history, and, indeed, all of the other places on Earth where history occurred" as "of limited importance."[11] Its "bounded conception of constitutional memory" ignores features of the past "not relevant to its theoretical claims,"[12] "stiff-arming historians" and "setting boundaries on how other lawyers should use history."[13] Indeed, "conservative" originalism risks not just inaccuracy but injustice, entrenching the past exclusion of women, ethnic minorities, and other "groups shut out of formal constitution-making."[14]

None of this might matter if originalism could defend its choice of emphasis and pay its own way. But rather than "debat[e] the pros and cons of originalism" at the level of theory, Balkin suggests, we'll learn more if we "focus instead on how people actually make constitutional claims."[15] *Memory and Authority* offers an account

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[9] *See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY 6–7 (2004).

[10] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 199 (2024).

[11] *Id.* at 15.

[12] *Id.*

[13] *Id.* at 250.

[14] *Id.* at 16.

[15] *Id.* at 17.

of "how people *use* history when they interpret the Constitution," employing "modalities" or "forms of argument" to gain "authority" for their own claims and to "undermine[]" those of others.[16] That's the right focus, the book contends, because "[t]he structure of legal rhetoric reflects the structure of legal reasoning."[17]

This last argument is a step too far, for not all legal rhetoric is created equal. As a study of rhetoric, *Memory and Authority* establishes that lawyers, judges, and others in our legal system use history for a variety of rhetorical purposes. But while it accepts that every form of argument is backed by an "implicit theory" of which facts matter,[18] the book refuses to judge these forms of legal rhetoric by how plausible their implicit theories might be—and, what's more, criticizes others for doing so. Instead, on its telling, any attempt to corral the rhetorical use of history is necessarily doomed, because lawyers "interested in endless disputation"[19] will always "want to persuade audiences and win arguments with their opponents," searching "for ever new historical sources and approaches"[20] whether their underlying theories are sensible or not.

In other words, *Memory and Authority* sees American lawyers as using history the way Tonya Harding might use a crowbar, to kneecap their opponents whenever they think they can get away with it. But just as the attack on Nancy Kerrigan served only as indirect and limited evidence of the rules of U.S. Figure Skating, lawyers' rhetorical use of history serves only as indirect and limited evidence of the content of American law.

Treating every use of legal rhetoric as equally probative of American law is fatal to the theoretical project—including to Balkin's own "thin" theory of constitutional law, which stretches itself past the breaking point in the hopes of accommodating the changing winds of social movements. Rather than take advocates' rhetorical moves for granted, we scholars have the indulgence and time to look for the implicit theories underlying these moves, to air those theories explicitly, to identify what might make them true or false, and to assess how plausible they are on those grounds. Constitutional theories need microfoundations: a theory of what *American constitutional law* provides ought to be responsible to a theory of what *American law* provides, which in turn ought to be responsible to a theory of *legal content* more generally.[21] Or, to put it in slogan form, *constitutional theory needs more theory*—less court- or

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[16] *Id.* at 3 (emphasis added and omitted) (discussing PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7–8 (1982) (presenting different types of constitutional argumentation)).

[17] *Id.* at 237.

[18] *Id.* at 20.

[19] *Id.* at 249.

[20] *Id.* at 14.

[21] *Cf.* Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 550–51 (2013) (distinguishing theories of law from theories of interpretation or adjudication).

lawyer-watching and more concern about distinguishing the content of the law from the many other law-adjacent phenomena in a complex society like ours.

This approach sometimes goes under the bad name of "the methodological autonomy of law"[22]—as if law were made in a vacuum, without any involvement from politics, economics, or real-life human beings. But methodological autonomy is part of how we learn things about a complex and interrelated world. Our social world is chock-full of different and overlapping systems of norms, principles, rules, and standards; understanding them often means sorting through all of them and attributing different practices, criticisms, or evaluations to different systems. We might need to distinguish, say, norms of etiquette from norms of fashion, even as a guest's wearing a long white dress to a wedding offends against both. Or we might need to separate legal norms (like the rule against perpetuities) from the many nonlegal customs of lawyers, such as wearing morning coats, opening arguments with "May it please the Court," or adopting certain styles of historical rhetoric. To refuse to draw these distinctions simply because they all affect us in practice—because we human beings have to act under all of them at once—makes our analysis less sophisticated rather than more so; it flattens, rather than enhances, our understanding of the social world.

I. LAW AND LEGAL RHETORIC

American lawyers use history instrumentally and in many different ways; on this point Balkin is entirely correct. But this fact also tells us little about American law. To know what to make of lawyers' rhetorical moves, we need to know the implicit legal theories underlying their arguments, as well as what might make those theories true or false. And the fact that these theories might devalue some common forms of argument is a feature, not a bug. If theory is going to be useful, it has to make a difference somewhere; and if law isn't going to be everything to everyone, it has to be capable of ruling some things out.

A. The Uses of Legal Rhetoric

Lawyers often use historical argument both more broadly and more instrumentally than an originalist like me might like. Sometimes lawyers look to the past because the Constitution's meaning remains constant over time,[23] or because the law of the American Founding remains our law until lawfully changed;[24] but they also

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[22] BALKIN, *supra* note 10, at 14, 247.

[23] *See, e.g.*, South Carolina v. United States, 199 U.S. 437, 448 (1905) ("The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when adopted, it means now.").

[24] *See, e.g.*, Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 838–39 (2015); William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 LAW & HIST. REV. 809, 811–12 (2019).

"invoke," as Balkin notes, "whatever memories of the past they think will make their arguments persuasive to their intended audiences."[25] Balkin describes how they argue in a variety of different registers—from text, structure, purpose, consequences, judicial precedent, political convention, customs, natural law, national ethos, political tradition, and more[26]—treating history as "useful to the extent that it helps [them] make claims of legal authority using one of the[se] standard forms of justification."[27] And in choosing which historical facts to emphasize, they unashamedly favor the ones that favor them: "Advocates will pick the part of the past they want to honor, while disclaiming or glossing over other parts of the past."[28]

The question is what to make of all this, and whether it says anything meaningful about the content of American law. Looking to legal rhetoric to help identify legal content responds to a natural intuition: if we want to know what our law is, maybe we should see what people say about it, what kind of claims about it are typically offered and accepted. Thus theories like Philip Bobbitt's, "present [c]onstitutional law as a set of relations to argument," rejecting any other "set of legal presuppositions" on which that practice of argument "is supposed to depend."[29] Or theories such as H.L.A. Hart's, self-described as an exercise in "descriptive sociology,"[30] which emphasize the "complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."[31] All else equal, we might take the grounds invoked in legal argument to correspond, more or less, to the criteria their listeners use.

But legal argument includes logic and rhetoric both. Lawyers routinely use rhetorical moves in the heat of the fight that they wouldn't defend in the cool confines of the study. Consider the 2005 case of *Kelo v. City of New London*, which asked whether taking a home for economic development is a "public use."[32] The homeowners' brief noted that "Suzette Kelo, a registered nurse," had "made extensive improvements" to her "Victorian-era house" because "[s]he loves the water view" and "the people in the area."[33] The city, meanwhile, pointed out that "[b]y the time the petitioners' properties were condemned in November 2000," the "$300 million Pfizer facility" "was almost completed."[34] What's curious here is that neither of those

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[25] BALKIN, *supra* note 10, at 213.

[26] *Id.* at 18–20.

[27] *Id.* at 22; *see also id.* at 267 ("Lawyers want to use the past to help them make arguments that (1) successfully claim legal authority and (2) rebut claims to authority offered by their opponents.").

[28] *Id.* at 26.

[29] BOBBITT, *supra* note 16, at 245.

[30] H.L.A. HART, THE CONCEPT OF LAW, at vi (3d ed. 2012).

[31] *Id.* at 110.

[32] 545 U.S. 469, 472 (2005); *cf.* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

[33] Brief of Petitioners at 2, *Kelo*, 545 U.S. 469 (No. 04-108), 2004 WL 2811059.

[34] Brief of the Respondents at 3, *Kelo*, 545 U.S. 469 (No. 04-108), 2005 WL 429976.

things, though taking up valuable space in a merits brief, could possibly affect the merits of the case before the Court. If the city didn't have power to take the land, it was its own foolishness to let $300 million of construction go by before finding out. And if Suzette Kelo had been an unemployed layabout who hated children and kicked puppies, that wouldn't make the taking of her home any more or less of a "public use" under the Takings Clause.

All the same, these rhetorical moves aren't surprising. Lawyers try to get judges to sympathize with their clients, not because *the law* always balances equities or cares about sympathy, but because judges are human beings who face a cognitive-dissonance cost when ruling against sympathetic parties. It might have been an interesting rhetorical choice (who knows, maybe a more strategic one) had Kelo's lawyers instead portrayed her as "a squeezing, wrenching, grasping, scraping, clutching, covetous old sinner"[35]—and had they argued that darn it, this is America, and even *this poisonous hag* has as much right to her property as the rest of us. But that rhetorical choice, while important to advocates, wouldn't have had much to do with the law. In fact, if a lawyer or judge had explicitly treated Kelo's real-life sympathetic qualities as a ground of decision rather than window dressing, they'd have been acting contrary to clear legal norms. The law simply doesn't say—and neither side in *Kelo* would've said it says—that an economic-development taking qualifies as a public use only if the owner is a real jerk.

Some people might deny this kind of distinction, claiming that *whatever* prompts judges to act is equally part of the law. This is the deeply unrealistic doctrine that sometimes goes by the name of "legal realism"[36]—whether or not many actual Realists agreed with it.[37] If umpires tended to be more lenient on home teams, for example, any fool could tell these personal biases from the rules of the game. So too if judges tended to be harsher or more lenient after lunch. As zealous advocates, lawyers of course want to know such things, just like they'd want to know if a certain judge can be bribed. But as jurists, they'd have no trouble separating facts like these from a straightforward account of what the law provides. So legal rhetoric *doesn't* always reflect the structure of legal reasoning. That means we need some way of distinguishing the argumentative moves that actually respond to the law from those that respond only to the human beings applying the law.

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[35] CHARLES DICKENS, A CHRISTMAS CAROL: IN PROSE, BEING A GHOST STORY OF CHRISTMAS 3 (London, Chapman & Hall 1843).

[36] *Cf.* O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460–61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

[37] *Compare* BRIAN LEITER, *Legal Realism and Legal Positivism Reconsidered*, *in* NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 59, 69–73 (2007) (arguing that most didn't), *with* Leslie Green, *Positivism, Realism, and Sources of Law*, *in* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 39, 44–51 (Torben Spaak & Patricia Mindus eds., 2021) (arguing that more did).

B. Law and Legal Theory

That means looking to theory. As Balkin correctly notes, each "standard form of legal argument . . . rests on a background or unspoken theory of legal justification,"[38] an "implicit theory of why arguments of the type we are making are valid and persuasive."[39] In practice, while "[l]egal argument often elides the[se] theoretical assumptions," by "[b]ringing these premises to the surface" we can "evaluate and criticize historical arguments on their own terms."[40] Indeed, Balkin reserves his harshest criticism for what he sees as "[b]ad uses of history," which "mislead their audiences about the kinds of justification they actually employ."[41]

So one might think the next step would be to surface these unspoken background theories and see how plausible they are. We might, for example, look to consequences because they're a good heuristic for what rule, standard, or principle the relevant lawmakers actually chose: all else being equal, they probably didn't choose something that everyone knew would be terrible. Or we might look to consequences for more presentist reasons: a certain choice's being terrible is a good argument, all else being equal, not lightly to suppose that it governs Americans today. Similarly, we might look to precedent as a rule of evidence (that we need more confidence to discard what judges previously said the Constitution meant),[42] or as a rule of substantive law (that what our Constitution means can change depending on what future judges say it means).[43]

Drawing distinctions like these requires a deeper kind of description than Balkin's behaviorist approach. Merely chronicling how "lawyers use many different modalities of argument"[44]—textual, precedential, prudential, ethical, and so on[45]—implicitly treats all these forms as operating on the same plane, and in a certain sense they do: they all show up during the same sixty minutes of oral argument time and on the same pages of the U.S. Reports. But the mere fact that people *use* forms of argument like consequences or precedent doesn't show that they're legally *right* to use them. The whole force of the implicit-theory point is that certain styles of argument might on reflection prove unpersuasive because their implicit theories won't stand up to scrutiny.

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[38] BALKIN, *supra* note 10, at 5.

[39] *Id.* at 20.

[40] *Id.* at 24.

[41] *Id.* at 262.

[42] *See, e.g.*, Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 1–2 (2001).

[43] *See, e.g.*, Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1122–23 (2008).

[44] BALKIN, *supra* note 10, at 247.

[45] *Id.* at 18–20, 27–53, 149–51.

That scrutiny, in turn, requires some deeper account of what would make these implicit theories true or false. That account ought to be based on some broader theory of American law, which ought to follow from one's theory of legal content in general. If a society's law is determined by its "complex, but normally concordant, practice" of using "certain criteria" to identify legal norms[46] (perhaps reflected in its "official story," a "shared account of the law's structure and sources, which members of its legal community publicly advance and defend"),[47] then we might want to ask how American legal actors *justify* their forms of argument: what they hope to prove by them, what limits on those modalities they readily concede, and so on. Many nineteenth-century cases, for example, are described even by non-originalists as using a variety of "structural, textual, and historical arguments in the same opinion," but "with their 'overall purpose' likely being 'to explicate the original meaning of the Constitution,'" and with the discovery of that meaning being their "'overarching goal or result.'"[48] Simply counting up the uses of certain methods won't tell us much about what those methods were meant to do.

The same goes for more modern times. We might note, say, that consequences are regularly used as evidence of which path was historically chosen, but that they're also regularly and explicitly discounted once the historical choice of path is known. (It's a commonplace that "a given law or procedure" being "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.")[49] Or we might see that it's a standard move to overrule even a long-standing precedent as "wrong the day it was decided,"[50] but not to "overrule" some provision of the Constitution (say, the Natural Born Citizen Clause) on the ground that it was wrong the day it was ratified.[51] More generally, we might notice that it's *de rigueur* for judges and judicial candidates to acknowledge the force of whatever rule, standard, or principle was long-ago adopted in the Constitution,[52] to make unlikely arguments about which rule, standard, or principle it

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[46] *See* HART, *supra* note 30, at 110.

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

[48] *See* Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 823–24 (2022) (quoting Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1199).

[49] INS v. Chadha, 462 U.S. 919, 944 (1983).

[50] *See* Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 519–21 (2018).

[51] *See* U.S. CONST. art. II, § 1, cl. 5; Sachs, *supra* note 24, at 862; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 899 (1996).

[52] *See, e.g.*, *The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010) (statement of Elena Kagan) ("[S]ometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.").

was,[53] or even to argue such historical claims "to a draw,"[54] portraying the historical record as unrecoverably unclear. But it isn't publicly acceptable in legal argument to *admit* that the historical choice of rule, standard, or principle goes against you, and then to say that the lawmakers made a stupid choice which we should simply ignore today. That sort of thing happens in academia now and then, but it's recognized even by its advocates as near-universally rejected;[55] when done by public officials, it regularly results in public opprobrium and apologies,[56] just as the Hartian descriptive sociologist would expect.

In other words, the various modalities might not all be on the same plane: they might be *structured*, with some having more importance than others, as a matter of law and legal norms and not just good public policy. Exactly which forms of argument are more important than others is an empirical question, and some of the evidence is discussed below.[57] But the idea that legal theories might impose some constraints on our practices of argument, making some of them more and some less relevant to legal content, is hard to avoid on any plausible account of American law.

C. What Theories Leave Out

On the role of these legal theories *Memory and Authority* is of two minds. The book agrees that legal theory "imposes a perspective or filter on history,"[58] that "theory makes history relevant,"[59] and that it's "correct[]" to hold that "law's interest in history is limited."[60] Indeed, in some passages it accuses scholars of not being theoretical *enough*, making theoretical "moves *within* legal argument" without

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[53] *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 664 (2015) (contending that the Framers of the Fourteenth Amendment "entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning"); *cf.* Richard Primus, *Is Theocracy Our Politics?*, 116 COLUM. L. REV. SIDEBAR 44, 56–57 (2016) (noting the prevalence of "motivated reasoning" about original law).

[54] William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2380 (2015).

[55] *E.g.*, LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 9 (2012) (noting sadly that "[b]oth sides want to treat the Constitution as a law that commands real outcomes"); Strauss, *supra* note 51, at 885 (conceding that his preferred method of common-law constitutionalism "is not an approach we usually associate with a written constitution, or indeed with codified law of any kind"); *cf.* Primus, *supra* note 53, at 56 (suggesting that perhaps "the Court feels an obligation to show fidelity to original meanings—or at least to avoid showing *infidelity* to them").

[56] *E.g.*, Jacob Gershman, *Posner Apologizes for Saying the Constitution Is Useless*, WALL ST. J. (July 1, 2016, 7:38 PM), https://www.wsj.com/articles/BL-LB-54096 [https://perma.cc/TUW8-34QM].

[57] *See infra* Section II.B.

[58] BALKIN, *supra* note 10, at 23.

[59] *Id.*

[60] *Id.* at 252.

making those moves explicit.[61] Yet in other, adjacent passages it disparages the very same theoretical moves as unrealistically "setting boundaries on how other lawyers should use history,"[62] "stiff-arming historians"[63] by declaring that "no history gets in unless law says that it does."[64] The common thread in these competing arguments is their choice of target: "conservative originalists,"[65] who seek to build a "Maginot Line"[66] that might keep out pesky historians as well as competing advocates. This sort of ox-goring aside, the book's concessions to theory in fact serve as a strong defense of policing disciplinary boundaries—not as a means of maintaining guild privilege or seeking political advantage, but as a necessary part of honest intellectual work.

Fights over the role of history in legal argument are sometimes personalized as fights between lawyers and historians.[67] That's something of a distortion, not least because the same people regularly wear both hats; many professional lawyers have extensive historical training and vice versa, and professional identity is no prerequisite to good scholarship. The real distinction, putting aside special contexts such as advocacy or litigation, concerns the *aim* of legal or historical inquiry. The former asks "which interpretation of the law is correct" (or was correct at some prior time); the latter tends to ask how we can better understand the past, "how law and society developed in the way they did."[68] Legal inquiry applies to the world an implicit legal theory, to which certain facts are categorically more relevant than others; historical inquiry usually seeks more holistic forms of knowledge and explanation of the past. Whether a particular bunch of people sat in a particular room and said "aye," and whether they or others *thought* they had amended the Municipal Water Code, are bog-standard historical questions; whether they *did* thereby amend the Water Code is both a historical question and a legal one. (Maybe no one realized that the meeting was invalidly called, under a little-known state statute that the rules of the relevant community would have nonetheless treated as valid law. Legal inquiry tends to care more about that sort of thing, though historical inquiry can take an interest as well.) It shouldn't surprise us, then, that law might leave some "messy details of history on the cutting-room floor," so as "to produce the kind of knowledge that might be useful to the legal enterprise."[69] As Balkin notes, "[a]ll legal theories reconfigure history to theory in varying degrees," because their "[t]heoretical commitments tell lawyers what facts are relevant and important and why."[70]

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[61] *Id.* at 250.
[62] *Id.*
[63] *Id.*
[64] *Id.* at 246–47.
[65] *Id.* at 240.
[66] *Id.* at 253.
[67] *E.g.*, Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625, 626–27 (2008).
[68] BALKIN, *supra* note 10, at 232.
[69] *Id.* at 242.
[70] *Id.*

So it may come as a surprise to "conservative originalists" to be told that all their "theorizing and argument," generally too "complex" to be of interest beyond "the legal academy,"[71] is actually being hidden from their readers—that their extensive responses to historical critiques really just "disguise[] disagreements *among* lawyers about how to use (and how not to use) history."[72] For some of them have been arguing all along that the legal relevance of the past is a question of law, not history,[73] to be settled by considerations of legal theory, which considerations they discuss quite explicitly and often at unfortunate length. In this regard *Memory and Authority* simply misreads its source material. Originalist arguments that law "only lets [history] in on its own terms"[74] are explicitly pitched as *correctives* to those who wish to exclude historical inquiry *even when* the law might call for it (those, say, who question whether judges may ever "apply history in resolving legal disputes," for "[i]f they act as historians, they cease to be judges").[75]

By contrast, the standard "conservative originalist" response to historical critiques is precisely the same as Balkin's: that disciplinary experts, of whatever discipline, should avoid getting over their skis by advancing implicit legal theories without saying so. For example, thirty historical organizations recently critiqued the majority in *Dobbs v. Jackson Women's Health Organization*,[76] not for being unaware of certain historical facts (say, that many antebellum states "tolerat[ed] termination of pregnancy before occurrence of 'quickening,'" or that this practice "was eventually—although quite gradually—superseded by criminalization"), but for drawing from those facts what the organizations saw as the wrong constitutional inferences.[77] Anyone has a right to make this kind of legal argument, but not to claim that "standards of historical scholarship"[78] settle the question on their own. Likewise, anyone can claim (as the organizations did) that *Dobbs* "erodes fundamental rights" and may "deepen inequalities in our country," but not that these topics fall within the disciplinary expertise of nineteenth-century-Americanists—let alone of the Society of Architectural Historians, the German Studies Association, and the Shakespeare Association of America.[79]

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[71] *Id.* at 59.

[72] *Id.* at 14.

[73] *See* Baude & Sachs, *supra* note 24, at 810.

[74] BALKIN, *supra* note 10, at 247 (discussing Baude & Sachs, *supra* note 24).

[75] Helen Irving, *Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning*, 84 FORDHAM L. REV. 957, 959–60 (2015); *cf.* Baude & Sachs, *supra* note 24, at 811 (discussing Irving's arguments).

[76] *History, the Supreme Court, and* Dobbs v. Jackson*: Joint Statement from the AHA and the OAH*, AM. HIST. ASS'N (July 6, 2022), https://www.historians.org/news/history-the-supreme-court-and-dobbs-v-jackson-joint-statement-from-the-aha-and-the-oah/ [https://perma.cc/R4W3-UEW9] (listing organizations critical of the *Dobbs* decision).

[77] *Id.*

[78] *Id.*

[79] *Id.*

Memory and Authority's main critique of legal theory is a practical one. Given "law's distinctively adversarial professional culture,"[80] we'll never successfully "escape or seal off historical inquiry,"[81] because zealous advocates will keep invoking arguments from history whether or not the best legal theory says they can. In other words, theoretical restrictions on using history suffer from a form of self-defeat: "legal doctrines and legal methods" can try to restrict which historical facts are relevant, but "the incentives of legal argument work in precisely the opposite direction," encouraging "lawyers on the other side of a dispute" to bring in the favorable facts anyway.[82] Even if "some legal claims are more plausible than others,"[83] lawyers "do not simply stop arguing"; rather, they "find new ways to keep on arguing,"[84] with "incentives to make whatever arguments they believe will persuasively construct legal authority."[85] In the end, "[f]ights over constitutional doctrine do not hold off historical dispute," but merely "encourage lawyers to find ever new ways to make their cases," making "historical dispute never-ending."[86]

This claim—that theoretical reasoning is impotent in the face of litigation incentives—represents a very strange view of what legal theories are for. We've had legal prohibitions of jaywalking or tax evasion on the books for a very long time, along with more serious crimes such as drug trafficking or murder. Unfortunately, people's incentives often lead them to violate those restrictions, sometimes because the restrictions themselves (as in the case of drug trafficking) make violation more profitable. This is a real practical problem for law enforcement, but very few see it as a *theoretical* problem for the existence of criminal laws, which can be regularly violated but still perfectly valid parts of a *system* with sufficient reality on the ground. There's "no necessary connection between the validity of any particular rule and *its* efficacy";[87] "a society might have breathtaking levels of tax evasion and still have tax law."[88] The standing possibility that legal actors might depart from existing norms of acceptable argument, or that our legal system might "in the fullness of time" come to accept new styles of historical argument heretofore unknown, hardly shows that our current restrictions on such arguments have no force today—again, so long as the system of which they're a part has sufficient reality on the ground.[89]

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[80] BALKIN, *supra* note 10, at 14.
[81] *Id.* at 251.
[82] *Id.* at 247.
[83] *Id.* at 250.
[84] *Id.* at 251.
[85] *Id.* at 250.
[86] *Id.* at 251.
[87] HART, *supra* note 30, at 103.
[88] Baude & Sachs, *supra* note 47, at 200.
[89] Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 569–70 (2019) (applying this argument to customary law generally).

(As Hart notes, it's "impossible to provide by rule for the correction of the breach of every rule.")[90]

Besides, nothing in this self-defeat argument is specific to history. The same incentives apply to currently forbidden legal arguments drawing on economics, political theory, morality, botany, or whatever source of knowledge one chooses. Parties and lawyers have incentives to win, sure. But the function of our existing legal theories is to channel those incentives in particular directions, and those theories are no less real for sometimes being honored in the breach.

II. THEORIES, THIN AND OTHERWISE

If we need to argue at the level of legal theory, what theory should we adopt? *Memory and Authority*'s "living originalism"[91] starts off with a theory quite friendly to more orthodox originalists, namely that "duly enacted law remains in force until it is lawfully changed."[92] That's the central intuition of the newer forms of originalism, and it's an intuition broadly shared within our legal system.[93] If Article II conferred a removal power on the President, it remains in force today, and if it didn't, that choice remains in force too.[94] Legal rules can be added after the Founding, of course, but only through means that were already lawful beforehand: Article V amendments, Article II treaties, "legislative Powers herein granted,"[95] doctrines of common law, equity, or admiralty, and so on. This simple recursive assumption is generative enough to produce a highly capacious form of originalism,[96] one "catholic in theory but exacting in application."[97] If a putative legal norm doesn't have a "pedigree" or chain-of-title stretching back to the Founding (or some other pedigreed norm excusing its absence), then it isn't part of U.S. law.[98]

Balkin departs from this approach by stretching his theory into a "thin"[99] and more accommodating one, in the hopes of leaving fewer "messy details . . . on the cutting-room floor."[100] Yet as one might expect, the attempt to account for ever more facts comes at a real cost in coherence. A constitutional theory can be flattened thin enough to cover a multitude of lower-order legal rules and day-to-day legal practices (or, as they say, to cover a multitude of sins). But this flatness only brings it into

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[90] HART, *supra* note 30, at 143.
[91] BALKIN, *supra* note 10, at 9.
[92] *Id.* at 11.
[93] *See* Sachs, *supra* note 24, at 838.
[94] *See generally* U.S. CONST. art. II, § 1, cl. 1; *id.* § 2.
[95] *See id.* art. I, § 1.
[96] *See* Sachs, *supra* note 24, at 845.
[97] William Baude & Stephen E. Sachs, *Originalism's Bite*, 20 GREEN BAG 2D 103, 104 (2016).
[98] *See* Sachs, *supra* note 24, at 865.
[99] BALKIN, *supra* note 10, at 62.
[100] *Id.* at 242.

conflict with the more structured higher-order commitments that are more likely to determine our law. And Balkin's moral arguments for a thin theory, whether based on democratic legitimacy or on social justice, fail to cohere with the arguments from practice. What's needed isn't the ability to handle ever more facts, but a clearer account of *which* facts matter and why.

A. The Thin Theory

The core intuition of Balkin's theory is an originalist one: that in our system "duly enacted law remains in force."[101] To find out what law was duly enacted, we have to read the Constitution the way they'd have read words back then, not how we might read them for the first time today. Balkin agrees, for example, that "'domestic violence' . . . refers to riots or insurrections, not interspousal battery,"[102] that "Republican form of government" doesn't refer to the Republican Party, and so on.[103] Constitutional interpretation shouldn't "unwittingly engage in a pun or a play on words," applying two centuries of linguistic evolution to a text that couldn't possibly have planned for it.[104]

In looking for duly enacted law, moreover, we're looking for the Constitution's original content, not the original expected applications of its authors.[105] "When the Constitution states a rule," a "standard," or a "principle," we apply that rule, standard, or principle, "because that is what the text says"; but we apply them to modern facts.[106] For example, Section 2 of the Fourteenth Amendment fixes the apportionment formula for the House; as the "whole number of persons in each State" varies, the number of seats for that state varies, no matter how many seats John Bingham expected each state to have. But if you want to change the formula itself (say, to count only citizens, or those of voting age), you'll have to amend the Constitution: that sort of change can't be achieved simply by applying old law to new facts. As Chris Green put it, the enactors' "choice of language is a choice about what sorts of changes should make a difference."[107]

So far, so good; everything seems entirely orthodox, even for "conservative originalists." So where's the "thin" part? Balkin limits his claims about duly enacted law to circumstances where "the text of the Constitution announces a clear, unambiguous rule"[108]—the subject, as he put it in past work, of "likely and overwhelming

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[101] *Id.* at 11.
[102] *Id.* at 101.
[103] *Id.* at 102.
[104] *Id.* at 98.
[105] *See id.* at 103.
[106] *Id.* at 104.
[107] Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 583 (2006).
[108] BALKIN, *supra* note 10, at 11.

[Founding-era] agreement."[109] When "the text is not clear"[110]—either because we can't tell which rules, standards, or principles were enacted back then, or because it isn't obvious how to apply them today—we have to "engage in constitutional construction,"[111] "the work of political and social movements."[112] That is, American society today somehow decides on "the best way to implement the Constitution"[113] (on a very broad notion of "best"), using various "doctrines, conventions, practices, laws, and institutions to implement the Constitution's provisions and further constitutional values."[114] Unlike the hard-coded text, these constructions are pretty malleable; each generation can "build on previous constructions," alternatively "adding," "modifying," or "replacing" them, using its "practical judgment . . . to build out the Constitution faithfully."[115] On this view, "constitutions are only frameworks," "built out over time" as Americans "struggle with each other" in "constitutional politics," as expressed "by both the judiciary and the political branches."[116]

B. Thinness and Practice

One advantage Balkin sees in all this Darwinian struggle is that it incorporates a "rich historical record,"[117] any part of which might be invoked by one side or another and might offer political wisdom in the present. While only a few facts are relevant to defining the law of the Founding, "all of this history can be useful in constitutional construction";[118] thus a "wide zone" for construction isn't a defect of the thin theory but a positive good.[119] Living originalists are "better able to learn from and make use of the work of professional historians" than "conservative originalists" are, for they don't "insist . . . that historians ask the wrong questions or look at the wrong evidence."[120]

Yet this effort to incorporate more facts on the ground is also the thin theory's main drawback, because facts on the ground aren't the most important facts that legal theories need to address. Many legal systems are *structured*: their lower-order, on-the-ground rules are derived from higher-order, more general ones, with those in turn derived ultimately from social agreement how to identify our law.[121] We

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[109] Jack M. Balkin, *The Construction of Original Public Meaning*, 31 CONST. COMMENT. 71, 80 (2016).
[110] BALKIN, *supra* note 10, at 11.
[111] *Id.* (emphasis omitted).
[112] *Id.* at 9.
[113] *Id.* at 11.
[114] *Id.* at 98.
[115] *Id.* at 99.
[116] *Id.* at 129.
[117] *Id.* at 120.
[118] *Id.* at 127.
[119] *Id.* at 106.
[120] *Id.*
[121] *See* HART, *supra* note 30, at 107 (noting that a particular rule's validity might turn on

could try to stretch and mold a thin theory to match most of our lower-order rules, but only by deforming the theory's own account of how we're supposed to derive them.

1. On-the-Ground Rules

One goal of the thin theory is "saving the appearances,"[122] vindicating on-the-ground legal rules that ordinary Americans know and value. The warnings of *Miranda v. Arizona*,[123] the appointed-counsel right of *Gideon v. Wainwright*,[124] or the "one person, one vote" principle of *Reynolds v. Sims*[125] are familiar parts of American legal culture, whether or not they're derivable from the Founding. To Balkin, our need for "democratic legitimacy"[126] forbids us to treat "practices that most Americans regard as valuable"[127] "as *mistakes* that we are stuck with and must grudgingly accept," rather than "as *achievements* to be proud of."[128] If the vast majority of Americans don't want "to strip married women of their rights" or "outlaw a host of popular federal government programs,"[129] then no democratically legitimate legal system could require it.

Yet as Balkin concedes, legal rules that are "less democratically legitimate law" are often "no less law."[130] Americans have lots of views about constitutional law that might need saving, and many of them are about its sources rather than its contents. It's entirely possible, for instance, that restaurant segregation was banned by statute in D.C. for eighty-odd years without virtually anyone noticing;[131] that sort of thing is only conceivable because we've got a higher-order legal practice of looking to the statute books (whatever they might contain) as taking priority over what was then the far more familiar lower-order practice of letting D.C. restaurants exclude customers on the basis of race.

"a criterion of validity provided by some other rule," terminating in the "*ultimate* rule of a system," which rests on social fact); *id.* at 103 (pointing out that "the inefficacy of a particular rule . . . may or may not count against its validity," in contrast to the general acceptance or "disregard of the rules of the system" as a whole); Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2256 (2014) (distinguishing higher-order and lower-order practices and rules).

[122] Ilkka Niiniluoto, *Scientific Progress*, STAN. ENCYC. PHIL. (Jan. 22, 2004), https://plato.stanford.edu/entries/scientific-progress/ [https://perma.cc/5BJW-AZPY].

[123] 384 U.S. 436 (1966).

[124] 372 U.S. 335 (1963).

[125] 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

[126] BALKIN, *supra* note 10, at 131.

[127] *Id.* at 112.

[128] *Id.* at 113.

[129] *Id.* at 70.

[130] *Id.* at 132.

[131] *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 102–04 (1953); Sachs, *supra* note 121, at 2265–68.

For the same reasons, whether cases like *Gideon* are correct statements of American law depends less on whether Americans are accustomed to their outcomes than whether they follow from the sources which our legal system is accustomed to employ. Neither *Gideon* nor its predecessor *Johnson v. Zerbst*[132] is taken as a self-justifying "fixed star in our constitutional constellation";[133] instead, they're understood to be derived from whatever the Sixth or Fourteenth Amendments said, just as the rule about D.C. restaurants was a derivation from whatever the statute books said. True, many post-*Gideon* Americans *think* the Sixth Amendment right "to have the Assistance of Counsel"[134] refers to a right to an attorney at taxpayer expense, not just a right to retain an attorney at your own expense (partly because Supreme Court Justices, who ought to know better, have told them so). But if they were as well-informed as constitutional law professors, they might see it as "just a coincidence—almost a matter of homonymy—that the modern right" can be expressed in superficially similar language,[135] the way "Republican Form of Government"[136] just happens to name a modern political party or "the right . . . to . . . bear arms" an ursine mammal.[137] And if there's no principle in the American legal system that'd have the Sixth Amendment's content vary with such coincidences, then it's hard to say, even on the thin theory, why it would. In other words, Balkin's thin theory can't guarantee the law's consistency with familiar results, because plenty of familiar results are contradicted by just the kind of "likely and overwhelming agreement" that the thin theory takes as conclusive.

When the thin theory does cohere with familiar results, it's often just happenstance, resting extraordinarily important features of American law on some very weak historical reeds. For example, Balkin claims that the thin theory preserves modern doctrine on women's equality because the Fourteenth Amendment's text doesn't "mention" the "common-law coverture rules" prevalent at its enactment; he says it was merely "the initial legal construction" of phrases like "'equal protection of the laws,' 'due process of law,' and 'privileges or immunities of citizens of the United States'" that left such laws in place.[138] But if a review of the evidence persuades us that "privileges or immunities of citizens of the United States" specifically referred to a set of civil rights previously recognized at common law,[139] then it'd be true as a matter of meaning, not just expected application, that the Clause "does not disturb the common law";[140] reading the Clause differently today would be changing the

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[132] 304 U.S. 458 (1938).

[133] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[134] U.S. CONST. amend. VI.

[135] Strauss, *supra* note 51, at 920.

[136] U.S. CONST. art. IV, § 4.

[137] *Id.* amend. II.

[138] BALKIN, *supra* note 10, at 103.

[139] *See, e.g.*, William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1249–50 (2024) (discussing such a view).

[140] BALKIN, *supra* note 10, at 103.

principle, not just applying it to modern facts. The same goes for "one person, one vote": if "privileges or immunities of citizens if the United States" *definitionally* excluded voting to the extent that voting was a local right and not a general one,[141] and if the "protection of the laws" *definitionally* referred to remedial mechanisms for protecting rights granted elsewhere,[142] then much of what we now call "Fourteenth Amendment voting rights" would be ruled out. Maybe there was just enough Reconstruction-era disagreement about these questions to deprive them of the thin theory's "overwhelming agreement" and to render them matters of construction instead. But in that case the achievements Balkin celebrates as central to American democracy would be matters of 150-year-old happenstance: the degree of agreement from 1866 to 1868 has no necessary connection to these rights' reception among the American people today. "[S]uccessful social movements may have little idea about the original semantic meaning of constitutional language,"[143] and we shouldn't expect them to, especially as social movements keep going while historical meaning stays the same. The "thin" theory can ride the tiger of social movements for a while, but the tiger always eats you in the end.

2. Higher-Order Argument

If the thin theory can't reliably account for on-the-ground legal practice, maybe it better expresses our higher-order commitments. When the Constitution's text "announces a clear, unambiguous rule," Balkin writes, "people treat the text as the source of a legal obligation,"[144] just as the thin theory would suggest. But when the original meaning is less clear, so is the legal system's response. Balkin describes Americans as "cafeteria originalists" the way some people are "cafeteria Catholics," those who "pick and choose which parts of the Church's teachings to accept."[145] Because Americans "pick and choose when to follow the views of the founders,"[146] or else "artfully recharacterize" those views "to support contemporary political and legal arguments,"[147] he sees originalism in "American constitutional culture" as "not mandatory," but "defeasible."[148] The thin theory, he contends, "better captures how people actually use adoption history in constitutional interpretation—sometimes employing it but sometimes rejecting or ignoring it."[149]

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[141] Baude, Campbell & Sachs, *supra* note 139, at 1219 n.201.

[142] *Id.* at 1241 & n.339 (citing sources).

[143] Neil S. Siegel, *Jack Balkin's Rich Historicism and Diet Originalism: Health Benefits and Risks for the Constitutional System*, 111 MICH. L. REV. 931, 937–38 (2013).

[144] BALKIN, *supra* note 10, at 11.

[145] *Id.* at 71.

[146] *Id.*

[147] *Id.* at 72.

[148] *Id.* at 161.

[149] *Id.* at 127.

This argument is deeply flawed, as one can see by noting that the "cafeteria" comparison goes precisely the other way. For the example to make sense, we have to be able to identify "the Church's teachings" as something *distinct* from the various doctrines the individual members of its flock might pick and choose. Even if most Catholics would rather sleep in than go to Mass each Sunday, *the Church* might still take this obligation quite seriously, as indeed it does.[150] For the same reasons, American law can still be originalist even if individual lawyers and judges are often happy to "sleep in," partly because they wouldn't endorse such conduct as a matter of doctrine.

Even worse for the comparison, many Americans aren't just cafeteria originalists but cafeteria *lawyers*—abandoning or adopting their legal theories whenever it serves their personal, professional, political, or ideological ends. Everyone accepts "the clear textual rules of the Constitution" (two Senators for each state and so on),[151] but that, the cynic might suggest, is because they can't get away with changing those rules *sotto voce* the way they can for other provisions (like "Assistance of Counsel").[152] It's quite natural for people to "interpret the history differently" to prevent "bad consequences for contemporary policy questions."[153] But the fact that they have to reinterpret the history *at all* is a tell, revealing that our higher-order rules don't allow for more open departures from history for consequences' sake. And the fact that lawyers and judges don't "always commit themselves to the strictures of particular academic theories," but instead use originalism however it's "most useful to their cause and most persuasive to their audiences,"[154] is just what we'd expect given Balkin's account of the litigation incentives of zealous advocates. We should hardly be surprised that lawyers and judges pick and choose constitutional principles when they can, just like they pick and choose when it's safe to cross a street against the light.

A more serious challenge would be that Americans don't find originalist claims probative even in a heartland case. If originalist arguments really were the coin of the realm, Balkin argues, then "lawyers would always cite them as their most powerful legal arguments, and judges would never ignore them."[155] This claim seems to treat today's lawyers and judges, as Chief Justice Taney infamously asserted of the Founders, as "incapable of asserting principles inconsistent with those on which they

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[150] *See, e.g.*, Fr. Manuel Garrido, *The Obligation to Attend Mass on Sundays*, ETERNAL WORD TELEVISION NETWORK, https://www.ewtn.com/catholicism/library/obligation-to-attend-mass-on-sundays-1101 [https://perma.cc/DG2K-UFL8] (last visited Nov. 27, 2024) (describing Sunday attendance as "a commandment of the Church which binds under the penalty of grave sin").

[151] BALKIN, *supra* note 10, at 118.

[152] U.S. CONST. amend. VI.

[153] BALKIN, *supra* note 10, at 153.

[154] *Id.* at 72.

[155] *Id.* at 161.

were acting."[156] In fact they're extremely capable of doing so, which is why we academics have to hold their feet to the fire. Balkin also notes that judges tend to use originalism "when there are relatively few precedents on point," or when lawyers "want to discard existing bodies of precedent and go off in a new direction."[157] That, too, is exactly what we'd expect if originalism were the orthodox account of the *substance* of the law—for which precedent serves merely as a temporary stand-in, itself designated by the original law of stare decisis to be left in place in unclear cases.[158]

A still more serious challenge would be if the thin theory's overwhelming-agreement rule were *recognized* as overriding ordinary originalist principles. But no such recognized rule exists. American jurists seem perfectly willing to consider whether Hamilton or Madison or Federal Farmer had the better argument on some contested point of law—of *their* law, and only by implication of ours. Even when everyone today agrees that a question of original history is unclear, still "[c]lients spend good money hiring lawyers to dig up originalist evidence—the stronger the evidence, the better—which is then treated as meaningful even by those who rarely describe themselves as originalists."[159] Indeed, it's entirely possible for modern jurists to argue that Justice Iredell had a better argument than the majority did in *Chisholm v. Georgia*,[160] even though they had five votes to his one. This means that claims of widespread original dissensus—say, that "there was no consensus about what legal methods people should use to interpret the new Constitution"[161]—are often misdirected, so long as there were better or worse arguments under the rules of the time. The anti-Federalist "Brutus" thought it a terrible thing that the Constitution would be read through the traditional rules for interpreting statutes,[162] while the arch-Federalist Alexander Hamilton thought it a wonderful thing;[163] given that both largely agreed on substance despite disagreeing on policy, that's a better-than-even-money argument for which rules actually applied.[164]

At its core, the thin theory's concern for whether the text is "clear" equivocates between an epistemic and a substantive claim, confusing a lack of certainty in the

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[156] Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 410 (1857).

[157] BALKIN, *supra* note 10, at 64.

[158] Sachs, *supra* note 24, at 860–64.

[159] William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1485 (2019).

[160] 2 U.S. (2 Dall.) 419 (1793); *cf.* PennEast Pipeline Co., LLC v. New Jersey, 594 U.S. 482, 499 (2021) (describing *Chisholm* as an "error").

[161] BALKIN, *supra* note 10, at 125.

[162] *Brutus XI*, *in* 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 513–14 (John P. Kaminski & Gaspare J. Saladino eds., 1984).

[163] THE FEDERALIST NO. 83, at 559 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[164] *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1140–42 (2017).

present for a *Chevron*-like delegation in the past.[165] Sometimes we have to apply a complex rule, standard, or principle to present facts; in such cases there's often uncertainty even when there's no more interpretation to be done. (We might know precisely what the text communicated—say, that habeas suspensions are allowed when "the public Safety may require it"[166]—and yet have no clue when the public safety actually *does* require it,[167] something that the text can't possibly tell us and that the Founders didn't know either.)[168] And sometimes we have to identify which rules, standards, or principles the Constitution actually contains; our confusion in these latter cases is a fact about *us*, not about the law the Constitution made. (If one day we discovered conclusive evidence settling all disputes over congressional powers, we wouldn't say that provisions which were clear at time t_0 and unclear at t_1 were now clear again at t_2; we'd just say that *our understanding* of those provisions had improved.) If, "[f]or rule of law reasons, the Constitution continues as law until it is lawfully changed,"[169] those rule-of-law reasons don't stop operating whenever the better argument falls just shy of a "consensus";[170] they keep going so long as one argument is better and another worse. There isn't a consensus about law today either, but judges don't think the rule of law lets them stay agnostic about it, let alone to pick a worse argument over a better one.

To be clear, it *is* a standard move to argue that a lack of constitutional clarity requires the use of other factors—to say that "oh well, it's all a historical morass, so let's decide in some other way."[171] But at worst that reflects a theory of constitutional *adjudication* under uncertainty, not a distinct theory of what our constitutional *law* really provides.[172] By contrast, if there are two possible historical readings, and one of them is meaningfully less plausible than the other, it *isn't* a standard move to say "who cares, let's go with it anyway," or even "let's leave it up to the rough-and-tumble of constitutional politics instead." You can argue the history "to a draw,"[173] but you can't just wave away a loss. This distinction matters: the content of a legal

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[165] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

[166] U.S. CONST. art. I, § 9, cl. 2.

[167] *See* Timothy A.O. Endicott, *Legal Interpretation*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 109, 109 (Andrei Marmor ed., 2012) ("If, on the best interpretation, the law requires you to do what is reasonable, you will need a technique other than interpretation in order to identify the reasons at stake.").

[168] *Cf.* HART, *supra* note 30, at 128 (discussing the legislative handicaps of "ignorance of fact" and "indeterminacy of aim").

[169] BALKIN, *supra* note 10, at 131.

[170] *Id.* at 135.

[171] *E.g.*, McDonald v. City of Chicago, 561 U.S. 742, 916 (2010) (Breyer, J., dissenting) (arguing that the Court shouldn't "look to history alone but to other factors as well," especially when "the history is so unclear that the experts themselves strongly disagree").

[172] *Cf.* Berman & Toh, *supra* note 21 (distinguishing the two).

[173] Baude, *supra* note 54, at 2380.

system, like a good deal of parenting, is about doing as we say, not as we do.[174] Just as lawyers can't say that it makes a legal difference whether Suzette Kelo is a real nice lady, they also can't say—even in the absence of overwhelming Founding-era agreement—that Congress's powers were *more plausibly* broader than their client's position permits.

C. Thinness and Morals

If the thin theory can't offer the best positive account of our law, maybe it has other attractions. *Memory and Authority* offers at least two. First, a thin theory leaves more questions up to constitutional construction and constitutional politics: that way it can better reflect modern preferences and (the argument goes) be more democratically legitimate. Second, construction considers a broader swath of history than just drafting and ratification: that way it can incorporate the experiences of Americans once excluded from the political process. Yet both arguments, by trying to incorporate more, again end up doing less.

1. Democratic Legitimacy

A thin theory, *Memory and Authority* claims, "better accommodates the multiple sources of the Constitution's democratic legitimacy"[175] than other theories do. By deciding less, it tracks common understandings and coheres with "what constitutions are";[176] it also leaves more for "the forces of democratic politics,"[177] promoting democratic legitimacy by adapting to modern preferences.

These are strangely anti-positivist claims for a work so focused on actual practice. "[W]hat constitutions are" can differ from one society to another; we need to know how *our* constitution fits into *our* legal system, which might rely on a thin-thick distinction but then again might not. Balkin prefers unfinished "framework" constitutions to completed "skyscraper" constitutions,[178] but this seems a matter of taste. Some societies might want "each generation[]" to "contribut[e] to the constitutional project";[179] others don't. Even a relatively crisp constitution might leave future generations with plenty to do on their own (setting tax rates, legislating privacy rights, building highways, declaring wars, and so on); if the taste for constitutional contributions can vary from place to place, there's no reason why our Constitution *has to* be "never fully completed."[180]

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[174] *See* Sachs, *supra* note 121, at 2266.
[175] BALKIN, *supra* note 10, at 127.
[176] *Id.* at 129.
[177] *Id.* at 130.
[178] *Id.*
[179] *Id.*
[180] *Id.*

The same goes for concerns that thicker forms of constitutionalism are unwise. The "limited capacities of any single generation"[181] suggest that we should put fewer hard-coded rules into the Constitution, but not that we should read the Constitution as if some of its historically hard-coded rules weren't. As Caleb Nelson points out, the Framers were well aware of this issue, but they saw it as "a *drafting* issue rather than an *interpretive* issue."[182] Rather than specifying detailed rules for excise taxes or House elections, say, they delegated authority on those topics to particular lawmakers. When they did specify detailed rules, though, those rules were just as much the law as their open-ended delegations.

Balkin worries that such choices lack legitimacy: the Constitution's "democratic legitimacy depends on more than the moment of adoption," including the work of construction, incorporating as it does the "crucial" contributions of more recent "political and social movements."[183] But legitimacy and legal validity are two different things. Worrying that the Constitution "may become less democratically legitimate"[184] over time is like worrying that California's Proposition 13 might become worse tax policy over time: if it's "no less *law*" over time,[185] then maybe we should *alter* that law, not pretend that it's anything other than what it is. The fact that modern court decisions (like those adopting "one person, one vote") are highly popular, or even that Americans might see their government "as deeply unjust and illegitimate" without them,[186] doesn't show that they accurately describe our legal system: sometimes the law just *is* deeply unjust and illegitimate, and a system with greater democratic legitimacy isn't any more likely to be the law. (From the perspective of global history, virtually every legal system that's ever existed had little democratic legitimacy to speak of, so if anything democratic legitimacy lowers the odds.)

Nor does the thin theory reliably advance democratic legitimacy, at least as it's commonly understood. The requirement that we "be faithful to the basic framework of the Constitution"[187] commits us to clear but oft-bemoaned provisions like the Senate and the Electoral College. And the limited scope for hard-coded rules allows for wild failures of legitimacy in the process of construction, a rough-and-tumble enterprise that has a great deal more to do with power and dumb luck than with democracy. As Balkin previously noted, had Chief Justice Vinson "not died of a heart attack in September 1953, leading to Earl Warren's appointment as Chief Justice,"[188]

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[181] *Id.* at 134.

[182] Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 543 (2003).

[183] BALKIN, *supra* note 10, at 9.

[184] *Id.* at 132.

[185] *Id.* (emphasis added).

[186] *Id.* at 131.

[187] *Id.* at 100.

[188] Jack M. Balkin, *The Roots of the Living Constitution*, 92 B.U. L. REV. 1129, 1149 n.68 (2012).

the constitutional politics of the twentieth century might have been starkly different; where's the democratic legitimacy in that? *Miranda*, to cite another example, was an elite project, something that majorities have never voted for and indeed have voted against—in a law that passed both houses of Congress, was signed by President Johnson, and has never been repealed.[189] So why would "continuing democratic legitimacy" mean letting social movements and contingency run wild, rather than insisting that "[a]ll legislative Powers herein granted" be "vested in a Congress of the United States,"[190] or that all "powers not delegated to the United States, nor prohibited by it to the States," be "reserved to the States respectively, or to the people"?[191]

In any case, democratic legitimacy isn't the same as legitimacy *tout court*, which is what most anti-positivist theories really care about and which requires that the government be morally worthy of support. One can be as democratic as one likes and still engage in horrific treatment of noncitizens abroad, of nonhuman animals, of the unborn, etc. Depending on one's moral theory, these might be more important for determining whether a government is legitimate than whether it accounts for the recent contributions of social movements (including social movements for evil). The thin theory chases popular approval, but the legitimacy of a legal system isn't a popularity contest.

2. Exclusion and Inclusion

The most surprising claim on behalf of the thin theory is that it's better able to include the voices of groups unjustly excluded in the past. To Balkin, "[t]he history and experience of groups shut out of formal constitution-making—women before the Nineteenth Amendment, free Black people before Reconstruction, Native Americans, and slaves—is irrelevant to originalism except to the extent that these groups influenced framers and ratifiers."[192] Yet "[i]f constitutional memory features only a small group of white men as the central actors," he argues, "the American constitutional tradition belongs to them, and it is their views that matter."[193] Balkin rejects this "false portrait of the country's history,"[194] urging in its place a form of constitutional construction that "embrace[s] an expansive conception of collective constitutional memory."[195]

There's a great deal that could be said here, but I'll restrict myself to three points.

First, the historical views of excluded groups will only sometimes track the present views of those who identify with them. Balkin notes that "[w]omen, Native

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[189] *See* 18 U.S.C. § 3501, *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).
[190] U.S. CONST. art. I, § 1.
[191] *Id.* amend. X.
[192] BALKIN, *supra* note 10, at 16.
[193] *Id.* at 7–8.
[194] *Id.* at 8.
[195] *Id.*

Americans, African Americans, and many poor white men were excluded from official constitution-making"; given that "they constituted most of the population," he speculates that "the Constitution might have looked quite different" had they been included.[196] But how? If, as Michael Klarman suggests, the Constitution was primarily perceived as a white-male-elite project ("a scheme to favor the mercantile interest,"[197] some back-country farmers thought), then more universal suffrage might well have led to its defeat—or else to something much closer to the then-existing Articles of Confederation, with many fewer powers for Congress and many fewer limits on the states. Given the limits on *everyone*'s foresight across two centuries, whether excluded or no, it's hard to say that running the counterfactual forward would reliably produce a more just state of affairs today.

The fundamental error of this style of reasoning is to assume that excluded groups two hundred years ago had roughly the same interests and preferences that similar demographic groups do now. If, as Balkin contends, "free Black people and white plantation owners would [have] disagree[d] about . . . questions of federalism and national power,"[198] *in an era of Fugitive Slave Acts* the plantation owners would often have taken the broader view of inherent national authority. Indeed, given how often political parties and interest groups flip-flop on federalism in the modern day, there's no reason to suspect—and it's rather insulting to suggest—that black and white Americans would by virtue of their race have held consistent views on federalism across the centuries. Or consider the category of recent immigrants: immigrants too recent to naturalize couldn't vote for the ratifying conventions, but recent immigrants today might feel they have rather little in common with those of the 1780s. If we want to promote inclusion, we could just focus on the concerns of actual people today, instead of symbolically incorporating the opinions of other people who kind-of resembled them two hundred years ago.

Second, while including more divergent views might produce more "disagreements among the public"[199] (and thus more room for construction on a thin theory), it's by no means clear that constitutional construction is good for the oppressed and constitutional interpretation bad for them. Remember that social movements don't always bend toward justice. Jim Crow was the product of social movements just as much as its abolition, and the plaintiff in *Giles v. Harris* would have appreciated a rather thicker reading of the voting rights secured by the Fifteenth Amendment.[200] On the other side of the coin, the thin theory preserves a great deal of clear constitutional text that was *also* generated through a process from which many were excluded (the Senate, the Electoral College, the Contract Clause, etc.); the stronger the

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[196] *Id.* at 132.

[197] MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 451 (2016).

[198] BALKIN, *supra* note 10, at 136.

[199] *Id.*

[200] 189 U.S. 475 (1903).

argument against "deferring" to "the judgment of the past,"[201] the stronger the argument against the thin theory as well.

Third, we should be careful not to moralize what's an essentially intellectual disagreement. Balkin darkly ascribes to originalists the view that "women and enslaved people[] are not constitutional meaning makers," unless they managed to influence "those who framed and adopted the Constitution."[202] This is an academic form of shooting the messenger. The *problem* with pre-Civil-Rights-Movement democracy was that so many people were excluded from full political participation. To say that the laws actually made under such conditions were crucially shaped by other people's political preferences, and that this fact can be crucial to understanding which laws those other people made or didn't make, should be a commonplace of honest investigation and not a moral scandal.

As Balkin notes, "[e]mphasizing the deeds, arguments, and even existence of people and of communities with comparatively lower status" may "symbolically raise[] the status of groups that identify with them today."[203] Whether or not these are worthy goals, the academic's higher obligation is to truth. One can agree that such groups "matter more to the history of the country" than was once thought, without retelling this history through rose-colored glasses. Indeed, part of *admitting* the depth of past wrongs is to admit how these groups were often excluded from the choice of legal rules, standards, and principles—to admit how their voices didn't matter legally, even though they *should* have mattered morally. And if "duly enacted law remains in force until it is lawfully changed,"[204] this exclusion may be an argument for changing the law by lawful means *today*, not for sneaking in such changes under the banner of constitutional theory.

CONCLUSION

In a memorably titled paper, the sociologist Kieran Healy takes the unusual step of criticizing calls for nuance in theoretical debate:

> When faced with a problem that is hard to solve, a line of thinking that requires us to commit to some defeasible claim, or a logical dilemma we must bite the bullet on, the nuance-promoting theorist says, "But isn't it more *complicated* than that?" or "Isn't it really *both/and*?" or "Aren't these phenomena *mutually constitutive*?" or "Aren't you leaving out [something]?" or "How does the theory deal with agency, or structure, or culture, or

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[201] BALKIN, *supra* note 10, at 204.
[202] *Id.* at 199.
[203] *Id.* at 190.
[204] *Id.* at 11.

> temporality, or power, or [some other abstract noun]?" This sort of nuance is, I contend, fundamentally antitheoretical. It blocks the process of abstraction on which theory depends, and it inhibits the creative process that makes theorizing a useful activity.[205]

To Healy, unnecessary nuance is a form of intellectual "kudzu,"[206] taking up so much space that it chokes off conceptual growth. Forming and using concepts requires abstraction, and that "means throwing away detail, getting rid of particulars."[207] We identify some objects as "chairs" by spotlighting a few of their similarities and discarding a vast swath of their differences (color, texture, place of manufacture, and so forth). We do this because the concept "chair" is helpful in organizing our world, saving us the trouble of handling all this information at once. Yet when we call "for a theory to be more comprehensive, for an explanation to include additional dimensions, or for a concept to become more flexible and multifaceted," we may "paradoxically end up with less clarity. We lose information by adding detail."[208]

My praise for ignoring facts is intended in the same spirit. In some sense, the pursuit of knowledge is always assisted by learning more. But the effort to make intellectual progress on *something* usually requires us not to focus on everything at once. Like 1Ls who study a case by highlighting all of it (and so really highlight none of it), we need to learn to explain where the moving parts are, which portions of our reasoning are doing the work, which facts matter, and which facts are merely along for the ride.

By contrast, *Memory and Authority* throws cold water on these efforts at theoretical clarity, urging an increased focus on the "[p]racticing lawyers and judges" who "do not trouble themselves too much with these theoretical disputes," and on the "politicians and the members of the public [who] do not trouble themselves at all."[209] If what you want to explain is the "frequent rhetorical use of originalist tropes in American politics and popular culture,"[210] then by all means; most people who invoke originalism don't think much about its most fiendish intricacies, just as short-order cooks don't think much about competing theories of organic chemistry.[211] If you're looking for a political movement, then that's what you'll find—"a political practice that draws on cultural memories about America as a nation."[212] Whether in the sociology of science or the sociology of law, what best explains *movements* and what makes them succeed or fail will typically be facts about *people*

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[205] Kieran Healy, *Fuck Nuance*, 35 SOCIO. THEORY 119, 122 (2017) (alterations in original).
[206] *Id.*
[207] *Id.* at 121.
[208] *Id.* at 122.
[209] BALKIN, *supra* note 10, at 62.
[210] *Id.* at 59.
[211] *See* Sachs, *supra* note 24, at 885.
[212] BALKIN, *supra* note 10, at 74.

and not about their ideas. (If we ask what caused a certain set of nineteenth-century intellectuals to become Darwinists, only part of the answer will involve finches in the Galápagos, and a larger part will involve why they became *Social* Darwinists.)

That's not to say that intellectual virtues have no impact in popular debates. Balkin argues that "[c]onservative originalism has succeeded not because it is apolitical or methodologically coherent," but because "it constructs memory and gives voice," in a way that "liberals and progressives" haven't been able to match by "articulat[ing] their vision of social life and connect[ing] that vision to the Constitution."[213] So why haven't they? Surely over the fifteen years since *The Constitution in 2020*[214] there's been plenty of time to articulate a vision of social life; indeed, there's been no shortage of such visions. The progressives' problem, it seems, has been in connecting their surfeit of visions to the Constitution we actually have—and a shortage of apolitical reasoning and methodological coherence may be a significant reason why.

Regardless, if what you really want to know isn't how to win in the arena but whether a particular theory is *true*, being able to answer the theoretical questions is the only currency that matters. What counts as law? Is law "fundamentally a matter of social fact,"[215] a thick description of one aspect of human culture in a particular society? Or does its study necessarily involve some degree of moral evaluation, such that questions of legitimacy might determine its content whatever the social facts turn out to be? What facts about society or morals might justify a conclusion that our law provides thus-and-so? These are long-debated questions of legal theory, but too many works in constitutional theory neither answer nor bracket them. Instead, they interchangeably assert arguments of various kinds, advancing a variety of implicit theories without alerting the reader that they're doing so. Most law students and law professors aren't interested in legal theory or jurisprudence, and usually they don't have to be. But if the arguments being made turn on controversial theoretical questions, we ought to be able to surface them and to provide some real theoretical answers.

Whose theories are correct about U.S. constitutional law depends on a number of empirical facts, facts one definitely shouldn't ignore. But this Essay's praise for ignoring facts is a way of calling for more straightforward work in theory. We need more concern for *legal theory* in *constitutional theory*, and more consideration of *which* facts about the past might make a difference to American law.

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[213] *Id.* at 174.

[214] *See* THE CONSTITUTION IN 2020 (Jack M. Balkin & Reva B. Siegel eds., 2009) (presenting a variety of visions of progressive constitutionalism).

[215] Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 355, 356 (Jules Coleman ed., 2001).