Originalism, Positivism, and Normativity
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I am legal positivist who thinks that American law is, and ought to be, originalist. I say this because I believe American law to satisfy certain criteria that it is possible for legal systems not to satisfy, and that it's good that it does. But arguments for or against the descriptive claim that originalism conforms to norms inherent in American law today are different from arguments for or against the claim that the originalist vision is morally optimal because it represents what American law ought to be. I will consider arguments of both types.

Positivistic Originalism

Positivistic originalism is, for me, a set of principles about what the content of law is, how it is determined, and how it is applied. My first originalist principle is O1.

O1. The content of legal provision is what was asserted or stipulated by the original lawmakers in approving it. What gives the speech acts of these actors the force of law is their position in the constitutionally-based system the populace takes to be authoritative.

According to this principle, the contents of laws are determined by social and communicative factors of the same general type as those that determine the contents of uses of language by individuals, groups, and institutions, generally. What gives the contents of the assertions and stipulations of legal actors the force of law is the authority accorded to them by the populace.

My conception of originalism also incorporates O2 and O3, about how legal content is applied to particular cases.

O2. In applying a law to facts of a case, the legal duty of a judge is to reach the verdict determined by the asserted content of the law, unless (a) that content is vague and so doesn't determine a single, determinate verdict, or (b) the content, the surrounding law, and the facts in the case determine inconsistent verdicts, or (c) the contents plus new facts of a kind that could not reasonably have been anticipated by the original lawmakers are plainly and importantly inconsistent with the law's rationale, which is the publically stated purpose that supporters advanced to justify it.[1]

[1] Clause (c) isn't a blank check. It covers cases in which a literal application of a law's content to *unanticipated facts* of a particular case lead to *obviously unwanted results* that subvert or fail to advance the rationale of the law in ways that can be corrected by *fine-tuning its content*. See section 1 of Soames (2017).

O3. Authorized judicial modifications of legal content required by O2 are, subject to some qualifications, those that make the minimum change in legal content that maximizes fulfillment of its original rationale.

O3 reflects both the American Constitution, which gives Congress all legislative power, and the constitutions of many states. So, when a court is forced to legislate by precisifying vague content or resolving inconsistencies it must be maximally deferential to legislative authority.

It shouldn't be assumed that the deferential legislation authorized by O3 always takes the form of modifying the legal content of a specific law or legal provision. Sometimes the content of the relevant rule remains intact, but its operation is suspended by special circumstances. Consider H.L.A. Hart's *No-Vehicles-In-The-Park* example. When an ambulance races through the park on a life-saving mission to the hospital, it doesn't violate the law, even though the law's content hasn't changed. Instead, the ordinance may be understood to have been temporarily suspended, as many traffic laws are, rather than rewritten, in emergencies.

Something similar might be said about *Riggs v. Palmer*[2], discussed in Dworkin (1967), in which a New York court decided that a man who murdered his grandfather cannot inherit the victim's property, on the grounds that "*No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.*"[3] This general Dworkinian principle affects a mass of what the court called "statutes regarding the making, proof, and effect of wills, and the devolution of property," without rewriting each of them.[4] What is the source of this legal principle? It is not clear that it has a single source, but should, I think, be seen as derivable from the purposes, or rationales, of the body of laws cited by the court in *Riggs*, along with, perhaps, related bodies of law. If so, this kind of "judicial legislation" is an instance of the originalist principle O3,

[2] 115 N.Y. 506, 22 N.E. 188 (1889).

[3] Id. at 511, 22 N.E. at 190.

prompted by a special case of 2(c) in which literal application of legal content to unanticipated cases would lead to results that importantly conflict with the discernable purposes or publically stated rationales supporting the enactment of that content.

Although this application of O2 and O3 is rather special, the principles themselves are legal versions of rules we follow in daily life when given vague, contradictory, of self-defeating instructions. My wife says, "*Please pick up a large, inexpensive hat for me from the shop. I want keep the sun off my face when we go out*." Her request is *vague*, because her words *large* and *inexpensive* are vague. At the shop I find that no hat is clearly large or inexpensive. Knowing my wife's purpose, I select one that will keep the sun off her face pretty well, without costing more than any that would do as well. Although I can't do *exactly* what she asked, I minimize the extent to which I fail, while maximizing the degree to which her purpose is fulfilled. Similar reasoning applies to judges applying a law that is vague about a crucial fact.

Next my wife says, "*I am dying for a soda. Please bring me the largest bottle of soda in the fridge*." At the fridge, I see it contains two bottles of soda identical in size. Since the request presupposed one bottle larger than any other, it is *inconsistent with the facts,* making it impossible for me to do exactly what was asked. Noticing that one bottle is open, causing the soda to go flat, I select the other, fulfilling the purpose of my wife's request. For inconsistency with purpose, imagine she makes the same request, but the fridge contains only a large, open bottle of soda that has lost its fizz plus two smaller, unopened bottles, one larger than the other. Knowing she can't stand flat soda, I realize that doing what she literally asked would defeat her purpose. So, I bring her the larger of the unopened bottles.

When words guide us, we calculate the content and purpose of the agent's words, which, together with non-linguistic facts, determine our action. I discharge my obligation, despite not

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[4] Id. at 509, 22 N.E. at 189.

doing what was literally requested because it was vague, inconsistent, or self-defeating in light of unanticipated facts. I minimize the extent to which my action deviates from the content of the request while maximizing the degree to which it fulfills the intended purpose. O3 tells judges to do something similar. Everyone agrees that judges are authorized to *interpret* law when applying it to facts in cases. The first task is to articulate the original asserted content of the text and the lawmakers' intended purpose in adopting it. In easy cases this determines the outcome. In hard cases vagueness, inconsistency, or threat of self-defeat sometimes force judges to minimally modify legal content in order to maximize fulfillment of the lawmakers' publically determinable rationale. Judges thus become lawmakers themselves, whose judicial legislation is required to be maximally deferential to the original lawmakers.

My rule O3 is not inherent in the very idea of a legal system. The Constitution could have explicitly stipulated different principles, including O3M.

O3M. Authorized judicial modifications of legal content required by O2 are those that would result in the morally best outcome.

O3M would authorize judges to rewrite vague or inconsistent legal contents in whatever way they think morally best. Although this *violates* originalism based on our actual constitution, it would be *mandated* by originalism based on the imagined counterfactual constitution.

Next I turn to legal positivism, which I take it to be the conjunction of five principles.

(i) Legal content is determined by more basic social facts.

(ii) Legal requirements provide many citizen/subjects with reasons for actions over and above the desire to avoid punishment for violating them.

(iii) *Moral beliefs and attitudes* of citizens toward their legal system are among the social facts that make the system something more than a system of commands backed by force.

(iv) Nevertheless *moral truths* play no role in determining the contents of individual laws or the status of any provision as legally valid. The laws of a legal system can, in principle, be completely described by an independent, morally neutral observer.

(v) At most, we may be reasonably confident that no system of commands backed by force counts will long prevail as legal system unless the resulting pattern of social organization constitutes a moral improvement over a Hobbesian state of nature. This is not a high bar.

Anti-positivism holds that social habits, practices, and attitudes--including moral attitudes--are insufficient to determine legal content. *Truths* about moral goodness and rightness are needed to arrive at legal content.

Originalism, as I have sketched it, is consistent with positivism. What I take to be our actual Hartian rule of recognition stipulates (roughly) that (i) rules passed by institutions recognized by the Constitution and operating in accord with it are laws unless they have been overturned by recognized constitutional processes. It also recognizes that (ii) the Supreme Court is the highest authority adjudicating legal disputes, including those involving constitutional provisions. It further recognizes what anyone who has thought about the application of law to new facts must realize -- namely, that (iii) (a) sometimes new facts fall within an area of vagueness left by the original asserted content of a constitutional provision, leaving a range of indeterminacy about the proper application of the provision, (b) sometimes new facts generate inconsistencies between different provisions that require correction, and (c) sometimes previously unanticipatable facts determine a result that plainly subverts a central aspect of the discernable purpose of a constitutional provision. Finally, I assume that (iv) the Hartian rule directs the court -- when, and only when, confronted with constitutional cases of types (a)-(c) -- to do what ordinary agents typically do when acting under the direction of others, namely to be maximally deferential to those directing them (e.g., the framers and ratifiers of the Constitution) by making the minimum modification of the controlling (constitutional) content that maximizes the fulfillment of its discernable purpose. What, if anything, the Court is to do in cases in which either the asserted content or its intended purpose is too unclear to support confident judgments is not, I think, settled by our rule of recognition. Thus, *the rule of recognition* remains a work in progress, the completion, or fuller articulation of which, is a matter to be settled by normative debate, to which I will turn later.

The same is true of originalism. It too will be incomplete if there are cases in which its key notions -- *asserted content* and *original, publically stated rationale or purpose* -- aren't clear enough to support the confident judgments needed to apply the method of identifying minimal modification of content and maximal fulfillment of intended purpose. A second sense in which positivistic originalism is incomplete concerns cases in which the notions are clear enough and the method applies perfectly well, but the result is *a range of equally acceptable judicial outcomes*, rather than a single most highly justified result. Since the method involves weighing two values, some results of this type must be expected. To what should we appeal in these cases when selecting a single outcome from the restricted range of justified outcomes? The answer is *not*, I think, settled by any currently recognized authoritative procedure. Hence it remains a matter of normative debate (to be taken up below).

How, if I am right about all this, should we understand the relationship between the Constitution and our evolving constitutional law? In many cases application of originalist norms rooted in principles O1-O3 will result in a range of outcomes any of which would be legally justified, if selected. But whether or not a decision is justified, it will change constitutional law. How so, one might wonder? How can something unconstitutional be constitutional law? Isn't the Constitution itself law, making anything inconsistent with it unlawful? The answer, if we are positivists, should be "*No, there is a sense in which the Constitution itself isn't always law.*" *Constitutional law* changes over time, even though *original constitutional contents and purposes* don't. Originalism tells us that those contents and purposes are still a crucial standard by which Court precedents are to be evaluated. Newly adopted constitutional constructions can be overturned if they are shown to be inferior to competing constructions more in harmony with the original asserted contents and intended purposes of the Constitution. This is positivistic originalism American style.

If the Constitution were different, the logic of originalism wouldn't change, but its content would. If the Constitution explicitly stipulated O1, O2, and O3M, positivistic originalists would still distinguish the content of constitutional law at a given time from the content of the original constitution in the way actual originalists do. But our counterfactual originalists would authorize the Supreme Court to decide a limited range of cases by acting as an unelected super-legislature -- a kind of non-hereditary version of the old British House of Lords, revising laws and constitutional provisions according to the moral majority of the justices at a given time.

Since some anti-originalists dream of something like this, it is worth figuring out whether their anti-originalism is also anti-positivist. If it is, they must hold that some moral truths -- in the Constitution or not, espoused by judges and others or not -- are needed to determine the content of law, over and above what it's content would otherwise be. Imagine two scenarios with the same legally significant actors, the same legal practices and the same contingent moral and non-moral beliefs and attitudes. They differ only in that the moral beliefs in one scenario are all true, but those in the other aren't. If the laws must have the same content in the two scenarios, then, moral facts aren't needed to determine legal facts; social facts, legal practices, and moral *beliefs* are enough. Positivism would then be vindicated and anti-positivism could be dismissed.

Mark Greenberg's Anti-Positivist, Anti-Originalism

With this, I turn to Mark Greenberg's argument against positivism and originalism, in "How Facts Make Law."[5] He claims that social facts and legal practices plus cognitive and evaluative attitudes--including moral *beliefs* and *commitments* -- never *determine* contents of laws. Legal content, he thinks, always requires both factual and normative *truths*. His *determination relation* connecting those truths with legal contents is most naturally understood as *apriori consequence*; B is an apriori consequence of A iff B is derivable from A by

[5] In *Legal Theory,* 2004, pp. 157-198.

deductive reasoning alone.[6] Not that he ever derives the legal from the non-legal. He does, however, maintain, not implausibly, that in order for law to be intelligible to us, derivations of legal content from underlying facts must*, in principle*, be possible. According to his anti-positivism, legal content *can* be derived from normative facts plus social facts (including facts about what legal actors say, assert, think, believe, and value) but they *can't* be derived without normative facts.

Greenberg believes normative truths are needed to determine (i) which of the many assertions, beliefs, and actions of legal actors do, and which do not, contribute to legal content, (ii) which are most important, and (iii) how all relevant facts interact to determine content. His argument is abstract. Let N be the set of *purely descriptive non-legal facts* in a given jurisdiction that are *candidates* for helping to determine legal contents. He imagines theories, called "models," each of which selects a subset N* of N called "legal practices" and maps them onto purported truths about legal contents of the system, thereby explaining how all legal contents are derived. He says:

> [M]odels are candidate ways in which practices [e.g. sayings and doings of legally significant actors] contribute to the content of the law...[Models] determine what counts as a law practice; which aspects of law practices are relevant to the content of the law; and how different relevant aspects combine to determine the content of the law. (179)
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> [He then asks] whether law practices can themselves determine which model is correct. [*His answer will be "No."*] Certainly the content of the law...concerns, in addition to more familiar subjects of legal regulation, what models are correct. That is, the content of the law includes rules for the bearing of law practices on the content of the law. [*Rules stating how descriptive facts about legal actors bear on the contents of laws.*] For example, it is part of the law of the United States that the Constitution is the supreme law [*relevant actors being framers and ratifiers*], that bills that have a bare majority of both houses of Congress do not contribute to the content of the law unless the President signs them, and that precedents of higher courts [*sayings and doing of judges]* are binding on lower courts in the same jurisdiction. (179)

Models (i.e. theories) identify non-legal facts that help determine *legal contents* and principles used to derive those contents from the facts. For Greenberg, s*ome principles* relating non-legal facts to legal contents themselves count as *legal* truths. These are the crux of his

[6] p.165.

argument. He insists that *all legal content* must be derivable from non-legal truths. So, if some *principles* needed in the derivation are themselves *legal*, we are stuck. To square the circle, he claims that adding non-legal normative truths (the contents of which he doesn't identify) must, somehow, allow us to derive the *legal principles* needed to relate descriptive practices to the legal content they help to determine.

His argument goes like this: (i) Models need *principles* to derive legal contents from descriptive social and institutional truths. (ii) Some of these *principles* are themselves *legal* in nature. (iii) Since models with different legal principles can agree on the same descriptive facts while yielding different legal contents, it is indeterminate which models are correct. (iv) Since legal facts can't be radically indeterminate, there must be an external standard which, when added to models, allows us to determine the correct models and legal contents. (v) Since the models already include all descriptive facts, the needed addition must be normative.

One's first reaction is to think that something has gone wrong. How could the presence of a principle -- *A bill passed by both houses of Congress, but vetoed by the President, does not become law unless the veto is overturned by a 2/3 vote of each house* -- in one of Greenberg's models of American law be a problem? The principle is, after all, in the Constitution. His answer is that because it is a *legal fact*, the principle must be derivable from non-legal facts.

In reply, one naturally draws attention to an obvious fact.

F1. The principle is the asserted content of one of the provisions of the written document known as "The Constitution of the United States," which was unanimously adopted by a group voting on behalf of their respective states in "The Continental Congress," after which it received majority votes in conventions all thirteen states.

Greenberg would agree F1 is a descriptive (non-legal) fact, but he would deny that it is sufficient, when added to the relevant model, to derive the *legal* conclusion that *a bill passed by both houses of Congress, but vetoed by the President, doesn't become law unless the veto is overturned by a 2/3 vote of each house.* Moreover, he would be right to do so.

The needed derivation requires something more basic. It must be a fact about us that we take RR_{US} to be our fundamental Hartian rule of recognition.

RR_{US} *Rules passed by institutions recognized by the Constitution, and operating in accord with it, are to count as (federal) laws unless they have been overturned by recognized constitutional processes*.

If this is our rule, then we should be able to use the fact, F2, to derive Greenberg's legal principle.

F2. Most Americans, including both citizens and officials, take RR_{US} to be definitive

Although he doesn't say so, Greenberg may not agree with me that F2 is a fact. If so, he needs to say why, which he doesn't do. I doubt this would be his preferred response, in any case. The generality of his conclusion -- that moral truths are always needed to determine legal contents in all legal systems -- shouldn't rest on any contingent truths about what citizens do or don't accept. Since F2 is contingent and non-normative, his only remaining response must be to claim that adding F2 to other descriptive facts *won't* allow us to derive the conclusion that *a bill passed by both houses of Congress, but vetoed by the President, doesn't become law unless the veto is overturned by a 2/3 vote of each house.*

Why not? Suppose a group forms a club, stipulating that a sub group will make club rules. Surely, one is inclined to think, facts about the actions of the sub group, the original agreement, and club members' continuing attitude to the agreement should allow us to derive club rules. What else, beyond the beliefs, attitudes, and actions of the club members could be required? Greenberg thinks that genuine normativity is required in the legal case, and, presumably, in simple cases like this, too. To convince us, he offers an argument intended to apply to all such cases.

Greenberg's Kripke-Style Skeptical Argument

Greenberg patterns his argument after a paradox presented by the philosopher Saul Kripke that begins with a truism.[7] What we mean by a word *isn't* exhausted by the cases in which we have already applied it. Rather, what we mean must somehow determine the word's correct application to indefinitely many so-far unencountered cases. If it didn't, we would be free to apply it in new cases any way we liked, without changing its meaning or saying anything false. But we aren't free to do this. So, if a word means *so-and-so,* some fact about us must determine how it applies to new cases. Next, Kripke introduces a hypothetical skeptic who argues that there is no determining fact. If that's right, then either we don't mean anything by the word, or something beyond facts about us is needed to determine meaning. Some philosophers, though not Kripke himself, concluded that the determining factor must be normative.

Kripke's example is '+', which we take to designate a function that assigns a single natural number to each of infinitely many pairs of numbers. Since its range of application exceeds the relatively small number of pairs to which we have applied it, *something* must determine its correct application to new cases. But, the skeptic argues, we can't find it. For simplicity, he imagines we haven't previously computed 68 + 57. Realizing this, he asks us "What is 68 + 57?" Doing the calculation now, we say "68+57 = 125." But, the skeptic asks us ,"Did you, in the past, use '+' to designate the same function you do now? If so, what fact determined "125" to be the right answer to the question before you ever considered it? "

Suppose we say that both now and in the past we used '+' to express our *beliefs* about the addition function, which determines 125 as the sum of the two numbers. If we do say this, the skeptic will simply reformulate his original question. He will grant that we previously used the *words, say, "9 + 16 = 25"* to express a belief. But what belief -- one about addition, which we

[7] Saul Kripke (1982).

are now talking about, or one about a different function, *quaddition,* that agrees with the addition function on all previously considered cases, but assigns 5 to the computation 68 plus 57? To answer this question we must find facts that determined contents of our past *beliefs*. But determining contents of our past beliefs is no easier than determining *what we meant in the past by our words*. It is the same problem in another guise.

Other responses are also problematic. We might say we associated '+' with an *algorithm* computing a function that assigns 125 to the arguments 68 and 57. But now the skeptic asks, *What is an algorithm? Is it the symbols we use to express it, or is it their content?* If it is merely a collection of symbols, independent of any interpretation, it won't determine the value of any function at any arguments. If it is the content of the symbols, then the same question can be raised about it that was raised about '+'. At some point, we must stop using symbols to interpret other symbols. If we ever mean anything by our words, there must be some words the meanings of which aren't determined by (i) the applications we have already made of them, (ii) the linguistically-stated rules we have associated with them (which themselves require interpretation), or (iii) any introspectable, content-bearing, mental images or psychological representations that accompany their use. [8]

Fair enough, we should reply. Still, this doesn't show that *normative* facts are needed to settle our meanings. In fact, we may continue, the meaning of '+' *is* determined by the algorithm we associate with it. Yes, the algorithm's content *does* depend on the contents of the simple terms used to express it. But these contents *are*, in turn, determined by facts about us. All we need is a notion *the successor of a number*, our understanding of which consists in our uniform dispositions to add one (i.e. to count), until the numbers get too large for us do anything with. The content of our word *successor* is the *simplest function that respects those dispositions,*

[8] See pp. 387-402 of Soames (2009a).

which extends to all natural numbers. Once we have grounded its content, we can use it to define other arithmetic notions, including addition (which can be reduced to repeated counting) and multiplication (which can be reduced to repeated addition). Furthermore, the idea generalizes beyond arithmetic. The search for content typically starts with perceptual content, in which our perceptual experience represents things as being certain ways, i.e. as having certain properties. Language enters with our intentions to use words to stand for perceptible content -- various objects and properties. More abstract general terms -- 'water', 'heat', 'light', 'lead', 'tiger', 'animal', etc. -- are introduced to designate natural properties that *best explain* the observed similarities of individual things to which we apply the terms.[9]

With this brief reply to the Kripkean skeptic, we return to Greenberg. He says:

> It may be helpful to notice that the problem [of deriving legal content from non-legal facts] has a structure similar to...Saul Kripke's problem about 'plus' and 'quus' ['addition' and 'quaddition'] In order for there to be legal requirements, it must be possible for someone to make a mistake in attributing a legal requirement...One makes a mistake when one attributes a legal requirement that is not the one the law practices yield when interpreted in accord with the correct model. For any candidate legal requirement, [no matter how bizarre], however, there is always a nonstandard or "bent" model that yields that requirement. [just as for any proposed "sum", no matter how bizarre, there is always a nonstandard meaning of '+' that yields that result, while being consistent with our past uses of '+'] It is therefore open to an interpreter charged with a mistake to claim that in attributing the legal requirement in question, she has not made a mistake in applying one model but is applying a different model. (182)

> Here is an example. Suppose that on February 1, 2005, a judge in a state court in the United States must decide whether a woman has a federal constitutional right not to be prevented from having an abortion. Imagine that the judge holds that the woman does not have such a right...The judge claims...that according to the correct model of how judicial decisions contribute to legal content, when constitutional rights of individuals are at stake and strong considerations of justice support the claims on both sides, such decisions should be understood as establishing a form of "checkerboard solution"...[W]hether a person has the right...depends on whether the person is born on an odd- or an even-numbered day. Since Jane Roe was born on an odd-numbered day (let us assume), Roe v Wade's contribution to the content is that only women born on odd numbered days have a constitutional right to an abortion. (182)

Greenberg knows the judge's decision is absurd, just as Kripke realizes the absurdity of the idea that '+', as we used it in the past, really determined that 68+57 = 5. Just as the normative reader of Kripke takes this absurdity to show that *no facts about our past use of '+'* determines

[9] See Soames (2009a, 2009b).

its correct application to new cases, so, Greenberg thinks, the absurdity of the imagined judge's application of Roe v Wade to the new case shows that *no descriptive facts about past legal actors* determine correct legal content. Just as the anti-descriptivist about meaning thinks that normative facts about what will best coordinate the activities of users of '+' are needed to determine its correct application in a new case, so the anti-positivist, Greenberg, thinks that normative facts are needed to determine that the new decision is legally incorrect.

Why Greenberg's Argument Doesn't Work

Having sketched a response to Kripke's paradox about meaning (which, I have argued elsewhere, confuses two different notions of what it is for one set of truths to determine another), we can't take Greenberg's argument merely to piggyback on it, if it is to have any chance of success.[10] There is a way of reading it as introducing a new factor, which, though it suffers from problems of its own, is worth considering in its own right. The crucial point for Greenberg is that moral truth is needed to *explain* why his "bent model" of *Roe* is incorrect. This is dubious. It seems, on the contrary, that the bent decision is incorrect because it is inconsistent with the conjunction of (i), *what the Justices asserted and were taken to have asserted* in *Roe* by virtually everyone (whether they liked the result or not) (ii), *the common understanding of the role of the Supreme Court in our legal system,* (iii) even F2 above (if it is a fact). Although Greenberg would surely agree that these play a role, he would insist that our conclusion must rest on unacknowledged *moral truths*. Why, we must ask, would he say this?

Perhaps because he equivocates on normativity. He recognizes that his bent judge exceeded his legal authority *and so violated his legal obligation.* If he takes obligations to be, at bottom, moral, he may think that in recognizing the bent decision to be a violation of the judge's duty, we are presupposing a moral truth. However, all he has shown is that the judge

[10] See the two articles mentioned in the previous footnote for the critique of Kripke.

violated his *legal obligation.* It is a further question whether his action is, or is not, morally correct. The violated *legal norm* arises from the beliefs, intentions, assertions, values, desires, and expectations of legal officials and informed citizens. Although these incorporate evaluative standards, such standards need not depend on *moral truths*. There may often be moral truths in the vicinity, but what really generates legal obligation, and provides reasons for action, is the mere fact that *people have the values they do*.

Greenberg apparently doesn't see this. The following passage is a window on his thinking.

> The most important point is that facts about what participants believe (understand, intend, and so on) could not do the necessary work [of ruling out bent models] *because such facts are just more descriptive facts.* As with facts about the behavior of lawmakers, we can ask whether facts about participants' beliefs are relevant to the content of the law, and if so, in what way. Since the content of the law is rationally determined, the answers to these questions must be provided by *reasons*. As I have argued, the law practices, including facts about participants beliefs, cannot determine their own relevance. (p.185) [my italicized emphasis]

This, I suspect, may be the crux of the error. Greenberg insists that determinants of law must explain the *reasons* why legal contents are what they are. This involves, among other things, explaining how and why legal norms generate legal obligations, which provide *reasons for action*. Motivating reasons always require *valued ends sought by the actor*. So, Greenberg may think, legal contents are can never be determined by value-free facts.

He is right to think that we must explain how laws provide *reasons for action*. He is also right in thinking that reasons for action require *valued ends sought by the actor*, and so are never value-free facts. But he overlooks the fact that the values need not be those one *takes to be moral,* let alone those that are *genuinely moral*. To explain why something is *a motivating reason for action* all we need is a true statement of what one values and how the action, say obeying a law, tends to advance those values. We can do this without presupposing any significant moral truths.

In general, legal norms depend on all manner of beliefs, desires, expectations, and values relating citizens to one another and to the legal system. These include (i) shared confidence that

the system is as effective as might reasonably be expected in safeguarding *one's own welfare and that of those one cares about*, (ii) some sense that the burdens and benefits it imposes are tolerable, and (iii) a belief that the rule-making process is at least minimally representative of the governed, and so capable of being influenced by them. One can state these beliefs and attitudes purely descriptively. Yes, to count as a legal system, social rules and practices of a given society must be *broadly valued* by it members. But the values don't have to be regarded as primarily moral by those who hold them, still less must they be genuinely moral. Yes, legally coordinated social cooperation virtually always achieves some genuine moral gains over entirely uncoordinated actions in a state of nature. But this is compatible with legal systems that are evil, as well as morally bad laws in systems that are on the whole good. Most importantly, to correctly describe the legal content of a given legal text, and to identify the non-legal facts that determine it, one doesn't have to presuppose any significant moral truth. In short, Greenberg has failed to provide an real objection to legal positivism, or originalism.

Positivistic Arguments For and Against Originalism

Having argued that originalism is consistent with positivism and rejected an argument against positivism that, had it been sound, would have applied against originalism too, I turn to a pervasive positivistic argument against the version of American originalism I have sketched. It holds that originalism is inconsistent with *our real Hartian rule of recognition*, which accepts the legitimacy of many non-originalist Supreme Court precedents. If our legal norms were really originalist, it is maintained, then these decisions would not be so widely accepted.

Although the argument is not without force, it moves too quickly. It's true that a sizable number of important Supreme Court decisions in the last 100 years haven't been originalist. But what should we conclude from this? There is, after all, no originalist doctrine of Supreme Court infallibility. The originalist rule of recognition stipulates that the originally asserted contents of

laws passed by institutions set up by, and operating in accord with, the originally asserted content of the Constitution remain legally valid, *unless they have been overturned by recognized constitutional processes.* It further authorizes the Supreme Court, as the highest authority in applying constitutional content to new circumstances. The fact that Americans have, by and large, accepted its decisions as genuine law, *whether or not they have believed the cases to have been rightly decided*, supports, rather than undermines, an originalist rule of recognition.

Nearly everyone admits that some standards of constitutional interpretation are better than others, that judges sometimes make mistakes, and that there are limits to what they are legally authorized to do. *What, then, are the legal standards to which judges are expected to adhere?* Originalism *legally authorizes* them to make the minimum modification of original constitutional content that maximizes fulfillment of its original intended purpose (i) when the original content neither definitely applies, nor definitely fails to apply, to new facts, (ii) when the new facts create conflicts between constitutional provisions, or (iii) when new facts that couldn't have been anticipated would make following the original content seriously and transparently self-defeating. Roughly this, and no more, must be included in the rule of recognition governing the actions of the Supreme Court, if the American system is originalist.

So is our system originalist, or not? The case is mixed. On the plus side, there is the continuing respect paid to the constitutional separation of powers, and its delegation of legislative authority to Congress alone. Although it is widely recognized that the Court sometimes must make new law by adjusting constitutional content to new circumstances, the Court is widely expected to be maximally deferential to the Constitution when it does so. Originalism spells this out. On the minus side, large parts of the population often want particular results, which they are willing to accept without being too scrupulous about how the

results are achieved, when things go their way. Thus, we have a divided legal culture that sometimes swings one way and sometimes swings another.

Nevertheless, I believe the balance of evidence favors an originalist conception of our rule of recognition. The crucial point is that although originalism is an increasingly well worked-out, easy to understand legal philosophy, there is no comparably consistent, well worked-out, and widely accepted counter to it. Yes, non-originalists outnumber originalists among federal judges, and greatly outnumber originalists among American law professors and federal office holders, many of whom may have their own agendas. So, it may seem that those most influential in conferring positivistic legitimacy on legal standards and principles must determine non-originalist standards and principles.

But they don't, because they lack a unifying positive doctrine that would bring them together. Law professors are often results-oriented, enthusiastically approving social and political decisions that advance their favored agendas, while disdaining those of their opponents. If the Supreme Court always pushed in one direction -- left, right, or center -- a coherent ideology empowering it as an independent political institution might be constructed and embraced. But, as recent decades have shown, the Court is no longer predictable. Federal office holders, and politicians aspiring to be, are also results-oriented. Because the Constitution limits their power, most of them aren't consistent originalists either. But since they differ on who should have the power to do what, they too are not united around any competing legal philosophy; nor could they easily be. Finally, the non-originalism of federal judges -- which often reflects their decades-long experience as law students, law professors, and public officials -- is diminishing as originalism becomes more prominent.

In short, specific, detailed alternatives to originalism are both in short supply and vulnerable to legitimacy challenges of their own. Whereas originalism is a coherent, easily

understood political philosophy that gives substance to Americans' reverence for the Constitution, there is little appetite for *explicitly* granting the Court the power to non-deferentially legislate on its own, independent of the democratically elected branches. Because of this, originalism is, I think, the leading conception of the role of the judiciary and its legal responsibilities in America today. This explains why, in justifying their decisions, justices never say they are legislating their own political or moral views. Rather, they advertise themselves as disinterestedly deriving their results from traditional constitutional principles. The originalist conception of their non-political role also explains their lifetime tenure, their code of conduct, and the fact that they are appointed, rather than elected.

The Incompleteness of Positivistic Originalism and the Need for Normative Completion

In arguing that originalism best describes the authority accorded to the judiciary in the United States, I have relied on a principle that authorizes judicial modifications of legal content in three cases: (a) when the application of original content to new facts is vague, and so doesn't determine a definite outcome, (b) when that content, the surrounding law, and new facts determine inconsistent verdicts, (c) and when new facts of a kind that couldn't reasonably have been anticipated, or taken into consideration, by the original lawmakers render a law's content plainly and importantly inconsistent with its the publically stated rationale. In these cases, judges may be authorized to make the minimum change in legal content that maximizes fulfillment of the law's original rationale. Although this concession to what is, in effect, judicial legislation might not be accepted by some originalists, I don't think any reasonable case can be made that our actual Hartian rule of recognition renders them illegitimate.

But this isn't the end of the story. As I mentioned earlier, the content of what I take to be our Hartian rule of recognition is incomplete, in the sense of not providing answers to all important questions involving legitimacy. My originalist principles implicitly recognize this by

directing judges to perform a task -- striking a proper balance between minimizing changes in content and maximizing fulfillment of intended purpose -- which can often be done, more or less equally well, in more than one way. What should guide judges in choosing among them? It is no use looking for guidance in our basic rule of recognition, which isn't detailed enough to provide an answer. As far as I can see, there is, at present, no definitive, legal fact of the matter.

At this point our inquiry becomes normative. Would we do better authorizing judges

(i) to exercise their own moral judgment in selecting the best of the remaining policy alternatives, or

(ii) to decide the individual case at hand, while refusing to provide a general rationale favoring any of the remaining, equally deferential, alternatives, thus eschewing the precedential status of the decision and leaving the policy choice to the democratic branches, to voters, or, in constitutional cases, to the amendment process, or

(iii) to exercise their own discretion, treating their decision as precedential when the issues raised by the alternatives are relatively minor, while leaving broadly consequential policy issues to the people or the democratic branches?

I favor (iii) but the question is ripe for debate.

Similar issues arise when epistemological limitations make it impossible to identify original content or intended purpose with sufficient clarity to sharply delimit the proper range of judicial discretion. In these cases, we need a *normative* theory to guide us. One of the most intriguing of those is given by John McGinnis and Michael Rappaport in *Originalism and the Good Constitution* (Harvard 2013). There they argue that the form of democratic government that produces the best consequences for its citizens -- securing liberty, stability and consensus -- is one that relies on super-majoritarian rules and processes (as exemplified in the U.S. by the super-majoritarian ratification of the original Constitution, the super-majoritarian amendment process, and by the super-majoritarian features of federalism, the separation of powers, and a bicameral legislature).

One of their most interesting points concerns the process of amending the Constitution, which, on the face of it, would seem to be the best way of updating a governing document that is more than 200 years old. Today that the process is often regarded too difficult. But is it? The Constitution has been amended 17 times since the ratification of the Bill Of Rights in 1791, including 12 amendments in the twentieth century (all but 1 before 1972). Why the current dearth of amendments? McGinnis and Rappaport argue that the rampant judicial activism starting in the mid 1930s has been an important, but unfortunate, cause. Their point is that although vast changes in the economy may justify greater governmental oversight than had previously existed, this could have been better achieved by ratifying carefully drafted and socially negotiated constitutional amendments than by the piecemeal adjustments of an unrepresentative and economically unsophisticated Supreme Court, whose preemptory rulings preempted what could have been achieved by a more consensual process.[11] Worse, once the tide of judicial activism gained momentum, it began to produce divisive, partisan results that undermined public faith that the Court could be trusted not to subvert constitutional content, old or new.[12]

Originalism also stands in need of a another kind of normative completion. How should we treat past changes in constitutional law produced by extra constitutional means, including the evolution of non-constitutional governmental practices? Changes of this sort occur when constitutional provisions are quietly ignored and replaced by extra-constitutional practices that go unchallenged. For example, Article I, Section 8 of the Constitution gives Congress alone the power to declare war. Nevertheless, that power was compromised by the Korean War, the War in Viet Nam, and the First and the Second Gulf Wars. The United States never declared war in

[11] chapter 5 of McGinnis and Rappaport (2013)

[12] See their discussion of the failure to ratify the Equal Rights Amendment.

Korea, though the war it fought left 36,000 American soldiers dead. Although the other wars were sanctioned by congressional resolutions, they weren't declarations of war, and in Viet Nam the resolution followed military involvement rather than initiating it. This result has, arguably, shifted American constitutional law.

Barak Obama's *Iran Deal,* as it was commonly called, is another example. Although it was clearly a treaty with a foreign nation, the President didn't submit it to the Senate, the approval of which by a 2/3 majority is constitutionally required. As with limited wars, a congressional fig leaf was offered instead. As I write, Obama's deal has now been repudiated by a new President, Donald Trump. But if Obama's practice is repeated, the clause concerning foreign treaties might also become a dead letter.

To deal with issues of this sort, my positivistic conception of originalism needs to be extended by a normative principle roughly along the following lines.

N. When dealing with cases in which the original content of a constitutional provision CP has been ignored and replaced by an extra-legal practice, the Court must first articulate the content of the practice, incorporating past precedents (if any), and then either replace it with the original asserted content and intended purpose of CP or revise it by bringing it as close as possible to that content and purpose, without seriously undermining important and legitimate reliance expectations created by the practice.

Non-originalist precedents could be treated similarly. When the Court finds that the facts of a current case create a conflict between the original content and intent of a constitutional provision, on the one hand, and a constitutional precedent L* produced by an earlier *mistaken* decision, on the other, the task is to change L* in a way that narrows the previous error (by bringing the interpretation of the provision closer to what is now seen to be correct) while minimizing legitimate reliance costs associated with the change. This should be done to the extent that the consequences of the rectification of L* for settled law are foreseeable and reasonably localized. When this isn't so--when the mistaken L* is inextricably entrenched in a complex body of surrounding law--the goal may have to be

reduced to creating a carve-out for L* that leaves it in place, while isolating it and preventing its influence from spreading. Reapplication of this rule over time may gradually narrow the impact of past erroneous judicial decisions, while avoiding unpredictably destabilizing effects on the body of existing law. In this way, rectification of previous error may proceed, and become cumulative, without inviting disastrous or quixotic quests. How, precisely, this is to be achieved is a normative question about which different views, compatible with our originalist Hartian rule of recognition, are possible.

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