
WHY THE DECLARATION OF INDEPENDENCE IS NOT LAW—AND WHY IT COULD BE

FREDERICK SCHAUER*

The Declaration of Independence, or at least one authoritative version of it, lies under several inches of glass at the National Archives in Washington. So too does the Constitution of the United States. Yet although the two documents are located side by side in the same building and honored in what appears to be much the same way, the Constitution is universally understood to be law, and the Declaration of Independence is widely (even if not universally¹) understood not to be. But why is this so? My goal in this Article is to explore this question, arguing that both the legality of the Constitution and the current presumed non-legality² of the Declaration are matters of contingent empirical and sociological fact rather than being functions of anything more formal, more logical, or more legal.

I. JUST ENOUGH JURISPRUDENCE

One of the enduring and important lessons of twentieth century analytic jurisprudence in the positivist tradition³ is that law and legal

* David and Mary Harrison Distinguished Professor of Law, University of Virginia. An earlier version of this Article was delivered (via Skype) at the National Constitution Center on April 14, 2015, and I have benefited from the comments and questions on that occasion. I am also especially grateful to Alexander Tsesis for conceiving and organizing the live and published versions of this Symposium.

1. See Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 419–20, 422–23, 429–31, 435–37 (2006) (giving examples of how the Declaration has been treated as binding positive constitutional law).

2. Which is not the same as illegality.

3. For reasons well-explained in Robert S. Summers, *Legal Philosophy Today—An Introduction*, in *ESSAYS IN LEGAL PHILOSOPHY* 1, 15–16 (Robert S. Summers ed., 1970), I try to avoid the use of the word “positivism.” Even if the term is not as “dominantly pejorative” today, *id.* at 16, as it was when Summers was writing, it does remain “radically ambiguous,” *id.*, and is often more distracting than helpful. Nevertheless, this Article is situated within a tradition—often taken to have

validity ultimately rest on non-legal foundations. Both Hans Kelsen and H.L.A. Hart developed this claim, albeit in different ways, and it will be useful before turning to the Declaration to explore and explain their relative contributions.

Kelsen is best known for offering what he labeled a “Pure Theory of Law,”⁴ the most important aspect of which, at least for our purposes here, is the idea of a hierarchy of norms.⁵ A norm is valid, Kelsen argued, when it is authorized by a higher norm, and that higher norm is validated by a still higher one, and so on, until we reach the highest norm.⁶ This highest norm is, allowing for the awkward transposition of the spatial metaphor from highest to deepest (or from top to bottom), the most foundational norm of all. Kelsen called this foundational norm the *Grundnorm*, which in its common English translation is designated as the “basic norm.”⁷

In developing the Pure Theory, Kelsen was uninterested in describing actual legal systems, and instead focused on the somewhat elusive ideas of legal consciousness, legal comprehension, and legal cognition.⁸ In order to comprehend the law or to understand a legal system, Kelsen maintained, it is necessary to assume, or presuppose, the basic norm.⁹ The basic norm is the presupposition that enables someone to talk about and identify *law*, and to distinguish the hierarchical system of legal norms from other norm systems.¹⁰

Although this seems somewhat mysterious, the basics of the Kelsenian approach are sufficient to establish the core idea that the foundational norm of a legal system is not (and, by definition, cannot be) something that is derived from, or authorized by, an even more foundational norm. Rather,

started with Jeremy Bentham and John Austin in the eighteenth and nineteenth centuries, further developed by Hans Kelsen and H.L.A. Hart in the twentieth, and exemplified now by Joseph Raz and many others—that emphasizes the contingent human dimensions in the identification of law (law as a social fact).

4. HANS KELSEN, *PURE THEORY OF LAW* 1 (Max Knight trans., Univ. of Cal. Press 1967) (2d ed. 1960); HANS KELSEN, *The Pure Theory of Law and Analytical Jurisprudence*, in *WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE* 266, 266 (1957). A valuable modern interpretation can be found in LARS VINX, *HANS KELSEN’S PURE THEORY OF LAW: LEGALITY AND LEGITIMACY* (2007).

5. See Hans Kelsen, *The Function of a Constitution*, II *FORUM* 583-6 (1964), translated in *ESSAYS ON KELSEN* 109, 117-19 (Richard Tur & William Twining eds., Iain Stewart trans., 1986).

6. *Id.* at 117-18.

7. Roberto J. Vernengo, *Kelsen’s Rechtssätze as Detached Statements*, in *ESSAYS ON KELSEN*, *supra* note 5, at 99, 103.

8. See Alida Wilson, *Is Kelsen Really a Kantian?*, in *ESSAYS ON KELSEN*, *supra* note 5, at 37, 49-51.

9. Hans Kelsen, *supra* note 5, at 114-17.

10. *Id.* at 117-19.

the *Grundnorm* is simply assumed, presupposed, or hypothesized.¹¹ As a legal matter, the *Grundnorm* is neither legally authorized nor legally valid. It just is.

The idea that law ultimately rests on non-legal or extra-legal foundations becomes less mysterious, more concrete, and more directly relevant in the hands of H.L.A. Hart. In particular, one of Hart's central ideas was that of a *rule of recognition*.¹² Legal systems, Hart argued, consist of primary rules of conduct—the conduct-regulating rules of criminal law, tort, and much of administrative law are straightforward examples—and secondary rules—the rules about the rules.¹³ These secondary rules include rules of adjudication, rules of change, and, most importantly, rules of recognition—the rules that tell us what the rules are.¹⁴ For example, the Administrative Procedure Act (“APA”),¹⁵ or at least part of it, is a rule of recognition because it tells us which regulations of federal administrative agencies qualify as valid law. Administrative regulations adopted in accordance with the mandates of the APA are valid law, but purported regulations not in compliance with the Act are invalid;¹⁶ they are not law at all. To put it differently, and in a way that explains Hart's terminology, non-compliant regulations are not *recognized* as law while those regulations that do comply with the APA are recognized as valid law.

But then what makes the APA valid law? For Hart, as for Kelsen, authorizing or validating laws exist as part of a hierarchy, and therefore we know that the APA is itself valid law because it has been passed by Congress and signed by the President in accordance with the provisions of Article I of the Constitution of the United States.¹⁷ Article I is thus another and higher rule of recognition, and it is Article I that recognizes some statutes as law and, implicitly, other directives as not law at all, even if on the surface they resemble law.¹⁸ A purported statute that might in external appearance and form look like a law would not be a valid law if not adopted in accordance with the rule of recognition that is Article I.

11. See Geoffrey Samuel, *Is Law a Fiction?*, in 110 LEGAL FICTIONS IN THEORY AND PRACTICE 31, 37–38 (Maksymilian Del Mar & William Twining eds., 2015).

12. H.L.A. HART, THE CONCEPT OF LAW 94–110 (Paul Craig et al. eds., 3d ed. 2012).

13. *Id.* at 80–99.

14. *Id.* at 94–96.

15. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2012).

16. 5 U.S.C. § 706. Among a vast number of examples, see *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

17. U.S. CONST. art. I.

18. And thus purported statutes violating Article I's procedures for enactment do not count as law at all. *E.g.*, *Clinton v. City of New York*, 524 U.S. 417, 447–49 (1998); *INS v. Chadha*, 462 U.S. 919, 952–59 (1983).

The regress, however, continues. We can say that the regulations of the Occupational Health and Safety Administration, for example, are law because they are recognized as such by the APA and that the APA is law because it is recognized as such by Article I of the Constitution; but what makes Article I law? What rule of recognition recognizes *it* as law? Here, Hart departs usefully from Kelsen in identifying the empirical or factual analogue to the decidedly non-factual Kelsenian *Grundnorm*.¹⁹ For Hart, things like the Constitution of the United States are recognized as law by what he called an *ultimate rule of recognition*—the rule²⁰ that identifies what is to count as law within a jurisdiction or a legal system.²¹ The ultimate rule of recognition in the United States is therefore, and importantly, not the Constitution of the United States.²² Rather, the ultimate rule of recognition in the United States is the “rule” that recognizes the Constitution as law in the first place.²³

For Hart, the ultimate rule of recognition is not a hypothetical construct, not an assumption, not a logical presupposition, and not a Kantian transcendental understanding.²⁴ It is a raw fact. The ultimate rule of recognition is the social fact, not itself legally valid or invalid, that determines what counts as law.²⁵ As I have elaborated on other occasions,

19. Hart distinguishes his view from Kelsen’s on exactly this ground in HART, *supra* note 12, at 292–94.

20. *Id.* at 105–10. It may be confusing to conceive of the ultimate rule of recognition as a rule at all, for it is less of a rule than a set of fluid and fuzzy-edged practices identifying what is law in a particular society and what is not. *Id.* at 101–02. The point is made most notably in A. W. B. Simpson, *The Common Law and Legal Theory*, in OXFORD ESSAYS IN JURISPRUDENCE 77 (A. W. B. Simpson ed., 2d ser. 1973). See also Frederick Schauer, *Is the Rule of Recognition a Rule?*, 3 TRANSNAT’L LEGAL THEORY 173 (2012).

21. For an insightful explanation, see Grant Lamond, *The Rule of Recognition and the Foundations of a Legal System*, in READING HLA HART’S *THE CONCEPT OF LAW* 97 (Luís Duarte d’Almeida et al. eds., 2013).

22. For suggestions to the contrary, suggestions that appear to me to misunderstand the pre-constitutional status of the idea of a rule of recognition, see Michael Steven Green, *Legal Revolutions: Six Mistakes About Discontinuity in the Legal Order*, 83 N.C. L. REV. 331, 359–60 (2005). The complexities of how the Constitution relates to the ultimate rule of recognition are valuably analyzed in Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 631–45 (1987). See also the various chapters in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* (Matthew D. Adler & Kenneth Einar Himma eds., 2009).

23. The ultimate rule of recognition in the United States also recognizes other things as law—the common law most obviously—and appears, even without benefit of the Supremacy Clause of Article VI, to recognize the Constitution as hierarchically superior to other laws. See HART, *supra* note 12, at 105–10.

24. Cf. Wilson, *supra* note 8, at 37–54 (describing Kelsen’s views in Kantian terms).

25. See NEIL MACCORMICK, H.L.A. HART 137–38 (William Twining ed., 2d ed. 2008); P. M. S. Hacker, *Hart’s Philosophy of Law*, in LAW, MORALITY, AND SOCIETY: ESSAYS IN HONOUR OF H.L.A. HART 1, 10 (P. M. S. Hacker & J. Raz eds., 1977); Benjamin C. Zipursky, *The Model of Social Facts*, in HART’S POSTSCRIPT 219, 262 (Jules L. Coleman ed., 2001).

I could write a document that looks like a constitution for the United States and provide that this constitution would be valid upon my signing it.²⁶ Once I signed it, therefore, it would be valid according to its own terms, in the same way that the Constitution behind the glass at the National Archives is valid according to its own terms.²⁷ In the strictly logical sense, the two documents would be equally internally valid according to their own terms and thus equally entitled to be considered as the Constitution of the United States.²⁸ But of course the document behind the glass at the National Archives *is* the Constitution of the United States,²⁹ and my self-drafted constitution for the United States is not.³⁰ And accordingly, the point of the example is that the validity of the capital-C Constitution, and thus the determination of which small-c constitution is the capital-C Constitution, is not a matter of logic and not a matter of anything contained or not contained in the various small-c constitutions. It is simply, but importantly, the fact of which of the potentially infinite number of small-c constitutions is, as an empirical matter, accepted in some jurisdiction as the capital-C Constitution. It is a question of social fact and not a question of logic. And it is therefore not a question of law. It is the pre-legal and pre-constitutional question of what is to count as law and what is to count as the Constitution in the first place.

Although I have just been referring to the Constitution, in reality nothing about the idea of an ultimate rule of recognition is limited to constitutions or constitutional law. As Hart explains, for example, enactments of the U.K. Parliament that are signed by the sovereign are law,³¹ and so too are the decisions of certain courts and, under some circumstances, custom.³² Consequently, we know that the decisions of the Court of Appeal are British law and the decisions and rules of the World Chess Federation (“FIDE”) are not, but that is solely because the ultimate rule of recognition in the United Kingdom recognizes the former and not

26. See FREDERICK SCHAUER, *THE FORCE OF LAW* 77–82 (2015) [hereinafter SCHAUER, *THE FORCE OF LAW*]; Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145, 152–53 (Sanford Levinson ed., 1995) [hereinafter Schauer, *Amending the Presuppositions of a Constitution*]. See also Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 22, at 175, 180–81.

27. See SCHAUER, *THE FORCE OF LAW*, *supra* note 26, at 79.

28. *Id.*

29. Or at least most, but not all, of it is, and the document behind the glass is most, but not all, of the Constitution, but exploring why this is so would be getting ahead of things.

30. See SCHAUER, *THE FORCE OF LAW*, *supra* note 26, at 79.

31. HART, *supra* note 12, at 148.

32. *Id.* at 44–49.

the latter as British law. Because the content of the ultimate rule of recognition is simply a question of fact about which the idea of (legal) validity is inapt, there is no logical or legal reason why the decisions of FIDE could not, in theory, become part of British law. Some ultimate rule of recognition might be criticized as morally defective, inefficient, practically useless, or otherwise flawed, but as a matter of law the ultimate rule of recognition cannot be legally valid or invalid. To repeat, it just is. An ultimate rule of recognition could as easily, as a jurisprudential matter, include the rules of FIDE as exclude them, and an ultimate rule of recognition including the FIDE rules as law would be no less an ultimate rule of recognition than the current United Kingdom ultimate rule of recognition, which of course refuses to recognize the FIDE rules as law.

An important issue, and one regularly debated in jurisprudential circles, is the question of *whose* acceptance or internalization is necessary for the factual existence of the ultimate rule of recognition. For Hart, the ultimate rule of recognition was identified in the internalization practices of officials.³³ We could identify the ultimate rule of recognition by seeing which rules are accepted and used as law by officials and which rules are not.³⁴ But the issue is not without controversy. Perhaps the ultimate rule of recognition is better understood as what a polity as a whole accepts as its law.³⁵ And to the extent that legal regimes exist or not depending on the practices and implicit decisions of the holders of ultimate force, then perhaps the ultimate rule of recognition can be understood as identifying which law or laws the army is willing to enforce and which law or laws it is not.³⁶ Still, without delving too deeply into these questions surrounding whose acceptance is determinative, we can say that the existence and, thus, the content of the ultimate rule of recognition—the ultimate determination of what counts as law in a particular society—are to be determined, according to Hart and correctly so, by the raw empirical fact of social acceptance.³⁷

II. SOME EXAMPLES

At various times in history, competing legal systems have laid claim

33. *Id.* at 101–03, 316.

34. *Id.*

35. See MACCORMICK, *supra* note 25, at 33 (suggesting that the question of which legal system “exists” is to be determined by the practices of “the bulk of the inhabitants” of that society).

36. See Alexander & Schauer, *supra* note 26, at 178–79 (suggesting that the acceptance practices of “the 101st Airborne and the FBI” may be important in determining what the ultimate rule of recognition in fact is).

37. HART, *supra* note 12, at 107–10.

to being the law of the same piece of the planet. In the country now known as Zimbabwe, formerly known as Rhodesia, and before that as Southern Rhodesia, for example, two competing regimes beginning in 1965 claimed to be the government and the valid lawmaking authority for the country.³⁸ One regime was the government of Ian Smith, which in November of 1965 issued a Unilateral Declaration of Independence declaring itself to be the government of the country of Rhodesia—the claims of Great Britain as the colonial sovereign notwithstanding.³⁹ At the same time, Great Britain, the government that had governed Rhodesia for generations, claimed to be the government and lawmaker for the country and that the Smith faction was not to be counted as a genuine government or genuine lawmaker.⁴⁰

So what then was the ultimate rule of recognition for this geographic area? And thus, what was the law for this area? As things played out, some combination of military force and international recognition made the decision, such that the non-validity of “Smith law” emerged from non-legal decisions about which legal system the ultimate rule of recognition recognized.⁴¹

Similar events had taken place earlier, in the late 1950s, in the context of what is now Pakistan.⁴² More recently, in Egypt, first in 2011 and then in 2013, the ultimate determination of which government and therefore which legal system would be in force was made not by formal law, and not even by judges, but by the army in deciding which of the competing factions and competing legal orders to support and defend.⁴³ Similarly, although it has been argued that the compelled ratification by former

38. F. M. Brookfield, *The Courts, Kelsen, and the Rhodesian Revolution*, 19 U. TORONTO L.J. 326, 327–29 (1969).

39. *Id.* at 327–28. The impetus for the declaration of independence from Great Britain (of special relevance here is that the terminology was hardly a coincidence) was the push by Great Britain to dismantle the apartheid system of elections (and much else), a push that Smith and his followers resisted on substantive grounds. T.C. Hopton, *Grundnorm and Constitution: The Legitimacy of Politics*, 24 MCGILL L.J. 72, 73–74 (1978).

40. Brookfield, *supra* note 38, at 328–29.

41. See *id.* at 339–40, 346–48; R. W. M. Dias, *Legal Politics: Norms Behind the Grundnorm*, 26 CAMBRIDGE L.J. 233, 258–59 (1968); J. M. Eekelaar, *Principles of Revolutionary Legality*, in OXFORD ESSAYS IN JURISPRUDENCE, *supra* note 20, at 22, 22–23; J. W. Harris, *When and Why Does the Grundnorm Change?*, 29 CAMBRIDGE L.J. 103, 128 (1971).

42. See Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d’Etat & Common Law*, 27 CORNELL INT’L L.J. 49, 54–57 (1994); Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225, 1226–30 (1993).

43. The events are described in Asma Alsharif & Yasmine Saleh. See *Special Report: The Real Force Behind Egypt’s ‘Revolution of the State,’* REUTERS (Oct. 10, 2013), www.reuters.com/article/us-egypt-interior-specialreport-idUSBRE99908D20131010; *Timeline: Egypt’s Revolution*, AL JAZEERA (Feb. 14, 2011), www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html.

Confederate states of the Thirteenth, Fourteenth, and Fifteenth Amendments rendered those amendments unconstitutional,⁴⁴ the best response, both historically and jurisprudentially, is that these and related issues have been, in the words of the Supreme Court, “resolved by war.”⁴⁵ After all, there can be little doubt that the American Revolution and its subsequent law (including the Constitution) were illegal under British law,⁴⁶ but that controversy, too, was resolved not by law but by war, with the resolution determined at Yorktown in 1781.

The lesson from the jurisprudence and from these examples should now be apparent. Law is what the ultimate rule of recognition says it is, nothing higher and nothing deeper. If the people, the officials, or the army of the United Kingdom were to decide, in whatever manner such decisions about practices are made, that the rules of FIDE—or for that matter, the statutes enacted by the Parliament of Canada—were to be all or part of British law, then they would be, and they are not now part of British law solely because the officials, the people, and the army of the United Kingdom refuse to treat them as such.

III. AND SO TO THE DECLARATION OF INDEPENDENCE

The rules and decisions of FIDE are not only not (now) the law of the United Kingdom, but they are also not now the law of the United States. Nor is canon law. And Shari’a law is not the law of the United States, not because some states have officially said that it is not,⁴⁷ but because it has simply not been accepted as such by judges, other officials, the public, and the relevant enforcing authorities. Relatedly, and even more controversially, the law of other jurisdictions is (generally) not the law of and in the United States,⁴⁸ and, somewhat less controversially, the

44. See Joel Parker, *The Origin of the United States, and the Legal Status of the Southern States on the Suppression of the Rebellion*, Lecture Delivered in Dartmouth College (Apr. 1869), in *LECTURES DELIVERED IN THE LAW SCHOOL OF HARVARD COLLEGE, AND IN DARTMOUTH COLLEGE, 1867–68, AND ’69*, at 37, 66–67; Joseph E. Fallon, *Power, Legitimacy, and the 14th Amendment*, *CHRONICLES*, Mar. 2002, at 42–43. See also BRUCE ACKERMAN, *WE THE PEOPLE 2: TRANSFORMATIONS* 99–116 (2000).

45. *Testa v. Katt*, 330 U.S. 386, 390 (1947).

46. Had it not been illegal, after all, it would not have been a revolution.

47. See Jaron Ballou, Note, *Sooners vs. Shari’a: The Constitutional and Societal Problems Raised by the Oklahoma State Ban on Islamic Shari’a Law*, 30 *LAW & INEQ.* 309, 309 (2012); Aaron Fellmeth, *Current Developments: U.S. State Legislation to Limit Use of International and Foreign Law*, 106 *AM. J. INT’L L.* 107, 107–17 (2012). Oklahoma’s prohibition of Shari’a law was invalidated on First Amendment religious discrimination grounds in *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012).

48. The issues and controversies are described in, for example, Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 *HARV. J.L. & PUB. POL’Y* 653 (2009); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 *HARV. L. REV.* 148 (2005); Comment, *The*

Preamble to the Constitution is not either.⁴⁹ Even less controversially, the syllabus to a decision of the Supreme Court of the United States is not law,⁵⁰ although the syllabus to a decision of the Supreme Court of Ohio does in fact have legally operative effect.⁵¹

What all of this indicates is that the question of what counts as law—or, simply, what *is* the law—is empirical, factual, and contingent. When Lon Fuller, in his enduring *Speluncean Explorers* article, had the fictional Justice Handy rely in his opinion on the Chief Executive’s non-public plans, provided to Handy by the Chief Executive’s secretary by way of Justice Handy’s wife’s niece,⁵² Fuller was plainly inviting the reader to consider whether this was a proper source of information, whether it was relevant to the determination of the action, and thus whether it was law. And now that modern technology has made access to such information ever easier, such questions about what is to count as law are more and more coming to the forefront.⁵³

So is the Declaration law? Probably not. And if so, only weakly so.⁵⁴

Debate Over Foreign Law in Roper v. Simmons, 119 HARV. L. REV. 103 (2005). On the issues in non-U.S. and comparative perspectives, see ELAINE MAK, JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS (2013); THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES (Tania Groppi & Marie-Claire Ponthoreau eds., 2013).

49. See Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 555–56 (1999) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999)). That American practice is at odds with much of the practice elsewhere in its treatment of the Preamble emphasizes the point that there is nothing about the very idea of a preamble or the very idea of law that prevents preambles from being law. See Liav Orgad, *The Preamble in Constitutional Interpretation*, 8 INT’L J. CONST. L. 714, 718–21 (2010).

50. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 327 (1906). The interesting historical background to *Detroit Timber* is described in Frank D. Wagner, *How Not to Write a Syllabus*, 15 SCRIBES J. LEGAL WRITING 153, 154–55 (2013).

51. *State v. Wilson*, 388 N.E.2d 745, 751 (Ohio 1979). For commentary, see generally Gil Grantmore, *The Headnote*, 5 GREEN BAG 2d 157 (2002); John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L. REV. 447, 452 (2001).

52. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 642 (1949).

53. See, most recently and most acrimoniously, *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015). More generally and less acrimoniously, see Frederick Schauer, *The Decline of “The Record”: A Comment on Posner*, 51 DUQ. L. REV. 51, 51–54 (2013); Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 495 (2000).

54. Implicit in this sentence is the thought that law-ness, and law, may be matters of degree. Lawyers and judges frequently talk of this or that case as being good law or bad law, such that the former indicates active, operative, and citable law, while the latter indicates cases (or other items) that have been overruled or passed into desuetude. But if there can be good and bad law in this sense, then there can, or so it seems, also be pretty-good-but-not-great law, and pretty-bad-but-not-totally-irrelevant law. If that is so, however, then perhaps the authoritative status of law can also be scalar rather than binary. If law is defined or characterized as such precisely because of its authoritative status, JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979), then it is only a small step to

The very existence of this Symposium indicates that this is a debatable question. After all, we do not see symposia devoted to the question whether the statutes in the United States Code are or should be law. They are, and everyone knows it, so there is no room for debate and no need for a symposium. But the Declaration is different. As some of the contributions to this Symposium explicitly or implicitly acknowledge,⁵⁵ lawyers who would argue for a concrete conclusion by relying heavily on the provisions of the Declaration would now be treated with some considerable skepticism in a way they would not if they argued for a conclusion from a federal statute or from any of the provisions of the capital-C Constitution of the United States. And the very fact that some of the other contributions to this Symposium⁵⁶ are best read as urging that the Declaration become or be treated as constitutional law indicates that those contributors accept that, right now, the Declaration is not part of the Constitution and not part of American positive law, strictly defined.

Like so many factual questions that legal academics all too often answer by bald assertion or conversion into the normative, the question whether the Declaration is law is, in reality, an empirical one. How often do lawyers cite the Declaration in their briefs or make explicit reference to it in oral argument? How often does a lawyer giving advice to an actual or potential client rely on the Declaration in predicting a legal outcome? And how often do judges rely on the Declaration in reaching their conclusions and/or justifying those conclusions in written opinions? There are, to some extent in practice and certainly in theory, answers to these questions, and the sum total of those answers would tell us whether the Declaration is now part of the corpus of American law better than my largely unsupported suppositions.

In default of actually doing the extensive empirical analysis just suggested, I, along with others here,⁵⁷ am inclined to believe that the Declaration is not now part of American law, or not much of a part of American law, whether constitutional or otherwise. The Declaration is

the conclusion that it is scalar and not binary, and that various sources of law or other legal items may have degrees of law-ness rather than being law or not.

55. E.g., Frank I. Michelman, *The Ghost of the Declaration Present: The Legal Force of the Declaration of Independence Regarding Acts of Congress*, 89 S. CAL. L. REV. 575 (2016).

56. See, e.g., Daniel Farber, *Historical Versus Iconic Meaning: The Declaration, the Constitution, and the Interpreter's Dilemma*, 89 S. CAL. L. REV. 457 (2016); Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485 (2016); Alexander Tsesis, *The Declaration of Independence and Constitutional Interpretation*, 89 S. CAL. L. REV. 369 (2016).

57. E.g., Lee J. Strang, *Originalism's Subject Matter: Why the Declaration of Independence Is Not Part of the Constitution*, 89 S. CAL. L. REV. 637 (2016).

obviously a huge part of American history and American culture, but so too are such plainly non-legal items as the Mayflower Compact, Betsy Ross's flag, "The Star-Spangled Banner," the Gettysburg Address, the picture of the flag being raised at Iwo Jima, and the speeches of Presidents John F. Kennedy and Ronald Reagan in Berlin.⁵⁸ And if we therefore distinguish everything that is an important part of American history and culture from the things that count as American law, then it appears that the Declaration falls on the culture side of the culture-law divide.⁵⁹ As long as the Declaration is understood by the relevant creators of the ultimate rule of recognition as not having normative force in actual legal disputes nor in dictating the legally acceptable behavior for citizens and officials, it will be difficult to make the case that it is now to be considered part of our law.

For the very same reasons that the Declaration is not now part of our law, however, there is no reason *in law* why the Declaration could not, at some point in the future, become law. Once we grasp the lesson that what is law and what is not law is a pre-legal matter to be determined by social fact as a result of social convention by whomever are the relevant rule-of-recognition determiners in a society, the Declaration is no longer necessarily or automatically off the table as part of our law or as part of the Constitution. Some parts of the actual text of the capital-C Constitution have been read out of it by the existing rule of recognition, just as the Constitution has been amended outside of the mechanisms specified in Article V⁶⁰ to include things that are not found in the actual text.⁶¹ The existing rule of recognition in the United States now appears to recognize as the Constitution of the United States both more and less than what is contained in the text of the Constitution. As long as this is so, and as long as we accept that it is and will always be so, neither logic nor the idea of law will prevent amending the Constitution again outside of the requirements of Article V so that it would, going forward even if not now, include some, many, or even all of the provisions of the Declaration.

In describing the ultimate rule of recognition as a factual matter, and

58. *But see* *Texas v. Johnson*, 491 U.S. 397, 421 (1989) (Rehnquist, C.J., dissenting) (relying on just such historical items to support his conclusion that the United States flag was to be treated as special for First Amendment purposes). Insofar as those items provided the basis for the Chief Justice's conclusion, they may have been, for him, law. *See* Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 880–86 (1991).

59. This, of course, is not to suggest that law is not and cannot be an important part of culture, or that culture cannot strongly influence law. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003).

60. U.S. CONST art. V.

61. *See* Schauer, *Amending the Presuppositions of a Constitution*, *supra* note 26.

in conceiving it as a pre-legal matter as to which *legal* validity was conceptually inapt, Hart recognized that non-legal factors of various kinds could still provide the basis for criticism (or approval) of the rule of recognition and thus, implicitly, could still be relevant in determining what *ought* to be in the rule of recognition and what ought not to be.⁶² And this applies equally to the Declaration. The Declaration itself might (or might not) be substantively defective, such that it would be morally or pragmatically or politically a poor idea to include it in our law. Or it might (or might not) be unartfully drafted, such that various legal process or legal craft goals might (or might not) be sacrificed by treating it as law. Indeed, it is even possible that treating the Declaration as law, with all of the issues of interpretation and application that follow from that “act,” might weaken the Declaration’s importance and effect as a historical, political, and inspirational manifesto.

These questions, however, are not mine here. Those more inclined than am I to the normative in legal scholarship are properly concerned with these issues. But my goal in this Article is only to explore the jurisprudential insights that enable us to see that neither the present (seeming, or partial) exclusion of the Declaration from legal and constitutional status, nor the future (partial or substantial) accession of the Declaration *to* legal or constitutional status is a function of existing law or a function of the nature of law. These are pre-legal matters of great normative import, but there is nothing in law that explains the current state of affairs and nothing in law that would preclude a substantially different future one.

IV. TWO OBJECTIONS

A. THE NORMATIVE LANGUAGE PROBLEM

There are two potential problems with the foregoing analysis, and it is time to deal with those problems. The first problem is what we might think of as the normative language problem, or the normative language objection. Specifically, neither the Declaration nor any of the other potential sources of law that I have mentioned above are written in characteristically prescriptive language. The Declaration, after all, speaks in the language of justification and not prescription.⁶³ It gives an outcome—*independence*, or the announcement thereof⁶⁴—and then provides a list of grievances

62. HART, *supra* note 12, at 107–08.

63. *See, e.g.*, THE DECLARATION OF INDEPENDENCE paras. 3–15 (U.S. 1776).

64. *Id.* para 2.

purporting to justify that outcome.⁶⁵ It does not tell King George III, the Parliament of Great Britain, or anyone else what they should do—what they ought to do. It does not prescribe, request, command, order, threaten, or do any of the things we typically associate with legal regulatory language. Implicit in the Declaration is the decidedly non-prescriptive message that it is now too late for any of that. “These are the things you ought to have done or ought not to have done in the past, but since you did not do them, this is the action we are now taking in response to your past transgressions.”⁶⁶ Period.

In contrast to the backward-looking and non-prescriptive language of the Declaration, most of the regulatory language of the Constitution and most of the language of ordinary law is explicitly phrased in prescriptive (i.e., directive) language. For example, the Constitution uses phrases such as “Congress *shall* make no law;”⁶⁷ “Each House *shall* be the Judge of the Elections, Returns and Qualifications of its own Members;”⁶⁸ “Excessive bail *shall* not be required.”⁶⁹ Although some of the language of the Constitution is *constitutive*—constituting, establishing, or creating certain institutions rather than regulating them⁷⁰—even this language generally speaks in the prescriptive voice with the use of the word “shall,”⁷¹ and only rarely does it not.⁷² Some of the language of some statutes is not quite as persistent in its use of the word “shall” as the Constitution, but even when the word “shall” is not used, the plain import of the language is undeniably prescriptive. When Rule 404 of the Federal Rules of Evidence, for example, announces that “Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person

65. *Id.* paras. 3–29.

66. *See id.*

67. U.S. CONST. amend. I (emphasis added).

68. U.S. CONST. art. I, § 5 (emphasis added).

69. U.S. CONST. amend. VIII (emphasis added). At times, the Constitution uses the word “may,” as in “Each House may determine the Rules of its Proceedings . . .” U.S. CONST. art. I, § 5. But I include the permissive, as well as the prohibitory, within the broad category of the prescriptive, even though the deontic operator may be different.

70. The sentence in the text draws on, but only as much as necessary, the distinction between constitutive and regulatory rules most associated with JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* 33–42 (1969). There is a close affinity between Searle’s notion of constitutive rules and some aspects of Hart’s idea of power-conferring rules, HART, *supra* note 12, at 26–49, and indeed the latter is more directly relevant to much of law and much of constitutional law.

71. *E.g.*, U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”).

72. *E.g.*, U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).

acted in accordance with the character or trait,”⁷³ the rule is plainly prescribing what ought to happen and what ought not to be permitted, despite the fact that the word “shall” is not used.

The first problem, therefore, is that the Declaration might be perceived as announcing that it itself is not law since it does not speak in the prescriptive voice with prescriptive or imperative language. This objection, however, is undercut in two ways. First, it is hardly necessary, as H.L.A. Hart noted,⁷⁴ that prescriptions, directives, or imperatives speak in literally prescriptive, directive, or imperative language. When a sergeant makes the entirely descriptive statement to a private that “your boots are not shined,” the sergeant is not simply making an observation. She is relying on the plain conversational implicature⁷⁵ that this kind of language in this context means, “Shine your boots, and promptly!” Just as we all know that the correct answer to “Do you know what time it is?” is not a simple “yes,” law too can and does often rely on the fact that the literal words of “shall,” “shall not,” “must,” “may,” and the like are hardly necessary in legal context to convey a prescription.⁷⁶ Although the Declaration is a series of statements and grievances, there is no reason in logic, in language, or in law that in some future context those statements could not be understood as being forward-looking prescriptions rather than mere descriptive statements.

More importantly, the “decision” to understand certain declaratory statements as non-prescriptive and as non-legal is itself a contingent empirical component of the ultimate rule of recognition. Just as the rule of recognition in the United States could be changed to allow the law of France or the rules of FIDE to become components of American law, so too could the rule of recognition be changed by the relevant changers⁷⁷ to recognize and validate certain non-prescriptive statements or documents as part of our prescriptive, imperative, permissive, or empowering law. If a sign on the side of the road says “65 miles per hour,” a visitor from Mars or

73. FED. R. EVID. 404(a)(1).

74. See HART, *supra* note 12, at 18–20.

75. The basic idea is that certain words, phrases, and the like have a meaning in conversational context that diverges from how that language might be understood acontextually or in a different context. The idea is most associated with PAUL GRICE, *Logic and Conversation*, in *STUDIES IN THE WAY OF WORDS* 1, 22 (1989). A good overview is Wayne Davis, *Implicature*, *STAN. ENCYCLOPEDIA PHIL.* (June 24, 2014), <http://plato.stanford.edu/entries/implicature>.

76. Consider, for example, “Parking is not allowed here.” See PABLO E. NAVARRO & JORGE L. RODRÍGUEZ, *DEONTIC LOGIC AND LEGAL SYSTEMS* 78 (2014) (highlighting the fact that the same words may be used to formulate norms or to express a norm proposition depending on the context).

77. See *supra* text accompanying notes 31–35.

even somewhere closer might not know whether this is a maximum or minimum, or an order or a suggestion, but all American drivers would know that even in the absence of any prescriptive language this is a mandatory maximum. Similarly, a rule of recognition or some other second-order rule could provide that the Declaration is to be read as a prescription, just as “65 miles per hour” is to be read as a mandatory maximum, and there is nothing in the nature of language or law to preclude such an understanding. The lesson to be drawn from the non-legal and foundationally factual nature of the ultimate rule of recognition is not only that it is the ultimate rule that determines what is to count as law, but also that aspects of the ultimate rule of recognition, or even subordinate rules of recognition, can provide the same kind of prescriptive frame that common understanding provides for the “65 miles per hour” sign. Nothing in the very nature of law prevents this, and thus nothing prevents ultimate or non-ultimate rules of recognition from recognizing as law some number of items that do not speak in a particular prescriptive style or voice.

B. THE PROBLEM OF THE LAW-INTERPRETATION DISTINCTION

Another potential and related problem is that many of the examples I have used, and by extension, the Declaration as well, are examples of aids to interpretation or support for legal arguments, but not examples of law itself. It is widely accepted that the Federalist Papers, for example, are a legitimate source of guidance in interpreting the Constitution,⁷⁸ that Wigmore is an accepted source of guidance on evidence,⁷⁹ Prosser an accepted source of guidance on torts,⁸⁰ and Loss and Seligman equally accepted on the law of securities regulation,⁸¹ but such recognition, so the objection would go, does not mean that the Federalist Papers, Wigmore, Prosser, and Loss and Seligman are law. Basically, the objection is that there is a distinction between law, on one hand, and the authorities and sources that might assist in interpreting and applying that law, on the other. As a result, so the objection goes, to draw on the widespread use by courts

78. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Amy Gutmann ed., 1997) (arguing that *The Federalist* is an important source of interpretive guidance for Justice Scalia not because of what it might indicate about the original intentions of the Framers, but rather because it displays how the text of the Constitution was originally understood).

79. The current Wigmore has different editors for each volume. See, e.g., DAVID H. KAYE, DAVID E. BERNSTEIN & JENNIFER L. MNOOKIN, *THE NEW WIGMORE A TREATISE ON EVIDENCE: EXPERT EVIDENCE* (2d ed. 2011).

80. See W. PAGE KEETON ET AL., *PROSSER & KEETON ON THE LAW OF TORTS* (W. Page Keeton ed., 5th ed. 1984).

81. See LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* (4th ed. 2006).

and scholars of these various secondary sources to make claims about the legal status of the Declaration would be to make an assumption about the legal status of those often-used sources that ignores the distinction between the law and the various sources that might help us understand, interpret, and apply it.

The foregoing argument might indeed be troubling for some of those who would advocate treating the Declaration as law, but perhaps it is a mistaken assumption that there must be some fundamental distinction between formal law and various other sources of legal authority. But perhaps the distinction itself is problematic, and perhaps the distinction is both theoretically problematic and in some tension with the realities of actual legal argument and actual judicial decision-making.

In terms of the theory, we can start with the idea, mostly associated these days with the work of Joseph Raz,⁸² that lying at the core of the very idea of law is the practice of authority. A necessary (but not sufficient) condition for law is that some authority—the state, most obviously—claims that its directives should be treated as authoritative by some class of subjects, who, the authority claims, should then set aside—exclude—whatever reasons they might otherwise have for pursuing some course of action. Under the Razian scheme, legal authority is accepted when some class of addressees of the law take the implicit or explicit directives of a legal item as supplying content-independent reasons for action.⁸³ To follow a legal rule, therefore, is to treat the very existence of the rule as a (not necessarily conclusive) reason to do what the rule says, and to follow a precedent is to do much the same thing as a previously decided case.

All of this is plainly and, more or less, non-controversially true for statutes, for constitutional provisions, and for important precedential cases. But it also appears to be true for authoritative treatises, for (some) cases from other jurisdictions, and for various other so-called persuasive or secondary authorities. But if the contents of those sources are taken as authoritative in this content-independent sense, it is no longer clear that their status is fundamentally different from the status of the statutes, constitutional provisions, and within-jurisdiction cases that are

82. See JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (Princeton Univ. Press 1990) (1975); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); JOSEPH RAZ, *THE MORALITY OF FREEDOM* 23–105 (1986).

83. On content independence—the taking of some directive as supplying a reason for action because of its source and not because of its content—see H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 254–55 (1982).

uncontroversially accepted as authoritative.⁸⁴ What Wigmore says about evidence matters and is taken as a reason for decision precisely because Wigmore said it, and what the Wyoming legislature says matters and is taken as a reason for decision precisely because that body said it. It is no accident that we refer to constitutional provisions, statutes, cases, treaties, articles, historical materials, and the like as “authorities,” and that is because they are all to some degree understood to be authoritative.

This is not the place to develop a full theory of legal authority, but the point of the foregoing is to suggest that all recognized legal sources are important by virtue of their acceptance as authorities. The idea of authority does not distinguish, except as a matter of degree, the authority of a within-jurisdiction statute from the authority of a venerable treatise writer. They are both in some way and to some degree authoritative.⁸⁵ If they are not taken to be authoritative, then they are not a part of the law at all, and that is so even if they might have been put forth by a legislature or a court. But if such sources are taken to be authoritative, and are taken to be reason-giving because of their source and not because of their content, then they are law, to a greater or lesser degree. As a result, to treat the Declaration as having legal weight is only to say that it is acceptable to rely on it as a component of all of the reasons that together produce a legal conclusion. And if and when we say that, we are not saying anything about the Declaration that we are not already saying about a vast number of legal sources that do not happen to emanate from legislatures or courts.

Treating the Declaration, Wigmore, and Prosser as part of our law might trouble those who wish law to be more democratic or who believe in a version of natural law theory that would treat democratic legitimacy as among the necessary properties of law, but to the legal positivist, for whom the idea of the rule of recognition is all important, the democratic desirability of a law is to be kept distinct from its legal status. And so, if the various forces and institutions that together create the rule of recognition wind up recognizing the Declaration as a valid legal source, they will have in the process recognized the Declaration as part of our law. That the Declaration comes from neither a court nor a legislature nor a constitutional convention may go to its moral or political or pragmatic desirability in any

84. This is the abbreviated version of an argument presented at much greater length in Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1935–60 (2008). See also FREDERICK SCHAUER, *THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING* 61–84 (2009).

85. With very different language, starting from very different premises and with very different conclusions, the argument in the text bears some affinity with Ronald Dworkin’s attempts to break down the law/non-law distinction. See generally Ronald Dworkin, *A Reply by Ronald Dworkin*, in *RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE* 247 (Marshall Cohen ed., 1984).

of a number of ways, but these defects will not go to its legality. Indeed, the fact that the decisions of the non-majoritarian Supreme Court and other unelected courts are treated as law should reinforce the idea that, at least in the United States and at least under the current American rule of recognition, majoritarian provenance is not a component of legal validity. From this quite different direction, therefore, we can again conclude that the recognition of the Declaration as a part of our law would less offend existing understandings of law and the rule of recognition than some number of objectors to that outcome might suppose.

CONCLUSION

The lessons of this Article are simple. Once we understand, whether it be from Hans Kelsen or from H.L.A. Hart or from somewhere else, that what is law is simply what a society decides is law, then a substantial objection to treating the Declaration as authoritative law has been overcome. Therefore, although it appears, as an empirical matter, that the Declaration is not now part of our law, there is nothing in the idea of law that would prevent it from becoming so.

To say all of this is still to bracket the question whether it would be desirable to treat the Declaration in this manner. Perhaps it is pragmatically wise to draw a distinction between the legal prescriptions that emanate from legislatures and courts and those that might have a different provenance. Perhaps there are aspects of the Declaration that make elevating its status to law morally troubling. And perhaps there are other reasons why it might be a poor idea to grant the Declaration (or accept it as) authority in a legal sense. What I have argued here leaves all of these questions for others or for other times. The central idea is that these concerns are concerns of substance and not concerns about the fundamental nature of law. To treat the Declaration as law would in no way be in tension with the very idea of law. And thus the question whether the Declaration should be treated as law, interesting and important as it is, is one that is to be debated on substantive, and not jurisprudential, grounds.