On the Problem of Legal Change

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Identifying legal change is an ordinary part of legal decisionmaking, but participants in those decisions regularly focus on different measures. A version of the problem arises when one observer points to results while another observer points to processes for generating such results. Often change can be detected on one of those dimensions and not another. This Article offers a way to think about legal change that captures process–result combinations. The Article illustrates the combination with numerous examples from ordinary life, ordinary law, and constitutional law—including particular controversies such as same-sex marriage benefits, as well as crosscutting debates over methods of interpretation.

The Article then offers explanations and implications. It examines why people might want to link results with antecedent legal processes, estimates the seriousness of the problem this creates for measuring legal change, and evaluates fixes involving the exclusion or the aggregation of dimensions of interest. Excluding either processes or results from consideration tends to sacrifice valuable information for both empirical and normative analysis. Aggregating dimensions using a common metric probably is a more promising response, but plausible common metrics tend to drift away from a workable concept of legal change. The Article closes by raising the possibility of normative legal analysis without independent value for either legal change or status quo. Throughout, the Article draws lessons from psychology, philosophy, politics, and empirical studies.

TABLE OF CONTENTS

INTRODUCTION .......................................... 99
I. CONCEPTUALIZING LEGAL CHANGE ..................... 103
   A. INTRODUCING X=X+1 .............................. 103
   B. ELEMENTS OF CHANGE ............................. 104
   C. ANALOGIES COMPARED ............................. 106

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D. LAW’S FRAMES ................................... 107
1. Legal Texts .................................. 107
2. Legal Institutions ............................ 108
3. Law and Society ............................. 109

II. THE X=X+1 PROBLEM ............................ 111
A. PROCESSES AND RESULTS .................. 111
B. ORDINARY LIFE ............................... 113
1. The Morality of Conservatism ............... 113
2. The Psychology of the Status Quo .......... 115
3. The Politics of Tax Baselines .............. 117
C. ORDINARY LAW .................................. 119
1. Injunctions and the Status Quo ............ 119
2. Patents for Processes and Products ........ 121
3. Nonretroactivity in Habeas Corpus ........ 122
4. Common Law Method and Statutory Interpretation ... 123
D. CONSTITUTIONAL LAW ....................... 125
1. Ground-Level Disputes ..................... 125
2. Abstract Principles .......................... 127
3. High-Level Theories ......................... 131
4. New Process, Old Results ................... 134

III. EXPLANATIONS AND IMPLICATIONS .............. 136
A. THE ATTRACTION OF X=X+1 ................. 137
B. THE SEVERITY OF X=X+1 .................... 139
C. LEGAL CHANGE GOING FORWARD ............. 143
1. Exclude Dimensions .......................... 143
2. Aggregate Dimensions ....................... 146
3. Law Without Change? ......................... 152

CONCLUSION ............................................ 154
“Of course, the question is at rest, and ought not now to be disturbed.”¹
“[I]t sometimes happens that the status quo is a condition not of rest, but of action . . . .”²
“Same as it ever was.”³

INTRODUCTION

Identifying legal change is an ordinary part of legal decisionmaking, and thus frequently subject to debate. Often it’s difficult to tell who is winning the argument. In United States v. Windsor, for example, the federal government was charged with changing the rules for distributing benefits to same-sex couples.⁴ One side argued that the Defense of Marriage Act (DOMA) took something away from these couples. The federal government would no longer rely on state law to test whether someone is married, thereby ignoring the post-1996 choices of some states to expressly authorize same-sex marriage. “[T]his was a real difference,” Justice Kagan said at oral argument.⁵ The other side contended that no state expressly authorized same-sex marriage in 1996, and therefore the Act maintained the status quo of no federal benefits to same-sex couples. “Things stay the same,” Paul Clement claimed.⁶ A majority of the Supreme Court ended up taking the former perspective, attacking the statute for, among other things, making an “unusual deviation from the usual tradition.”⁷ The dissenters asserted, to the contrary, that the statute represented “stabilizing prudence” and assailed the Court for “impos[ing] change” on the rest of us.⁸

Little effort is needed to find other divides over legal change, with different factions on either side. In National Federation of Independent Business v. Sebelius, the federal government was charged with coercing states into an expansion of Medicaid.⁹ Part of the charge depended on characterizing the expansion as a new program, with which compliance was a condition for continuing to receive funding under the old program. On one side, Justice Ginsburg asserted that, “in truth,” the Act does not create a new separate program but “simply reaches more of America’s poor than Congress originally covered.”¹⁰ She portrayed the Medicaid program as moving along a trajectory of expansion, with participants warned early about changes.¹¹ On the other side, Chief Justice

3. TALKING HEADS, Once in a Lifetime, on Remain in Light (Sire Records 1980).
6. Id. at 70.
7. Windsor, 133 S. Ct. at 2693.
8. Id. at 2708–09 (Scalia, J., dissenting); see also id. at 2696 (Roberts, C.J., dissenting) (“Interests in uniformity and stability amply justified Congress’s decision to retain the definition of marriage . . . .”).
10. Id. at 2635 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).
11. See id. at 2630–31 (“Expansion has been characteristic of the Medicaid program.”).
Roberts portrayed the new offer as a sharp break from past practice.\textsuperscript{12} He agreed with the objecting states that, “in reality,” the latest expansion is “a new program.”\textsuperscript{13}

These are two among countless disputes in which the notion of legal change becomes integral to legal reasoning. Indeed, the notion of legal change might be part of every legal argument. Sound legal arguments require grounding in the status quo; they must rely on legal authority considered valid now.\textsuperscript{14} This is so even when existing law favors or authorizes change in some respect.\textsuperscript{15} Think about Chief Justice Roberts’s opinion in \textit{Shelby County v. Holder}, which declared invalid the Voting Rights Act’s formula for subjecting jurisdictions to preclearance.\textsuperscript{16} The asserted problem was Congress’s failure to update the formula—the failure, that is, to change law. But the Chief Justice also indicated that the same old constitutional test tolerated the original statutory formula in 1965 and then condemned it at some point thereafter.\textsuperscript{17} “Our country has changed,”\textsuperscript{18} but supposedly the Court’s use of the Constitution had not.

The above are all recent newsworthy decisions, but I could have chosen any time and any tribunal. Every legal decision is like this. Decisions always locate a foothold in the status quo—because someone who argues for nothing but legal change is supposed to lose the legal argument, however strong his position as a matter of politics, morality, or anything else. This is banal for lawyers, but it is remarkable given other settings in which old ideas are not independently valued. There are elections in which most voters prefer change over more of the same, and there are commercial markets in which a new feature is essential to success. “I have an idea,” the software architect tells his CEO, “It is well-settled, already in widespread practice, and clear to anyone who knows anything about the subject.” In technology firms, this might add no value. In law firms, this is excellence.

To evaluate legal claims, we are supposed to know the difference between

\begin{footnotesize}
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\item\textsuperscript{12} See \textit{id.} at 2605–06 (plurality opinion).
\item\textsuperscript{13} \textit{Id.} at 2605; see also \textit{id.} at 2603–04, 2607. For an instance in which Chief Justice Roberts joins a coalition finding stability by emphasizing antecedent processes while Justice Ginsburg joins a coalition finding change by emphasizing results, see \textit{Peugh v. United States}, 133 S. Ct. 2072 (2013), discussed \textit{infra} in text accompanying notes 120–26.
\item\textsuperscript{14} Cf. Robert Post, \textit{Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics}, 98 CALIF. L. REV. 1319, 1323 (2010) (“Bureaucracy and law each rest on the presumption of agreement, although not necessarily on the fact of agreement.”).
\item\textsuperscript{15} Nonlegal change is favored in the demand for novelty in patents, see \textit{infra} section II.C.2, while legal change is authorized via processes for making or amending constitutions, statutes, and regulations. See H. L. A. Hart, \textit{The Concept of Law} 93–94 (1961) (discussing rules of change); see also Fed. R. Civ. P. 11(b)(2) (permitting lawyers to make claims based on “nonfrivolous argument[s] for . . . new law”). Consider as well the decennial census, which arrives at a new population number every time, and the ongoing command that legislative districts have roughly equal populations. See \textit{Reynolds v. Sims}, 377 U.S. 533, 568 (1964).
\item\textsuperscript{16} 133 S. Ct. 2612, 2631 (2013).
\item\textsuperscript{17} \textit{See id.} at 2625 (relying on \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 328, 330 (1966) and stating that “[a]t the time, the coverage formula . . . made sense”).
\item\textsuperscript{18} \textit{Id.} at 2631.
\end{enumerate}
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change and status quo. Do we? Perhaps what we consider legal change is the product of unjustified choices, like a status quo bias with an arbitrary reference point. If instead legal change is a well-behaved concept, then we should be able to specify it, lock down examples, and draw whatever normative conclusions are appropriate. Can we?

In this Article, I try to make progress by using several curious examples from life and law, and by concentrating on one recurring type of problem. This recurring problem involves combinations of processes and results, loosely defined. One observer points to results, another points to processes by which such results are generated, and someone is asked to detect change. Process–result combinations appear not only in marquee debates over the Eighth Amendment and high constitutional theory, but in daily slogs over injunctive relief, partisan debates over taxation, and the psychology of everyday decisions. Empiricists who study legal change face process–result combinations, as well. This is the $X=X+1$ problem, named after some old-fashioned computer code and explained below.\(^{19}\)

This recurring problem presents complications for anyone interested in measuring or evaluating legal change. In fact, the complications seem equally serious for conservatism and radicalism, full stop. Assuming that one should want to maintain the status quo, for instance, what is the appropriate response if

\(^{19}\) See infra sections I.A & II.A (describing a simple computer program that repeats the same instruction in order to change the horizontal position of a dot on the computer monitor); infra note 23 (comparing and contrasting the combination of acceleration and velocity in physics).


Attempts to measure legal change, which depend on at least implicit definitions, are addressed in sections III.B and III.C. The empirical contribution of George L. Priest, Measuring Legal Change, 3 J.L. Econ. & Org. 193 (1987), is considered infra in text accompanying notes 226–34. Also close to my subject, though narrower, is an elegant essay by Julius Stone, The Ratio of the Ratio Decidendi, 22 Mod. L. Rev. 597, 613–14, 619–20 (1959) (discussing the common law method’s mixed relationship to change via treatment of material facts). A sweeping claim, unnecessary to my analysis, that “all legal phenomena are in constant evolution” appears in Jean-Louis Halpérin, Law in Books and Law in Action: The Problem of Legal Change, 64 Me. L. Rev. 45, 47 (2011) (investigating how legal positivism might address the distinction between black-letter law and behavior). I also bracket the deep claim that change is just a description that depends on perspective from a chosen interpretive system. See Stanley Fish, Doing What Comes Naturally 157–59 (1989). The thought that interpretive communities are “engine[s] of change,” id. at 150, is discussed infra note 200.

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\(^{19}\) See infra sections I.A & II.A (describing a simple computer program that repeats the same instruction in order to change the horizontal position of a dot on the computer monitor); infra note 23 (comparing and contrasting the combination of acceleration and velocity in physics).
each option shows change along one dimension and stability along another? Does conventional legal reason have the resources to handle such questions? Is there wholesale advice to give for the $X = X + 1$ problem? I explore answers here, but my primary missions are analytical: to identify an important subset of legal change problems, to show how this subset arises in many fields of study and debate, and to present generative questions. How best to answer these questions is partly a function of normative commitments that I leave to the reader. But we cannot get intelligent responses to the $X = X + 1$ problem until it is better understood.

Part I identifies key conceptual choices that surround legal change, which involves various dimensions of difference over time within the same frame for law. Part II investigates the $X = X + 1$ problem, linking it to process–result combinations. A battery of illustrations in life and law is presented, ranging from experimental psychology and partisan argument to preliminary injunctions and DNA patenting, closing with special attention to constitutional theory. Part III presents explanations and implications, both empirical and normative. After offering an account of why process–result combinations might be attractive and a serious challenge for measuring and evaluating legal change, the discussion turns to prospects for managing the problem by excluding dimensions of interest or aggregating them along a common metric. These are constructive responses for some settings. But the closing discussion also raises the possibility that challenges for the concept of legal change outrun the value of trying to evaluate it, and that sometimes we are better off with a kind of “law without change.”

My own view is that the idea of legal change is neither empty nor worthless. Change and status quo are real phenomena in law—as real as they are for pulse rates or global surface temperatures—and they are useful notions for understanding law’s character. Good measures of legal change facilitate accurate descriptions and positive theories, whether or not the status quo should receive independent value in normative decisions. True, good measures are hard to find when dimensions of process and result proliferate; these mixtures generate commensurability problems. Excluding any of these dimensions from view usually erases important facts, while aggregating them through a common metric tends to cause drift away from the concept of legal change. Or so I will argue. In any event, today’s legal debates are too often shallow logical stalemates in which one narrow focus or another is poorly defended, if it is defended at all. Standard legal argument leans us hard toward the status quo, but usually without offering intellectual resources for dealing with the inevitable combinations of change plus stability that life hurls at us every day. We should confront that problem in thoughtful and creative ways—or move on to other matters.

Before proceeding, I should acknowledge, loudly, that nobody supports the

20. See infra sections III.C.1–2.
status quo for all law. Parts of the legal system will change, like it or not, and people are conservative about certain features of their legal system, not all of it. These features might be chosen using values beyond simple conservatism or for sheer strategic reasons, or they might be picked through unconscious psychological mechanisms. Regardless, the analysis here aims to illuminate one core challenge for identifying legal change, even for narrow subsets of legal phenomena. The X=X+1 problem can be raised productively even when an observer believes that a corner of the law has been justifiably prioritized for study or preservation. If nothing else, raising the problem can help clarify people’s commitments regarding legal change in relation to other values. To see this, though, we need to ask what counts as legal change in the first place.

I. CONCEPTUALIZING LEGAL CHANGE

A. INTRODUCING X=X+1

Let’s begin with an illustration that lacks ideological charge but that has conceptual power. When personal computers began entering people’s homes in the early 1980s, BASIC was the programming language of choice for tech-intoxicated novices. Among BASIC’s more powerful instructions was “X=X+1,” which makes no sense in algebraic terms but was quite meaningful to programmers. This instruction simply told the computer to add one to the value of a variable called X. The power of the instruction came from including it within a larger program that would repeat the same instruction at opportune times. Repeating the same instruction within the same program can result in change somewhere else.

Suppose that X stands for the horizontal position of a dot and that X starts with the value zero, which denotes the far left side of a computer monitor. The first line of programming code could be X=X+1, the second line of code could tell the computer to draw a dot at horizontal position X, and the third line could send the computer back to the first line until X reached some maximum value, whereupon the program would end. Execute the program and suddenly a dot appears to be racing across the monitor. Utterly unexciting today, of course, but a simple program like this can help show a particular challenge for the idea of legal change.

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21. I was one of these people.
22. “X=X+1” is nonsense or a paradox in algebraic terms because, under those conventions, the statement would indicate that the variable X is always one greater than its value. See Douglas Eadline, The X=X+1 Issue, LINUX MAG. (June 3, 2008), http://www.linux-mag.com/id/6121/. In this regard, BASIC did not work like algebra.
23. If this programming example is too unfamiliar, compare velocity and position in physics. The former can be constant while the latter is changing. I will, however, follow through with my X=X+1 example. Trajectories do not clearly suggest the conscious design of processes to produce various results. The element of human design in my programming example can be associated with one understanding of legal institutions and the rule of law, see infra section III.A, which tends to make legal change a special subcategory for investigation.
B. ELEMENTS OF CHANGE

Now draw back and consider the necessary elements of legal change as a working concept. Putting aside an adequate concept of law for the moment, a good first step is defining change as \textit{difference over time}. This largely matches conventional use of the term, although the concept of change can be applied to other variables, including space.\textsuperscript{24} Webster’s first definition for the intransitive verb “change” is “to become different,”\textsuperscript{25} calling to mind phrases such as “I changed my mind” and “Don’t change horses in midstream.”

After this first step, however, the idea of change becomes difficult to pin down. Law professors can spot a so-called baseline problem,\textsuperscript{26} and one of us will ask something like, “Change compared to what?” Such baseline-related challenges are themselves subject to unwitting ambiguity, actually. Classic uses of the baseline concept, such as in the practice of medicine, blend together several separable choices. When a doctor uses a baseline pulse, for instance, she makes crucial choices about what, how, and when to measure for purposes of comparison.\textsuperscript{27} Each choice should be explicit at some point, to understand the practice at issue, and a generic baseline question might not prompt adequate specification.

Increasing precision, someone searching for change needs to select (1) an object, (2) a metric, and (3) a timeframe of interest in order to make relevant comparisons. The observer may say that an object of interest “changed” if at $T_1$ the object measured differently on a metric of interest compared to $T_2$—as in, “The dot changed position from the left side of my screen a minute ago to the right side of my screen now.” With this setup, “instability” can refer to a special case of (back-and-forth) change over some extended timeframe, while “tradition” is the flip-side case in which the status quo persists. Nuances might then be added, such as the pace of change. Add a definition of law that covers the object of interest, and we should be able to identify “legal change.”

\textsuperscript{24} See, e.g., Chris Mortensen, \textit{The Limits of Change}, 63 Australasian J. Phil. 1, 6 (1985).
\textsuperscript{25} Webster’s \textit{New World College Dictionary} 245 (Michael Agnes ed., 4th ed. 2010).
\textsuperscript{26} See, e.g., Duncan Kennedy, \textit{Cost-Benefit Analysis of Entitlement Problems: A Critique}, 33 Stan. L. Rev. 387, 413 (1981) (“[A] whole new area of . . . value-laden choice . . . is introduced when we pick one of the possible base lines for defining what is and what is not a ‘change.’”); Louis Michael Seidman, \textit{Reflections on Context and the Constitution}, 73 Minn. L. Rev. 73, 78 (1988) (explaining that deciding whether a condition on funding “adds to the cost” of exercising a right requires the decision maker to “specify a preexisting baseline against which the cost can be measured”); Cass R. Sunstein, \textit{Lochner’s Legacy}, 87 Colum. L. Rev. 873, 908 (1987) (explaining that “the notion of a taking depends on an antecedent baseline”).
\textsuperscript{27} See, e.g., Sherry H. Stewart et al., \textit{Heart Rate Increase to Alcohol Administration and Video Lottery Terminal Play Among Probable Pathological Gamblers and Nonpathological Gamblers}, 20 Psychol. Addictive Behaviors 53, 55 n.3, 56 (2006) (measuring heart rates before and after video-lottery play, with and without alcohol consumption, for probable pathological gamblers and others); see also Ronald J. Heslegrave et al., \textit{Measuring Baseline-Treatment Differences in Heart Rate Variability: Variance Versus Successive Difference Mean Square and Beats Per Minute Versus Interbeat Intervals}, 16 Psychophysiology 151, 152 (1979) (arguing that interbeat interval can be a better metric than beats per minute for assessing changes in heart rate variability in the presence of shifting linear trends).
Using math-like terms simplifies matters, but even an artificially high degree of precision leaves complications that have been discussed for centuries. A fundamental objection comes from the claim that there is not, really, one object that endures at both ends of a timeframe, at least if the object is supposed to become different from itself. Perhaps every time period has a unique set of objects; perhaps “the” object is a different object after any of “its” nontemporal features change. Such objections are embedded in the \( X=X+1 \) example, as it happens. The computer monitor helps leave the impression in our heads that a single dot is moving by rapidly, lighting up and then darkening a series of separate pixels. On the monitor, there are, in fact, multiple dots at multiple locations at multiple time periods, which we can compare without pretending that there is one dot enduring while changing. Perhaps law is like this.

Whether or how identity across time is real, people believe in it, and these beliefs are significant on their own. The sense of persistence alongside change in the world structures people’s thinking, decisions, and behavior. Constructs of change and status quo might be useful, too, in fostering socially beneficial intertemporal projects; but without elaborating that logic, further investigation into legal change is warranted to understand how people think and make an important class of normative judgments. Dispositions toward what people consider change and status quo, including the resilience of those dispositions, should be understood. As a matter of everyday perception and practical reality, a single thing can persist yet change—including law.

Even so, the idea of change remains somewhat complex. There is an initial issue regarding the object of interest: which object and how specified? Similarly, ascertaining change depends on a metric, and the best metric can be a matter of intelligent disagreement. Recall our earlier example of the medical decisions bound up in baseline pulse measurements. Then there is the issue of timeframe, of which there are infinite possibilities. So choices must be made on

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29. See id. at 49 (observing that Heraclitus and Hume can be interpreted as rejecting the persistence of objects such that “each moment is a new beginning”). If you wonder whether you can step into the same river twice, see HERACLITUS, FRAGMENTS, at xii, 27 (Brooks Haxton trans., 2001), ask what counts as “the river.” My discussion here, I should note, is a very simple version of a serious metaphysical investigation into whether objects endure, such as by having time-indexed properties, see id. at 52–53; Sally Haslanger, *Endurance and Temporary Intrinsics*, 49 ANALYSIS 119 (1989), or “perdure” by having distinct parts spread out over time. See DAVID LEWIS, *On the Plurality of Worlds* 202–04 (1986). A learned introduction is Sally Haslanger, *Persistence Through Time*, in *The Oxford Handbook of Metaphysics* 315 (Michael J. Loux & Dean W. Zimmerman eds., 2003). A notable challenge to the significance of persons enduring over time is DEREK PARFIT, *Reasons and Persons* 216–17 (1984) (concluding that personal identity across time does not matter).

30. A similar illusion is fostered by motion pictures. See Joseph Anderson & Barbara Anderson, *The Myth of Persistence of Vision Revisited*, 45 J. FILM & VIDEO 3, 3–4, 10–11 (1993) (distinguishing the process by which people fuse flickering light into a continuous image from the process by which people perceive motion on screen, which is perhaps the same process for perceiving actual motion).
a variety of axes. In the (apparently) moving-dot example, one observer could say that he is not interested in the location of dots but rather computer screens; another observer could say that she is not interested in horizontal position but instead velocity; yet another observer could say that he is not interested in the timeframe that includes the program’s execution but rather a later period. These hypothetical disagreements are trivial, but essential choices like these accompany every attempt to identify legal change.

C. ANALOGIES COMPARED

These challenges have analogues in analogies. The choices necessary for identifying change overlap with the choices on which analogies depend. In looking for change, we compare the same object, X, at two different times, T1 and T2, using the same metric. In looking for analogues, we compare two different objects, X and Y, using the same metric, without necessarily considering time. The search for difference or similarity along a specified metric makes these two operations similar, and in both cases people may debate how best to choose the objects and metrics. Any two things are both the same and different in countless ways.31 Furthermore, first-glance distinctions between searches for change and analogy might fade on second thought. Analogies work on two or more objects while change is supposed to work on only one—but this “supposed to” might be ill-founded, as noted above. And analogical reasoning might construct a metric based on, and not before, the process of comparing X and Y—but we can equally well imagine metrics arising from the process of comparing X at T1 and T2.

Separate treatment makes sense nonetheless. Unlike analogizing, searching for change requires a timeframe. Making comparisons across time seems uniquely challenging, at least if circumstances surrounding the object of interest must be analyzed. Moreover, the concept of legal change appears to have a special connection to the process–result combination explored below. In arguing about legal change, people often contend that a process is connected to a result across multiple time periods: a process might produce a result, which affects the extent of legal change associated with one option facing decision makers compared to the other options. Of course, an observer may analogize two different objects along the two dimensions of process and result, and this may include questions as to whether each object has a similar process–result relationship. But this just

means that analogies can incorporate a process–result problem that is frequently essential for evaluating claims of legal change. In any event, learning that analogical reasoning shares an \( X=X+1 \) problem of the same frequency and depth would be a welcome extension of the analysis here.

D. LAW’S FRAMES

This is not the place to develop a deep theory of law’s boundaries, but we do need plausible understandings of law that relate to the identification of legal change. Below I sketch a few possibilities for framing law as an object of interest that are relevant to evaluating legal change and are inspired by familiar approaches to legal theory.

1. Legal Texts

One possibility is to focus on legal texts and not the remainder of the legal system, let alone forces outside it. This focus has a loose association with modern textualist or formalist theories, but the goal would be establishing a frame to study legal change as opposed to establishing the autonomy of legal reason or the proper method for legal decision. The object of interest would be fantastically narrow, but in a way that simplifies measurement. If your object is the text of the United States Code or Constitution, and your metric relates to symbols in those texts, it is fairly easy to tell when the object changes. Look for valid Article V amendments or Article I legislation. Hard questions of validity do arise, but that complication seems minor compared to more expansive frames. With a textual focus, legal change might be identified by clicking on the compare-documents feature in a word processing program, but we should not trivialize this kind of textualism today. Legal texts are now the subject of rigorous statistical analysis by gifted empiricists, partly due to the development of high-speed-computer content analysis.

However, for many observers, even a highly skilled focus on legal texts is weirdly narrow (excepting legal database companies and recorders of statutes). What this perspective gains in easy measurement is counterbalanced by massive losses in practical significance. One concern is that an unsophisticated textualist perspective blinks a gap between look and meaning. Paragraphing changes,

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bullet points, and recodifications that disclaim an intention to change meaning would register as legal change. True, supposedly cosmetic alterations can change the intelligibility of texts, and this can prevent people from adopting new meanings for old texts when conventions change. But we might be interested in the stability of law’s meaning apart from the form of law’s texts. One solution is to shift the object of interest to the meaning of legal texts, and then measure meaning by adopting an interpretive method. But of course we have competing methods to choose from. Although many or all competitors will converge on the meaning of, say, a recodification, sometimes different methods will suggest different answers. A focus on law’s meaning entails controversy and complexity.

Other concerns stem from gaps between texts and behavior. A text itself does nothing; people may or may not do things with texts. A focus on legal texts might count too much or too little legal change. It would count textual amendments that codify existing practices and have zero effect on anyone’s behavior; it would not count radical changes in behavior that are not reflected in a legal text. Thus, the transition from the post-Plessy regime to the post-Brown regime would not count as legal change if the object is the U.S. Constitution—after all, the word string in the Equal Protection Clause did not change. Legal texts are part of the legal system as we know it, and somebody ought to know exactly what the validly enacted text of the Constitution and the U.S. Code look like. But the simplicity of narrow legal textualism will not eliminate the understandable demand for broader and more complicated objects and metrics.

2. Legal Institutions

An alternative steps beyond word strings while staying within the boundaries of legal systems as conventionally understood. Observers could look upstream to the legal processes by which legal norms are generated and downstream to consequent official behavior. Both steps can be taken without crossing lines ordinarily thought to divide legal institutions from other parts of society. Thus, statutes, regulations, and judicial doctrine are each the product of an antecedent process—legislation, rulemaking, the common law method. And each can be used to produce a result when an official applies the norm—a decision to arrest, to demand payment, to enjoin. There is overlap between this legal-institutions perspective and Holmes’s bad-man perspective, which called for predictions about how officials are likely to act, and which he promoted as a practical orientation for “a right study and mastery of the law as a business with well


understood limits.”37 Predictability is not the same as a stable status quo,38 but law-as-prediction does concentrate on official behavior in accord with a legal-institutions perspective.

In extending the frame to certain processes and results while trying to confine the frame to legal institutions, nettlesome questions arise. Lawyers, interest groups, and political parties influence the processes that generate legal rules. Locating them within legal institutions would mean that their behavioral changes count as a kind of legal change, even though this complicates the assessment and tests a public–private conceptual boundary. If instead they are excluded from the assessment, then our object of interest might fail to include what many people believe is important. Similarly, some will be puzzled by a curiosity that extends to consequent results in terms of official behavior but not private parties. Why concentrate on how DOMA influenced officials but not how officials used DOMA to influence the lives of couples? Anyone is free to say, “Because I study only law,” and anyone else is free to ask, “Why?” Furthermore, a legal-institutions perspective might not register textual changes that track preexisting official behavior, including new statutes which might be the paradigm category of legal change;39 yet it would register changes in official behavior that are not reflected in formal legal texts. For these reasons, one could conclude that a legal-institutions perspective is incomplete and hazy to boot. But one also may conclude that this perspective gets closer than legal textualism to measuring something interesting and important.

3. Law and Society

Another alternative is to erase lines between legal institutions and the rest of society. This broad frame can reach legal texts or their meanings as well as official behavior, but it would also consider the behavior of everyone else. A recognizable label for this perspective is “law and society.”40 It moves our attention further upstream by adding antecedent processes distinguishable from

37. Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 459 (1897). This notion obviously has been influential in law and economics, see, e.g., Richard A. Posner, The Problems of Jurisprudence 221 (1990), and it gets play elsewhere. See, e.g., Fallon & Meltzer, supra note 19, at 1763–64 (using ex ante predictability to competent lawyers in judging whether law is “new”).
38. See infra section III.C.2 (discussing aggregation strategies).
39. Presumably, some new legislation does not change behavior predictions. Also, some legislation is predictable before formal enactment, so a prediction orientation might see legal change before enactment. Perhaps this orientation can somehow be combined with textualism, such that, for example, legal change would occur only after enactment and only if not predicted beforehand. Predictable judicial judgments are different: they might be retroactive in a deep sense, so the observer is predicting how T1 conduct will be treated by a court in T2 rather than how T2 conduct will be treated under statute in T2.
legal institutions but that influence their work, such as the roles of organized interests and popular opinion; it also moves our attention further downstream by adding the effects of legal institutions on nonlegal actors, such as how people react to rules and results delivered by officials.

Crudely, we may picture (1) nonlegal societal processes that influence (2) legal processes such as legislation, administration, enforcement, and adjudication, which in turn influence (3) results within those institutions, including new legal norms in statutes, regulations, and judicial doctrine, as well as ground-level results such as arrests and judgments, which yield (4) nonlegal results through effects on nonlegal social life. There are numerous ways of subdividing legal and nonlegal processes and results,41 and my distinction between “process” and “result” is deliberately thin.42 But after choosing metrics and timeframes, change might or might not be happening in any of these subdivisions. We might decide, for example, that what matters most is change with respect to results in social life and search for upstream changes that produce such consequences.

Many of the above-referenced forces intertwine, undercutting simple influence diagrams, and any law-and-society schematic obscures possible lines of influence.43 Even if causal influence runs in one sequence and direction, measuring change with this wide-angle lens is more complicated than a legal textual-

commitments are in such work. One might prefer hierarchies and remain interested in a law-and-society perspective.

41. Process–result relationships can be constructed by reading down the columns in boxes (2) and (3).
42. See infra section II.A.
43. See, e.g., Naomi Mezey, Law as Culture, 13 Yale J.L. & Human. 35, 55 (2001) (offering the generation and maintenance of Miranda warnings as an illustration of law and culture influencing each other).
ism or legal-institutions perspective. Moreover, a law-and-society perspective has an attenuated relationship to law as it is conventionally understood. What it gains in practical relevance is partly offset by what it loses in simplicity, tractability, and connection with ordinary ideas about law. As with legal textualism, this loss is beneficial for some purposes. Somebody should investigate the relationship between legal institutions and the rest of society, partly because of the difficulty in establishing causation. But if interest in legal change persists, it should not be made conceptually dependent on broader social change. Legal texts and official behavior can change or not while the rest of society changes or not, and we might achieve a better grip on the former phenomena as we make progress on the latter.

At this stage, we may set aside the law-and-society perspective. Not because it lacks social significance or because it weakens the claims below; in fact, it tends to strengthen some of the points that I make. We can, however, identify key challenges for a working concept of legal change without the complications of a broader perspective. The \( X = X + 1 \) problem also might be illustrated from a textualist perspective alone, but we can better understand a large spectrum of debate and analysis by adding a legal-institutions perspective. My investigation will include situations where law directs attention to change in nonlegal sectors, but my core concern will be change within legal institutions without neglecting legal texts.

II. THE \( X = X + 1 \) PROBLEM

Even within an undisputed timeframe, identifying legal change depends on choices regarding the object and metric of interest. If different observers make different choices, they might disagree on whether legal change is happening—or they might claim that they are disagreeing about one thing when instead they are characterizing different things. In what follows, I will concentrate on reappearing combinations of processes and results in disputes over the identification of legal change.

A. PROCESSES AND RESULTS

In searching for change, an observer might focus on antecedent processes or their consequent results (or both). In using the term “process,” I simply mean the method for reaching some result or class of results. I lump together what lawyers refer to as procedure and substance, thereby including all decision procedures for collecting and analyzing information as well as all decision rules, standards, tests, and formulas for making so-called judgments on the merits. In using the term “result,” I simply mean a consequence supposed to follow from the execution of a specified process. A result in this loose sense can itself be another process, such as a rule for generating still more downstream results, or it can be a part of another process. Any number of anterior processes might be associated with a given result, and a given result also might be associated with any number of subsequent results.
Return to the $X = X + 1$ example. This program for plotting a dot works by repeatedly telling the machine to add 1 to variable $X$. If we call this set of instructions “the process” and we call the value of $X$ “the result,” then the process never changes but the result changes constantly as the program runs. The machine keeps receiving the same instruction within the same program, but the value of $X$ continuously increases with every pass. If we focus on the process, there is no change; if we focus on the result, there is change. As a programmer trying to move dots around, I paid no attention to such characterizations. In other fields, however, the change characterization is supposed to matter.

We can modify the example so that the process changes while the result stays the same. Suppose the value of $X$ starts at zero but, this time, the first line of code is the instruction $X = X + 1$ and the second line is the instruction $X = 1$. This program has two different instructions at two different stages in the (same) program’s execution. On the other hand, these two different instructions both result in $X$ getting the value 1, so a dot would appear in the same place as the program runs. The process (measured by instructions) changes, while the result (measured by $X$’s value or the dot’s position) stays the same. Less imagination is needed to illustrate changing processes combined with changing results or unchanging processes combined with unchanging results.

Equally important, we can search for change further upstream or downstream from an initial point of interest. We could shift our attention another step back to evaluate an antecedent process by which the computer program was written. Depending on our metric, the coding process might be the same as or different from an earlier comparable effort; perhaps this time several programmers worked on the code simultaneously instead of serially. Similarly, we could shift our frame forward to add consequences of the program. Perhaps people still get the impression that a dot is moving, but the experience is unimpressive in 2014 compared to 1980 because such animation has become achingly familiar.

Seeing process–result combinations will allow us to evaluate many aspects of the same legal institution across time, but not every aspect. Not every pair of features can be joined into a process–result relationship. In the $X = X + 1$ example, an observer might track the size and position of the dot over time, but these features are not in a process–result relationship. Likewise for legal decisions. United States v. Windsor relied on an old doctrine against official animus, but the decision might add something new by relying on a federal legislative decision to reject inclusive state decisions as evidence of animus. The new factor easily could have emerged not as a result of the Court citing old doctrine but because of a realization sourced elsewhere. However debatable the causation question, the idea should be clear: process–result combinations form

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44. See 133 S. Ct. 2675, 2693 (2013) (citing Dep’t of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)).
45. See id.
an intelligible subcategory of inquiry into change—a subcategory with its own logic and implications.

Nothing normative necessarily follows, though. In a given setting, an observer might have sufficient reason to care more about one process or result than others, to combine measures of change across dimensions, or to ignore the phenomenon of legal change. For the moment, my message is that finding legal change can depend on where we look—and we are now better situated to understand this phenomenon in life and law.

B. ORDINARY LIFE

1. The Morality of Conservatism

The foregoing provides insight into innumerable claims made every day. Consider first conservatism as a moral philosophy. Conservatism has many strains, but in one simple sense it is a principle that favors the status quo when possible, allied with a disposition that is “cool and critical in respect of change and innovation.” This version of conservatism might appear to have few foul-weather followers and little actual influence on policy preferences. Simple conservative arguments are nonetheless aired repeatedly. For high-profile examples, recall charges that weakening the filibuster in the United States Senate based on a simple majority vote would “fundamentally change” the institution and “break the rules . . . to change the rules.”


47. See EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 33, 74–75 (Frank M. Turner ed., Yale Univ. 2003) (1790) (warning against “untried policy”); F. A. HAYEK, THE CONSTITUTION OF LIBERTY 397 (1960) (“Conservatism proper is a legitimate, probably necessary, and certainly widespread attitude of opposition to drastic change.”); Samuel P. Huntington, Conservatism as an Ideology, 51 AM. POL. SCI. REV. 454, 455 (1957) (defining conservatism as a “system of ideas employed to justify any established social order . . . against any fundamental challenge”); see also MICHAEL OAKESHOTT, On Being Conservative, in RATIONALISM IN POLITICS AND OTHER ESSAYS 168, 169 (1962) (describing a disposition in which one “prefer[s] the familiar to the unknown,” and “the grief of loss will be more acute than the excitement of novelty or promise”).

48. OAKESHOTT, supra note 47, at 172. Various qualifications are offered by each author. See, e.g., id. at 190 (acknowledging that, given constantly appearing new activity, “[i]nnovation . . . is called for if the rules are to remain appropriate to the activities they govern”). For a discussion of some versions of conservatism, see infra text accompanying notes 205–08.


Persistent conservative argument is understandable, even if no political party deploys it consistently. A claim to the status quo might elevate discussion above self-referencing partisan appeals and reach a range of audiences not otherwise sharing normative commitments. A conservative disposition of modest strength might be justifiable beyond strategy, too. Much depends on suppositions about human capabilities and the underpinnings of conservative theories. Perhaps softly preferring the status quo counts as rational or as a proxy for variables people should care about, such as high decision costs, transition costs, or uncertainty. 51

But which dimension of change takes priority? People might strive to stabilize certain results, any number of antecedent processes, or both. Multiple dimensions of process and result appear as far back as Burke’s writings, as when he suggested that his opponents were both manufacturing a new rule of succession and undermining the legitimacy of the current monarch, insofar as they demanded that legitimacy be traced to the people’s choice. 52 Perhaps changing the Senate’s cloture rule by simple majority vote was such a multi-dimensional change. 53 In many situations, however, change will register on one dimension and the status quo on another. I take it that no actual conservative, Burkean or otherwise, believes that everything in social life can or should remain the same. 54 The problem, in conservative terms, is evaluating mixed cases and trade-offs, including mixed messages from dimensions of process and result.

Thus, certain pro-slavery theorists notoriously turned to conservative values before the Civil War. 55 Whether the “massive revival of Burke . . . and Hegel . . . was in large measure a simple fraud,” 56 as Louis Hartz thought, any simple conservative defense of slavery should have faced a problem involving antecedent processes. 57 At the time, one could have concluded that the nine-

52. See Burke, supra note 47, at 12–15; cf. John Morley, Burke 245 (1888) (claiming of Burke’s evaluation of the American and French Revolutions that “[h]e changed his front, but he never changed his ground”).
53. One issue is whether changes to supermajority voting rules were indeed a distinct category in the Senate, to which a supermajority rule attached. A separate issue is whether the cloture rule change was the result of a stable process on a third dimension of interest: the further upstream process by which such second-order rules are changed by appeal to the chair.
54. See Muller, supra note 46, at 362.
56. Id. at 147.
57. Contrast Lincoln’s claim during the 1860 campaign that his side supported “the identical old policy on the point in controversy.” Abraham Lincoln, Address at Cooper Institute, New York City (Feb. 27, 1860), reprinted in The Portable Abraham Lincoln 197, 208 (Andrew Delbanco ed., 2009).
teenth century showed a trajectory of emancipation, albeit uneven, in economic, social, and political fields, and that there was no obvious exception to be made for the regional persistence of chattel slavery. One could have seen this emancipatory trajectory, moreover, without believing that causally responsible processes were easily diagrammed into a dialectic and without denying that abolition required change on some dimension. Samuel Huntington’s idea that “slaveowners were the conservatives in the South in 1850” is, at most, partly true.

Process–result combinations in theoretical conservatism have not totally eluded us. A version of the idea was voiced by Anthony Kronman, who did as much as anyone to insert a brand of Burkean conservatism into legal theory. In 1985, he observed that an institution is not only a set of rules but also “a kind of endless debate,” a “process of self-criticism . . . [that] makes it possible for those involved to assert at once, and without contradiction, their allegiance to the established order and their conviction that it must be reformed.” To the extent that conservatives share this institutional interest, thoughts like Kronman’s intimate bundles of stability and instability in processes and results, without apparent reason for ignoring or prioritizing any part of the mix. This is the $X = X + 1$ problem in moral–political form.

2. The Psychology of the Status Quo

Simple conservatism might not be especially influential as a thoughtful political philosophy, but it is a centerpiece of contemporary research in behavioral psychology. Avoiding change seems to matter to many people in many situations, in the sense of placing independent weight on what a person takes to be the status quo. Under certain conditions, preferring the status quo option counts as cognitive bias—a self-defeating consequence of drifting toward what looks tried if not true when utility or other values would be maximized by other options. Dozens of studies explore a status quo effect on everyday decisionmaking,
including the effect on people being paid for their good judgment. How people define the status quo gets far less attention, even though decision theory warns that reference points can be arbitrary, and literature on multiple reference points is blooming. Experimenters might control the choice of competing status quos, but elsewhere the choice may be open.

Think about a famous experiment by William Samuelson and Richard Zeckhauser. Subjects were told to imagine that they just inherited a windfall for which they faced an investment decision, with different options bearing different specified risk and reward probabilities. Some subjects were told that the windfall was currently invested in one of these options. This status quo labeling had an independent pull on respondents toward some of the options, even though sticking with this kind of status quo does not seem to offer lower decision costs, transition costs, or uncertainty.

The experiment singled out the current allocation of funds as the reference point, but this is not the only conceivable status quo. Suppose that the deceased investor habitually used a formula for allocating such funds which favors a particular risk–reward ratio based on currently available data. Either the current allocation or the old formula could be used as the status quo, in the sense of something that the new investor might want to stick with; in fact, both could be used if the investor has a way to aggregate preferences for both kinds of status quo. A bias toward status quo options is not the same as a bias toward inaction or ease, and an urge to maintain the status quo cannot itself dictate the operative conception of it. So far, conceptually valid competing versions of the

61. See, e.g., Zulia Gubaydullina et al., The Status Quo Bias of Bond Market Analysts, 1 J. APPLIED FIN. & BANKING 31, 34–35, 46–47 (2011) (finding that bond market analyst predictions for T2 interest rates tend to be closer to the T1 interest rate than is the actual T2 interest rate).
63. See, e.g., Gregory J. Koop & Joseph G. Johnson, The Use of Multiple Reference Points in Risky Decision Making, 25 J. BEHAV. DECISION MAKING 49, 59 (2012) (investigating status quo, goal, and minimum-requirement reference points); Maurice Schweitzer, Multiple Reference Points, Framing, and the Status Quo Bias in Health Care Financing Decisions, 63 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 69, 70, 72 (1995) (finding many subjects advised using the contribution amount that the advisee used last year, and that a few recommended the amount that the subject had used); cf. Eyal Zamir & Ilana Ritov, Revisiting the Debate over Attorneys’ Contingent Fees: A Behavioral Analysis, 39 J. LEGAL STUD. 245, 268–69 (2010) (collecting studies indicating that a litigant’s reference point for judging gain or loss tends to be “the status quo” before litigation).
64. See Samuelson & Zeckhauser, supra note 51, at 12–13.
65. See id. at 15–19 & tbls.1a, 1b & 1c (showing statistical significance in five of eleven variations and estimating that the least popular options got the largest boost when designated as the status quo).
66. See id. at 35; see also id. at 12–13 (showing that subjects were told that broker fees and tax consequences were insignificant); id. at 22–26 (finding mixed evidence of influence when a subject’s previous choice counted as the status quo). In real life, a person might not even recognize a choice or might be shamed into a steady course. See id. at 10.
67. Samuelson and Zeckhauser mingled these two ideas, see id. at 8, although their experiments remain valuable. See Maurice Schweitzer, Disentangling Status Quo and Omission Effects: An Experimental Analysis, 58 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 457, 457, 470, 473 (1994) (noting also that “the” status quo competes with other reference points).
status quo are not drawing much attention from those modeling, experimenting, and gathering data on the psychology of decisionmaking.68

Reliable answers will turn on foundational mechanisms that account for a supposed status quo bias. We can guess, for instance, that most people will lean toward particular old results rather than old formulas for making investment decisions when the choice is open, and the mechanism of choice might involve the minimization of mental effort in processing information. Note, in this spirit, Samuelson and Zeckhauser’s finding that the attraction of options labeled as the status quo increased as the total number of options increased.69 It even seems possible that conceptually distinct variables will swamp the notion of a status quo bias. I will not speculate further on microfoundations. My main point is that precise reference points are not clearly established in existing research on status quo bias, and the options can represent processes and results. This is the X=X+1 problem in human psychological form.

3. The Politics of Tax Baselines

For reasons of psychology and ideology, conservative argument is part of our political practice, too. One high-profile debate involves tax policy, which incorporates a struggle over process–result choices. The debate is shaped by general opposition to raising taxes, which depends on a reference point that advocates fight to influence. Current law has been in competition with tax rates for the baseline position; current law can be thought of as a process in my terms, and rates as results of that process.

Cuts in income tax rates supported by President Bush in 2001 were enacted with a sunset provision,70 as was the cut in the payroll tax rate supported by President Obama in 2010.71 Thus, the Internal Revenue Code had a built-in small-c code for setting tax rates across many years, with preexisting statutory instructions taking over after more recent instructions expired, while the resulting tax rates would change after a given year. When these statutory suns were

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68. For exceptions, see Russell Korobkin, A Multi-Disciplinary Approach to Legal Scholarship: Economics, Behavioral Economics, and Evolutionary Psychology, 41 Jurimetrics J. 319, 333–34 (2001) (raising the general issue of multiple status quos, comparing sticking with the daily special at a restaurant and sticking with fish, and turning to regret aversion as a possible mechanism of choice); Pietro Ortoleva, Status Quo Bias, Multiple Priors and Uncertainty Aversion, 69 Games & Econ. Behav. 411, 420 (2010) (suggesting dynamic modeling whereby status quo alternatives would be endogenously derived rather than supposedly observable at the outset); and Schweitzer, supra note 63, at 72 (noting two possible forms of status quo bias in an experiment not designed for process–result combinations). See also infra note 221.

69. See Samuelson & Zeckhauser, supra note 51, at 8, 19, 26; see also Alexander Kempf & Stefan Ruenzi, Status Quo Bias and the Number of Alternatives: An Empirical Illustration from the Mutual Fund Industry, 7 J. Behav. Fin. 204, 207–08 (2006) (studying mutual equity fund investments). Other psychological frameworks for a status quo bias might include adaptive preferences, loss aversion, anchoring, and sunk costs.


scheduled to set at the end of 2011, people who wanted current tax rates extended could say that they opposed a “tax increase” (focusing on resulting rates), while those who supported higher tax rates could say that they opposed another “tax cut” (focusing on current law). The bill that passed the Senate in the early morning hours of January 1, 2012, just after the statutory sunset, was pointedly entitled the American Taxpayer Relief Act of 2012. On that date, the current-law and tax-rate baselines converged, in that the Code by then had refixed income tax rates unless and until another statutory amendment; so when the Code was amended later that day, some people’s income tax rates got cut from both baselines while nobody’s rates got increased from either baseline.

Surely the two sides were not disagreeing over a general disposition regarding change, but rather about the appropriate tax rate for some period of time. If you concentrated, you could pass judgment on these positions without deciding who wanted legal change, and you could test your conservatism by asking whether your position would be different if tax law did not already deliver what you wanted. Nonetheless, many advocates acted as if it mattered to their audiences whether one side wanted to raise taxes or the other side wanted to cut taxes. Indeed, at certain times, the President wanted to communicate that he wanted to raise taxes on wealthy people. Suitable baseline choices followed. The Office of Management and Budget highlighted its current policy baseline, which assumed the Bush tax cuts would not expire, and announced that the Act


75. See Lori Montgomery & Rosalind S. Helderman, Congress Approves “Fiscal Cliff” Measure, WASH. POST, Jan. 1, 2013, http://www.washingtonpost.com/business/economy/house-members-meet-to-review-senate-passed-cliff-deal/2013/01/01/6e4373cc-5435-11e2-bf3e-76c0a789346f_story.html (quoting Rep. Dave Camp (R-Mich.) calling the bill “the largest tax cut in American history”); Andrew Taylor & Alan Fram, Fiscal “Cliff” Deal Proving Elusive, ASSOCIATED PRESS (Dec. 30, 2012, 8:29 PM), http://bigstory.ap.org/article/fiscal-cliff-deal-would-pale-against-expectations (“Democrats said they had been told House Republicans might reject a deal until after Jan. 1, to avoid a vote to raise taxes before they had technically gone up, and then vote to cut taxes after they had risen.”). Voting on a bill to extend tax cuts for only less-wealthy people before January 1 and effective as of January 1 would technically not have been a vote to increase taxes on anyone, either, using either a current-law or current-rate baseline.
would reduce the federal budget deficit by billions.\textsuperscript{76} The President remarked that the Act “raises taxes on the wealthiest two percent of Americans while preventing a middle-class tax hike.”\textsuperscript{77} Perhaps unsurprisingly, there is yet another perspective from further downstream: the total tax take for the Treasury, which might or might not be controlled by different tax rates. This is the $X=X+1$ problem in tactical political form.

C. ORDINARY LAW

Similar issues can be identified in legal argument. The examples below are diverse in some ways, covering civil and criminal law, ordinary and constitutional law, litigated and unlitigated disagreements. But they share process–result combinations, foregrounded or not. One question is whether law handles these combinations with intellectual equipment more reliable than underspecified ideology, cognitive bias, and advocate strategy—a trio of troubling foundations perhaps not unfairly suggested by the examples above. My first illustration in law is intended to raise doubts. Either way, legal argument is a setting where process–result combinations emerge as people debate whether change is happening.

1. Injunctions and the Status Quo

Sometimes official decision makers are directed to look out into the world and distinguish change from the status quo. A workaday example occurs in the trenches of civil litigation. Although the Federal Rules of Civil Procedure do not say so explicitly,\textsuperscript{78} many judges got into the habit of saying that the purpose of a preliminary injunction or temporary restraining order is to preserve the status quo.\textsuperscript{79}

A doctrine favoring the status quo requires a defensible reference point, of course, which is no small task here. A fresh diktat from the bench is inherently destructive of the status quo. In fact nobody in the two-thousand year history of litigation has gone to the trouble of filing suit seeking nothing but the status quo, and no court could grant that request if it were made.\textsuperscript{80} Instead the judge

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{78} See Fed. R. Civ. P. 65.
\item \textsuperscript{80} Not even a “mere” declaratory judgment is a counterexample. Such court judgments change the legal position of both parties, not to mention the available information on the judiciary’s opinion on the merits of the issue, which is why plaintiffs take pains to get such judgments in the first place.
\end{itemize}
\end{footnotesize}
must rely on some other variable to pick out parts of the world to hold constant, or depart from any plausible conception of the current situation entirely. An indication of this need and desire to depart from a simple notion of the status quo is when judges announce, not altogether comically, that they aim to protect some status quo ante.81

In presenting different slices of the status quo, one side might focus on a freeze frame of the world at a recent point in time while another side might focus on processes in play at the same time. Consider the sprawling fight over a new waste dump after Hurricane Katrina left about twenty-two million tons of debris to deal with.82 The dump received emergency permission to operate from the State of Louisiana and the City of New Orleans, despite ordinary zoning rules and protests.83 Before the permit expired, a trial judge ordered that “[t]he status quo . . . shall be maintained” by allowing the dump to remain open while litigation proceeded.84 Keeping a dump open does preserve the status quo in one concrete, result-like sense: trash keeps going to the dump without inhibition from officials. But, simultaneously, such an order implicates change in a process-like sense: through litigation, the dump received a contempt-backed entitlement lasting beyond the expiration date of the emergency permit that the administrative process was willing to allow. There was an open dump and there was an administrative process for deciding whether dumps stay open. By entering an injunction, the court could not help but disrupt the status quo in some sense, but the court plausibly could claim to be preserving it in another.

Status quo choices have been flagged for more than a century but snappy solutions elude us. “[I]t sometimes happens that the status quo is a condition not of rest, but of action,” William Howard Taft wrote in 189385—leaving open exactly when. The challenge of saying “when” prompted some observers to conclude that the effort is a distraction from more important tasks, such as estimating the likelihood of success on the merits and the relative difficulties of

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81. See, e.g., GoTo.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1210 (9th Cir. 2000) (criticizing lawyers for “severely mischaracteriz[ing]” the notion of preserving the status quo and reiterating that preliminary injunctions are supposed to preserve “the last uncontested status which preceded the pending controversy” (quoting Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir. 1963)) (internal quotation marks omitted)).
82. See generally LA. DEP’T OF ENVTL. QUALITY, COMPREHENSIVE PLAN FOR DISASTER CLEAN-UP AND DEBRIS MANAGEMENT (2009).
correcting early errors.86 The problem with searching for the status quo is not only that it might be a poor proxy for other factors or that its valuation is somehow subjective. The status quo might be independently valuable to a decision maker, and comparing supposedly irreparable harms seems challenging, too.87 An additional, nagging problem is that judges face combinations of change plus status quo along dimensions of process and result. And they lack standard tools for eliminating or aggregating these dimensions.88

2. Patents for Processes and Products

Process–result choices arise in patent law too, although in this setting, old law rewards new developments89 and on both dimensions of novelty. The patent statutes recognize a distinction between new processes and new products,90 providing inventors a choice of routes to intellectual property protection. Although there can be disagreement over whether a supposed invention should count as a process or a product, the option for inventors to proceed on either track helps illustrate process–result distinctions and choices.

In Association for Molecular Pathology v. Myriad Genetics, Inc., a company claimed to have discovered genetic sequences that greatly increase the risk of ovarian and breast cancers.91 Patent doctrine excludes protection for so-called naturally occurring phenomena,92 so the company needed to navigate around that exclusion. One such route is to claim a new process for isolating the genetic sequence, but the processes used by the company “were well understood, widely used, and fairly uniform” among a cohort of scientists.93 So the fight shifted to claims regarding new compositions of matter. In the end, the Court blocked claims for isolated genomic DNA sequences while allowing claims for isolated complementary DNA.94 Understanding the technical details of that specific holding is not important for present purposes; the relevant part of the case is the oscillation between processes and resulting products in the search for

87. See Lee, supra note 79, at 155–63 (articulating these two concerns).
88. A law student made a similar observation fifty years ago, remarking that the status quo was too unstable for judicial decisions. Note, Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1058 (1965). Fortunately this doctrine now “frequently is ignored.” Wright et al., supra note 79, § 2948.
89. See U.S. Const. art. I, § 8, cl. 8 (referring to “Progress,” “Inventors,” and “Discoveries”).
92. See id. at 2116.
94. See id. at 2111–12, 2116–19.
old and new. The company’s patent claims worked off of the process–product distinction, moving to one side of the line when the other was blocked, and the Court reserved judgment on novel downstream applications of the company’s knowledge of nature.95

Furthermore, the Court’s reasoning shows yet another process–result combination, by applying an old and new formula for the assessment of patentability. As for the old aspects, the Court dutifully quoted statutory text and judicial precedent,96 making the opinion look like thousands of others. At the same time, the Court faced a curious situation in which Congress was apparently silent on the specific question, practice in the Patent and Trademark Office (PTO) pointed toward one result on patentability, and the federal government’s lawyers pointed toward a different result.97 That situation had not been addressed expressly in any previous Supreme Court decision, it seems. Myriad Genetics thus gives readers new information on how the Court thinks judges are supposed to deal with conflicting authorities during the process of interpreting patent statutes, even if one believes that Myriad Genetics’s holdings confirm old lines that were already clear in patent doctrine.

3. Nonretroactivity in Habeas Corpus

More commonly, legal norms prefer the status quo over change. A well-vetted example appears in the thicket of federal habeas corpus law.98 Judges developed a doctrine under which new rules of criminal procedure could not be the basis for federal habeas relief.99 Such new rules might be created on direct appeal, but only old rules could be invoked to unsettle a final conviction on federal habeas. Which rules are new? One possibility was “all of them,” inasmuch as each application of a rule can be considered a new result that fills out the rule’s scope. An application provides information about how a rule operates—at minimum confirming that a previously recognized rule is still validly invoked. Mere confirmations of validity can be nontrivial events, given the possibility of judges modifying doctrine and overruling past decisions.

The Supreme Court was not willing to go so far. Instead, the Court inserted a bit of process into its understanding of old procedural rules. It generally limited the category of new rules to those that generate a result “not dictated by precedent” or not “apparent to all reasonable jurists.”100 On the other hand, as the Court recently restated in Chaidez v. United States, “when all we do is apply a general standard to the kind of factual circumstances it was meant to address,

95. See id. at 2120; cf. id. at 2118–19 & n.6 (denying that the company’s research efforts described in the patent specification made the composition-of-matter claims patentable).
96. See, e.g., id. at 2116 (relying on Diamond v. Chakrabarty, 447 U.S. 303 (1980)).
98. See Fallon & Meltzer, supra note 19, at 1734.
we will rarely state a new rule.”101 This is the process–result distinction in action again, with the Court allowing for some new results on habeas compared to precedent, if those results follow easily from the application of otherwise old norms. And as with Myriad Genetics, the Court’s own development of this doctrine can be viewed as part of a larger process by which judges consciously shape possibilities for habeas relief.102 The habeas rules have changed to restrict doctrinal change during habeas, but judicial innovation is nothing new to the habeas process.

4. Common Law Method and Statutory Interpretation

As the patent and habeas examples suggest, the X=X+1 problem reappears in debates over judicial methodology, including those surrounding common law adjudication. Every lawyer is familiar with conventions for arguing from judicial precedent,103 along with techniques for adjusting the significance of helpful or harmful cases. Part of this practice requires a degree of respect for preexisting doctrine and case results, but analogical legal reasoning also facilitates a degree of innovation through application to new situations. “[A]ttention must be paid to the process,” Edward Levi demanded in 1949, and then he denied that law produced by analogical legal reasoning in courts is either changing or unchanging.104 “It is both.”105 The observation was penetrating, even if what to do with the common law’s schizophrenic character was awfully obscure.

Going further, we know that common law tradition recognizes situations in which doctrine can be revised and cases overruled.106 In more than one way, then, common law systems have a “magic” that can “transform a symbol of immobility into a vehicle of change,” as Julius Stone observed.107 Conventional legal practice joins the conservation of certain past results (broadly defined) with the authorization for innovation and even destruction of existing norms. Common law systems of reason thereby incorporate possibilities for stability.

101. 133 S. Ct. 1103, 1107 (2013); see also id. at 1108 (attempting to distinguish the issue of rule applicability to new situations).
104. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949).
105. Id. (depicting the process as a nonmystical moving classification system that nonetheless depended on imperfect logic). Levi perhaps went too far in writing that the debate over change in law “misses the point,” id., and he could have gone further in observing process–result combinations beyond adjudication.
106. See infra note 235 (collecting sources).
107. Stone, supra note 19, at 597; see id. at 618 (characterizing common law reasoning as a combination of logic, facts, and value judgments).
and change in either dimension of process or result. One side may demand adherence to allegedly analogous results and applicable doctrine, while another side may legitimately call for different outcomes under a preexisting process for evolution.

Similar choices are present in statutory interpretation. A rivalry exists between a brand of textualism that promotes static meaning for statutes until formal legislative amendment\textsuperscript{108} and a brand of dynamism that recognizes a kind of judicial creativity.\textsuperscript{109} A robust version of the latter involves a judge assuming the “creative” role of “a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began.”\textsuperscript{110} A potentially restrained version follows textual meaning whenever it seems unambiguous and then, only as a second- or third-tier tiebreaker, turns to post-enactment developments such as new facts and values associated with the statute’s subject matter.\textsuperscript{111} Either way, an essential feature is indexing current statutory meaning or application to post-enactment developments. It could be that textualism is unavoidably dynamic in this sense, at least in the hands of people facing unforeseen situations and statutes with inevitable vagueness.\textsuperscript{112}

But explicitly change-oriented theories may take sharp conservative turns. Textualism is about consistency with the meaning of authoritative statutory text understood in a particular way; but, to be frank, it is not the settled practice of all sitting officials. At least for patches of recent history, judges among others have evinced a kind of dynamism in statutory interpretation, explicitly or implicitly considering public-spirited versions of legislative purpose or their own sense of good statutory meaning in light of contemporary facts and values. Indications of such practices are not only crucial to accurate descriptions of legal institutions; they also get pulled into normative claims. William Eskridge defended his original version of dynamic statutory interpretation partly by claiming that judges were already doing it, even if they did not always say so.\textsuperscript{113}

To the extent that real-world interpreters follow such patterns, textualism might

\textsuperscript{108} See, e.g., Manning, supra note 32, at 7.


\textsuperscript{110} Ronald Dworkin, Law’s Empire 313 (1986) (analogizing from common law cases).

\textsuperscript{111} See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1482–84 (1987) (offering a “cautious and conventional” version of the dynamic interpretation model).

\textsuperscript{112} Cf. David L. Shapiro, Continuity and Change in Statutory Interpretation, 67 N.Y.U. L. Rev. 921, 926 n.17 (1992) (“[M]y approach—emphasizing as it does the value of continuity—is complicated when the setting in which the statutory question arises is dramatically different from that in which the statute was enacted.”).

\textsuperscript{113} See Eskridge, supra note 111, at 1481–82 (“[T]his model depicts what the Supreme Court typically does . . . .”); see also Dworkin, supra note 110, at 316–17 (asserting that his theory was “a better interpretation of actual judicial practice” than focusing on legislators’ expectations).
be the enemy of the status quo in a results-oriented sense.114

On the other hand, we could bring yet another antecedent process into focus—the process by which people decide which interpretive and adjudicative methods to deploy. If we pay attention to these upstream systems, then a shift toward textualism, which arguably already is underway in the courts, starts to look like an outgrowth and ally of the status quo in a process-oriented sense. Conclusions about change and stability in interpretation seem to flip as we move upstream and downstream across processes and results.

D. CONSTITUTIONAL LAW

Many debates in constitutional law and theory have a structure similar to the examples above. Not every constitutional issue is open to respectable disagreement on questions of change; whether or not the decennial census in Article I may be executed in different ways over time, nobody believes that the numerical results must be the same across decades. But there are countless instances of constitutional advocates and theorists debating legal change and dividing along dimensions of process and result.

1. Ground-Level Disputes

Sometimes a constitutional norm is understood to direct attention beyond constitutional law to check whether ordinary legal change is happening. In these spots, constitutional law is like preliminary injunctions or patent law, both of which direct attention beyond their boundaries in a search for old and new; in each context, a process–result choice reappears. We opened with the DOMA and Affordable Care Act (ACA) disputes,115 and we can find similar choices in various patches of constitutional doctrine.

The Contracts Clause116 indicates a retroactivity constraint. Contracts formed under state law at T1 might be protected from changes in state law at T2. A heavyweight in litigation at first, later courts responded to the clause with sagging enthusiasm. One early twentieth century technique was inserting a broad concept of reserved powers into the baseline for judging impairment of contractual obligations.117 The notion is that states have long-standing authority to protect public health, safety, and welfare, and contractual obligations are created against this background. If we look at contracts and contract law at


115. See supra text accompanying notes 4–13. For another big-name example, recall Bush v. Gore, 531 U.S. 98, 117–19 (2000) (Rehnquist, C.J., concurring) (concluding that the Florida Supreme Court had changed state law by ignoring a state statutory deadline on recounting ballots); id. at 135–37 (Ginsburg, J., dissenting) (asserting that those judges had instead interpreted existing law within an ongoing tradition).


T1 compared to T2, we might find legal change impairing obligations that were enforceable in the earlier period. But the change can disappear if the T1 baseline includes a reserved power to ban a risky product, for instance. The former focus is on concrete results (a sales contract enforceable then but not now), whereas the latter is more like a background process that allowed for such results (an enduring legislative power exercised now but not then).

An icy judicial response to Contracts Clause claims is old news, but the same process–result choice gets posed in contemporary litigation surrounding the neighboring Ex Post Facto Clauses. Ex post facto claims may seem easy to evaluate when a legislature sets two different determinate sentences before and after the relevant criminal conduct, but sentencing discretion can be trickier to assess. The Supreme Court made the U.S. Sentencing Guidelines advisory but they remain “the initial benchmark” and an anchor for district judges. In Peugh v. United States, the Court recently held that applying Guidelines revisions to previous criminal conduct can violate the ex post facto norm. This was a plausible result, given vague doctrine asking whether a “change in law” presents a “significant risk” of increased punishment. A new formula for district judges that yields a new reference point for departures, even if formally advisory, easily could yield different sentencing outcomes compared to a process with no such reference point. But if the Guidelines are sufficiently law-like to trigger concerns about an ex post facto “Law,” in what sense did the Guidelines change?

Although a new Guidelines formula is a kind of legal change, those formulas are produced by an antecedent process that might have been stable during the relevant timeframe. Part of Justice Thomas’s dissent clued in to this choice. Writing for four Justices, he argued that new Guidelines come from a standing process of data collection and analysis that is designed to keep sentences “more in line with fixed statutory objectives,” and he pointed out that “[p]rior to

118. See U.S. Const. art. I, § 9, cl. 3; id. § 10, cl. 1.
120. Id. at 2078.
121. Id. at 2083 n.4 (quoting Garner v. Jones, 529 U.S. 244, 250–51 (2000)) (internal quotation marks omitted); see also Cal. Dep’t of Corr. v. Morales, 514 U.S. 499, 505 (1995) (stating that the Clause forbids “enhanc[ing] the measure of punishment by altering the substantive ‘formula’ used to calculate the applicable sentencing range”).
123. U.S. Const. art. I, § 9, cl. 3.
124. Peugh, 133 S. Ct. at 2091 (Thomas, J., dissenting).
petitioner’s sentencing, Congress directed the Commission ‘to consider’ whether fraud guidelines” were still appropriate. 125 Unnervingly, Justice Sotomayor’s majority opinion offered no direct response. 126 A skeptical reaction to the dissent’s move upstream might be to ask why we should stop with the process for producing Guidelines. Why not add the process for amending statutes, along with the processes for detecting criminal behavior and choosing who gets arrested, prosecuted, and bargained with—even when sentencing is determinate? These are, unfortunately, perfectly good questions.

2. Abstract Principles

The questions should be equally insistent when decision makers wonder whether a constitutional norm is itself dynamic. 127 A textbook illustration involves the Eighth Amendment. Some people suggest that the Amendment should be understood as a static list of punishments that were considered cruel and unusual at the time of ratification, such as being drawn and quartered. 128 Others contend that the Amendment embodies a more abstract concept that begs each generation of interpreters to judge what is cruel and unusual. 129 The opposition between these positions is not entirely diametric, insofar as the first group might allow analogies from old examples and the second group might use old examples to inform their contemporary judgments, but they do represent different approaches.

The two positions are the same in one core respect, however: both end up championing change and the status quo simultaneously. The first group focuses on constancy regarding a list of punishments (results). They recognize, indeed they may advertise, that today’s judges often do not share this focus on

125. Id. at 2092 (quoting U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 653 (2003)). This shift to antecedent legal processes has an interesting connection to temporal framing of defendant behavior. See Mark Kelman, Interpretive Construction in the Substantive Criminal Law, 33 STAN. L. REV. 591, 593–95, 600–11 (1981) (indicating effects of temporal framing on views of defendant responsibility in ways that can obscure hard ideological choices regarding determinism). Ultimately the dissent turned normative, suggesting that potential offenders should have no guarantee of what the penalty will be, other than the formal statutory range. Justice Thomas went on to propose new doctrine that he thought consistent with original understanding. See Peugh, 133 S. Ct. at 2094–95 (Thomas, J., dissenting). The majority replied that it was following Court practice of “giv[ing the Clause] substance by an accretion of case law.” Id. at 2081 (majority opinion) (quoting Dobbert v. Florida, 432 U.S. 282, 292 (1977)) (internal quotation marks omitted).

126. A plurality section of Justice Sotomayor’s opinion referred to new Guidelines influencing decisions to plead guilty, see Peugh, 133 S. Ct. at 2085 (plurality opinion), but a post-charge focus on defendant behavior requires justification beyond simple conservatism. Cf. id. at 2084 (gesturing to “basic principles of fairness”). It is not enough to say that the Court should give people fair warning of a “change in law”; the dissent’s logic suggests that there was no relevant change in law.


stabilizing the list. And so, although the second group welcomes updates to the list, they may focus on constancy regarding judicial doctrine and adjudicative method for updating the list (processes).130 Perhaps the Amendment always has been a directive to exercise contemporary judgment; regardless, past cases invoke “evolving standards of decency.”131 Indeed, if the first group prevails by “relitigat[ing] old Eighth Amendment battles”132—a nicely crafted conservative counterattack from judges otherwise busy updating the list—we can expect change in doctrinal formulas and judgments about particular punishments and perhaps in the larger process by which doctrine is produced. It is worth asking whether attention to antecedent process in cruel-and-unusual punishment cases is consistent with attention to sentencing results in a case like Peugh and whether both fit with the drift in Contracts Clause litigation. But the key point is that constitutional decision makers encounter process–result problems every day.

To further fill out the spectrum, recall Lawrence v. Texas, which famously reconsidered the constitutionality of criminalizing sodomy.133 Here, the debate over legal change ambles across several dimensions. No one could dispute that a legal result changed: the majority refused to limit its reasoning to statutes that single out homosexual sodomy134 and expressly overruled Bowers v. Hardwick.135 The dispute was over how much change Lawrence represented on other dimensions. This is where process–result combinations emerge. Justice Scalia’s dissenters moved a step back from the repudiation of Bowers and excoriated the Court for “cho[osing] today to revise the standards of stare decisis”136—that is, changing the doctrine for changing doctrine. The dissent further condemned “the invention of a brand-new ‘constitutional right’ by a Court that is impatient of democratic change.”137 On this account, the majority was imposing change up and down the line, from a particular result back through multiple forms of antecedent process.

“True and good” was not the response. Justice Kennedy’s majority opinion spotted islands of stability on the dimension of process. As for stare decisis, the majority made a doctrinally orthodox argument that Bowers was undermined by subsequent decisions.138 More notably, the majority denied that application of principles associated with liberty created a new right instead of

130. Critical observers may wonder whether the results could be the same once any contextual variable has changed. See Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 220–21 (1980). I am setting aside this doubt and charitably assuming that a static list of punishments is meaningfully the same thing over time.
132. Id. at 2464 n.4.
134. See id. at 574–75.
136. Lawrence, 539 U.S. at 592 (Scalia, J., dissenting).
137. Id. at 603.
138. See id. at 574–75 (majority opinion).
carrying forward an original understanding. In an exit paragraph, the Court asserted that “those who drew and ratified the Due Process Clauses” did not presume to know “the components of liberty in its manifold possibilities.”\(^{139}\) Instead “[t]hey knew... later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.”\(^{140}\) In its defense, then, the majority asked readers to recall a growing stock of constitutional cases and to believe that the Constitution incorporates certain stable principles that may yield shifting results.\(^{141}\)

The foregoing controversies mark an on-ramp to higher-level struggles over the content of constitutional law. Many constitutional norms are subject to lawyerly debate regarding whether they are best characterized as “dynamic” as opposed to “static” prescriptions, and some theorists suggest global views on the extent to which our constitutional law is dynamic. An intimation of widespread dynamism entered public debate no later than Hamilton’s argument in \textit{Federalist No. 34} that “[t]here ought to be a \textit{capacity} to provide for future contingencies as they may happen,”\(^{142}\) and judicial opinions no later than Marshall’s claim in \textit{McCulloch v. Maryland}\(^{143}\) that the Constitution was “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”\(^{144}\) Notably, however, nobody seems to advocate totally dynamic constitutional norms, to the extent that this is legally intelligible.\(^{145}\) Everyone locates footholds of stability in their claims. Whether the theorist pushes for abstract principles or concrete applications, general concepts or particular conceptions, constancy is sought on some dimension of process or result.

Think about how Ronald Dworkin defended abstract principles against Justice Scalia’s worry about “the difficulties and uncertainties of the philosophy which says that the Constitution changes; that the very act which it once

\(^{139}\) \textit{Id.} at 578–79.

\(^{140}\) \textit{Id.} at 579; \textit{accord United States v. Virginia}, 518 U.S. 515, 557 & n.21 (1996) (“A prime part of the history of our Constitution... is the story of the extension of constitutional rights and protections to people once ignored or excluded.” (citing \textit{Richard B. Morris, The Forging of the Union}, 1781–1789, at 193 (1987))).

\(^{141}\) The \textit{Lawrence} dissenters no doubt understood that old legal norms must be applied in new circumstances and in ways that, in one sense, generate new law. \textit{See, e.g.,} James B. Beam Distilling Co. v. \textit{Georgia}, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) (“But they make it \textit{as judges make it}, which is to say \textit{as though} they were ‘finding’ it... .”).

\(^{142}\) \textit{The Federalist No. 34}, at 211 (Alexander Hamilton) (Carl Van Doren ed., 1979); \textit{see also id.} at 210 (calling for attention to “remote futurity”).

\(^{143}\) 17 U.S. 316 (1819).

\(^{144}\) \textit{Id.} at 415 (emphasis omitted).

\(^{145}\) A bold assertion on the dynamic side came from Charles Reich in 1960: “There is no such thing as a constitutional provision with a static meaning.” Charles A. Reich, \textit{Mr. Justice Black and the Living Constitution}, 76 Harv. L. Rev. 673, 735 (1963). But Reich referred to novel applications to preserve function or purpose: “If it stays the same while other provisions of the Constitution change and society itself changes, the provision will atrophy.” \textit{Id.} at 735–36. Essentially the same point was made in \textit{Weems v. United States}, 217 U.S. 349, 373 (1910) (discussing cruel and unusual punishment).
prohibited it now permits, and which it once permitted it now forbids.” 146
Dworkin gracefully sidestepped the second part of the complaint regarding particular results while stiff-arming the first part. On the implication that “the Constitution itself changes,” Dworkin wrote, “I meant the opposite.” 147 Indeed, Dworkin contended that he was the better friend to an unchanging Constitution: “[K]ey constitutional provisions, as a matter of their original meaning, set out abstract principles rather than concrete or dated rules. If so, then the application of these abstract principles to particular cases, which takes fresh judgment, must be continually reviewed . . . .” 148 Other prominent theorists take this path from result to antecedent process via abstract principles, emphasizing an element of conservatism in old protocols that yield new patterns of results. 149

Judges likewise advance the argument that what initially appears to be a pure change in constitutional law is actually part of a larger, stable process. 150 Among notable instances is the joint opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey, in which the Court’s changing positions on segregation and economic regulation were called “defensible . . . as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations . . . .” 151 Perhaps it was no surprise that Chief Justice Roberts did not cite Casey when he wrote the opinion striking

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147. Dworkin, supra note 129, at 122.
148. Id.; see also Ronald Dworkin, Freedom’s Law 13 (1996); Ronald Dworkin, Justice inRobes 120–23 (2006); Ronald Dworkin, Life’s Dominion 145 (1993).
down Section 4 of the Voting Rights Act in Shelby County v. Holder, but his logic was basically the same: change the relevant facts, apply the same constitutional formula, and, to borrow a phrase, “the very act which [the Constitution] . . . once permitted it now forbids.”

Such positions share the idea that an abstract norm need not be entirely dynamic. Theoretically, a principle can stay equally abstract over time, measured by the best interpretation of the norm or the understanding of officials on the ground, even while repeated resort to this principle leads to different results over time. Powerful objections to this line of thought remain, to be sure. A fundamental question is whether meaningful abstract standards exist: perhaps a standard either is associated with concrete conceptions or it fails to guide judgment. But this objection sits beside my immediate goal, which is associating the principle–application distinction with the process–result dimensions. Frequent assertions of stability on the former dimension alongside change in the latter help confirm that the process–result combination is a central feature of constitutional argument.

3. High-Level Theories

Our investigation has reached methodological issues that cut across clauses and cases. Elevating to theories of how people should interpret the Constitution or decide constitutional cases, we can see another collection of discussions about legal change that implicate dimensions of process and result. These discussions thus resemble methodological inquiries involving common law reason and statutory interpretation and, for that matter, the rest of the examples above.

Groups of originalists advocate understanding constitutional law in accord with the original intent, original understanding, or original public meaning of the Constitution. This meaning, they contend, was fixed at the time of ratification, notwithstanding vagueness or difficulty discovering the meaning now. Part of what instigated the contemporary originalist movement was a sense that judges had departed from the true meaning of the Constitution and instead made up new law to suit themselves. Sometimes this allegation of infidelity

152. 133 S. Ct. 2612, 2631 (2013).
153. Scalia, supra note 146, at 45–46.
154. See Samaha, supra note 127, at 1755, 1769–71 (contrasting abstractness, dynamism, and breadth in constitutional design).
155. See Louis Michael Seidman, On Constitutional Disobedience 13 (2012) (indicating that a commitment to abstract constitutional values is essentially meaningless); Tushnet, supra note 31, at 791 (stating that concepts are “at least in part” composed of conceptions); Brest, supra note 130, at 217 (similar). A softer concern is that the choice between concepts and conceptions cannot be made satisfactorily by linguistics or history without a moral view on the “conversational context.” Andrei Marmor, Meaning and Belief in Constitutional Interpretation, 82 Fordham L. Rev. 577, 577, 592 (2013).
156. See Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 101 & n.16 (2010).
is combined with the charge, perhaps intentionally hyperbolic, that judges are rewriting or changing the Constitution. Regardless, like the Eighth Amendment example, some originalists suggest that judges should maintain a static sense of constitutionally prohibited, permitted, and required practices, and not change that sense to fit post-enactment preferences. To the extent an originalist understanding of the Constitution yields a few abstract concepts, they might be liquidated into more concrete historical lessons.

But on some metrics, originalism is radical. Once we adopt a legal-institutions frame that examines official behavior—which seems necessary to make sense of the arguments—originalist demands run into big problems on simple conservative metrics. A key charge from originalists is that today’s judges fail to act consistently with the meaning of the Constitution. But wanting consistency with authority is not the same as wanting constancy over time. David Strauss has drilled home the observation that judges tend to reason from judicial precedent rather than constitutional clauses or originalist history, at least for now.

Common law constitutionalism arguably is the norm in the Supreme Court, and surely in lower courts. Transitioning to a practice with a larger role for originalism would change the current process of adjudication, not to mention consequent results. Unless the originalist movement is willing to defend...
such change against conservative fears, its aspirations must stay small—such as the free-floating ascertainment of documentary meaning, not a practical prescription for adjudicating constitutional cases, and perhaps conceding a large “construction zone” where doctrine is fabricated to implement the Constitution after original meaning runs out. Common law constitutionalism is not pure conservatism, either, but standard operating procedure in the courts does offer grounding for a conservative line of attack on the most ambitious originalist aspirations.

In addition to common law constitutionalism, we now have a batch of constitutional theories designed to accommodate unstable results within roughly stable decision processes. Some were instigated by doubts that transformational aspects of the New Deal and the Second Reconstruction comport with a straightforward interpretation of the Constitution. A well-cited example is Bruce Ackerman’s theory of higher lawmaking during constitutional moments, which has a clear process orientation. He elaborated an analogue to Article V amendments, involving a sequence in which constitutional change is placed on the agenda and deliberated over until national political institutions consolidate. These alternative amendment processes are said to validate the modern administrative state and 1960s civil rights victories.

Other writing on social movements and political parties may be less schematic, but likewise pictures recurring processes that yield fresh results. Among the most influential work in this direction is Reva Siegel’s contextualization of judicial positions on topics such as sex equality, Fourteenth Amendment enforcement, and Second Amendment rights. Such work situates judicial doctrine within a larger scheme of mobilization and debate, claiming, for instance, that constitutional dialogue outside the courthouse may have serious effects on what judges come to believe are plausible constitutional positions. Of similar character is Jack Balkin’s and Sanford Levinson’s sketch of constitutional revolutions following clashing social movements, partisan politics, and, perhaps ultimately,
judicial blessing. Whether or not these theories are persuasive descriptively or normatively, they share an upstream migration from particular legal results to antecedent constitutional processes.

A less obvious theoretical partner involves equilibria in constitutional systems, but this brand of theory does orient attention toward formulas and away from results. Normative equilibrium theories endorse a long-running status quo weight or amount for some constitutional value, even though particular legal rules will change over time. The thought is that constitutional law should sometimes require constancy along a general metric, such as a balance of power among branches or a degree of privacy against governmental intrusions. Static balances can be achieved in more than one way, however. Any number of results will conform to the desired balance, although changing one part of the legal system may require a compensating change elsewhere. Hence an equilibrium proponent might want either limits on legislative delegation to agencies or a legislative veto thereafter, but not both, so as to maintain “a proper balance of powers.” If the balance is part of a formula for generating answers to constitutional questions, then equilibrium theories show another migration to process (loosely speaking) where stability might be found.

4. New Process, Old Results

Many of the above theories account for new results over time, but they are, in addition, remarkable attempts at conformity with past results. They look to an ongoing system of decision and attempt to show how it allowed for a stream of innovative outcomes. Retrospective fit is a mainstay in legal argument, of course, but such assertions are used for more than maintaining established trajectories or old processes: fit with past results is used to defend overt changes

168. See Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, 87 Va. L. Rev. 1045, 1068 (2001) (“Partisan entrenchment through presidential appointments to the judiciary is the best account of how the meaning of the Constitution changes over time through Article III interpretation rather than through Article V amendment.”).


170. See Levinson & Pildes, supra note 169, at 2348.

171. See Kerr, supra note 169, at 481–82.

172. Greene, supra note 169, at 128.
in processes going forward. Familiar old results can be reaffirmed even as unset
ttled new questions are answered differently by a reformed process. At
some stage, a new process will yield a set of results different from the old
process, but the difference will come in the future and might be restricted to
new questions. Another mark of conservatism in law, then, is credit taken for
preserving results from T1 when a new decision procedure is offered for T2.

At the micro level, an example of a new process/old results claim appears in
Employment Division v. Smith. The majority restated free exercise doctrine to
immunize so-called neutral laws of general applicability, regardless of the effect
on religious conduct. Four Justices criticized this move for decreasing sensi-
tivity to burdens on religion, but the majority pointed at a pattern of losses
by claimants under the old doctrine. This shift to results prompted Justice
O’Connor’s objection to an “unusual” test of doctrinal vitality according to the
“win-loss record” of the claimants. So apparently both sides believed that the
magnitude of legal change mattered, and the measure of this magnitude differs
when past and projected results are added to doctrinal reformulation.

At the macro level, consider the enduring debates over originalism. Critics
assert that originalism is not only a small part of the judicial decisionmaking
process now, but that adding more of it would produce awful and shocking
results—at least for people accustomed to paper currency and federal environ-
mental regulation, along with rights to sex equality, interracial marriage, and
integrated public schools. But like the reformers of free exercise doctrine,
many scholars deny that originalism mandates transformational results. A grow-
ing number of articles try to reconcile text, history, precedent, and contempo-
rary sensibilities, contending that a series of widely accepted results fit into
some version of originalism. Recent efforts address decisions thought un-
achievable on orthodox textual or historical modes of argument, such as Brown,

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173. I ignore the modest possibility of efficiency-enhancing changes that lack other effects on the
content of legal decisions.

174. Such thinking should be familiar from common law reasoning. See supra section II.C.4.
Consider, too, Tushnet’s illustration of openness in reaching new results that fit with past results by
choosing a convenient formula that covers both. See Tushnet, supra note 31, at 822.


176. See id. at 879.

177. See id. at 891–92 (O’Connor, J., concurring).

178. See id. at 883–84 (majority opinion).

179. Id. at 897 (O’Connor, J., concurring).

180. The story becomes more complicated if we extend the timeframe. The effect of Smith was
softened by subsequent state and federal lawmaking, see, e.g., Douglas Laycock, Theology Scholar-
ships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty,
118 Harv. L. Rev. 155, 211–12 (2004), not to mention the Court’s recent recognition of a ministerial
exception to generally applicable antidiscrimination laws. See Hosanna-Tabor Evangelical Lutheran

181. See David A. Strauss, The Living Constitution 12–18 (2010); Cass R. Sunstein, Radicals in

These efforts are not restricted to one segment of the left–right ideological spectrum, either. The participants represent people committed to originalism who may be concerned about intolerable results, and people committed to tolerable results who may be concerned about originalism.

Layered on top is a response to a conservative worry about the transition to originalist decisionmaking in the face of conflicting judicial precedent. True, some originalists repudiate conflicting precedent, but many authors are more preservative of judicial work product. Detente has been suggested for originalism and stare decisis, whereby many of today’s judicial doctrines would survive as permissible constructions of constitutional commands that are somewhat vague. No consensus exists on the size of the construction zone, the specific method of decision within it, or the best institutional choice and design options. But scholars’ interest in opening such conceptual space suggests an inclination toward simple conservatism in addition to logical coherence and compromise. There is the hope of preserving old results with a reformed process for constitutional analysis going forward. Perhaps it should be no surprise if opponents of originalism, or even constitutionalism, are similarly sensitive to audience inclinations toward a status quo.

III. EXPLANATIONS AND IMPLICATIONS

A tall stack of examples shows process–result combinations with mixed messages on legal change, indicating a challenge for measuring and evaluating the phenomenon. Below, I offer explanations for the prevalence of these X=+1 problems and then roughly estimate their severity. The rest of the Article scopes out three potential responses, though possibly not tidy solutions: (1) exclude some dimensions, (2) aggregate dimensions under a common metric, or (3) drop legal change from the analysis at hand. Throughout, I suggest how conscientious empiricists and normative decision makers might view these issues. My conclusions are somewhat provisional, however, and the best response to an


184. See, e.g., Amar, supra note 149, at 141–99; Balkin, supra note 149, at 138–255.


188. See Adam M. Samaha, Talk About Talking About Constitutional Law, 2012 U. Ill. L. Rev. 783, 788 & n.16 (collecting views).

189. See, e.g., Klarman, supra note 169, at 414–15 (contending that an anticonstitutionalist position is not radical, given contemporary practice).
X=X+1 problem surely will differ in different settings. My principal goals are to identify an important and recurring challenge for understanding legal change and to structure and advance the investigation of that phenomenon with wholesale suggestions. Existing work on the subject is not yet even that far along.

A. THE ATTRACTION OF X=X+1

Why might X=X+1 problems be, or seem, prevalent? Why might it be easy for lawyers, judges, and scholars to show combinations of processes and results when change is at issue? We have not fully measured either the actual prevalence of these combinations or the frequency with which they are presented; accurate measures would be hard to get. But given the numerous examples above, it is appropriate to wonder why oscillating attention between process and result happens repeatedly.

Attention to results is hardly worth explaining. The category is sufficiently broad that anyone should be able to isolate an object of importance to observers and argue for its preservation. A focus on results represents the concrete, simple, and immediate elements of standard legal analysis. Stabilizing desirable results links up with people’s most salient concerns. What needs further explanation is recurring attempts to connect desirable results with a larger process that would otherwise be neglected. Why is that response common and commonly valued in legal argument? Three reasons begin to explain the phenomenon.

The first reason involves relevance and respect. Processes have a fair chance of being accepted as relevant to the question of change, rather than rejected as changing the subject. Antecedent processes are supposed to be causally connected to results somebody cares about, and therefore those processes can be underscored without ignoring the other person’s values. For the same reason, attending to antecedent processes shows respect for the listener’s concern about a given result while suggesting a bigger picture to consider. Furthermore, this broader process-oriented perspective might cut across ideological divides, such as left–right, that otherwise separate the participants; this, too, might be accepted as a sign of respect rather than distraction. We still may doubt that many people are open to persuasion by simple conservative arguments. But commonplace references to standard operating procedure and tradition indicate that there is an audience for stability in legal processes, regardless of whether the attraction is deeply philosophical.

Second, a relatively broad perspective may indicate laudable sophistication. Bigger pictures often are better pictures. To introduce an overlooked anterior system of processes by which results are produced is to show an enlightening insight into the way the world works. Sophisticated arguments are not always persuasive, of course; lawyers are sometimes advised to avoid complexity in
advocacy,\footnote{190 and explaining more with less is valued in many disciplines.191 But when the stakes seem high or audiences are otherwise patient, an expert understanding of causal mechanisms is likely to gain attention and credit. In addition, what we have been calling process and result basically tracks intuitive and refined approaches to normative evaluation: attention both to decision procedures and the pattern of results that they yield, to check our hunches against experience and informed reflection, is an approach that can be appreciated by utilitarian, deontological, and other theorists.192}

Third, a sophisticated view of processes and results is comforting in an otherwise unruly social life. Connecting results with processes does make our picture of life more complicated, but also more understandable. The claim is that an antecedent process produces results, it governs them, and so we better understand why they happen. Explaining legal results by antecedent processes at least should draw audiences inclined to view social life as significantly determined by intentional design, or even path dependence, as opposed to a series of unpredictable exogenous shocks.

More specifically, orderly process is a goal of many lawyers and judges working conscientiously toward a rule of law.193 What exactly constitutes the rule of law is subject to some debate, but here I refer to concepts akin to reasoned judicial decisions and due process more generally.194 Part of what makes a legal system respect-worthy in many people’s minds is confidence that outcomes are reasoned and the result of a structured decision process, rather than arbitrary in the sense of random lightning strikes or individual official whim. The sociological and moral legitimacy of our legal system probably depends on plausible, systematic relationships between legal processes and results. People concerned with legal institutions strive to maintain those relationships, and therefore process–result combinations, every day. The $X=X+1$ problem might well be embedded in rule-of-law aspirations.

This helps explain why hunting for antecedent processes is a familiar re-

\footnote{191. See, e.g., GARY KING ET AL., DESIGNING SOCIAL INQUIRY 20, 104–05 (1994) (discussing social science); CHARLES PERROW, THE NEXT CATASTROPHE 260 (2007) (discussing engineering).}
\footnote{192. See, e.g., Posner, supra note 37, at 71–74, 122–23, 457 (discussing practical reason and testing by consequences); JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTatement 29–32 (Erin Kelly ed., 2001) (discussing reflective equilibrium).}
\footnote{193. See, e.g., PAUL W. KAHN, THE CULTURAL STUDY OF LAW 15 (1999) (“The rule of law . . . is not merely rule under the existing law; it is this whole process of continuous reform.”); Harry W. Jones, Law and the Idea of Mankind, 62 Colum. L. Rev. 753, 758 (1962) (linking an international rule of law to “orderly processes of legal settlement”).}
\footnote{194. See, e.g., Holmes v. South Carolina, 547 U.S. 319, 325, 331 (2006) (using “arbitrary” in the sense of a rule not furthering a permissible interest); Judith Resnik, Tiers, 57 S. Cal. L. Rev. 837, 852 (1984) (“As the example of the coin-flipping judge illustrates, we insist upon deliberate, rational dispute resolution.”); Adam M. Samaha, Randomization in Adjudication, 51 WM. & MARY L. REV. 1, 39–40, 58–59 (2009) (discussing conceptions of due process as “reasoned decision making or instrumental rationality”).}
response to concerns about legal change, while nagging weaknesses keep the response controversial. One weakness is a downside of sophistication. The added complexity from linking processes to results taxes the audience if the process is not already apparent. Even if everyone is thinking thoroughly, linking processes to results involves an empirical claim about causation. The claim might be erroneous or difficult to prove.\textsuperscript{195} For instance, we can be confident that precedent and ideology influence judicial decisions sometimes, while remaining uncertain about precisely when and how much these factors matter. Scarcity of relevant data might entrench doubts about definitive conclusions on asserted process–result links without observers discarding the possibility entirely. Sometimes the social world is far sloppier than 1980s computer code, and it can be hard to tell when. Moreover, because the stakes can be high in legal argument, an audience may wonder whether advocates are strategically manipulating reference points while also wondering whether other salient reference points are any better grounded.\textsuperscript{196}

All told, we should expect recurring combinations of process and result in arguments over legal change—partly because results include concrete and urgent needs, partly because antecedent processes suggest relevant and sophisticated understanding, and partly because these suggestions are often debatable. Certainly, other forms of normative argument share this dual sensitivity to micro concerns and macro systems, but the combination is undeniable in legal practice and theory. Indeed, the orderly connection of results to antecedent processes is an important goal for those building or maintaining legal institutions. A legal institution that cannot account for its results by reference to any discernible process might not be a legal institution at all.

\section*{B. THE SEVERITY OF X=X+1}

If process–result combinations are frequent and attractive in law, how severe is their threat to intelligently measuring and evaluating legal change? My illustrations of the X=X+1 problem earlier in this Article were not at all randomly selected. Perhaps there are easy cases to consider, no matter how often a legal result can be associated with an antecedent legal process.

Suppose that, in some fraction of situations, everyone should agree that both a process and a result dimension show either change or no change. For this fraction, the X=X+1 problem would be solved—as long as the goal is to detect legal change, not measure its magnitude. We can tally up change/change combinations and no-change/no-change combinations as binary variables. Mixed combinations could be put in a hard cases pile; but perhaps the stack would be short, and a simplifying empiricist could decide to count every situation show-


\textsuperscript{196} The remarks in this section apply to the addition of downstream results, too.
ing change (or not) on any dimension as an instance of legal change (or not). In the context of normative analysis, the outlook is somewhat encouraging as well. A simple conservative preference will be decisive whenever Option A is associated with no change on any dimension of process or result, while Option B is associated with change on either or both dimensions. Option A would always dominate.

Probably few people hold such crude positions for studying and evaluating legal change, but there is a problem even if we adopt them for the sake of argument.\textsuperscript{197} The $X=X+1$ problem remains serious because every or nearly every position on law may be characterized as promoting change on at least one dimension and the status quo on at least one other. We only have to look far enough upstream and downstream, and remain open to cause-and-effect relationships.

Concentrating first on results, every decision by every official represents change within the legal system. In a narrow but real sense, each result has never happened before, which automatically threatens the status quo. This thought matters less from a textualist perspective,\textsuperscript{198} because notable legal texts such as the Constitution and many federal statutes do not even arguably change very often. But for those who care to characterize legal institutions (probably everyone), legal decisions must be accounted for. They make legal change on at least one dimension. In fact, we could see change in every legal decision even if we started demanding significance in addition to novelty. Each new decision reveals information about how officials are behaving, including how they are willing to exercise power. This is no less true for decisions that match widespread expectations or reinforce conventional wisdom. Whether the decision involves passing a statute, adopting a regulation, enforcing a rule, or deciding a court case, something new and telling, even if only reassuring, is added to the legal system. We could fairly conclude, for example, that DOMA was a new statute that imposed a new federal definition of marriage that was invoked to deny a new claim for a tax benefit, but was invalided by a new Supreme Court decision that relied on a new line of reasoning. On this logic, every legal decision is new, in part.\textsuperscript{199}

Concentrating next on antecedent processes, every legal decision might be old, too. Each decision is preceded by a process of some sort, whether formal or informal, conscious or unconscious. And pretty much any process can be segmented into several subprocesses. Legislation, rulemaking, enforcement, and adjudication have subroutines in which information is gathered, judgments are formed, and directives are issued. Surely some part of this process of multiple

\textsuperscript{197} And even if we assume consensus on what counts as change on every dimension. \textit{But cf. supra text accompanying notes 9–13} (describing disagreement in \textit{National Federation of Independent Business v. Sebelius}).

\textsuperscript{198} \textit{See supra} section I.D.1.

\textsuperscript{199} \textit{Cf. infra} note 203 (discussing a category of nondecision, as in dormancy of a legal institution, that is distinct from, say, deciding not to decide the merits of a case).
subroutines can be characterized fairly as stable over some timeframe. The legislative process that yields a statute this month is somehow like the process in place last month; the same is true of executive and judicial processes. If nothing else, five votes still beat four. Although unpredicted results can shake one’s belief that antecedent processes are understood or influential, the stability and constraint of a decisionmaking process often will be uncontested or plausible. We could conclude, for example, that DOMA was enacted using the same old legislative voting rules to maintain the same old denial of federal benefits to same-sex couples and was enforced against Windsor using the same old routine of invoking this statute, but was invalidated by a Supreme Court decision following the same old practice of judicial review. At the limit, perhaps every legal result is determined by a Grand Equation that we have yet to discover, but even a less determinist position can allow for the conclusion that nearly every legal decision is old, in part.200

If all legal decisions can fairly count as change (each is new information and so on), and if many or all legal decisions can fairly count as the result of a status quo process (majority rule and so on), then is the concept of legal change empty? So far, we have no reason to halt the search upstream and downstream across dimensions of process and result, until change combines with stability. Because we have restricted law’s frame to legal institutions, we have limited the freedom to throw in an antecedent process or a subsequent result; the private sector is shielded from view. But this cannot eliminate the problem. Most or all legal decisions will be, simultaneously, part of something new and part of something old within the legal system. DOMA and possibly every other legal event would present mixed cases, not simpler cases of thoroughgoing change or status quo.

This conclusion is not devastating by itself. By examining processes and results, we can associate legal decisions with both change and the status quo—on different dimensions of interest. This does not indicate that there is no such thing as a legal status quo, or that legal change is a distracting conclusion driven by offstage preferences. All that the foregoing indicates is that each legal decision probably has dynamic and static aspects. A second dimension of

200. Compare Fish’s characterization of an interpretive community, literary or otherwise:

[S]ince an interpretive community is an engine of change, there is no status quo to protect, for its operations are inseparable from the transformation of both its assumptions and interests; and since the change that is inevitable is also orderly—constrained by evidentiary procedures and tacit understandings that at once enable change and are changed by what they enable—license and willful irresponsibility are never possibilities.

FISH, supra note 19, at 156.

Fish’s remarks contain tensions, unless his object of interest is oscillating between processes and results. Claiming “no status quo to protect” is too strong, given his assertions of orderly change and evidentiary constraints. His interpretive communities involve partly stable processes that interact with their results, which may interact with each other. See id. at 146, 149–51 (quoting D. Lawrence Wieder, Telling the Code, in ETHNOMETHODOLOGY 144, 161 (Roy Turner ed., 1974), who characterized a code among convicts “as a continuous, ongoing process, rather than as a set of stable elements of culture”).
interest hardly implies that both dimensions should be ignored or that measures on both dimensions cancel out. We could believe that Windsor is an important decision for same-sex couples seeking federal benefits and not an important decision for same-sex couples seeking marriage rights in states that deny them, all without suggesting that “importance” in court decisions is an empty distraction. So, too, with legal change. Attending to both processes and results captures different aspects of reality.

Sensitivity to multiple dimensions casts new light on old debates. Recall the originalist charge of judges fabricating new rights by going rogue from the Constitution’s true meaning, and the common law constitutionalist counter-charge that strong-form originalism would be a radical departure from established judicial practice. This is a real disagreement alright, but we should see that each side is highlighting a different dimension of legal change, and neither side is purely conservative. Judges actually are recognizing particular rights that were not established or enforced in earlier times, Windsor being just one example among thousands in our constitutional history, and that series of results actually is related to an ongoing process of adjudication. Disliking the process does not make it new, and liking the process does not make its results old. Someone who wants to understand legal change faces these two dimensions of process and result, which together deliver mixed messages.

And there are more dimensions out there. Adjudication itself can be linked to upstream meta-processes, with a set of forces combining to produce a set of decision makers with a mixture of preferred methods. If those people or their methods begin to change, there is no pat conservative view on the matter. Many changes in the process of judicial review plausibly could be the results of a stable meta-process. If judges begin fixating on originalist history, for example, we should hesitate before interposing status quo concerns. Common law constitutionalists and others rightly directed our attention from case results to antecedent processes, but without marking a stopping point. In fact, recommending much of anything for judicial behavior is hard once we suspect that each judge is wrapped in numerous layers of influential processes, all combining to allow or even direct what each of them is thinking. Can we know whether our recommendations are part of an old or new process of development? Aren’t they both?

201. See supra text accompanying notes 157–64.
203. A category of non-decisions deserves note. A legal text may be stable during some time frame as measured by its words, yet not invoked within any legal institution. Whether or not these texts are dead letters for the rest of society, under these conditions empiricists using a legal-institutions perspective could find no change on any dimension of legal process or result. These patches of textual and institutional dormancy can be compared with other areas in which official decision goes on using other legal norms. See, e.g., Adam M. Samaha, Originalism’s Expiration Date, 30 CARDOZO L. REV. 1295,
C. LEGAL CHANGE GOING FORWARD

Thus a principal challenge for those who care about legal change—to measure it, model it, or make normative arguments about it—is not that the concept is empty, but that it is *multidimensional*. The legal status quo cannot be maintained on every dimension, but stability seems possible on one or more dimensions. This should be a core concern for those who want to measure legal change, including those who wish to defend an optimal or preferred amount of it.\(^{204}\) How can we make progress in the face of multidimensionality?

1. Exclude Dimensions

One possibility is to exclude from consideration one or more dimensions of process and result. Sometimes simpler is better, and a lack of sophistication might be defended here. Unquestionably, exclusion solves the problem of identifying legal change across dimensions, but the challenge is delivering a persuasive basis for exclusion. The task is to explain why an empiricist or normative analyst should ignore either the formula for distributing benefits to same-sex couples or the resulting class of beneficiaries; either the list of prohibited punishments or the process by which the list is composed; and so on. Why not consider both, or neither?

No intelligible version of conservatism cuts cleanly between dimensions of process and result. Preferring stability over change generates no reason for valuing stability in antecedent processes differently from stability in consequent results. A person can be familiar with and attached to either the most deeply antecedent processes within law or to the series of statutes or regulations or doctrines or judgments that those processes yield. A simple status quo preference indicates that both dimensions should be considered, and we might rule out more complicated versions of conservatism as not truly conservative insofar as they add values that must be defended independently. At this stage, however, even a promiscuous view of conservatism will not overcome the challenge. Values beyond simply minimizing change would have to track a distinction between process and result. What kind of values would those be? They are not plainly indicated by leading conservative thought, either.

We could look to a cautious version of conservatism associated with Burke, in which attempts to engineer new social relationships are worrisome because people tend to fare worse with abstract theory over experience and time-worn

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\(^{204}\) This concern is present even if one ignores other downsides associated with conservatism, such as negative effects on innovation. *See, e.g.*, Saul Levmore, *Changes, Anticipations, and Reparations*, 99 ColuM. L. Rev. 1657, 1658 (1999); infra note 210.
institutions.\textsuperscript{205} Or we could look to a selective version associated with Huntington, in which the fundamental elements of institutions, somehow specified, should be preserved while less fundamental attributes may be sacrificed.\textsuperscript{206} Or we could look to a psychological version associated with Oakeshott, in which a conservative disposition is built on feelings of familiarity, attachment, identity, and expectations.\textsuperscript{207} Or we could look to an optimistic version associated with Hayek, in which systems subject to evolutionary pressure give an assurance of progress based on the aggregated wisdom of multiple generations.\textsuperscript{208} These versions of conservatism indicate little or no leaning toward stability in processes or results. Worry about the consequences of change may arise in equal strength for upstream processes and downstream results, and selecting fundamental aspects of institutions hardly leans toward one or the other at wholesale. Psychological attachments and expectations are likewise affixed to both processes and results, with an open empirical question whether one category is more frequently salient. True, optimistic evolutionary versions of conservatism spotlight processes, and so they prize stability there; perhaps cautious institution-oriented conservatism is similar. But such leanings turn out not to matter for reasons built into our analysis of change.

This remaining roadblock is that the process and result categories overlap, and intentionally so.\textsuperscript{209} A “result” can be part of a “process,” as when a list of constitutionally permissible punishments is part of a criminal justice system; or a “result” can be a “process” on its own, as when the formulas in the Sentencing Guidelines are produced during a process for revision. A soft line between process and result is needed to match a recurring pattern of legal argument and analysis, which feeds on this overlap. The relevant relationship between process and result is cause-and-effect, not something more confined. And the resulting overlap in categories applies to evolutionary conservatism and other brands that emphasize institutions or reliable processes. Multiple evolutionary processes may be at work in the same field, for instance, or one evolutionary process may be influenced by a meta-process that should be subject to respect as well. Indeed, urgent calls to abandon a time-tested process might themselves be part of healthy evolution.\textsuperscript{210}

\footnotesize{205. See Burke, supra note 47, at 74, 81.
206. See Huntington, supra note 47, at 454–56 (adverting to, for example, religion and hierarchy without displaying a preference for processes or results); cf. Modern Political Theory from Hobbes to Marx 151 (Jack Lively & Andrew Reeve eds., 1989) (suggesting that debate will fruitfully shift to the question of the defensible purposes of specified traditions).
207. See Oakeshott, supra note 47, at 168–72 (emphasizing, as well, skepticism about the predictable net benefits of innovation, without indicating a process–result distinction).
208. See Hayek, supra note 47, at 62. Hayek called himself a liberal, not a conservative. See id. at 397–98. But he wanted to protect traditions that emerged from the institutions that he did trust—“spontaneously grown institutions,” including the common law. See id. at 58–63, 400.
209. See supra section II.A.
210. In some conservative theories, antecedent processes further back in chains of causation might be especially valued. See, e.g., Hayek, supra note 47, at 62; Huntington, supra note 47, at 473 (stressing...}
The foregoing makes an exclusion strategy inauspicious generally, but localized exclusions are possible. A value beyond preserving status quo might indicate that a particular process or result should be prioritized for stabilization. For DOMA, some people might prefer that same-sex couples not receive federal benefits, and therefore focus on preserving a narrow beneficiary class; other people with other preferences could focus on something else. Relying on non-conservative values might seem like cheating in the search for legal change—akin to seeing and opposing only the changes that one dislikes for other reasons—so we could reject these grounds for exclusion. That said, law itself, best interpreted, may indicate localized exclusions.

Occasionally, legal authorities pretty plainly identify that we are supposed to look for change, as with the Ex Post Facto Clause, and law might even indicate which dimensions to consider. It is true that the illustrations in Part II usually lack clear statements supporting exclusion; preliminary injunction doctrine seems to take no position on process–result combinations, while patent law rewards novelty in either processes or compositions of matter, thereby avoiding some high-stakes choices between them. On the other hand, current Eighth Amendment doctrine does appear to prioritize a continuing process of common law–like reasoning about impermissible punishments over a fixed list of particular punishments that are impermissible. Perhaps ex post facto cases will stabilize judicial attention on Guidelines formulas and nothing further upstream. We should hesitate before depending heavily on these examples because a larger process influences just how evolutionary and assertive the judiciary will be in these fields. But there are, no doubt, pockets of current law that draw attention to particular dimensions of process or result, well-rationed or not.

Even so, standard legal reason will not come close to solving the problem of evaluating legal change across multiple dimensions. There is a further complication to recall now: change beyond legal institutions was sidelined from the outset of our analysis, unless law directed otherwise. Nonlegal change has been ignored. Perhaps standard legal reason often will limit the relevance of change to legal institutions, but simple conservatism cannot otherwise lend support to this exclusion. Presumably conservatives should be conservative about legal and nonlegal institutions. If so, we have made the exclusion strategy artificially easy by lopping off antecedent processes that do not qualify as part of the legal system, as well as consequent results that take place beyond official behavior. Even with this head start, the prospects for exclusion are often doubtful and surely limited.

reliable institutions). The intuition might be that processes further back implicate a larger domain of decisions and might have received better testing. Apart from observing that many antecedent processes are not part of a single unidirectional sequence (think about social groups influencing legal institutions and vice versa), it is difficult to evaluate, let alone confirm, the strength of the generalization. The Article V and Article VII lawmaking processes are arguably antecedent to a colossally large domain of further lawmaking, but neither is time-tested in the sense of frequent use.

211. See supra text accompanying note 89.
Turning to empirical study, the outlook for exclusion is almost equally bleak. A single researcher certainly can investigate a single dimension of legal change without losing credibility or connection to larger questions. In fact, scholars might perform especially well when they specialize in one or another aspect of legal change. Small projects that sound like busywork initially, such as close attention to word counts, may turn out to be the foundation for insight into the character of legal change. Empirical focus on a particular process or result may be tested later for effects elsewhere.

The problem for exclusion in empirical study comes when anyone attempts to piece together individual findings. If we want overall measures of legal change for a legal institution, or if we want to compare the amount of legal change associated with different options, then excluding dimensions of process or result thwarts these goals. The first goal is important for comprehensive descriptions, and the second goal is crucial for normative judgments. Empirically minded observers, moreover, lack reasons based in law for any such exclusion. In this sense, empiricists are worse off than normative analysts. To the extent that law directs decision-maker attention to one result or one process, the bracketing is a matter of “ought” that should not obstruct others from better understanding the “is” of legal change.

2. Aggregate Dimensions

If exclusion fails, perhaps aggregation will work. Aggregating measures of change across dimensions of process and result is appealing because it promises to beat the $X = X + 1$ problem without the weaknesses of exclusion. Aggregation need not sacrifice a sophisticated view of the legal system nor inject nonconservative values or unimaginative restrictions on what counts as process or result. So aggregation cannot easily be criticized for changing the subject or, in Levi’s terms, “miss[ing] the point.” Changing or freezing the formula for distributing marriage benefits would count for something, as would freezing or changing the resulting benefits for same-sex couples; so, too, with every other example. Aggregation offers hope of progress toward comprehensive empirical understanding and thorough normative evaluation.

The trick is in the counting, of course. Addition across dimensions looks impossible. Change might be detected and measured in each dimension, but those measures seem incommensurable. Change is not cash, so to speak, even


213. LEVI, supra note 104, at 3; see also supra note 105. Levi understood that analogical legal reasoning has features of change and stability, but the question here is what to do about it—there and in other parts of the legal system.
though the concept may be applied to every aspect of a legal system. Change measured in words of text is not the same metric as change measured in elements of a process for interpreting those words, and neither is the same as change measured in patterns of results regarding, say, marriage benefits or permissible punishments. Even if it were clear how to measure each of these phenomena (think about assigning a value to the magnitude of change caused by DOMA’s new federal formula for marriage or the Supreme Court’s opposition to capital punishment for minors), it is not clear how to add up the scores. The same problem surfaces in analogical reasoning: we can know that one dot is bigger and another dot is moving faster, but we have trouble telling whether the first dot is bigger than the second is faster.

To be sure, we are confronting a limited type of aggregation problem—situations involving change on one dimension of process or result and no change on another dimension. “No change” could be scored as zero, leaving only one dimension with one measure of change. But apart from the possibility of three or more dimensions of interest, as in Lawrence, even the simplest cases become hard. The interesting normative problems arise when each option implicates a kind of change and a kind of status quo. Decision makers sometimes find themselves comparing an Option A that would stabilize a process while changing results (continuing to follow state-law marriage definitions, for example, or continuing to follow common law reasoning on prohibited punishments) with an Option B that would stabilize results while changing a process (creating a federal definition of marriage to exclude same-sex marriages, for example, or shifting to an expected-application version of originalism to restrict the list of prohibited punishments). These situations pose hard commensurability problems.

We have not quite reached an intellectual impasse, though. Every day, people make decisions and trade-offs despite supposed commensurability problems. If nothing else, preferences can be elicited and combined across goals that otherwise lack a single metric. With enough background commitment to evaluating legal change, observers can fight through many of these initial challenges. The best response is to identify a common metric applicable to each dimension of interest.

214. See supra text accompanying notes 133–41.
215. See, e.g., ERIC A. POSNER, LAW AND SOCIAL NORMS 185–87 (2000) (concluding that incommensurability claims relate to how people represent themselves rather than a hindrance for rational choice); JOSEPH RAZ, INCOMMENSURABILITY AND AGENCY, IN INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110, 111–12, 127 (Ruth Chang ed., 1997) (distinguishing a rationalist view from a classical view of agency in which will plays a role independent of reason); CASS R. SUNSTEIN, INCOMMENSURABILITY AND VALUATION IN LAW, 92 MICH. L. REV. 779, 793 (1994) (arguing that incommensurable values could be incorporated into rational decisions).
One suggestion is to use people’s preferences about legal change for each option on the table to aggregate values on the dimensions of process and result. Preference intensity need not be converted into cold cash; satisfaction or another metric might be used instead of willingness to pay or accept. If it makes sense to go this far, however, we might as well elicit people’s preferences about law, period. Nothing in the character of aggregated individual preferences makes them especially appropriate for representing the value of legal change or the status quo, as compared to the value of different versions of law in sum. Turning to individual preferences as the metric is close to turning away from an independent value for legal change or stability in normative decisions. And for the empiricist, reliance on preferences is even less defensible. Measuring the amount of legal change seems utterly disconnected from what people like in their laws.

Another suggestion is to search the underpinnings of conservative legal theory for a value that cuts across processes and results. Now, this approach might fracture simple legal conservatism by unearthing different values among adherents. But let us assume that fracturing will not happen or, if it does, that different metrics for legal change can be adopted by different people without harm. The deeper question is whether a search for underpinnings will compromise the integrity of legal change as an independently interesting concept. That is, will an acceptable common metric begin a conceptual drift away from legal change and toward distinct phenomena and values? A clear answer depends on a choice among plausible underpinnings. To keep the discussion focused, we can track one prevalent and accessible line of conservative reason.

Many people might have difficulty adjusting to legal change when their ex ante expectations were otherwise. People become familiar with one salient course of events, often they expect that course to continue, they plan for the future accordingly, and an unpredicted change in course is costly to them. Feelings of familiarity, expectation, and surprise are psychological facts. Although measuring those phenomena is not costless or error free, rough quantification is possible. Equally important, people experience familiarity, expectation, and surprise with respect to everything in a legal system that can be called a process or a result. Returning to an Eighth Amendment example, a person could be startled by a shift to expected-applications originalism just as she could be shocked by juvenile executions suddenly stopping, without appar-

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217. Here, I am commenting on the feasibility, not the desirability, of aligning legal norms with expectations. Among major objections is a resulting drag on legal innovation and people’s incentive to anticipate and adapt; however, there are crosscutting incentives to consider. See Levmore, supra note 204, at 1667 (considering new losers, new winners, and state officials as joint contributors to the content and timing of new law). Another issue is whether the actual influences on people’s expectations are acceptable. See, e.g., Richard A. Epstein, Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations, 45 STAN. L. REV. 1369, 1371–72 (1993) (expressing concern about a downward spiral under an investment-backed expectations test in takings law); William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 GEO. WASH. L. REV. 1265, 1268 (1999) (“[G]overnment . . . can easily condition the citizenry to expect little or no privacy.”).
ent commensurability problems hindering aggregation of these reactions. If we are comfortable totaling up feelings across relevant groups of people, aggregation becomes feasible. The same suggestion regarding individual expectations should work for personal attachment through familiarity, as well as for concerns about decision costs or transition costs thought to be associated with legal change on any dimension.

Now we can imagine solving innumerable $X=X+1$ problems in the sense of obtaining rough comparisons of how much total “legal change” accompanies competing options. Perhaps, for instance, many people’s expectations were contradicted when juvenile executions were prohibited, but nearly nobody’s expectations would be thwarted by changing the process for determining such outcomes because nearly nobody pays attention to obscure mechanisms of legal change. Perhaps more people built firmer expectations on the federal government following state definitions of marriage than on the federal government denying benefits to same-sex couples. Perhaps none of this is true. The point is that those investigating legal change could formulate intelligent questions that would collapse distinctions between processes and results. 218

No one seems to have attempted this way forward, but, without ignoring serious technical difficulties, 219 it is available. Behavioral psychologists already are studying the influence on people’s decisions of multiple reference points, such as people’s goals, survival requirements, and the status quo in a result-like sense. (All three seem to matter. 220) Not much intellectual stretching is required to investigate how people deal with different conceptions of the status quo or how people are influenced by several possible mechanisms of a status quo bias. Those efforts remain largely forthcoming. 221 In legal scholarship, we have an old stock of legal theory about the expectations of private parties, 222 plus a growing stock of data on judicial behavior and formal legal change. 223 Yet

218. Another approach to commensurability problems is a kind of nonnumerical considered judgment. My sense is that this alternative shares the prospect of overcoming an impasse on aggregation, although some people will reject it as a less transparent and less rational version of adopting a common metric. Regardless, a considered-judgment alternative likewise raises the question whether legal change is a concept with independent value.

219. One problem is getting evidence of expectations before a possible legal change to avoid retrospective reporting. If researchers do ask questions beforehand, the questioning can influence what is salient and expected. There also is the possibility that observers have no solid expectation within a range of conceivable outcomes. A careful effort to conceptualize varieties of legal uncertainty, with reference to ongoing empirical efforts to measure by survey, is Kevin E. Davis, The Concept of Legal Uncertainty (Nov. 2011) (unpublished manuscript) (on file with the author).

220. See Koop & Johnson, supra note 63, at 59.

221. One study of investment in which different versions of the status quo were tested did not track a process–result distinction. See Schweitzer, supra note 63, at 72 (including what an advisee had contributed and what the advisor had contributed last year).

222. See supra note 210.

223. See, e.g., Lawrence Baum, Measuring Policy Change in the U.S. Supreme Court, 82 Am. Pol. Sci. Rev. 905, 907 (1988) (attempting to control for case content in measuring liberal/conservative outcomes in civil liberty cases over time); Priest, supra note 19, at 202–04 (measuring spreads in final settlement offers); James F. Spriggs, II & Thomas G. Hansford, Measuring Legal Change: The
much productive investigation remains undone if the goal is translating legal change into people’s expectations, familiarity, and so on.

It is not too soon to wonder, however, what such research has to do with legal change as an independently interesting topic. Expectations, familiarity, and predictability are conceptually separable from notions of change.\(^{224}\) As we have seen repeatedly, the concept of legal change requires an object and metric of interest, which could be an antecedent process or a consequent result. On either dimension, legal decisions can be expected or not, familiar or not, and predictable or not. But those possibilities are individually and socially notable regardless of whether they match any sound working definition of legal change or status quo on any dimension of interest. A society in a state of recurring shock over legal decisions is different from one whose predictions for law are always correct. At the same time, phenomena such as expectation and surprise do not capture paradigmatic instances of legal change and the status quo.

The point is easiest to establish for new legal texts, but it holds for official behavior. Uncontroversial instances of change on one dimension of law, such as a new statute beyond recodification or an abrupt decision to stop enforcing a statute against some class of offenders, might be fully expected by a knowledgeable observer, while the persistence of the status quo on that dimension might arise as a great surprise.\(^{225}\) So, too, with aspects of the legal system that are most salient to people or easiest to follow at the lowest decision cost. Legal change may be related to these phenomena, but the relationship is not close to an identity.

Revisiting George Priest’s classic article, Measuring Legal Change,\(^ {226}\) helps make the point. Priest offered a clever proxy for uncertainty in that paper. Using elegant economic theory and attending to investment incentives and selection effects, he conjectured that changes in how judges and juries evaluate legal claims will almost always yield transitory uncertainty among litigants and their lawyers regarding how the new standard applies to particular cases. This transitory uncertainty, he thought, would often show up as an increased spread between plaintiff and defendant pretrial settlement offers, which could be tracked over time.\(^ {227}\) He then gathered such data on Cook County tort suits to measure the magnitude and pace of legal change more precisely than had generations of legal historians and commentators.\(^ {228}\) Impressive.

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\(^{225}\) An example is Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013), which offered surprisingly little change to the Court’s existing position on race-based affirmative action. See Olatunde Johnson, Commentary: Fisher’s Big News: No Big News, SCOTUSBLOG (June 24, 2013, 11:12 PM), http://www.scotusblog.com/2013/06/fishers-big-news-no-big-news/.

\(^{226}\) See Priest, supra note 19.

\(^{227}\) See id. at 200–04 (dividing the spread by actual judgments).

\(^{228}\) See id. at 194–96, 202–21 (quoting historians such as Friedman and Maitland).
But the project has a questionable sense of proxy and ultimate concern. Priest found a plausible indication of litigant or lawyer uncertainty and a direct measure of litigant behavior, each of which is socially significant on its own. Their connection to legal change, whichever conception Priest was using, is attenuated and not obviously important to everyone else. Priest himself noted that a “new rule” might be expected, adverting to the conceptual divide between expectations and canonical forms of legal change. Moreover, Priest read a stack of judicial opinions for indications of formal doctrinal change, which is not a proxy for legal change but the real thing, just in one form. Knowing the sources of people’s uncertainty is useful, of course, as is tracing the effect of doctrine on official and litigant behavior. Studies like Priest’s cannot fully accomplish those goals. But they do offer valuable information about social life—regardless of whether the proxy for uncertainty also is a proxy for legal change of any kind. Revealingly, Priest ended his article by calling case reading “a crude but reasonably adequate proxy” for his settlement ratios when such data is unavailable. He was hunting for uncertainty, and rightly so.

The exercise of identifying attractive metrics for aggregating measures of legal change across dimensions of process and result, it seems to me, suggests that we either accept serious sacrifices in precision or embrace the obvious. That is, we could either accept that plausible proxies for measuring legal change in aggregate are quite crude, or we could decide that the aggregating measure is worth more than what it is supposed to stand in for. If we need a model from legal practice, the doctrine of stare decisis can facilitate subtle moves toward aggregation via conceptual drift. When courts bear down on the question whether to change doctrine, they introduce practical considerations that Priest and everyone else should account for. Among other factors, judges express concern about real-life uncertainty, reliance, and workability under current circumstances. Courts might not have good information on these

229. Id. at 209 (proceeding to assume, however, that “all rules in question were unanticipated”).
232. Cf. Priest, supra note 19, at 210 (acknowledging the issue of multiple causes of uncertainty, but asking rhetorically whether there is any better measure of legal change).
233. Id. at 222.
234. In trying to make sense of the Supreme Court’s attempt to detect “new law” in contexts such as habeas corpus and qualified immunity, Richard Fallon and Daniel Meltzer nicely suggested moving away from conceptual claims about lawmaking to a potentially empirical inquiry into ex ante predictability from the perspective of competent lawyers. See Fallon & Meltzer, supra note 19, at 1763. My point about proxies has a similar spirit. But here I am addressing commensurability problems arising from multidimensional process–result combinations, which was not Fallon and Meltzer’s project, and I am not committed to a lawyer’s perspective on predictability.
phenomena or misjudge their importance, but even educated guesswork is a sign that decision makers can use basic human concerns to slice through process–result commensurability problems. They can do so by drifting away from the concept of legal change toward underlying reasons to care.

3. Law Without Change?

The possibility that common metrics are independently important triggers this thought: The difficulty of aggregating measures of legal change per se might not be worth the trouble, at least in normative analysis. Legal decision makers have work to do with limited resources. They can gather only so much reliable information on how multiple dimensions of a legal system are changing or remaining the same, on top of any sensitivity to uncertainty, decision costs, and other effects. Tolerance for legal-change investigations will depend on the depth of one’s commitment to some version of the status quo, but that commitment is subject to challenge. Setting aside legal commands that demand inquiry into change, normative theorists have much ground to cover before such inquiries are fully defended. Before closing, then, a gesture toward significant reform in standard legal analysis seems appropriate.

We can try to picture a revision of legal analysis that does not depend on the concept of legal change. The basic idea would be to arrive at correct answers, not old answers. We can start imagining how legal analysis would operate without granting independent value to status quo answers. “Law without change” might not be an easily recognized form of legal decisionmaking today, and avoiding all references to change cuts hard against widespread lawyer habits. But perhaps legal argument could retain respect for legal authority without entertaining conceptually slippery or difficult-to-aggregate claims about the status quo. Legal decisionmaking could prize consistency with approved sources of authority, and even account for people’s actual expectations and reliance on this or that part of the world, without adding points solely for law’s constancy over time.

We do have a small-scale model for such analysis. While withholding extra credit for existing practice, recall the pedestrian example of preliminary injunctions. Identifying the status quo that is supposed to be preserved, with all the difficulty of specification, probably is not worth the distraction in this setting. Thoughtful judges must puzzle over what “preserving the status quo” can possibly mean when a court starts ordering people around, while no judge should doubt the significance of other considerations such as likelihood of success on the merits, the difficulty of undoing the effects of an erroneous

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236. See supra section II.C.1.
decision on limited information, and the comparative importance of the interests at stake. Preliminary-injunction analysis can operate just fine without specifying a status quo, and formal rules of procedure do not command otherwise. Thus, a judge may thoughtfully decide whether an environmentally risky dump is entitled to stay open while litigation unfolds without deciding how to tally up the combination of change and stability caused by interim judicial protection. And the distracting suggestion that parties in such cases should fight over who truly supports the status quo now “frequently is ignored” if not rejected outright.237

Similar remarks apply to the Defense of Marriage Act. The Windsor majority and dissent disagreed about whether the Act made legal change, but an unambiguous answer to that question depends on excluding one or more dimensions from view. Nobody offered a clear reason for their preferred exclusion. The Justices were equally unhelpful on the question of whether measures of legal change can be aggregated. Commitments underpinning the Justices’ leaning toward one or another status quo were left unexplained, and thus any common metric remained beyond reach. Such nagging analytical gaps should make us wonder whether judges really must close them—whether other considerations alone can ground a judgment. It is not as if the Justices had nothing to talk about except legal change. They wrote at length about independently significant considerations, including the value of states making policy on marriage and the equality, liberty, and dignity effects on couples who are left out of the category.238

As a quick test of importance, flip some status quos. Suppose that, in 1996, all states excluded same-sex couples from their marriage laws and the federal government had always had its own definition of marriage that likewise excluded same-sex couples. Suppose further that, in that year, Congress reenacted the federal definition on a record just like the real DOMA, and then some states began including same-sex couples in their marriage laws. Would, or should, anyone who agrees with Windsor want to uphold my hypothetical federal statute just because its formula stayed the same? Or suppose that, in 1996, all states included same-sex couples in their marriage laws, but the federal government switched from a federal definition of marriage that included same-sex couples to a definition that excluded them. Would, or should, anyone who disagrees with Windsor want to condemn this hypothetical federal statute just because the results for same-sex couples seeking federal benefits changed? Why?

Even if the answers are not self-evident, these questions are productive. They help test how much we care about legal change per se on dimensions of process or result, compared to other considerations. We all care about considerations beyond change. My guess is that, once asked, we have a hard time offering reasoned explanations for sustaining a narrow focus on one or another dimen-

237. Wright et al., supra note 79, § 2948.
sion of legal change without turning to those other considerations. True, particular areas of law do strongly indicate sensitivity to change somehow defined, such as ex post facto claims of the kind examined in Peugh.239 In those situations, the best response might be to translate multidimensional process–result problems into a common metric involving, say, expectations with respect to a preferred cohort, such as judges or defendants or ordinary people. Regardless, the notion of legal change need not be exported to other fields of normative decisionmaking where the directions are less obvious. In those spaces, we can respect the best available meaning of legal authorities without checking our interpretations for change per se.240

Given everything else covered in this Article, I will only plant that thought. Developing a practice of legal argument without change claims is a major project standing alone. Without going that far, more of us can start wondering about the persuasiveness of arguments grounded in claims about legal change. These arguments must launch from a workable conception of legal change that incorporates multiple dimensions of process and result, before getting to plausible positive and normative theories thereof. If it is possible in the future to conduct legal argument without much consideration of legal change, that choice easily could be best given a combination of conceptual multidimensionality, less-than-perfect positive theory, and debatable normative propositions regarding the status quo. In the meantime, we might take the simpler step of making discussions about legal change more informed, more thoughtful, and more creative.

**CONCLUSION**

A recurring problem for identifying and evaluating legal change arises when an official decision implicates combinations of change and status quo along different dimensions of process and result. This problem will not go away—process–result combinations are built into legal institutions—and the problem has no single or perfect solution. In a few situations, law will dictate exclusion of the complicating dimensions for decision makers, although observers will remain free to wonder about them. In many more situations, we can aggregate dimensions of interest using a common metric, with some effort and some errors, and with conceptual drift away from legal change. Finally, in some unknown number of situations, we might openly abandon the search for legal change and pay better attention to other matters of shared concern. These lessons are not extraordinarily precise, but they represent real progress and a hope for more in the future.

239. See supra text accompanying notes 120–26.

240. An arguable devotee of law without change is Clarence Thomas, who appears to place little or no value on judicial precedent when it conflicts with his judgment about the Constitution’s true meaning. Note, however, that a person could dispense with inquiries into legal change and consider only judicial precedent and never the Constitution’s text. Thomas’s ordering of legal authorities must come from commitments apart from change.
This Article began with the debate over legal change in *Windsor*, but I omitted a remarkable development during oral argument. A more nuanced picture of DOMA appeared. After asserting that things stayed the same when the statute was enacted, Paul Clement acknowledged under questioning that Congress was, “in a sense, forc[ed] . . . to choose between its historic practice of deferring to the States and its historic practice of preferring uniformity,”241 apparently as in uniformly defining marriage in cross-sex terms. A little later, the Solicitor General similarly confessed that Congress faced a choice between different kinds of uniformity,242 and therefore different kinds of stability and change. I count this as an intellectual breakthrough, not to be expected from tacticians engaged in oral advocacy where acknowledging complexity can be dangerous.

When the time came to issue opinions, it is true, the Justices looked worse than the advocates. Their arguments reverted to competing focuses on the formula by which benefits were distributed as opposed to the resulting class of people who received benefits. One side focused on process, the other on results, and neither showed why. But progress in understanding legal change need not stop there. It could be that with additional pressure, sustained over time, many able analysts will think through the realistic potential for measuring and judging legal change, and the best way forward will become clearer—however much change or stability that course requires.

242. See id. at 88–89.