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Paradoxes of Positivism and Pragmatism in the Debate about Originalism

ANDRÉ LEDUC*

The long-running debate between originalism and competing accounts of the Constitution has unfolded with little attention to classic American jurisprudential concepts of legal positivism and legal pragmatism. In this syncretic article, I explore how these jurisprudential and theoretical strands fit together. I also explore several lessons we can learn about legal positivism and legal pragmatism and one critical lesson we can learn about the debate about originalism, if we contextualize the debate over originalism in that part of the space of reasons.

First, positivist and natural law originalisms are substantially similar in their substantive constitutional content. Originalism critics—both those who embrace positivism and those who embrace natural law—similarly share substantially congruent substantive criticisms of originalism. These parallels raise an important question about the significance of the distinction between legal positivism and natural law. The debate over originalism shows that the opposition between legal positivism and natural law may be less interesting or important than it is generally taken to be.

Second, the fundamental difference between originalism—which, in relevant part, defends a deontological account of constitutional law—and its consequentialist pragmatist critics provides another argument why the debate about originalism cannot be resolved on its own terms. I have previously argued that sophisticated philosophical premises make the originalism debate pathological rather than fruitful. But those arguments are quite highfalutin. This article provides another argument for the fruitlessness of the debate. Without common grounds between the protagonists as to the place of consequences in constitutional decision process, a resolution of the more particular issues in the debate over originalism cannot be hoped for or expected. But as we contextualize the originalism debate we may understand why it is a dead end in our constitutional theory and, more importantly, in our constitutional decision process. It is a dead end because the two sides in the debate have

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inconsistent theories of the nature of constitutional law. With a better understanding of how the debate fits in with other parts of our constitutional jurisprudence, we may leave the debate behind in our continuing constitutional discourse.

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The debate over constitutional originalism has proceeded with scant attention to many of its premises and assumptions.¹ Those assumptions and tacit premises have been important in the debate; indeed, they have made the debate possible.² I have explored a number of the more subtle philosophical and jurisprudential assumptions and unstated premises in a series of prior articles.³ My project in those articles was to tease out the unstated underlying commitments of the protagonists in the debate over

1. André LeDuc, *The Ontological Foundations of the Debate Over Originalism*, 7 WASH. U. JURIS. REV. 263, 264-65, 306 (2015) [hereinafter LeDuc, *Ontological Foundations*]; see, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 219 (1997) [hereinafter BERGER, *GOVERNMENT BY JUDICIARY*] (articulating a classic critique of the Warren Court’s Equal Protection jurisprudence on the basis of the Fourteenth Amendment’s original understanding).

2. LeDuc, *Ontological Foundations*, *supra* note 1, at 264-65, 306; see generally André LeDuc, *Originalism, Therapy, and the Promise of the American Constitution* (May 19, 2016) (unpublished manuscript) (on file with author) [hereinafter LeDuc, *Originalism, Therapy, and the Promise of the American Constitution*].

3. See, e.g., LeDuc, *Ontological Foundations*, *supra* note 1, at 264-65, 306; André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN ST. L. REV. 131, 132-33 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*]; André LeDuc, *Political Philosophy and the Fruitless Quest for an Archimedean Stance in the Debate over Originalism*, 85 UMKC L. REV. (forthcoming 2017); André LeDuc, *Competing Accounts of Practical Reasoning in the Debate over Originalism 1-2* (Mar. 24, 2016) (unpublished manuscript) (on file with author) [hereinafter LeDuc, *Formalism and Interpretation*]; André LeDuc, *The Nature of Our Constitutional Practice: Unstated Premises about Meaning in the Debate over Originalism*, __ BYU PUB. L. J. (forthcoming 2016) [hereinafter LeDuc, *Constitutional Practice*].

originalism and to defend the claim that those commitments have made the debate fruitless and even pathological.⁴

The debate has also proceeded with little attention to its jurisprudential and theoretical context. In particular, it has historically been indifferent to the long-standing debate between legal positivism and natural law and oblivious to the American tradition of legal and philosophical pragmatism and the controversies that surround them.

This article continues my syncretic project of fitting historically distinct strands in our constitutional theory and jurisprudence together. The task here is in some ways simpler than in my earlier articles, but is equally important. Attention to these two jurisprudential background claims immediately exposes important tensions and paradoxes in the debate about originalism. Legal positivism claims that law is separable from morality or ethics and that legal obligation is independent of moral obligation.⁵ That claim has generally been met with apparent indifference by both sides in the classical debate about originalism.⁶ The distinction between legal positivist accounts of law and alternative accounts like those of natural law has been largely disregarded.⁷ Originalism is articulated in both positivist and non-positivist versions; however, the positivist originalist line of the theory is clearly dominant.⁸

Recently, both legal positivist and natural law originalists have begun to contextualize originalism within this framework.⁹ These new legal

4. See LeDuc, *Ontological Foundations*, *supra* note 1, at 264-65, 306; LeDuc, *Anti-Foundational Challenge*, *supra* note 3, at 132-33; LeDuc, *Formalism and Interpretation*, *supra* note 3, at 1-2; see generally LeDuc, *Originalism, Therapy, and the Promise of the American Constitution*, *supra* note 2 (describing the pathological features of the debate).

5. See, e.g., H. L. A. HART, *THE CONCEPT OF LAW* 155-56 (2d ed. 1994) (1961) [hereinafter HART, *CONCEPT*]; JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 151-52 (2001) [hereinafter COLEMAN, *PRACTICE*] (emphasizing the modal character of the separation thesis: legal obligation and moral obligation are not necessarily congruent, rather than that it is necessary they not be congruent); H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 *HARV. L. REV.* 593, 593-94 (1958) [hereinafter Hart, *Positivism and Separation*].

6. I will term the originalism that preceded the so-called “New Originalism,” “classical originalism,” and the debate about that theory’s claims the “classical” debate.

7. See ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 102 (1999) [hereinafter GEORGE, *NATURAL LAW*] (leading defense of natural law for a contemporary American political theory audience); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 23-24 (2d ed. 2011) [hereinafter FINNIS, *NATURAL LAW*].

8. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 45 (Amy Gutmann ed., 1997) [hereinafter SCALIA, *INTERPRETATION*] (arguing that interpreting the Constitution based upon anything other than the social fact of the Constitution’s original understanding or of its Amendments is impossible without recourse to a judge’s personal preferences); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) [hereinafter BORK, *TEMPTING*] (arguing for the impossibility of such purported alternatives). See also COLEMAN, *PRACTICE*, *supra* note 5, at 143 (that predominance is likely a corollary of the predominance of legal positivism more generally; originalists are, and are speaking to, a positivist audience).

9. Jeffrey Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* (forthcoming 2016), available at <http://ssrn.com/abstract=2793875> [hereinafter Pojanowski & Walsh, *Enduring*

positivist originalists and natural law originalists claim to offer powerful new versions of originalism.¹⁰ Analyzing the classical debate in the context of the traditional distinction between natural law and positive law allows us to assess the claims of the new positivist originalists and the new natural law originalists. Their claims to offer powerful new versions of originalism that advance the debate are mistaken.

Although the participants in the debate between legal positivists and their critics suggest that the distinction is fundamental to jurisprudence—a stance that has been prevalent in Anglo-American jurisprudence since the 19th century and classically for even longer¹¹—the positivist and non-positivist originalists reach substantially uniform substantive positions.¹² Students of the Hart-Fuller debate and Ronald Dworkin's assault on legal positivism might anticipate that these two strands of originalism would be substantially different, reflecting the great differences in the theories underlying their foundations.¹³ On the contrary, the substantive differences appear quite modest.¹⁴ In the case of the debate over originalism, the distinction between natural law and positive law appears to make little difference.

The substantial conformity of natural law and positive law originalism raises an interesting and important question about the significance of the choice between natural law and positive law theory.¹⁵ One important qualification emphasizes the logical modality of the separability thesis of

Originalism]; William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015) [hereinafter Baude, *Our Law*]; Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817 (2015) [hereinafter Sachs, *Legal Change*].

10. See Baude, *Our Law*, *supra* note 9, at 2351; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 3.

11. See HART, CONCEPT, *supra* note 5, at 185-89; Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 631 (1958) [hereinafter Fuller, *Positivism and Fidelity to Law*]; Hart, *Positivism and Separation*, *supra* note 5, at 593-94, (classic modern defense of legal positivism); see, e.g., JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 309, 312 (2d prt. 1961) (1789) (classic statement of utilitarianism); see, e.g., JEAN-JACQUES ROUSSEAU, *The Social Contract*, in THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES 178-80 (Susan Dunn ed., 2002) (1762) (classic social contract account of the origin of the state and of legal obligations).

12. See *infra* text accompanying notes 340-60.

13. See HART, CONCEPT, *supra* note 5, at 181-89; Fuller, *Positivism and Fidelity to Law*, *supra* note 11, at 631; Hart, *Positivism and Separation*, *supra* note 5, at 593-94; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 7-9 (1977) [hereinafter DWORKIN, TAKING]; see also *infra* text accompanying notes 340-60; see generally W.J. Waluchow, *The Many Faces of Legal Positivism*, 48 U. TORONTO L.J. 387 (1998) (surveying the 20th century debates about legal positivism).

14. See Jeremy Bowers et al., *Which Supreme Court Justices Vote Together Most and Least Often*, N.Y. TIMES (July 3, 2014), http://www.nytimes.com/interactive/2014/06/24/upshot/24up-scotus-agreement-rates.html?_r=0 (we see this modest difference most clearly in the substantial overlap in decisions on the Supreme Court by Justice Scalia, on the one hand, and Justice Thomas, on the other hand).

15. See COLEMAN, PRACTICE, *supra* note 5, at 125-26 (describing the opposition of natural law and positive law theory in the context of a contemporary defense of legal positivism).

legal positivism. It asserts that legal and moral obligations are not necessarily coextensive, not that those legal and moral obligations are necessarily distinct or disjointed.¹⁶ Thus, the substantial substantive overlap between a natural law originalism and a positive law originalism should not necessarily be too surprising. Moreover, the critics of originalism adopt both positivist and non-positivist stances. Thus, the distinction between positive law and natural law appears similarly to result in little substantive difference for the critics of originalism in the debate. For example, the substantive criticisms of originalism by natural law theorists like Dworkin appear to have little difference to the criticisms made by positivists like Posner and Sunstein. In each case, the results that originalists defend and the narrow sources of constitutional law that they privilege are rejected by their critics.¹⁷ The first paradox is thus why a seemingly important jurisprudential distinction does not appear to make a significant difference with respect to either the originalist theories defended or the alternative theories advanced by the critics in the originalism debate.

The paradox dissolves with the recognition that, as a matter of American constitutional law and theory, the distinction between legal positivism and natural law is of little moment. Certainly it is of far less moment than has been generally assumed. The reason that it is of less importance can be explained when examining the American constitutional context, where the practice of constitutional argument determines the corpus of constitutional law in general¹⁸ and determines the outcome of any particular constitutional controversy in particular. In that context, the debate between natural law and legal positivism is between two theories that each account for a fixed, determinate body of law. American constitutional law is not consistent with that description. As a result, the competing originalist accounts offered by legal positivism and natural law are each inadequate to capture the nature of American constitutional law. But this failure has not been generally recognized or acknowledged by the proponents.¹⁹

16. *Id.*

17. Compare DWORKIN, TAKING, *supra* note 13, at 7-10, with Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1368 (1990) [hereinafter Posner, *Bork and Beethoven*], and Cass R. Sunstein, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 75-77 (2005) [hereinafter SUNSTEIN, RADICALS].

18. Judge Posner makes the point in his analysis of constitutional rights under the law of national security. See RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 17 (2006) [hereinafter POSNER, SUICIDE PACT] (“Constitutional rights are created mainly by the Supreme Court . . .”).

19. Bobbitt and Farber each recognize this failure in important ways, although only Farber draws the connection with the legal positivist claims and neither draws the implication for the debate between natural law and legal positivist theories. See generally PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, FATE]; see also Daniel A. Farber, *Legal*

Legal pragmatism insists that law is properly understood in instrumental, functional terms.²⁰ It is a social institution that is not only to be understood, but is also to be used, as a tool. It cannot be understood in anti-consequentialist, deontological terms alone. For pragmatists, the law is a tool that is used to efficiently organize communities and their consumption and production functions.²¹ Legal constitutional pragmatists like Justice Stephen Breyer, Judge Richard Posner, and Cass Sunstein therefore have roundly rejected the deontological stance of originalism.²² But they have not recognized that their rejection of that deontological stance in originalism simply reprises long-standing philosophical and jurisprudential debates about pragmatism.

Like originalism, legal pragmatism is defined in different ways.²³ Its relationship to philosophical pragmatism and to legal realism has been controversial.²⁴ Some have discounted the relationship of legal pragmatism to philosophical pragmatism, while others have emphasized the common threads and themes.²⁵ Here, legal pragmatism is a theory of law (including constitutional law) and decision exemplified by the methods of Richard Posner and Cass Sunstein, stripped of the doctrinal excesses and theoretical commitments of law and economics in the case of Posner²⁶ and stripped of

Pragmatism and the Constitution, 72 MINN. L. REV. 1331, 1338-50 (1988) [hereinafter Farber, *Pragmatism*].

20. See generally MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 15-18 (rev. ed. 1957).

21. See JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 169-72 (1979) (offering a proposed comprehensive classification of the functions of law and remarking on the limited systematic attention that the function of law has received).

22. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 74 (2005) [hereinafter BREYER, ACTIVE LIBERTY] (“Whatever ‘subjectively limiting’ benefits a more literal, ‘textual,’ or ‘originalist’ approach may bring, and I believe those benefits are small, it will also bring with it serious accompanying consequential harm.”); see, e.g., Posner, *Bork and Beethoven*, *supra* note 17, at 1368; SUNSTEIN, RADICALS, *supra* note 17, at 75-77.

23. See, e.g., COLEMAN, PRACTICE, *supra* note 5, at 6 n.6; RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 29 (1990) [hereinafter POSNER, PROBLEMS]; Farber, *Pragmatism*, *supra* note 19, at 1337 (“I use the term *legal pragmatism* for the nonfoundational approach to law.”); see generally Mark S. Kende, *Constitutional Pragmatism, the Supreme Court, and the Democratic Revolution*, 89 DENV. U. L. REV. 635, 655-56 (2012) [hereinafter Kende, *Pragmatism*]. Legal pragmatism also sometimes carries a realist commitment to the absence of a neutral stance in legal adjudication and interpretation. See generally Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) [hereinafter Posner, *Against Constitutional Theory*].

24. See, e.g., Kende, *Pragmatism*, *supra* note 23, at 637 (“Thomas Grey has made clear that a legal pragmatist need not be a philosophical one.”) (footnote omitted); RONALD DWORKIN, LAW’S EMPIRE 151-75 (1986) [hereinafter DWORKIN, EMPIRE] (criticizing pragmatism).

25. Farber, *Pragmatism*, *supra* note 19, at 1337 (“This term highlights the connection between the new turn in legal thought and the American pragmatist philosophers.”); see generally Kende, *Pragmatism*, *supra* note 23, at 637 (citing authorities emphasizing various connections between philosophical pragmatism and legal pragmatism).

26. It is Posner who has abandoned his early claims that law maximizes wealth, for example. See Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637, 1669-70 (1998)

the commitments to incompletely theorized decisions and judicial minimalism in the case of Sunstein.²⁷ Legal pragmatism emphasizes law's function and instrumentalism as a social practice and eschews bold and systematic theory.

Legal pragmatists challenge the originalists' account of constitutional law in which the judicial decision maker is neither required nor permitted to take the consequences of her decision into account.²⁸ Instead, the judge must only determine the best interpretation of the original understanding or the intentions of the relevant actors who adopted the relevant constitutional provision.²⁹ The pragmatists assert that such an approach disregards the instrumental character of law, including constitutional law.³⁰

Pragmatists like Posner assert that constitutional cases present disputes about the correct instrumental answer.³¹ For Posner, law is important because it works in the sense of maximizing social wealth or other fundamental social values.³² Under the pragmatic template, there is no other foundation or metric for constitutional law than that of functionality as a social tool.³³ Thus, originalism's commitment to original meanings requires pragmatists to reject originalism because its consequences would be unacceptable.³⁴ Sunstein argues that those consequences are unacceptable because they conflict with our most fundamental judgments and values.³⁵ Characterizing the values as fundamental here does not assert that they have a logical or ontological priority; it only asserts that the

[hereinafter Posner, *Problematics*] (distancing himself from his earlier claims that justice was a matter of rules maximizing wealth); see generally POSNER, PROBLEMS, *supra* note 23.

27. See generally SUNSTEIN, RADICALS, *supra* note 17; CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) [hereinafter SUNSTEIN, ONE CASE AT A TIME]; CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 49 (1996) [hereinafter SUNSTEIN, LEGAL REASONING].

28. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989) [hereinafter Scalia, *Originalism*]; see also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 17 (1971) [hereinafter Bork, *Neutral Principles*]; BREYER, ACTIVE LIBERTY, *supra* note 22, at 74; Posner, *Bork and Beethoven*, *supra* note 17, at 1368; SUNSTEIN, RADICALS, *supra* note 17, at 75-77.

29. Scalia, *Originalism*, *supra* note 28, at 856-57; see Bork, *Neutral Principles*, *supra* note 28, at 17.

30. See SUNSTEIN, RADICALS, *supra* note 17, at 75-76.

31. See POSNER, PROBLEMS, *supra* note 23, at 29 (articulating the claim that law is best understood as maximizing social wealth).

32. See RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 6 (1983) [hereinafter POSNER, ECONOMICS]; see also POSNER, PROBLEMS, *supra* note 23, at 29; *contra* Posner, *Problematics*, *supra* note 26, at 1669-70 (distancing himself from his earlier wealth-maximization claims).

33. See POSNER, ECONOMICS, *supra* note 32, at 6; see also POSNER, PROBLEMS, *supra* note 23, at 29.

34. See SUNSTEIN, RADICALS, *supra* note 17, at xiii-xv.

35. See *id.* at 83-84 (emphasizing the right to privacy derived by and from *Griswold v. Connecticut* and noting that those rights are hard to preserve in an originalist constitutional jurisprudence).

conflict is with judgments and values that we are unprepared to discard in order to preserve originalism. Thus, if the test of constitutional law is only whether it works to give us the democratic republic that we want, then readings or interpretations of the Constitution that do not help to realize the best constitutional law for that republic may be rejected.³⁶

The nature of the dispute between the instrumental account of constitutional law defended by the pragmatists and the formal, interpretative model defended by the originalists raises the question of how such a debate could ever be resolved. The dispute over instrumental and non-instrumental accounts of constitutional law may appear similar to the ongoing debate in moral philosophy between theories that make pursuit of what is right of paramount importance and those that make pursuit of what is good most important.³⁷ If the debate over originalism is grounded on a similar disagreement about the nature of law, then our understanding of the opportunities for resolution of the originalism debate may be informed by the course of that moral theory controversy. To the extent that the debate over originalism shares elements of that controversy in moral theory and to the extent that the underlying dispute has gone unresolved, we may question how the debate over originalism can be resolved. The second paradox is that so many protagonists have joined the debate over originalism without acknowledging or addressing the challenge to any potential resolution of that debate which would arise from the inconsistent tacit premises about whether constitutional law has a teleological or non-teleological character.

This paradox can be dissolved, too. With the recognition that originalism and legal pragmatism adopt fundamentally different stances with respect to the instrumental nature of constitutional law, we can understand why those inconsistent stances have brought the debate to a dead end or, at the least, a standstill. There is little reason to believe that a debate about constitutional theory and interpretation will resolve the question whether law, including constitutional law, is best understood as independent or autonomous (and thus to be understood and applied independently or, at least, indirectly, without a direct correspondence with any functional character) or whether it is best understood instrumentally, simply as a tool for ordering complex human societies and maximizing whatever those societies value maximizing. Moreover, both kinds of argument are part of our canonical constitutional decision process. This disagreement holds the debate hostage and explains why the debate cannot make headway in the face of that disagreement.

36. *See id.* at 75-76.

37. *See generally* W.D. ROSS, THE RIGHT AND THE GOOD (Philip Stratton-Lake ed., 2002) (1930) (defending a deontological moral theory).

I. POSITIVISM AND ORIGINALISM

The debate over legal positivism has been one of the most celebrated jurisprudential controversies of the late 20th century and the claims of legal positivism and its critics continue to attract substantial attention.³⁸ But little attention has historically been given to placing originalism and its critics within the context of that debate.³⁹ The reason for that failure is the pretension generally present on both sides of the debate that the positions are commonsensical and without need for jurisprudential analysis or foundations.⁴⁰ Once we are attentive to the framework of the debate over legal positivism, it may also appear puzzling how similar natural law and positivist originalist theories appear to be with respect to their implications for substantive constitutional law.⁴¹ Confirmation of the substantial congruence of the substance of the two theories also comes from the degree to which Justices Scalia and Thomas vote together. Nevertheless, while there are important consistencies between natural law and positive law originalism, there are also differences: natural law originalism generally denies legitimacy to non-originalist precedent. Randy Barnett would go much further than Justice Scalia, for example, in striking down precedent.⁴²

The place of originalism within the positivist/natural law framework has only very recently started to command attention in the debate.⁴³ Within the

38. See HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW v-vi (Jules L. Coleman ed., 2001) [hereinafter HART'S POSTSCRIPT]; BRIAN LEITER, *Legal Realism and Legal Positivism Reconsidered*, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 59-80 (2007) (arguing both that the traditional account that treats legal positivism as having offered a persuasive critique of legal realism and that the two theories are in fact compatible because they pursue different tasks). Scott Hershovitz has claimed that the debate over legal positivism has been the central debate of late 20th century Anglophone jurisprudence, but it has been small potatoes by comparison to the debate over originalism. See Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160, 1162 (2015) ("For more than forty years, jurisprudence has been dominated by the Hart-Dworkin debate.").

39. See Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1, 14 (2009) [hereinafter Berman, *Bunk*] (cataloging 72 theoretical varieties of originalism distinguishing across manifold axes but ignoring the distinction between positive law and natural law originalism); see generally HART'S POSTSCRIPT, *supra* note 38; DWORKIN, TAKING, *supra* note 13; but see James A. Gardner, *The Positivist Foundations of Originalism: An Account and Critique*, 71 B.U. L. REV. 1, 4-8 (1991) [hereinafter Gardner, *Positivist Foundations*] (arguing that originalism is committed to legal positivist premises).

40. In the case of originalism, see, e.g., Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823 (1997).

41. See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004) [hereinafter BARNETT, LOST] (deriving consequences like that of positive law originalism from natural law); Randy Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7, 12-13 (2006) [hereinafter Barnett, *Infidelity*]; Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 CONST. COMMENT. 257, 261, 263 (2005) [hereinafter Barnett, *Trumping*] ("[W]hy should precedent . . . bother originalists overly much if it conflicts with the original meaning of the Commerce Clause?").

42. See generally Barnett, *Infidelity*, *supra* note 41; Barnett, *Trumping*, *supra* note 41.

43. See Baude, *Our Law*, *supra* note 9, at 2351; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 1; see generally Sachs, *Legal Change*, *supra* note 9.

academy, originalists have begun to make cases for both positive law and natural law originalism expressly.⁴⁴ That work betrays a misunderstanding of the traditional positions taken in the debate. The limited direct role, if any, of natural law argument in our contemporary constitutional argument and decision results in a substantive constitutional law that originalist theory must account for, as well as seek to critique. Only the most radical natural law originalists (like Randy Barnett) would employ natural law argument to reconstruct that law more radically than would the positivist originalists. Some have suggested that the appeal to positivist premises is new.⁴⁵ Those claims fundamentally misunderstand the claims of traditional originalism in a cavalier way.⁴⁶ The new positivist and natural law originalists mistake the tacitness of invoking positivist premises by classical originalism for a commitment to very different theoretical foundations.⁴⁷ These claims permit the new positivist originalists to purportedly offer a new foundational argument for originalism.⁴⁸ Others have defended a natural law originalism—without even noticing Justice Thomas’s defense of such a theory.⁴⁹ They, too, claim to have articulated a new version of originalism that is superior to the old and resistant to the previous criticisms.⁵⁰

I will first correct this flawed historical narrative. Second, I will explain why the new articulation of the positions of the originalists and their critics within the context of the positive law/natural law dichotomy does not advance the debate. The same paradoxical congruence between the two versions of originalism reemerges. That paradox is resolved in the same way as the paradox with respect to the congruence of the two forms of originalism in the classical debate.

A. Positivist and Non-Positivist Originalisms

The dominant form of originalism generally offers a positivist theory of the legal obligations of constitutional law.⁵¹ Because legal positivism is an

44. Baude, *Our Law*, *supra* note 9, at 2351-52 (positivist); Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 1 (natural law).

45. See Baude, *Our Law*, *supra* note 9, at 2351 (characterizing the development as the “positive turn”); Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 1 (natural law).

46. See, e.g., Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 5-6.

47. See *id.*

48. See Baude, *Our Law*, *supra* note 9, at 2351-52 (positivist); Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 3-4 (natural law).

49. See generally Clarence I. Thomas, *Toward a “Plain Reading” of the Constitution: The Declaration of Independence in Constitutional Interpretation*, 30 HOW L. REV. 983 (1987) [hereinafter Thomas, *Plain Reading*].

50. See Baude, *Our Law*, *supra* note 9, at 2351 (positivist); Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 3 (natural law).

51. See, e.g., Gardner, *Positivist Foundations*, *supra* note 39, at 13-15. I will explore natural law originalism below. One notable exception to the claim that originalist theories are positivist is the

account of law and legal obligation, it warrants noting that positivist originalism treats the Constitution as law.⁵² That claim has generally been made tacitly without significant argument; it is treated as obvious, perhaps deservedly so. But the counterintuitive contrary position has been asserted by originalism's critics.⁵³ Moreover, some new originalists have questioned whether classical originalism is a positivist theory.⁵⁴ After briefly describing legal positivism, I will demonstrate that the dominant form of classical originalism is positivist.

Legal positivism stands in opposition to natural law.⁵⁵ There are a number of variants of legal positivism, and that variety is reflected in the varieties of legal positivist originalisms.⁵⁶ Inclusive legal positivism, the dominant form, acknowledges that there may be "moral criteria of legality" as well as positive legal sources.⁵⁷ The source of law is a matter of social facts; morality has no role as a source of legal obligation, but the overlap between legal and moral obligation is not problematic.⁵⁸ According to that account offered by, *inter alia*, Justice Scalia and Judge Bork, law is exclusively a social artifact.⁵⁹ That is, law's existence and content depends solely on social facts.⁶⁰ But Justice Scalia and Judge Bork also believed that

natural law originalism of Justice Thomas and Randy Barnett. See SCOTT DOUGLAS GERBER, *FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS* 45 (1999) [hereinafter GERBER, *FIRST PRINCIPLES*]; BARNETT, *LOST*, *supra* note 41, at 112-13.

52. See BORK, *TEMPTING*, *supra* note 8, at 171-76; see generally Sachs, *Legal Change*, *supra* note 9.

53. See BORK, *TEMPTING*, *supra* note 8, at 171-76 (the critics' claim is perhaps not fairly represented in Bork's account).

54. See Baude, *Our Law*, *supra* note 9, at 2351 (positivist); Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 5-6 (natural law).

55. See generally Brian Bix, *On the Dividing Line Between Natural Law Theory and Legal Positivism*, 75 *NOTRE DAME L. REV.* 1613 (2000) [hereinafter Bix, *Dividing Line*] (broadly discussing the points of agreement and disagreement between legal positivism and natural law theory); Hart, *Positivism and Separation*, *supra* note 5.

56. See COLEMAN, *PRACTICE*, *supra* note 5, at 67-69 (distinguishing inclusive and exclusive legal positivism).

57. See *id.*

58. See *id.* Thus, Justice Thomas's natural law originalism would not qualify as an exclusive legal positivist theory because of its apparent reliance upon moral theory in determining legal obligations. See GERBER, *FIRST PRINCIPLES*, *supra* note 51, at 45. There is, however, an important inclusive branch of legal positivism that might incorporate Justice Thomas's theory—inclusive legal positivism. This permits the moral status of putative legal norms to be a condition for whether such norms qualify as law *if and only if* the rule of recognition in such a legal system so provides. COLEMAN, *PRACTICE*, *supra* note 5, at 108 (accordingly, Justice Thomas's natural law originalism may be construed, I believe, as providing such a rule of recognition, either in the proposed interpretative stance toward the Constitution, or in the natural law practices of the Founders more generally).

59. See SCALIA, *INTERPRETATION*, *supra* note 8, at 45; BORK, *TEMPTING*, *supra* note 8, at 144; COLEMAN, *PRACTICE*, *supra* note 5, at 143.

60. See SCALIA, *INTERPRETATION*, *supra* note 8, at 45 (arguing that interpreting the Constitution based upon anything other than the social fact of the Constitution's original understanding or of its Amendments is impossible without recourse to a judge's personal preferences); BORK, *TEMPTING*, *supra* note 8, at 144 (arguing for the impossibility of such purported alternatives); see also COLEMAN,

much legal obligation is consistent with moral obligation.⁶¹ Most inclusive legal positivists would subscribe to the following four key theses:

- (1) Law is a social institution, founded on facts of social behavior;
- (2) There is no necessary connection between moral obligation and legal obligation;
- (3) The rules of law are identifiable in largely uncontroversial ways; and
- (4) The existence of a rule of law arises from the fact that it is the law, not from the fact that it ought to be the law.⁶²

Legal positivism's most fundamental claim is that law is a social fact.⁶³ The importance of this thesis is originally derived in principal part from its contrast with natural law theories of law; more recently, its importance is in contrast with Dworkin's account of the law.⁶⁴ A threshold question asks what a social fact is, and, implicitly, whether social facts are like other facts. Facts are generally discrete aspects of the world that our knowledge tries to picture in a classical epistemology.⁶⁵ Social facts, which are facts we create that we share as members of a society, are somewhat different because we construct them in a more direct way.⁶⁶ Social facts, as I use the term here, are socially constructed facts, not, for example, sociological facts about us as things: social facts are what we have constructed for ourselves as persons.⁶⁷ Social facts are, most generally, states of affairs relating to collective groups of persons that identify with a group or with members of a group in ways that are distinct from states of affairs relating to the beliefs and actions of the group members individually.⁶⁸ For example, when, while

PRACTICE, *supra* note 5, at 143 ("Law is a human artifact. It is designed by humans, presumably because it can serve a variety of our interests.").

61. See BORK, TEMPTING, *supra* note 8, at 252 (arguing that the Constitution embeds moral values and choices of the Founders).

62. See COLEMAN, PRACTICE, *supra* note 5, at 152-53, 158-59.

63. See *id.*

64. See *id.*

65. See RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 17-18 (1979) [hereinafter RORTY, MIRROR OF NATURE] (describing the philosophical power of our intuitions about the mental world); DONALD DAVIDSON, INQUIRIES INTO TRUTH AND INTERPRETATION 37-38 (1985) (arguing that there are not states of the world that correspond to sentences); see also *Social Epistemology*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 26, 2001), <http://stanford.library.usyd.edu.au/archives/sum2002/entries/epistemology-social/> (explaining the maxims embraced by classical epistemology).

66. See MARGARET GILBERT, ON SOCIAL FACTS 243-45 (1989) [hereinafter GILBERT, SOCIAL FACTS].

67. *Id.*

68. *Id.*

driving, I meet another car on a narrow road in the United States, two relevant social facts are that I expect that other car to bear to its right on the road and that I drive my own car on my right hand side of the road as we pass. Thus, by characterizing facts as governing members of society, I mean only that they shape or inform the members' conduct, rather than control or compel (in some way) the members' actions. Social facts include facts about law, but also include the state of the matter with respect to other forms of ordered social behavior.⁶⁹ Ronald Dworkin's celebrated (if precious) example of courtesy is another instance.⁷⁰

Social facts lack correspondence with what is often called the physical world that natural facts appear to have.⁷¹ Statements of social facts are true to the extent they express something about social facts; that can change with changes in the practices and beliefs of the relevant social group. Moreover, some statements of social fact immediately affect the underlying social fact expressed by the statement. This is less spooky than it sounds. When someone says to me, "You are being rude," that statement in the appropriate context (taking into account what is going on, my relationship to the speaker, and my mood, for example) not only expresses a social fact, but also invites or encourages me to change the fact by changing my behavior. Natural objects, without consciousness or self-consciousness, do not react in the same way, and therefore statements about them do not exhibit this same feature.⁷²

The relationship between social facts and an external world, if any, has been, and remains, problematic and controversial.⁷³ That controversy will not be resolved here, nor need it be. While I am inclined to follow contemporary pragmatists who reject the representational account, agnosticism on this question suffices here: it is enough to simply recognize the existence and importance of social facts.

69. *See id.*

70. DWORKIN, *EMPIRE*, *supra* note 24, at 47-49.

71. *See* Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87, 87-88 (1996) [hereinafter Dworkin, *Objectivity and Truth*]; GILBERT, *SOCIAL FACTS*, *supra* note 66, at 243-45.

72. Animals, with sophisticated sentience but seemingly without sapience, are an intermediate class. Some might suggest that the Heisenberg's uncertainty principle captures a similar kind of behavior for small inanimate natural objects, but this is not the place to explore that claim.

73. *See* Dworkin, *Objectivity and Truth*, *supra* note 71, at 87-88; Richard Rorty, *The World Well Lost*, in *CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980)* 3-18 (1982). Some have drawn a sharp distinction between social facts and natural facts, asserting that natural facts represent the world while social facts are constructed. Dworkin, *Objectivity and Truth*, *supra* note 71, at 87-88. Further, some have asserted that social facts, like value claims, also correspond with the world and are true by virtue of a correspondence with that world. *Id.* at 88-89; *see generally* LeDuc, *Anti-Foundational Challenge*, *supra* note 3.

Social facts are created by humans, for humans.⁷⁴ On this view, therefore, law is nothing more than a human artifact, and has no source or importance except as an institution of certain human societies.⁷⁵ This premise grounds the negative claim that is captured by the following thesis. By focusing upon the social fact thesis, legal positivism purports to account for law entirely on human terms; notions of natural law or divine law are dispensed with. Instead, law is to be explained by human institutions and actions, not by human nature.

One of the most important legal institutions for modern positivists is the rule of recognition.⁷⁶ The rule of recognition is the social practice that enables members of a legal community to recognize laws and distinguish them as social conventions, moral rules, ethical aspirations, and the like.⁷⁷ Various rules of recognition have been proposed.⁷⁸ In the context of originalism, it would appear that the constitutional rule of recognition must deploy original intentions, expectations, or understandings.⁷⁹ For the originalist, a constitutional rule of law must accord with the original understanding or expectations with respect to a constitutional text.⁸⁰ If it does, that rule of constitutional law is a primary rule of our constitutional law⁸¹ in the absence of constitutional amendment (or also in the absence of intervening contrary controlling precedent for some originalists).⁸²

Is that account sufficient to provide a rule of recognition (at least with respect to the Constitution) in accordance with classical legal positivism?

74. GILBERT, SOCIAL FACTS, *supra* note 66, at 243-45 (describing Durkheim's account of the coercive power of social facts).

75. COLEMAN, PRACTICE, *supra* note 5, at 143. As such, law is neither inherently good nor evil. Such a vision of law can, for example, incorporate the pessimism of Grant Gilmore. GRANT GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977) (promising that in Hell, the rule of law will be perfectly observed with complete procedural formalities, but without any accompaniment of justice). Gilmore thus offers a powerful example of law that would support the legal positivist stance.

76. HART, CONCEPT, *supra* note 5, at 94 (introducing the concept of a rule of recognition that permits the identification of legal rules in complex modern legal systems as a matter of their procedural provenance, i.e. that such rules were formally enacted as law).

77. *Id.* at 94-95.

78. See Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 175 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) [hereinafter RULE OF RECOGNITION AND THE CONSTITUTION].

79. See SCALIA, INTERPRETATION, *supra* note 8, at 45; see also BORK, TEMPTING, *supra* note 8, at 144.

80. *Id.* Exceptions may apply as a result of non-originalist precedent, but such exceptions are not part of the originalist theory. See SCALIA, INTERPRETATION, *supra* note 8, at 139-40 (describing stare decisis as a pragmatic exception to originalism).

81. See SCALIA, INTERPRETATION, *supra* note 8, at 45 (arguing that the original understanding of the constitutional provisions "is easy to discern and simple to apply"); see also BORK, TEMPTING, *supra* note 8, at 144; see generally RULE OF RECOGNITION AND THE CONSTITUTION, *supra* note 78.

82. See, e.g., SCALIA, INTERPRETATION, *supra* note 8, at 139-40; but see Barnett, *Trumping*, *supra* note 41, at 259-61.

Setting aside issues related to constitutional amendments (explored below) and any threshold reservations about whether the rule of recognition requirement can ever be satisfied, the implicit rule of recognition for originalists works. We may recognize an interpretation or reading of a constitutional provision as law if it is based upon the original understandings, intentions, or expectations of constitutional provisions adopted by the Constitutional Convention.⁸³ State conventions must have also approved and subsequently convened to consider and adopt that Constitution.

Potential constitutional crises would potentially undermine or discredit this account of our rule of recognition, even without us adopting a theory of informal constitutional amendment like that defended by Bruce Ackerman.⁸⁴ They would do so by undermining the determinateness of the Constitution and thus its apparent ability to serve as a rule at all—let alone as a rule of recognition.⁸⁵ For example, if a constitutional crisis results in a change in the constitutional law, then the rule of recognition will likely have changed in an extralegal and opaque way.

It is worth exploring whether Dworkin's objection that the principles employed in constitutional decision are too contestable to satisfy Hart's epistemic requirements, for the existence of a rule of recognition may also apply to originalists' constitutional argument.⁸⁶ That is, the complexity and nature of our constitutional law's content may preclude the existence of any algorithm that permits us to identify the discrete provisions of that law. For the originalists, it does not. They believe that the arguments from the

83. See generally Gregory E. Maggs, *Which Original Meaning of the Constitution Matters to Justice Thomas?*, 4 N.Y.U. J. LIBERTY 494, 496-99 (2009) [hereinafter Maggs, *Which Original Meaning*] (arguing that Justice Thomas adopts an originalism distinct from the widely recognized forms that privilege the original linguistic meanings, public understandings, or intended meanings).

84. See COLEMAN, PRACTICE, *supra* note 5, at 152-53. Bobbitt offers an analysis of constitutional crisis in his account of the funding of covert support for the Nicaraguan insurgency. See PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 65, 69 (1991) [hereinafter BOBBITT, INTERPRETATION]. This suggests that the rule of recognition may be more fragile than the legal positivist account may initially suggest. See COLEMAN, PRACTICE, *supra* note 5, at 152-53. Nevertheless, that rule of recognition would appear to be identifiable, even if its operation and application may be more problematic than may initially appear, at least for critics of originalism. See *id.* at 153; see generally RULE OF RECOGNITION AND THE CONSTITUTION, *supra* note 78. For Ackerman's theory, see generally 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1993) (defending a theory of constitutional change in which *de facto* amendments to the Constitution may be adopted at moments of constitutional crisis by the will of the people outside the purportedly exclusive processes provided for by Article V).

85. Mitchell Berman has challenged the Hartian account that treats the role of the Constitution as that of a rule of recognition on such grounds. See Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in RULE OF RECOGNITION AND THE CONSTITUTION, *supra* note 78, at 269 [hereinafter Berman, *Rule of Recognition*] (arguing that because constitutional law consists of making and choosing among various arguments that the concept of a rule of recognition that permits constitutional law to be identified by a set of conditions is mistaken).

86. See HART, CONCEPT, *supra* note 5, at 94; DWORKIN, TAKING, *supra* note 13, at 39-44.

relevant original authorities—intentions, expectations, or public linguistic understandings—are simple and compelling.⁸⁷ As Hart suggests, the rule of recognition operates genealogically, testing constitutional law by its source.⁸⁸ While some second-generation originalists tell a more complex story about linguistic meaning in their account of originalism, it is unclear whether they believe that increased complexity undermines the rule of recognition.⁸⁹ The same test of provenance remains available.

The evidence that the leading classical originalists adopt a tacit positivist account of law is pervasive and compelling.⁹⁰ One possible source of confusion is that the positivist commitments are tacit, not express.⁹¹ But legal positivism imposes no requirement that legal positivist accounts of law be self-conscious or express.

Berger explains the force of the Constitution and the controlling meaning of the original understanding as a matter of the rule of law's requirements.⁹² On his account, the binding force of the original understanding is not a matter of normative arguments, but is rather the requirements of the Constitution's authoritative status as law.⁹³ The new positivist originalists might argue that Berger's account is a natural law theory because the appeal to the rule of law should be understood as an appeal to a normative principle. On this account, the rule of law is not to be understood as a positive law concept of a legal rule, but as a normative concept denoting a virtue in a modern liberal political society.

The concept of the rule of law is generally a normative concept in contemporary American legal culture.⁹⁴ But it is also a descriptive concept. It describes a political and legal system in which there are certain established social practices.⁹⁵ In particular, justice is understood to be general, not particular or personal, in important respects, and is delivered

87. See, e.g., SCALIA, INTERPRETATION, *supra* note 8, at 45 (“Often—indeed, I dare say usually—[the original understanding] is easy to discern and simple to apply.”).

88. See HART, CONCEPT, *supra* note 5, at 94-95.

89. See, e.g., Lawrence B. Solum, *Semantic Originalism*, SOC. SCI. RES. NETWORK (Nov. 22, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

90. See, e.g., SCALIA, INTERPRETATION, *supra* note 8, at 44-45; BORK, TEMPTING, *supra* note 8, at 251-59; see also Gardner, *Positivist Foundations*, *supra* note 39, at 8.

91. See, e.g., SCALIA, INTERPRETATION, *supra* note 8, at 44-45; BORK, TEMPTING, *supra* note 8, at 251-59.

92. See BERGER, GOVERNMENT BY JUDICIARY, *supra* note 1, at 283-99.

93. See *id.* at 363-67 (describing the historical facts requiring recourse to the original intentions with respect to the Constitution's meaning).

94. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 (1989) [hereinafter Radin, *Reconsidering*] (acknowledging that while “the Rule of Law ideal is central to our legal tradition, it is deeply contested.”); see generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Rule of Law*].

95. See generally Radin, *Reconsidering*, *supra* note 94 (exploring various philosophical concepts of rules and rule following and the consequences of choosing among them with respect to the concept of the rule of law).

impartially by third persons—not by those directly involved in the legal controversy.⁹⁶ The concept of the rule of law is grounded on the premise that the content of law is knowable and that those subject to the law can conform to that law if they so choose.⁹⁷ Finally, those premises assume a social practice account of law and the rule of law.⁹⁸

Bork's legal positivism is admittedly clearer. Bork begins his account of constitutional law by noting that “[w]hen we speak of ‘law,’ we ordinarily refer to a rule that we have no right to change except through prescribed procedures.”⁹⁹ Bork acknowledges the normative judgments that are implicit in his reading of the Constitution.¹⁰⁰ But Bork defends those normative judgments not because they are correct but because they were judgments made by the Founders and included as law in the Constitution.¹⁰¹ It is the social facts of the genealogical account of the normative judgments in the adoption of the Constitution that makes the judgments authoritative, not the moral quality of those judgments.¹⁰²

Bork also emphasizes the fact that the Constitution is law as a matter of social fact.¹⁰³ That is a positive law account.¹⁰⁴ It is the fact that the Constitution is law that makes it binding upon us, not the fact that it is morally right or superior as a matter of political philosophy.¹⁰⁵ Finally, Bork also expressly rejects natural law originalism.¹⁰⁶ More specifically, Bork rejects the natural law originalism of Epstein.¹⁰⁷ His principal argument is that Epstein's argument, while purportedly based upon the Founders' Lockean theories, is more fundamentally utilitarian.¹⁰⁸ As such,

96. *See id.* at 790-91.

97. *Id.* at 784-86.

98. *See id.* One could certainly endorse the rule of law from a natural law stance; nothing about the concept of the rule of law is inherently positivist. But the concept of the rule of law endorsed by mainstream originalists is a positive version of that concept, not an exclusively normative concept.

99. BORK, TEMPTING, *supra* note 8, at 143. This claim appears to be echoed in Stephen Sachs's recent work. *See* Sachs, *Legal Change*, *supra* note 9, at 818 (noting that originalism is “a theory of our law: a particular way to understand where our law comes from, what it requires, and how it can be changed.”).

100. BORK, TEMPTING, *supra* note 8, at 176-77 (“that choice is not made by the judge [under originalism]; it was made long ago by those who designed and enacted the Constitution.”).

101. *Id.*

102. *Id.* at 251-52 (rejecting nonoriginalist theories of constitutional interpretation not on the merits of their consequences, but because they “require[] the judge to make a major moral decision.”).

103. *See id.* at 144.

104. *See* COLEMAN, PRACTICE, *supra* note 5, at 152-53, 158-59.

105. BORK, TEMPTING, *supra* note 8, at 144-45 (noting that the Constitution's text asserts it to be law).

106. *See id.* at 209-10 (criticizing Thomas Grey's natural law theory); *see id.* at 229-30 (criticizing Richard Epstein's natural law, libertarian constitutional theory).

107. *See id.* at 229-30.

108. *See id.* at 230. For Epstein's appeal to Locke and social contract theory, *see generally* RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 9-10 (1985) [hereinafter EPSTEIN, *TAKINGS*] (describing the social contract evolution from Hobbes to Locke).

it is not plausibly attributable to the Founders and their understanding of the Constitution.¹⁰⁹

Nor are these originalists outliers in the classical statement of originalism. In the case of Justice Scalia, the rejection of philosophical or moral theory to inform and shape our interpretation of the Constitution is express.¹¹⁰ That theory is rejected as a source of interpretation or decision because of the uncertainty of philosophical argument.¹¹¹ Justice Scalia also expressly rejects the Declaration of Independence's text as a source of interpretative guidance for the Constitution.¹¹² He sharply distinguishes between the normative, aspirational statements of the Declaration and the prosaic, legal statements of the Constitution.¹¹³

Two of the strongest classical statements of positivist originalism are made by Henry Monaghan and Frank Easterbrook.¹¹⁴ Monaghan's classic rebuttal to the living constitutionalism of originalism's critics is titled *Our Perfect Constitution*.¹¹⁵ Monaghan argues that the Constitution cannot be reinterpreted to finesse its flaws.¹¹⁶ The Constitution cannot be made perfect precisely because it must be understood, interpreted, and applied as it was adopted, because it is positive law.¹¹⁷ It is thus the ontological status of the Constitution as law that must be respected when the Living Constitution is rejected on this classical originalist account.¹¹⁸ Easterbrook's originalism is also positivist.¹¹⁹ Thus, Easterbrook argues that we must privilege the original understandings of the constitutional text

109. See BORK, TEMPTING, *supra* note 8, at 230.

110. See SCALIA, INTERPRETATION, *supra* note 8, at 44-45 (arguing that there is no agreement as to the principles that might inform interpretations of the Constitution that depart from the original understandings and intentions).

111. See *id.*

112. See *id.* at 134.

113. *Id.*

114. See generally Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) [hereinafter Monaghan, *Perfect*]; see also generally Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998) [hereinafter Easterbrook, *Dead Hand*]; Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479 (1993) [hereinafter Easterbrook, *Alternatives*].

115. Monaghan, *Perfect*, *supra* note 114, at 353.

116. See *id.* at 356-60 (characterizing the apologists of the Warren Court's constitutional jurisprudence as "'perfectionist[s].'").

117. See *id.* at 373-74 (characterizing the dominant problem of constitutional interpretation as that of giving effect to the policy choices made on the Constitution's adoption).

118. See *id.*

119. See Easterbrook, *Dead Hand*, *supra* note 114, at 1119 ("Our particular Constitution is a social contract that establishes rules for the making and enforcement of law.") Easterbrook asserts that claim even more forcefully. See *id.* at 1121 ("The fundamental theory of political legitimacy in the United States is contractarian, and contractarian views imply originalist, if not necessarily textualist, interpretation by the judicial branch.")

because they are the law.¹²⁰ No other constitutional theory of constitutional decision can make that claim, according to Easterbrook.¹²¹

There are non-positivist originalists, of course; the most prevalent are those articulating a natural law originalism. But there are also originalists, like Richard Kay, who at least sometimes reject both natural law originalism and positive law originalism.¹²² In introducing his defense of originalism, Kay writes: “I can no more hope to convince people whose preferences are based on values and attitudes which I do not share than they can expect to persuade me.”¹²³ Kay’s acknowledgment of the primacy of value or preference is a consequence of his recognition that law, including the Constitution, is a creature of social function.¹²⁴ The choice of interpretive method and the choice of substantive outcome must be shaped by those preferences and the assessment of the consequences of such choices. But just as natural law originalism is a minority, so, too, is non-natural law, non-positivist originalism.

The originalist commitment to positivism is perhaps clearest with respect to the exclusion of morality as a source of law.¹²⁵ Originalists like Judge Bork and Justice Scalia believe that non-positivist theories of law that rely upon morality as a source of law are hopelessly uncertain and controversial.¹²⁶ But originalism also embraces the first thesis of legal positivism enumerated above. All authority that is privileged by originalism qualifies as a social fact, whether it is the fact of the relevant actors’ intent, the original understanding, or the original expectations.¹²⁷ Original intentions and original expectations may initially appear to be private psychological states that do not qualify as social facts. But that objection misunderstands the nature of the original intentions and expectations that originalism privileges. As used in originalism, private mental states are not

120. Easterbrook, *Alternatives*, *supra* note 114, at 486 (“We must demand not that [a constitutional theory] conform to the reader’s political theory, but that it be law.”).

121. *See generally id.*

122. *See generally* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703 (2009) [hereinafter Kay, *Constitutional Interpretation*]; Richard S. Kay, *Original Intentions, Standard Meanings, and the Legal Character of the Constitution*, 6 CONST. COMMENT. 39 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988) [hereinafter Kay, *Adherence*].

123. Kay, *Adherence*, *supra* note 122, at 229.

124. *See id.* (acknowledging the importance of assessing constitutional theory’s “practical consequences . . .”).

125. *See* BORK, TEMPTING, *supra* note 8, at 251-52 (arguing that the moral disagreements results in moral theory being too indeterminate to serve as a source of legal authority in modern, pluralistic American society).

126. *See* SCALIA, INTERPRETATION, *supra* note 8, at 45-46; *see also* BORK, TEMPTING, *supra* note 8, at 251-59.

127. *See supra* text accompanying note 58; *see also* Maggs, *Which Original Meaning*, *supra* note 83, at 496-98.

relevant; it is instead the publicly shared and known intentional stances and expectations that are controlling. They are intentions and expectations with respect to the social conduct of the relevant public group.

Originalists who share the viewpoints of Justice Scalia and Judge Bork are also prepared to endorse the associated implication that law derives from what is, rather than from what ought to be.¹²⁸ Some of their harshest criticism is directed against non-originalists who would interpret the Constitution in a manner intended to achieve certain desirable outcomes.¹²⁹ The harshest criticism is that which is directed against non-originalists' invocation of moral theory or judgment to support constitutional interpretations or adjudication outcomes.¹³⁰

Positivism requires that law be recognizable in largely uncontroversial ways because of the role law must play in society.¹³¹ Opaque or unknowable law cannot play its appropriate functional and peremptory role to order our lives in a fair and efficient way. Since such law would not protect settled expectations, it would be unfair, because its obscurity would surprise us.¹³² It would also be inefficient due to the high transaction costs of determining what the law is.¹³³ Originalism shares this perspective with respect to constitutional law.¹³⁴ Two powerful critiques that originalism offers of non-originalist constitutional interpretation speak to the complexity and uncertainty of these theories.¹³⁵ In place of that complexity and uncertainty, originalism promises a theory of constitutional interpretation in which both the constitutional text and its importance are demonstrably ascertainable.¹³⁶ The original intentions, expectations, and

128. See BORK, TEMPTING, *supra* note 8, at 262-63; SCALIA, INTERPRETATION, *supra* note 8, at 45-46.

129. See, e.g., Monaghan, *Perfect*, *supra* note 114, at 353-54; BORK, TEMPTING, *supra* note 8, at 251-59; SCALIA, INTERPRETATION, *supra* note 8, at 43-44.

130. See COLEMAN, PRACTICE, *supra* note 5, at 108. This account ignores Justice Thomas's natural law originalism, of course, because he turns to an implicitly moral theory in interpreting the Constitution. See Thomas, *Plain Reading*, *supra* note 49, at 985-88.

131. COLEMAN, PRACTICE, *supra* note 5, at 120-21 (characterizing law as giving peremptory reasons for action); see generally Jules L. Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

132. See Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 366-68 (2005) (exploring what sources of legislative history and related evidence ought to matter to textualists for the law to be knowable by citizens and their lawyers).

133. See *id.* at 367-68.

134. See André LeDuc, *Evolving Originalism: What's Privileged?* 77 (Jan. 12, 2013) (unpublished manuscript) (on file with author) [hereinafter LeDuc, *Evolving Originalism*].

135. BORK, TEMPTING, *supra* note 8, at 254; SCALIA, INTERPRETATION, *supra* note 8, at 45-46 ("For the evolutionist, on the other hand, every question is an open question, every day a new day.").

136. See SCALIA, INTERPRETATION, *supra* note 8, at 45 (asserting that the original understanding of the constitutional text is usually "easy to discern and simple to apply.").

understanding with respect to the text give originalism its rule of recognition and its purported certainty and transparency.¹³⁷

The legal positivism of originalism features prominently in Stephen Sachs's recent defense of originalism.¹³⁸ Sachs argues that originalism ought to be understood as a theory of when and how constitutional rules change.¹³⁹ Sachs's theory faces the obvious challenge of accounting for changes in the law that cannot be reconciled with his originalist theory.¹⁴⁰ He acknowledges the challenge posed by non-originalist constitutional law.¹⁴¹ Sachs rather casually invokes a positivist claim that the internal point of view requires that participants in a legal system recognize accepted rules, even if the provenance of those rules is suspect.¹⁴²

According to classical legal positivism, law requires both shared practices and an internal point of view toward the practices by the agents sharing the behavior.¹⁴³ For a member of a community to adopt an internal point of view toward a rule, that member must subscribe to or endorse that rule.¹⁴⁴ To the extent that members of the legal community care about the provenance of purported legal rules, a defect in a law's genesis would make the necessary internal point of view unachievable.¹⁴⁵ In modern liberal democracies, we should anticipate that the members of the political community would care about defects in a purported law's provenance.

In any case, it may appear that Sachs has a response to the challenge that his theory does not offer an adequate description of our actual, authoritative constitutional law—and its provenance—on the basis that he is offering, as a matter of jurisprudence, only a normative theory—not a descriptive theory. There is a place for both kinds of theory in jurisprudence. That is not an adequate answer in the context of an account of our constitutional law, however, because our constitutional law is what we do as authoritative constitutional actors¹⁴⁶ and there is no Archimedean

137. See John O. McGinnis & Michael B. Rappaport, *Original Ideas on Originalism: Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751, 752 (2009) (arguing that the Constitution should be interpreted using the methods and approaches that the Founders or other relevant actors would have employed).

138. See generally Sachs, *Legal Change*, *supra* note 9, at 817.

139. See *id.* at 820.

140. See *id.* at 852-58.

141. See *id.* at 857 ("If you want to argue that some novel method of legal change was part of the Founders' law, go ahead; originalism is a big tent. But your argument only makes a difference if it's true.").

142. See *id.* at 829, 834.

143. See HART, CONCEPT, *supra* note 5, at 55-56.

144. See *id.* at 56.

145. See *id.*

146. See LeDuc, *Anti-Foundational Challenge*, *supra* note 3, at 170-73 (describing Bobbitt's views on the reasons to doubt that constitutional law has an ontological existence beyond our constitutional practice).

stance from which to repudiate otherwise legitimate constitutional law.¹⁴⁷ A theory that would radically reform our constitutional practice and delegitimize substantial parts of our constitutional law fails as a theory of our constitutional law.¹⁴⁸

Originalism also endorses the fourth key thesis of positivism, often referred to as the social fact thesis, which asserts that the authority of fact is a matter of social fact, not a matter of moral theory.¹⁴⁹ The social fact thesis is a corollary of the second thesis.¹⁵⁰ Originalists consistently argue that the drafters' original understanding or expectations, without regard to collective policy views or the views of a judge, determines constitutional law.¹⁵¹ This is the sense in which the Constitution is what it is, not what it ought to be.¹⁵² Monaghan captured this perspective forcefully in *Our Perfect Constitution*, where he criticized certain perfectionist, non-originalist theories of constitutional interpretation.¹⁵³

In the context of legal positivism, the distinctive feature of originalism is its claims about the rule of recognition and the relevant social facts that give rise to constitutional legal obligations. Originalism incorporates the social facts about the original linguistic understanding of the constitutional text into its rule of recognition for the Constitution. This approach may be compelling, or it may be subject to challenge, as originalism's critics assert; but it is not inconsistent with (at least in the case of the non-natural law originalists) having a rule of recognition. Moreover, the rule of recognition of legal positivist originalists is peculiarly originalist.

To summarize the argument thus far, I have argued that positive law originalism is a canonical form of legal positivism. It has a distinctive form of the rule of recognition, but not a rule that is inconsistent with its positivist character.

147. *See id.*

148. *See generally* LeDuc, Originalism, Therapy, and the Promise of the American Constitution, *supra* note 2; André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J. L. & PUB. POL'Y 99 (2014) [hereinafter LeDuc, *Five Lessons*] (arguing that philosophical argument cannot make such a claim); BOBBITT, FATE, *supra* note 19 (arguing that there is no further foundation for the legitimacy of our constitutional practice).

149. *See* COLEMAN, PRACTICE, *supra* note 5, at 151-61.

150. *See id.*

151. *See* Easterbrook, *Dead Hand*, *supra* note 114, at 1119 (attributing the claim that originalists are positivists to Jed Rubenfeld); LeDuc, *Evolving Originalism*, *supra* note 134, at 37.

152. Easterbrook, *Dead Hand*, *supra* note 114, at 1119.

153. *See generally* Monaghan, *Perfect*, *supra* note 114. Monaghan is most acerbic when he proposes an anthropological analysis of contemporary liberal theories of constitutional interpretation as an expression of traditional constitutional worship in our American political culture. *Id.* at 356-58. He thus stands as an example of an originalist who is not even committed to a global instrumental account of the Constitution.

Recently, both positivist and natural law originalists have challenged the claim that classical originalism is positivist.¹⁵⁴ Pojanowski and Walsh make one statement of that claim.¹⁵⁵ They assert that Bork and Berger make a normative, non-positivist argument for originalism on the basis that it “reins in platonic guardians”¹⁵⁶ By that, of course, they mean that those theories limit judicial discretion in constitutional interpretation. They do not offer an argument for their claim.¹⁵⁷ Baude also claims that classical originalism was not a legal positivist theory.¹⁵⁸ Finally, Sachs asserts that originalism needs a positivist rehabilitation because classical originalism was understood as “a theory of interpretation” and not as a positivist theory of law.¹⁵⁹ The argument to offer a new, positivist or natural law originalism is fundamental to the claim to offer a new originalism that avoids or disarms the classical objections to the earlier forms of originalism.

As demonstrated above, the dominant strand of originalism has always been a legal positivist theory. A potential confusion may arise because the classical originalists did not articulate their originalism as a legal positivist theory. But when we test the originalist theory against the defining tenets of legal positivism, the originalist theories comply handily. The new positivists argue that the earlier classical originalists defend originalism on interpretive grounds.¹⁶⁰ While that characterization may be understandable, it remains a misunderstanding.

The new originalists’ claim to offer an exciting new positivist originalism is manifestly mistaken. But perhaps the new positivist originalist’s claim can, with a fair measure of charity, be restated and rehabilitated. Perhaps the new positivist originalists are not so much offering a novel theory as they are offering a stronger version of the classical originalist theory. Certainly, the new positivist originalists articulate their positivist premises more expressly.¹⁶¹ Moreover, Baude begins his defense of the new positivist originalism by redescribing our constitutional law.¹⁶² That recognition of the importance of beginning a prescriptive account with description is a step forward in the originalism

154. See generally Sachs, *Legal Change*, *supra* note 9; see also Baude, *Our Law*, *supra* note 9, at 2351; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 3.

155. See Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 5-6.

156. *Id.*

157. See *id.*

158. See Baude, *Our Law*, *supra* note 9, at 2351 (“[T]here is a third way to assess originalism—and constitutional theories more broadly—by looking to our positive law, embodied in our legal practice.”).

159. See Sachs, *Legal Change*, *supra* note 9, at 818.

160. See, e.g., *id.*

161. See generally Baude, *Our Law*, *supra* note 9; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9; Sachs, *Legal Change*, *supra* note 9.

162. See generally Baude, *Our Law*, *supra* note 9, at 2370-86.

debate, which has generally ignored the importance of adequately describing our practice. Nevertheless, Baude's description is ultimately inadequate. Moreover, his claim that the new theory is stronger is unpersuasive because the new positivist originalists fail to offer new arguments for their substantive claims.¹⁶³

The new positivist originalists argue, positively, that originalism is our law.¹⁶⁴ The argument that originalism is our law—in the face of the originalist complaints that we need originalism to restore The Lost Constitution—is bold, but counterintuitive.¹⁶⁵ A Brandeis brief does not look like an argument from the original understanding, intentions, or expectations. Two arguments against Baude's claim are immediately apparent; Baude acknowledges both and offers a rebuttal.¹⁶⁶

First, classically, originalists have thought that there have been important, nonoriginalist Court decisions. *Brown v. Board of Education*¹⁶⁷ and *Griswold v. Connecticut*¹⁶⁸ would be two examples, among many. On Baude's account, he must choose among three accounts of those decisions:

- (1) Those decisions are, in fact, originalist;
- (2) Those decisions are not the law; or
- (3) Those decisions are permissible exceptions to our law's general originalism.

Without one of these propositions applying, these cases would appear to be counterexamples to Baude's claim.

Second, a variety of kinds of arguments are made in our constitutional practice. Bobbitt has offered a catalog of the canonical modes,¹⁶⁹ as has Balkin.¹⁷⁰ Others have identified additional kinds of argument as candidates

163. See generally Baude, *Our Law*, *supra* note 9; Sachs, *Legal Change*, *supra* note 9.

164. See Baude, *Our Law*, *supra* note 9, at 2351-52.

165. Compare Baude, *Our Law*, *supra* note 9, with BARNETT, LOST, *supra* note 41 (expressly invoking the metaphor of The Lost Constitution for the substantive constitutional law that natural law originalism would create), and SCALIA, INTERPRETATION, *supra* note 8, at 38-40 (claiming that nonoriginalist interpretation has been dominant on the Court and resulted in a substantial body of erroneous constitutional doctrine and precedent).

166. See Baude, *Our Law*, *supra* note 9, at 2370, 2376-83.

167. 347 U.S. 483 (1954).

168. 381 U.S. 479 (1965).

169. See generally BOBBITT, FATE, *supra* note 19 (identifying historical, textual, doctrinal, prudential, structural, and ethical as the six accepted modes of argument).

170. See JACK M. BALKIN, LIVING ORIGINALISM 4 (2011) [hereinafter BALKIN, LIVING ORIGINALISM].

for inclusion.¹⁷¹ Many of these modes of argument are manifestly nonoriginalist.¹⁷² Prudential arguments, most obviously, must be made on the basis of the implications of potential interpretations and decisions today. Baude must argue that these modes of argument are either, in fact, originalist in a way that no one has understood before, or that they are illegitimate.

Baude asserts a series of claims that he collectively dubs inclusive originalism.¹⁷³ He terms it *inclusive* because it admits of a role for non-originalist interpretative techniques when the original understandings or intentions are inadequate for resolving the relevant interpretative question.¹⁷⁴ I have suggested that strands of originalism should be classified based on what they privilege and how they privilege the relevant authority or interpretation.¹⁷⁵ On Baude's theory, it is the original public understanding that is privileged; Baude's focus is not principally on the intramural disputes that have surrounded the New Originalism and the concept of construction, for example.¹⁷⁶ As to the privilege accorded such readings, Baude asserts that originalism is not the only method of interpretation or decision, but that it is king of the interpretative mountain.¹⁷⁷ That is, originalist methods control when they apply and provide answers.¹⁷⁸ Other methods may step in only in the breach.¹⁷⁹ I have characterized such a form of originalism as a strong, nonexclusive, public understanding originalism.¹⁸⁰ While Baude begins by claiming that we share the intuition that the original understanding is the "real meaning . . ." of a text,¹⁸¹ he privileges the original understanding of the constitutional text on the basis of a two-pronged argument from our social practices.¹⁸² That argument adduces evidence from what Baude terms "higher-order [social]

171. J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1784-85 (1994) [hereinafter Balkin & Levinson, *Grammar*] (arguing that natural law argument should be included as an accepted mode of constitutional argument).

172. Prudential, structural, doctrinal, and ethical arguments are nonoriginalist modes of argument.

173. Baude, *Our Law*, *supra* note 9, at 2352.

174. *Id.*

175. See generally LeDuc, *Evolving Originalism*, *supra* note 134; André LeDuc, *Evolving Originalism: How Are The Original Understandings, Expectations, and Intentions Privileged?* (Jan. 2, 2013) [hereinafter LeDuc, *Privileged How?*] (unpublished manuscript) (on file with author).

176. See Baude, *Our Law*, *supra* note 9, at 2355 n.16 (characterizing inclusive positivist originalism as "agnostic . . ." on those controversies). Baude is at pains, however, to both endorse the techniques of New Originalism that cabin ambiguity and to reject the classical forms of originalism. See *id.* at 2357-58.

177. See *id.* at 2354-56.

178. See *id.* at 2363.

179. See *id.*

180. LeDuc, *Privileged How?*, *supra* note 175, at 26-34.

181. Baude, *Our Law*, *supra* note 9, at 2351 ("anything else is making it up").

182. *Id.* at 2365.

practices . . . and lower-order practices”¹⁸³ Legal positivist or not, this distinction is not like Hart’s distinction between primary and secondary rules in our legal system.¹⁸⁴

Baude begins with what he characterizes as our *higher-order* social practices, which include “widespread conventions about the Framers”¹⁸⁵ What Baude has in mind is the combination of the contemporary political-legal community’s beliefs with practices that treat the Constitution as binding and recognize it as pretty old.¹⁸⁶ He suggests that the Constitution is not binding because it asserts that it is binding, but that it is binding because we treat it *as if* it is binding.¹⁸⁷ Baude also identifies the beliefs and practices that treat certain questions as so easy that their answers are almost incontrovertible.¹⁸⁸ He gives the example of the question “Who is the President?” as this kind of question.¹⁸⁹ Baude is certainly right that these kinds of beliefs and practices exist.

Baude’s argument is that these beliefs and practices support the existence of inclusive positive originalism, even when these beliefs and practices do not prove its existence.¹⁹⁰ That claim appears somewhat questionable, not because these beliefs and practices do not exist (I agree here with Baude), but because they do not fit inclusive positive originalism particularly well. Consider the President.¹⁹¹ Baude’s claim is that the accepted, uncontroversial recognition of who the president is supports the claims of inclusive positive originalism. That support is not apparent; certainly, we have a practice of treating a particular person as the president, at any given point in time, and we also have an internal point of view toward those practices (in the relevant sense) even if we did not vote for the particular individual or find her policies or politics congenial. A legal positivist account can thus be given for the legal practice of treating the relevant individual as the president. But the sense in which that positivist account is an originalist account is not apparent.

183. *Id.*

184. See HART, CONCEPT, *supra* note 5, at 94.

185. Baude, *Our Law*, *supra* note 9, at 2365. I do not think Baude means to characterize these practices as conventions in any technical sense. See generally DAVID LEWIS, CONVENTION (1969) (classical philosophical description of the creation and maintenance of social conventions without the existence of a controlling formal rule governing the behavior); ANDREI MARMOR, SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW (2009).

186. See Baude, *Our Law*, *supra* note 9, at 2365-66.

187. See *id.* at 2366.

188. See *id.* at 2367.

189. *Id.* Although Baude does not make the point, the existence of these beliefs and practices explains why Judge Posner’s imaginative discussion of the complexities associated with the requirement that the president be at least 35 years old appears tendentious, falling on our deaf jurisprudential ears. See generally POSNER, PROBLEMS, *supra* note 23, at 265-67.

190. See Baude, *Our Law*, *supra* note 9, at 2365-67.

191. See *id.* at 2367.

Baude appears to argue that our current beliefs and practices tie back into the original understandings or intentions of the Constitution.¹⁹² It is not at all clear how this derivation works. Baude simply asserts that the identification of these beliefs and practices is a matter of the text, not policy or, presumably, wealth maximization goals.¹⁹³ But the invocation of the constitutional text appears too cryptic; it is not clear that anything about our current practices feels more like an invocation of the original intentions or understandings with respect to the text than like an invocation of our current understandings and intentions. If there were a controversy about that question, undoubtedly there would be recourse to the text and the historical understanding—but there would also be deployment of prudential arguments, structural arguments, and perhaps other kinds of argument.¹⁹⁴

Consider also the accepted beliefs and practices that are seemingly inconsistent with original understandings, intentions, and expectations. For example, consider the United States's nuclear arsenal and its relationship to the President and Congress.¹⁹⁵ I think that there is a widespread, largely uncontroversial view that the President, faced with an appropriate threat, could, even in the absence of an attack against the United States, deploy the United States's nuclear arsenal in one or more acts of war—even to the extent of triggering a global thermonuclear war. I do not think that even Professor Baude could make a plausible case that such actions are consistent with the original understanding, intentions, or expectations with respect to the War Powers Clause.¹⁹⁶ The president's original power to declare war, in the absence of a significant standing army, was understood, intended, and expected to be modest.¹⁹⁷ The technology of the modern world has changed all of that, for better or worse. But the power and, I think, authority that the president now has, while largely noncontroversial, cannot be reconciled

192. *See id.* at 2365-67.

193. *See id.*

194. The classic hypothetical of the Vice President's impeachment trial provides a good example. *See* Joel K. Goldstein, *Can the Vice President Preside at His Own Impeachment Trial?: A Critique of Bare Textualism*, 44 ST. LOUIS U. L.J. 849, 850-51 (2000). If a sitting Vice President were to be tried for impeachment in the Senate, a variety of arguments might well be made with respect to the question of whether she could preside. But the intuition that we would be bound by any original understanding, expectation, or intention appears weak. Prudential and structural arguments would be determinative, I believe. It would not be a very hard question, in practice. Baude's argument here does not appear persuasive.

195. *See generally* GARRY WILLS, *BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE* (2010) (attributing the Executive Branch's growth in power and authority to the technological changes associated with the development of thermonuclear weapons).

196. *See generally* JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3* (1993) [hereinafter ELY, WAR] (asserting that the original meaning of the clause giving Congress the power to declare war was very clear); *but see generally* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (arguing for a broad power in the president and only a narrow, formal power in Congress).

197. *See* ELY, WAR, *supra* note 196, at 3-5.

with the original understandings, intentions, and expectations. Moreover, the War Powers Clause, while dramatic, is hardly the only example of such inconsistencies.¹⁹⁸

The heavy lifting in Baude's argument for positive originalism is done by "lower-order practices."¹⁹⁹ These are the practices of judges in deciding cases and articulating those decisions and the reasons for those decisions in their opinions.²⁰⁰ In particular, Baude wants to focus on "how the Supreme Court *justifies* its rulings"²⁰¹ By this Baude means only that he will focus upon the arguments made by the Court in its opinions. Baude argues that the Court's current practice of justifying its decisions fits only inclusive positive originalism.²⁰²

He begins with *National Labor Relations Board v. Noel Canning*.²⁰³ Baude argues that, despite Justice Scalia's strong concurring opinion (where he dissents from the central holding of the case), the case is originalist.²⁰⁴ He reaches that conclusion because the majority concluded that the constitutional text was irremediably ambiguous; on that basis the Court looked beyond the sources of textual meaning.²⁰⁵ While Justice Scalia disagreed with that assessment of textual ambiguity,²⁰⁶ the majority's interpretative move is permissible under Baude's inclusive originalism.²⁰⁷ But it is worth pausing at the threshold step: the determination that the constitutional text is ambiguous. Even before analyzing the original understanding, Justice Breyer noted the particular importance of the institutional practice.²⁰⁸ He did not invoke that practice as a path to original meaning; he invoked it as an independent source of decision in a separation of powers case.²⁰⁹ Moreover, in the case of political or other social practices—the longer it goes on, the stronger its force becomes. Its temporal force is inverse to that of the original understanding which, to the

198. Other examples identified by originalists like Randy Barnett include the institutional apparatus of much of the modern administrative state. Barnett would also find an exercise of the eminent domain power that did not satisfy a far more robust public use requirement than that imposed by current doctrine unconstitutional as inconsistent with the original understanding of federal power. See BARNETT, LOST, *supra* note 41, at 354-55.

199. See Baude, *Our Law*, *supra* note 9, at 2370-71.

200. See *id.* at 2370. Those practices also likely include related, less articulated lower-order practices, like decisions about when to grant *certiorari*.

201. *Id.* at 2371.

202. See *id.*

203. 134 S. Ct. 2550 (2014).

204. See Baude, *Our Law*, *supra* note 9, at 2373.

205. See *id.* at 2373-74. (citing *Noel Canning*, 134 S. Ct. at 2553).

206. See *Noel Canning*, 134 S. Ct. at 2595-97 (Scalia, J., concurring).

207. See Baude, *Our Law*, *supra* note 9, at 2374 (characterizing the Court as "fight[ing] its way free from the text" without recognizing that the tendentious tone of the Court's originalism discussion signals the marginality of those considerations).

208. *Noel Canning*, 134 S. Ct. at 2559.

209. See *id.* (citing *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819)).

extent it varies, can only diminish over time. Already, we must acknowledge some doubts about Baude's originalist reading of this case.

Justice Breyer reached the conclusion that the Recess Appointments Clause is ambiguous because the language referring to "the recess of the Senate," which triggers the recess appointment power, was ambiguous.²¹⁰ It did not refer to a unique sessional recess.²¹¹ With that threshold cleared, Justice Breyer was off to consider purpose and practice.²¹² Justice Scalia was highly critical of Justice Breyer's finding of ambiguity in the text.²¹³ As Justice Scalia notes, while there are what he terms technical, legislative meanings and colloquial meanings of "recess," the more informal meaning of a break in the legislative work raises a number of particular questions that are not addressed and do not have apparent answers in the constitutional text.²¹⁴ Thus Justice Scalia argues that selecting the narrow, technical meaning of "recess" is not a difficult choice.²¹⁵ The ambiguity that Justice Breyer finds appears to be, at least in part, a creature of the other powerful arguments he finds for his decision.²¹⁶ If that is right, *Noel Canning* conforms to Baude's theory only in the most formal way.

I have also analyzed *Noel Canning* in the context of my argument that we can have a more fruitful constitutional jurisprudence if we first transcend and discard the framework of the originalism debate.²¹⁷ I argued that without the demands of the originalism debate and the claims of foundational theory, the Court could have resolved *Noel Canning* more directly.²¹⁸ The opinions could have acknowledged that there was no meaningful historical answer and turned to the prudential and structural arguments more comfortably, rather than as desperate, second-best methods.²¹⁹ The result would have provided the Court with a more powerful opinion and imposed a burden on Justice Scalia to explain why his argument from the original understanding should be controlling.

Turning back to the potential objections to Baude's claim, Baude argues that the usual suspects—the cases that are cited as examples of nonoriginalist or anti-originalist precedent—are not in fact nonoriginalist in their reasoning.²²⁰ That is, he argues that such precedents are, in fact,

210. *Id.* at 2560-61.

211. *See id.* at 2561-62.

212. *See id.* at 2568-69.

213. *See Noel Canning*, 134 S. Ct. at 2578.

214. *See id.* at 2598-99.

215. *See id.* at 2578.

216. *See id.* at 2558-60.

217. André LeDuc, *Beyond Babel: Achieving the Promise of Our American Constitution*, 64 CLEV. ST. L. REV. 185, 214-18 (2016) [hereinafter LeDuc, *Beyond Babel*].

218. *See id.* at 217-18.

219. *Id.*

220. *See Baude, Our Law*, *supra* note 9, at 2376-86.

originalist.²²¹ He denies that there are constitutional authorities that challenge the authority of the original understanding as privileged by originalism.²²² His argument is a *tour de force*.

Baude challenges the traditional characterization of *Brown*²²³ as a nonoriginalist case, arguing that the opinion in fact reflects an originalist approach.²²⁴ Classically, of course, *Brown* has been known for almost a quarter of a century as the cliff over which the originalists may be thrown, because that case and its progeny are now a central part of the constitutional canon.²²⁵ Even Robert Bork did not directly challenge *Brown*.²²⁶ The failure to assimilate *Brown* into the originalist canon is widely viewed as a substantial, if not fatal, challenge to originalism.²²⁷

Baude argues that *Brown*'s historical analysis of the relevant actors' position on segregated schools showed that the historical record was mixed; it yielded no unambiguous conclusion as to the original understanding of the Fourteenth Amendment's application to segregated schools.²²⁸ In such a case where originalism provides no unambiguous reading of the constitutional text, Baude's inclusive originalism permits other interpretative methods to be employed.²²⁹ Admittedly, originalists have tried to rehabilitate *Brown* over the past decades.²³⁰ But few have found that effort persuasive. Even the low bar that Baude sets (asking whether the historical record is unclear or uncertain) would not appear to be satisfied.²³¹ While the question may not provide incontrovertible evidence, our best historical and constitutional judgment must conclude that the holding in *Brown* that segregated schools were prohibited by the Fourteenth Amendment was not consistent with any of the original understandings,

221. *See id.*

222. *See id.* at 2391.

223. *Brown*, 347 U.S. at 483.

224. *See* Baude, *Our Law*, *supra* note 9, at 2380-81.

225. *See* GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 106 (1992) [hereinafter BASSHAM, ORIGINAL INTENT]. *Loving* may be an even higher and more dangerous cliff for originalism. *See* *Loving v. Va.*, 388 U.S. 1, 2, 12 (1967) (striking down a state anti-miscegenation statute).

226. *See* BORK, TEMPTING, *supra* note 8, at 74-83.

227. *See generally* BASSHAM, ORIGINAL INTENT, *supra* note 225; *see also* Baude, *Our Law*, *supra* note 9, at 2380.

228. Baude, *Our Law*, *supra* note 9, at 2380-81.

229. *See id.*

230. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 957-62 (1995) (making a valiant but ultimately unsuccessful effort to rebut Bickel's claim that the drafters and adopters of the Fourteenth Amendment did not understand it to prohibit racially segregated schools (and thus save the original understanding of the Fourteenth Amendment from the charge of a fundamental underlying racism consistent with racially segregated public schools)); Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1884-1902 (1995) (rebutting McConnell's historical claims).

231. *See* Baude, *Our Law*, *supra* note 9, at 2380-81.

intentions, or expectations at the time of that Amendment's adoption. The recognition of those nonoriginalist themes becomes even clearer when we consider *Loving v. Virginia*.²³² Given the prevalence of anti-miscegenation statutes at the time of the Amendment's adoption, the expectations and intentions would appear reasonably clear.²³³ There is no compelling evidence that the text's linguistic understanding was inconsistent with those intentions and expectations.

Baude might have accounted for these cases by expanding his account of precedent to accept nonoriginalist precedent as Justice Scalia does.²³⁴ That would have allowed him to acknowledge those cases as law, but to treat them as qualified exceptions to the general doctrine. He does not do so, I think, because he does not want to have the *ad hoc* exceptions to his theory that Justice Scalia and Judge Bork were willing to accept. Baude does not want those exceptions because in his positivist theory, the existence of such exceptions would be more fundamentally corrosive because there is no foundational argument for originalism that makes it law beyond its existence as law.

Baude also directly addresses the pluralist challenge to his theory of privileged originalist method.²³⁵ His first argument appears to be that the pluralist challenge to originalism's claim is not very powerful, to the extent that pluralism recognizes the textual and historical arguments of originalism as canonical, albeit not exclusively so.²³⁶ I think that claim is partially right; certainly other critics of originalism have argued against the force of textual and historical arguments. But the claim is overstated insofar as the core of originalism is to privilege, to a greater or lesser degree, those historical and textual claims.²³⁷ A pluralist theory that treats all of the canonical modes of argument as equal is fundamentally inconsistent with the core originalist claim. To the extent that some of the canonical forms of argument in such a pluralist account are normative or moral arguments, such a pluralist account would also not qualify as a positivist theory of constitutional law and decision. Second, and more importantly, Baude criticizes the pluralist

232. 388 U.S. at 1.

233. See Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1189-90 (1966); see generally Alfred Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966) (arguing that the historical understanding and intent of the Fourteenth Amendment permitted anti-miscegenation laws); but see *Loving*, 388 U.S. at 9 (holding that the history is enlightening, but "inconclusive.").

234. See SCALIA, INTERPRETATION, *supra* note 8, at 139-40.

235. Baude, *Our Law*, *supra* note 9, at 2404 (expressly addressing Bobbitt's modal pluralist theory but characterizing that theory as unclear).

236. See *id.* at 2404-07.

237. See generally LeDuc, *Privileged How?*, *supra* note 175.

theory.²³⁸ He argues that the claim of modal pluralism that there is no algorithm to resolve inconsistent claims of competing canonical modes of constitutional argument makes the resolution of such disputes outside the law.²³⁹ Baude offers no argument for his claim.

Baude argues that his positivist originalism will move originalism past the criticisms that have been made of classical originalism and beyond the originalism debate altogether.²⁴⁰ That, too, is a bold claim that is of particular interest to me because I have argued that the debate cannot make significant progress beyond its existing stalemate.²⁴¹ If inclusive positivist originalism can deliver the results that Baude claims, then my deflationary account of the debate as pathological and in need of therapy faces a powerful challenge.

There is reason to curb our enthusiasm for the claims made for inclusive positivist originalism. As I have argued above, the claim that originalism is our law is not very persuasive, not only because of the participants in the classical debate who do not believe that originalism is our law, but also because Baude's own brilliant efforts to reinterpret the cases and doctrine as consistently originalist are often unpersuasive. I have above challenged his re-originalization of *Noel Canning*.²⁴² But similar doubts arise with respect to *Brown* and *Miranda v. Arizona*,²⁴³ for example.²⁴⁴

Second, the positivist core of Baude's theory, which rejects normative argument, is not a good description of our constitutional practice. While the kinds of normative arguments that are made in constitutional argument are peculiar to constitutional law (like democracy enhancement, for example) the normative flavor is apparent. It is not clear that an exclusive positivist theory, even if inclusive (in Baude's terms), can account for the richness of our constitutional law and constitutional decision practice. As has been well described before, constitutional argument is often made on a non-originalist basis—and not simply in those cases in which originalism does

238. Baude, *Our Law*, *supra* note 9, at 2406-07.

239. *Id.* (claiming that the arguments for a particular resolution will need to be made on “nonlegal terms.”).

240. *Id.* at 2353 (“the positive turn helps move past the current debates and justify a form of originalism that does not derive from the dead hand.”) (citation omitted).

241. See generally LeDuc, *Originalism, Therapy, and the Promise of the American Constitution*, *supra* note 2.

242. Baude, *Our Law*, *supra* note 9, at 2372-74.

243. 384 U.S. 436 (1966).

244. See Baude, *Our Law*, *supra* note 9, at 2378-83. In the case of *Brown*, the historical record appears to support that the original understanding was that the Fourteenth Amendment did not prohibit racially segregated schools; that is *a fortiori* true with respect to the original intentions and expectations. See generally *Brown*, 347 U.S. at 483. Thus, the holding in *Brown* cannot be originalist. In the case of *Miranda*, the historical evidence for the modern requirements of criminal defendants' waiver of their Sixth Amendment rights appears even weaker. See generally *Miranda*, 384 U.S. at 436. *Miranda* remains a good example of the nonoriginalist constitutional jurisprudence of the Warren Court.

not provide an answer to a constitutional case controversy.²⁴⁵ Those arguments cannot be adequately captured by Baude's account, which makes originalism the king of the interpretative mountain.

In addition to the dominant legal positivist branch of originalism, there is also a non-positivist, natural law originalism.²⁴⁶ The leading alternatives to positivist originalism are at least two principal varieties of natural law originalism.²⁴⁷ Justice Thomas and Randy Barnett have both endorsed natural law originalism.²⁴⁸ Their views are representative of the two strands: interpretative natural law originalism and substantive natural law originalism, respectively.²⁴⁹ This originalism taxonomy becomes even more complex when we recognize that these two versions of natural law originalism have recently been joined by a new variety that claims to articulate a stronger express form of natural law originalism.²⁵⁰

Justice Thomas, an interpretative natural law originalist, has advocated incorporating the principles of the Declaration of Independence in constitutional interpretation.²⁵¹ He consults the natural law theory of the original actors in interpreting and applying the Constitution.²⁵² One example arises with respect to the scope of state power to take private property. Justice Thomas has interpreted the Fifth Amendment Takings Clause to not only mean what it expressly says, but also to generally articulate the limits of the state's power to take private property.²⁵³ As a matter of *semantic* meaning, the Takings Clause says nothing about the taking of private property for private use, but the Clause has been uniformly read to carry a negative implication that this kind of taking is not within the

245. See generally BOBBITT, FATE, *supra* note 19.

246. See BARNETT, LOST, *supra* note 41, at 53-54; Thomas, *Plain Reading*, *supra* note 49, at 985-86, 989. Natural law originalism has a long history in American constitutional law. See generally Dred Scott v. Sandford, 60 U.S. 393 (1857); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 151, 369 (1929) [hereinafter Corwin, *Higher Law*].

247. See BARNETT, LOST, *supra* note 41, at 53-54 (outlining substantive natural law originalism); Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 34-35 (1997) [hereinafter Kennedy, *Reaffirming Justice Thomas*] (outlining Justice Thomas's interpretive natural law originalism despite his disavowal of that theory in his confirmation hearings).

248. See BARNETT, LOST, *supra* note 41, at 53-54; Kennedy, *Reaffirming Justice Thomas*, *supra* note 247, at 34-37; see also Thomas, *Plain Reading*, *supra* note 49, at 989.

249. See *id.*

250. See generally Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9. The new natural law originalism raises many of the same kinds of issues I discuss here with respect to the new positivist originalism; analyzing that development is best done in a more extended discussion of natural law originalism.

251. See Thomas, *Plain Reading*, *supra* note 49, at 985-86.

252. See *id.* at 989.

253. See *Kelo v. City of New London*, 545 U.S. 469, 506 (2005) (Thomas, J., dissenting).

scope of the state's power.²⁵⁴ In that analysis, Justice Thomas looks to natural law to define the nature of rights in private property.²⁵⁵

Interpretive natural law originalists, like Justice Thomas, often take the Declaration of Independence as the single best statement of the underlying natural law foundations of the Constitution.²⁵⁶ That is, the natural law principles of the Declaration are taken as conceptual commitments of the constitutional text, too. Thus, when the Declaration and the Bill of Rights each use the term "equal" with respect to individuals, the term is to be interpreted consistently. Interpretive natural law originalism asserts that the constitutional text is to be interpreted and applied on the basis that the agents who adopted the original Constitution and the Bill of Rights believed that the Constitution is itself grounded in natural law philosophy.²⁵⁷

Interpretative natural law originalism adopts a different approach to the Reconstruction Amendments and to later amendments. It would not import natural law into the interpretation of these amendments because the relevant actors did not generally hold natural law views.²⁵⁸ Introducing natural law theory in the interpretative method would appear inconsistent with the original understandings, intentions, and expectations of the drafters of those Amendments.²⁵⁹

Interpretive natural law originalism is intuitively plausible.²⁶⁰ Most of the delegates to the Constitutional Conventions and ratifying conventions would have endorsed a religious or, in a few cases, secular account of natural law.²⁶¹ They would have viewed natural law as the source of the rights that were expressly protected by the Constitution's text.²⁶² Indeed,

254. See U.S. CONST. amend. V.

255. See *Kelo*, 545 U.S. at 506 (Thomas, J., dissenting) ("the Court has erased the Public Use Clause from our Constitution . . ."); see generally EPSTEIN, *TAKINGS*, *supra* note 108.

256. Thomas, *Plain Reading*, *supra* note 49, at 985-86; RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 25 (1998) [hereinafter BARNETT, *STRUCTURE OF LIBERTY*]; see Douglas W. Kmiec, *Natural Law Originalism for the Twenty-first Century—A Principle of Judicial Restraint, Not Invention*, 40 SUFFOLK U. L. REV. 383, 393-96 (2007).

257. See BARNETT, *LOST*, *supra* note 41, at 54-58.

258. See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181-214 (1998) [hereinafter AMAR, *BILL OF RIGHTS*] (describing the adoption of the Fourteenth Amendment and the debates about its implications for states).

259. See generally KURT T. LASH, *THE FOURTEENTH AMENDMENT AND THE PRIVILEGES AND IMMUNITIES OF AMERICAN CITIZENSHIP* (2014) [hereinafter LASH, *PRIVILEGES AND IMMUNITIES*]; AMAR, *BILL OF RIGHTS*, *supra* note 258.

260. See generally R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?*, 4 S. CAL. INTERDISC. L.J. 463 (1996); André LeDuc, *Originalism's Claim*, section I (July 15, 2014) (unpublished manuscript) (on file with author).

261. See generally Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421 (1991); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987); see also Corwin, *Higher Law*, *supra* note 246, at 408-09.

262. See BARNETT, *LOST*, *supra* note 41, at 53-54.

those rights would appear likely to be defined by natural law.²⁶³ The best interpretation and understanding of those provisions should therefore incorporate the natural law dimension of the text's linguistic meaning.²⁶⁴ Thus, given the genealogy of the constitutional text, natural law originalists argue that the underlying natural law is an important source for understanding the original linguistic understandings, intentions, and expectations with respect to the rights guaranteed.²⁶⁵ If we want to understand what the original actors intended, expected, or meant in regards to their semantic understandings with respect to certain conceptual terms, reference to their beliefs about natural law would appear relevant and important.²⁶⁶

Barnett advocates a stronger form of natural law originalism.²⁶⁷ Under his substantive natural law originalism,²⁶⁸ Barnett would look to natural law philosophy to determine the meaning and force of the Constitution.²⁶⁹ The source of the rights protected by the Constitution is natural law, not positive law.²⁷⁰ Positive law merely implements the natural law, much as interpretive administrative regulations fill in gaps in an underlying statute. Barnett's natural law is a libertarian theory that derives the only legitimate sovereign powers from a freedom-maximizing, night watchman state.²⁷¹ While that theory, or something like it, certainly had classical defenders, it is not clear whether the relevant actors endorsed it at the Founding.²⁷² It certainly was not the dominant political philosophy at the time of

263. See generally BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 256, at 18-24.

264. See *id.* When I speak metaphorically of the constitutional text's natural law dimension, I am referring to the elements of the provisions that derive from, or implement, natural law precepts. See *id.* at 54-58. For example, these elements include the provisions for the democratic election of Congress and the President, the prohibition on the taking of property except for a public purpose with just compensation, and the prohibition on interference with contracts by states. U.S. CONST. art. II, § 1, cl. 3; U.S. CONST. art. I, § 2, cl. 4; U.S. CONST. art. IV, § 3, cl. 2; U.S. CONST. art. I, § 10, cl. 1.

265. See generally Thomas, *Plain Reading*, *supra* note 49 (turning expressly to the natural law principles of the Declaration of Independence to interpret the Constitution); but see Thomas B. McAfee, *Perspective on Natural Law: Prolegomena to a Meaningful Debate of the Unwritten Constitution*, 61 U. CIN. L. REV. 107, 110, 142-43 (1992) (expressing some skepticism about the project to interpret the Constitution based upon natural law).

266. Michael S. Moore, *Constitutional Interpretation and Aspirations to a Good Society: Justifying the Natural Law Theory of Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2087, 2095-2100 (2001) (defending the role of natural law in constitutional interpretation and decision on the basis that judges are more likely to protect natural rights than democratic legislatures are).

267. See BARNETT, *LOST*, *supra* note 41, at 53-54 (outlining substantive natural law originalism).

268. See *id.*

269. See *id.* at 75-76.

270. See Thomas, *Plain Reading*, *supra* note 49, at 991-92; see also Corwin, *Higher Law*, *supra* note 246, at 151-53.

271. See BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 256, at 1-5.

272. See generally Michael, *supra* note 261, at 424-44 (arguing, *contra* Sherry, that the broader sources of natural law available to the Founders did not support judicial review to protect natural rights); Sherry, *supra* note 261, at 1128-34 (describing the sources of fundamental law for the Founders); Corwin, *Higher Law*, *supra* note 246.

Reconstruction.²⁷³ Nevertheless, the historical account in Barnett's constitutional analysis is not a condition for the legitimacy of his constitutional interpretation.²⁷⁴ He argues that only natural law originalism that interprets and applies the constitutional text through the lens of a libertarian political theory is legitimate.²⁷⁵ Thus, even if we learned that Madison and the rest of the relevant actors in the adoption of the Constitution were utilitarian, it would still be the case that only an interpretation of the Constitution based upon a libertarian natural law would be legitimate on Barnett's account. Thus, Barnett employs the philosophical theory of natural law to inform his reading of the Constitution and to articulate his substantive theory of the Constitution.²⁷⁶

But, even in the case of the Constitution and the Bill of Rights, it might be argued on at least two grounds that the underlying natural law should not be part of the Constitutional legal authority itself. First, to the extent that natural law would give the Federal government additional powers to act on behalf of its citizens, these natural law powers would be inconsistent with the limited powers granted to the Federal government under the Constitution.²⁷⁷ This strategy initially appears somewhat artificial because the leading contemporary American sources of natural law argument in the legal academy like Richard Epstein and Randy Barnett are libertarian in tone.²⁷⁸ But other natural theorists are entirely willing to uphold intrusive, socially conservative moral legislation consistent with what they understand as the dictate of natural law.²⁷⁹ In the hands of Robert George, for example, a substantive natural law originalism would approach the contemporary constitutional jurisprudence of privacy and equal protection very differently.²⁸⁰ Emphasizing that the Republic is a government of limited powers might result in a meaningful restriction of how a substantive natural law originalism might interpret the Constitution.

273. AMAR, BILL OF RIGHTS, *supra* note 258, at 181-214 (describing the adoption of the Fourteenth Amendment).

274. BARNETT, LOST, *supra* note 41, at 80-85; BARNETT, STRUCTURE OF LIBERTY, *supra* note 256, at 19-22.

275. BARNETT, STRUCTURE OF LIBERTY, *supra* note 256, at 2-4.

276. *Id.* at 19-24.

277. See U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

278. See generally BARNETT, LOST, *supra* note 41 (leading natural law libertarian originalist account of the proper interpretation of the Constitution); EPSTEIN, TAKINGS, *supra* note 108 (leading contemporary non-originalist natural law libertarian account of an important limit on state power).

279. See generally GEORGE, NATURAL LAW, *supra* note 7; FINNIS, NATURAL LAW, *supra* note 7, at 216-17 (arguing that the nature and centrality of human sexuality in human social life brings systematic regulation of sexual behavior within the proper ambit of natural law).

280. See, e.g., GEORGE, NATURAL LAW, *supra* note 7, at 184-95 (arguing that the protection of the First Amendment ought not extend to pornography because of pornography's deleterious effects on human flourishing).

Second, a strategy to discount the role of substantive natural law in reading the provisions of the Constitution might directly challenge whether natural law has the character required for it to play a determinative role in constitutional decision. Barnett emphasizes the importance of writtenness as a feature of the Constitution.²⁸¹ Natural law, by contrast, is unwritten; who, after all, would write it? If natural law were incorporated as a substantively determinative element of the Constitution, the benefit of writtenness that Barnett endorses would appear forfeit.²⁸²

Barnett's substantive natural law originalism also presents a number of questions as a matter of originalist theory. The first question is whether substantive natural law originalism ought to be treated as a variety of originalism at all. That question arises because of the potential conflict between natural law and the original understanding, intentions, and expectations with respect to the constitutional text. This is a potential problem with respect to the original provisions of the Constitution and the Bill of Rights, but it becomes a more serious problem with respect to later amendments, as the relevant actors likely did not endorse a natural law theory.²⁸³

Even with the original Constitution, how does one reconcile the constitutional provisions protecting slavery and, indeed, the slave trade with natural law?²⁸⁴ Historically, classical natural law doctrine did not prohibit slavery,²⁸⁵ even though by the time of the Constitution's adoption many had concluded that natural law prohibited enslaving free persons.²⁸⁶ One possible interpretative strategy would therefore be to defend a natural law theory that respects the rights of slave owners and does not protect slaves' right to freedom.²⁸⁷ While that strategy is theoretically possible, it appears

281. See BARNETT, LOST, *supra* note 41, at 100-09.

282. Barnett might argue that he can reconcile his commitment to the virtues of writtenness with the use of natural law as a substantive interpretive tool. He might argue that even these substantive unwritten interpretative methods are not enough to undermine the benefits of the written text. Indeed, he might argue that the entire corpus of constitutional interpretative techniques is unwritten, not just the natural law methodology.

283. See generally LASH, PRIVILEGES AND IMMUNITIES, *supra* note 259; AMAR, BILL OF RIGHTS, *supra* note 258.

284. U.S. CONST. art. IV, § 2, cl. 3 (prohibiting the free states from refusing to recognize the rights of slave owners); U.S. CONST. art. I, § 9, cl. 1 (protecting the slave trade in the United States before 1808 from federal prohibition).

285. See DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 95-96 (1966); see generally *Dred Scott*, 60 U.S. at 393.

286. See *The Antelope*, 23 U.S. 66 (1825). Natural law principles of equality and inclusion were tempered and overridden by the exclusion of non-whites; that exclusion generated the limitations on natural law and natural rights theory which provided the foundation for arguments legitimizing slavery. See *Dred Scott*, 60 U.S. at 404-18; see generally Thomas, *Plain Reading*, *supra* note 49.

287. See Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1322-25, 1354-55 (2000) (briefly describing some of the antebellum Southern Christian natural law justification for slavery).

inconsistent with the post-Reconstruction Constitution after the adoption of the Thirteenth and Fourteenth Amendments. In light of the text of the Thirteenth Amendment, slavery was impermissible in the United States, without regard to what natural law might otherwise provide. A more promising strategy would be to argue either that the historical provisions of the Constitution protecting slavery have lapsed, with respect to the limited protection of the slave trade (which expired in 1808), or that these provisions have been effectively repealed by the adoption of the Reconstruction Amendments.²⁸⁸ Thus, under the current Constitution, natural law originalism does not legitimize slavery and modern natural law theory would generally prohibit slavery.²⁸⁹

But this historical account may be too facile, because it fails to address the challenge of *Dred Scott v. Sandford*.²⁹⁰ Most of us want to say not simply that *Dred Scott* and *Plessy v. Ferguson*²⁹¹ are no longer the law today, but also to make the stronger claim that those cases were wrong when the Supreme Court decided them.²⁹² Originalists who adopt a substantive natural law approach cannot make this stronger claim, because the dominant form of natural law at the time of the Constitution's adoption permitted slavery and protected the property rights of slave owners.

But we need to be wary of the seductive appeal of whiggish constitutional history before rushing to conclude that this failure is a flaw in the originalist account. It may be that, as a matter of constitutional law, those cases were not wrong when they were decided. It would be tempting to conclude that the Constitution has always distrusted slavery, even when it did not expressly prohibit slavery. That interpretation or characterization might suggest that *Dred Scott* was wrong even when it was decided. But before the Reconstruction Amendments, there was much in the Constitution that tacitly endorsed slavery, even if the text never expressly referred to the

288. See Earl M. Maltz, *Slavery, Federalism, and the Structure of the Constitution*, 36 AM. J. LEGAL HIST. 466, 498 (1992) (arguing that the effective repeal of the antebellum law on slavery left many of the underlying questions of federalism that had figured into the antebellum constitutional law of slavery unresolved); see generally MARK TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* (1981).

289. See GEORGE, *NATURAL LAW*, *supra* note 7, at 323-24; FINNIS, *NATURAL LAW*, *supra* note 7, at 210-11.

290. *Dred Scott*, 60 U.S. at 393.

291. 163 U.S. 537 (1896).

292. See Sanford Levinson, *Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery*, in RONALD DWORKIN 136, 153-54 (Arthur Ripstein ed., 2007) (criticizing Dworkin's account of law as integrity as failing to make clear that *Dred Scott* was wrong when decided); see generally Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011) (including *Dred Scott* in what Greene terms the constitutional anticanon—the cases that are the most notorious and mistaken in the Court's history).

institution.²⁹³ As a historical matter, the arguments supporting the decision in *Dred Scott* were not implausible on their face, however troubling they appear today.²⁹⁴

The more general question is how substantive natural law originalism would address a tension or inconsistency between the semantic or linguistic meaning of the constitutional text and the precepts of natural law. An example is provided by the case of checkerboard statutes.²⁹⁵ Natural law would appear to prohibit such laws to the extent that they implicate rights relevant to natural law and not simply specifications that implement natural law.²⁹⁶ Natural law is universal and invariant; it does not vary fundamentally depending on the location.²⁹⁷ That is so both under classical natural law and the natural law theory defended by Ronald Dworkin.²⁹⁸ Yet the federalism of our Republic would not appear to systematically prohibit these laws, insofar as it allows state or local sovereigns to pursue alternative legislative and political strategies.²⁹⁹ The linguistic meaning of the constitutional text, while not express, would therefore likely not prohibit the

293. See generally ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 209 (1975) (canvassing the arguments that the Constitution had a pro-slavery commitment and the stance underlying the arguments made by the dissenters in *Dred Scott* that it did not).

294. See generally *Dred Scott*, 60 U.S. at 404-18 (describing in detail the racist views shared by slave owners and abolitionists in the North at the time the Constitution was adopted).

295. See DWORKIN, *EMPIRE*, *supra* note 24, at 178-84 (arguing that checkerboard laws violate the requirements of law as integrity). See generally Boris I. Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 *YALE L.J.* 1387 (1962) [hereinafter Bittker, *Race Relations*]. As I will use the term, a checkerboard statute is a law that provides for one rule in one location and a different rule in another location where the outcomes are not related to the physical location. The most celebrated example, of course, is the Missouri Compromise, which adopted different rules for different new states with respect to slavery. That law was the second Federal law invalidated by the Court (not on the basis that it provided such different rules) when it was struck down in *Dred Scott*. See generally *Dred Scott*, 60 U.S. at 393.

296. To the extent that such laws are different specifications of natural law principles, natural law would appear to permit inconsistency. See FINNIS, *NATURAL LAW*, *supra* note 7, at 284-90 (describing the choices that may be made under natural law through enactment of the *determinatio*). To the extent that such laws provide the substantive rights asserted by natural law, however, uniformity would appear to be required.

297. See generally LLOYD L. WEINREB, *NATURAL LAW AND JUSTICE* 43-66 (1987) [hereinafter WEINREB, *NATURAL LAW*] (describing the classical theory that found the source of natural law in the universals of nature). Admittedly, inessential laws may vary; some states may permit right turns on red lights, others may not. But that variation on the margin would not appear to extend to fundamental natural law questions like the legality of slavery.

298. DWORKIN, *EMPIRE*, *supra* note 24, at 217-18; FINNIS, *NATURAL LAW*, *supra* note 7, at 284-86, 288-90.

299. For Justice Brandeis's classic assertion of the principle of federalism that states may experiment with different economic and social policies, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Implicit in that claim is a recognition that such policies may be inconsistent with one another resulting in a legal checkerboard.

laws that were otherwise proper.³⁰⁰ It is not always clear how this inconsistency should be resolved.³⁰¹

Substantive natural law originalism must address the erosion of the commitment to natural law by the relevant actors behind the constitutional amendments after the Civil War. One could begin to explore this challenge by testing the post-reconstruction amendments against a natural law template. Because the post-reconstruction amendments are generally relatively modest in their import (with the exception of the Sixteenth Amendment and the Nineteenth Amendment), the absence of a historical natural law foundation for the relevant actors may be less significant. But the Sixteenth Amendment, authorizing the imposition of a Federal income tax, poses a more serious challenge to natural law constitutional theory.³⁰²

The ability to impose a progressive income tax and the associated potential for redistribution raises important questions under natural law property rights theory.³⁰³ Many libertarian natural law theorists have questioned the legitimacy of the progressive income tax.³⁰⁴ One possibility would be to read the Sixteenth Amendment as not including progressive income taxes.³⁰⁵ This interpretation appears difficult to reconcile with the text of the Amendment (which expresses no such limitation) and the understandings and expectations at the time of the Amendment's adoption.³⁰⁶ To the extent that a progressive personal income tax violates natural law, it is difficult to adopt a natural law foundation for the interpretation of that constitutional text.³⁰⁷

300. See *New State Ice Co.*, 285 U.S. at 311 (Brandeis, J., dissenting).

301. In some instances, the judges have deferred to the Constitution or other legal texts. See, e.g., *The Antelope*, 23 U.S. at 128-31 (acknowledging that enslaving prisoners in war is contrary to natural law but not uniformly contrary to positive law and affirming the claim of Spanish citizens for the return of certain enslaved persons as property).

302. U.S. CONST. amend. XVI.

303. See EPSTEIN, TAKINGS, *supra* note 108, at 283-305.

304. See *id.* at 284-85, 295-98 (arguing that progressive income taxation is constitutionally impermissible); Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 469, 485 (1987) (analyzing the theoretical literature and arguments with respect to the justice of a progressive income tax after conceding that fiscal choices can only be made on the basis of an underlying philosophical theory: "This discussion suggests something that careful thinkers have long recognized: no tax system can be evaluated without reference to a theory of political economy or public choice." (footnote omitted)). Randy Barnett has gone so far as to suggest in the public sphere that the Sixteenth Amendment should be repealed. Randy Barnett, *The Case for a Federalism Amendment: How the Tea Partiers Can Make Washington Pay Attention*, WALL ST. J. (Apr. 23, 2009), <http://www.wsj.com/articles/SB124044199838345461>.

305. WALTER J. BLUM & HARRY KALVEN, JR., *THE UNEASY CASE FOR PROGRESSIVE TAXATION* 6 (1953) (developing a cautious but classic statement of some of the principal arguments that call the progressive income tax into question).

306. See *id.* at 6-11; U.S. CONST. amend. XVI.

307. See generally Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAP. L. REV. 157 (1999) (criticizing Epstein's argument that natural law requires proportionate taxation).

A subtler problem raised by the changing conceptual commitments of the modern Republic for both interpretive and substantive natural law originalism is whether natural law theory has been replaced in the modern Republic by another substantive theory that informs constitutional interpretation. Ironically, it is an easier question for substantive natural law originalists; because they are committed to the truth of the natural law account, other theories are not privileged in constitutional interpretation because they are wrong.³⁰⁸ For the interpretive natural law originalist, however, if there were a persuasive case for the adoption of an alternative conceptual framework to natural law, it would be hard to explain why that new theory ought not to play the same role accorded natural law. Most originalists probably would agree with Judge Bork and Justice Scalia that there is no such replacement for natural law in the modern pluralist Republic.³⁰⁹ In any case, many of the most important and most controversial constitutional provisions are part of the original text or the Bill of Rights, when natural law was arguably dominant.

Positivist forms of originalism expressly reject natural law as an element of the relevant original public linguistic understandings, intentions, or expectations.³¹⁰ They make two principal arguments. First, to the extent that natural law originalists would look to the text of the Declaration of Independence, the positivist originalists reject the Declaration of Independence as a source of positive law.³¹¹ One argument for the positivists simply remarks that while the Declaration of Independence was an act of treason and a declaration of independence under the law of the British Empire, it is no longer authoritative in the constitutional republic later formed under the Constitution.³¹²

The lack of authoritative status for the Declaration of Independence on this account warrants explanation. It is not simply that the Declaration pre-dates the formation of the Republic. Other legal authorities predating the formation of the new sovereign Republic have retained their authoritative status in the Republic.³¹³ The Declaration of Independence is not authoritative in constitutional interpretation because even when it was

308. See generally BARNETT, LOST, *supra* note 41, at 89 (asserting the natural law legitimacy of the Constitution's original understanding).

309. See SCALIA, INTERPRETATION, *supra* note 8, at 45; BORK, TEMPTING, *supra* note 8, at 256-57 (asserting that the moral pluralism arising out of the absence of a teleological consensus prevents authoritative appeals to moral theory in constitutional interpretation).

310. See, e.g., SCALIA, INTERPRETATION, *supra* note 8, at 134.

311. See *id.*

312. See Lee J. Strang, *Originalism, the Declaration of Independence, and the Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN. ST. L. REV. 413, 448, 467-77 (2006) [hereinafter Strang, *Originalism*].

313. The state Constitutions that pre-dated the adoption of the United States Constitution are among the examples.

proclaimed, it was not law.³¹⁴ Whether the Declaration of Independence is rejected as law by means of a rule of recognition or otherwise, the positivist critics of originalism can reject the political philosophy of the Declaration of Independence because it is not law.³¹⁵ Positive law originalism would appear entitled to the same move.

Second, and more fundamentally, the positivist originalists reject the use of philosophical theory to interpret the language of the Constitution.³¹⁶ Originalists, who look to the original meaning of the constitutional text, treat the text as employing language in a vernacular, non-technical sense.³¹⁷ The particular philosophical meaning of the term “rights,” for example, is not relevant to interpreting the Constitution’s guarantees, even if that philosophical meaning varied from the vernacular.³¹⁸ The argument for rejecting philosophical content—even philosophical *semantic* content—is sometimes only a conclusive statement.³¹⁹ Justice Holmes is an oft-cited source for this approach.³²⁰ Sometimes the defense, as with Justice Scalia and Judge Bork, relies upon the epistemological status of philosophical knowledge; for them, philosophical claims are simply too uncertain and controversial to ground constitutional conclusions.³²¹ Justice Scalia and Judge Bork would appear correct in their judgment about philosophical arguments and conclusions; few would assert that philosophy has ever been put on the firm path of science, despite the many attempts to do so.³²² If they are wrong, it must be about the role philosophical argument plays in constitutional law and decision.

I have defended a limited, therapeutic role for philosophy in constitutional law.³²³ The role often accorded philosophical theory and

314. See, e.g., Strang, *Originalism*, *supra* note 312, at 448, 467-77 (making a variety of natural law and positive law arguments that the Declaration is not law, concluding that “[T]he [Declaration’s] original function was to end the previous regime, not to lay down principles to guide and limit its successors.”).

315. See *id.* at 467-77.

316. See SCALIA, INTERPRETATION, *supra* note 8, at 45.

317. See *generally id.* (asserting the necessity of a broad linguistic understanding as an element of new originalism’s public understanding theory).

318. See *id.*

319. See, e.g., *id.* at 44-45 (emphasizing that the claims of contemporary moral and political philosophy are largely a matter of continuing debate).

320. See *Lochner v. N.Y.*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). The power of Holmes’s assertion is reinforced by its context in his dissent from one of the most celebrated decisions in the contemporary constitutional anti-canon.

321. SCALIA, INTERPRETATION, *supra* note 8, at 44-45; BORK, TEMPTING, *supra* note 8, at 254-55 (arguing that the claim to ground substantive constitutional conclusions on philosophical moral theory is necessarily impossible); *but see* LeDuc, *Ontological Foundations*, *supra* note 1, at 264-65, 306 (arguing that positivist originalism is committed to far-reaching and controversial philosophical premises).

322. See SCALIA, INTERPRETATION, *supra* note 8, at 44-45; BORK, TEMPTING, *supra* note 8, at 254-55.

323. See *generally* LeDuc, *Five Lessons*, *supra* note 148.

arguments in constitutional law, and against which Justice Scalia and Judge Bork are arguing, is far more substantial.³²⁴ For Dworkin, of course, moral theory plays a constitutive role in constitutional law.³²⁵ But other critics of originalism look to moral theory to play an important, substantive role in constitutional theory and decision.³²⁶ The debate over the constitutional status of capital punishment provides a good example of critics' willingness to look to moral theory.³²⁷ Those who assert that capital punishment must be prohibited as cruel and unusual often look to moral theory for the meaning of the Eighth Amendment standard.³²⁸ Similarly, Martha Nussbaum has looked systematically to moral theory to defend her argument that our constitutional interpretation ought to be informed by moral philosophical thinking.³²⁹ Finally, Richard Posner's debate with his critics, on the occasion of his Holmes Lectures, turned on the place of moral theory in constitutional reasoning. A broad array of constitutional theorists have defended the place of moral philosophical reasoning.³³⁰ The willingness of originalism's critics to invoke substantive philosophical argument in defense of their constitutional argument is widespread.³³¹

Both the new positivist originalists and the new natural law originalists are express in their invocation of jurisprudence.³³² That strategy raises the question whether their use of philosophical arguments is persuasive as a matter of constitutional theory and metaphilosophy and whether those strategies are inconsistent with the claims I have made about the limited role that philosophical argument can play in constitutional law and theory.³³³

In characterizing their theories as making a positive turn in originalist theory, the new positive originalists invoke legal positivism to perform one principal task. Most fundamentally, Baude appears to believe that his

324. *Id.* at 104; see generally DWORKIN, *EMPIRE*, *supra* note 24.

325. See generally DWORKIN, *EMPIRE*, *supra* note 24.

326. See generally Martha Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007) [hereinafter Nussbaum, *Capabilities*].

327. See, e.g., SCALIA, *INTERPRETATION*, *supra* note 8, at 46.

328. See Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 121-30 (2004) (describing the role of moral argument in capital punishment jurisprudence).

329. See generally Nussbaum, *Capabilities*, *supra* note 326.

330. See Posner, *Problematics*, *supra* note 26; see also Ronald Dworkin, *Darwin's New Bulldog*, 111 HARV. L. REV. 1718, 1718 (1998); Charles Fried, *Philosophy Matters*, 111 HARV. L. REV. 1739, 1742-43 (1998) [hereinafter Fried, *Philosophy Matters*] (reporting, anecdotally, that as a judge he had recourse to such analysis); Martha Nussbaum, *Still Worthy of Praise*, 111 HARV. L. REV. 1776, 1776 (1998) [hereinafter Nussbaum, *Still Worthy*].

331. See Fried, *Philosophy Matters*, *supra* note 330, at 1741; Nussbaum, *Still Worthy*, *supra* note 330, at 1776-77; Dworkin, *supra* note 185, at 1718-19.

332. See Baude, *Our Law*, *supra* note 9, at 2351.; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9, at 3.

333. See generally LeDuc, *Five Lessons*, *supra* note 148 (arguing that philosophy can play a therapeutic role with respect to linguistic puzzles and pathologies, not a foundational role).

inclusive positivist originalism provides a basis on which to reject historically canonical modes of constitutional argument and, at least as importantly, constitutional doctrine and precedent.³³⁴ That is, while Baude asserts that our law is originalist and offers readings to show that more of that law can be brought within the scope of his claim than we might have anticipated, there are outliers that remain in our constitutional jurisprudence.³³⁵ Baude appears, reluctantly, to disavow those elements in our law, but the implications of the failure of those precedents to satisfy the requirements of inclusive positivist originalism is not entirely clear. Put another way, when law and originalism conflict, Baude is at least sometimes prepared to jettison the outlying law. Thus, it often implies ought, legally, in Baude's constitutional jurisprudence, but not always. Constitutional existence is not always prior to constitutional essence.³³⁶

When the existing law departs too far from the original understanding, it is subject to rejection and reform. The consistency principle that Baude invokes and deploys is never made entirely clear. On one hand, Baude appears to treat such non-conforming precedents as the law.³³⁷ On the other hand, he asserts that the original understandings can properly trump such precedent in decision, even when such precedents are themselves invulnerable to reconsideration.³³⁸ By insisting on a consistency principle, Baude creates his Archimedean stance from which to prune our unruly practice of constitutional argument and decision. When such principle does have effect, Baude's claim as a matter of methodological doctrinal purity is no more powerful than the other originalist claims to trump our established precedent, doctrine, and modes of argument.

Baude's account remains philosophically somewhat naïve, however, as evidenced by his approach to the famous two hikers and the bear joke.³³⁹ The argument that a theoretical account succeeds in the absence of an alternative is a fascinating sideshow in contemporary constitutional theory. What is it that the implicit argument claims and what part of that argument does Baude endorse? The joke, or principle as Baude styles it, asserts that a bad theory beats no theory.³⁴⁰ While Justice Scalia has frequently asserted

334. Baude, *Our Law*, *supra* note 9, at 2397-98 (exploring the kinds of arguments that would be excluded).

335. *See id.* at 2391.

336. *See generally* Jean-Paul Sartre, *Existentialism is a Humanism*, in *EXISTENTIALISM: FROM DOSTOEVSKY TO SARTRE* 290-91 (Walter Kaufmann ed., 1956) (classic statement of the existentialist thesis that for human persons their essential nature is determined by their existence and the choices that they make).

337. *See* Baude, *Our Law*, *supra* note 9, at 2391.

338. *Id.* at 2386.

339. *Id.* at 2407. Baude terms it a principle, but it is usually told as a joke.

340. *See id.*

that, it is unclear why that argument is even advanced. It is not true in scientific theory formation. It is also not the case in jurisprudence and is probably not the case in constitutional theory, either. A bad theory just means we need to continue to look for a good theory.

Finally, as a matter of substantive constitutional law, it is valuable to compare positivist originalism with the two forms of natural law originalism. The law that is derived by all three versions is substantially similar. Justice Scalia's and Justice Thomas's voting patterns reflect the substantial congruence between positive law originalism and the weaker form of natural law originalism, interpretative natural law originalism.³⁴¹ The principal sources of substantive doctrinal difference arise from a disparate treatment of precedent and, albeit to a lesser extent, principle.³⁴² Justice Thomas gives less deference to precedent than Justice Scalia,³⁴³ and his natural law theory offers the best explanation for that difference.³⁴⁴ For example, Justice Thomas would overrule the established Fifth Amendment jurisprudence on takings that has effectively read the requirement of public use out of the text.³⁴⁵

The lack of deference Justice Thomas accords non-originalist precedent is a corollary of his emphasis on the abstract principles stated expressly in the Declaration of Independence and implicitly, he asserts, in the Constitution.³⁴⁶ Justice Thomas's willingness to extend the protection given to private property is driven by his natural law theory.³⁴⁷ Similarly, Justice Thomas would dismantle much of the Supreme Court's Equal Protection jurisprudence on the basis of his colorblind principles grounded in natural

341. See GERBER, *FIRST PRINCIPLES*, *supra* note 51, at 38-47 (exploring Justice Thomas's views on natural law and their role in his constitutional jurisprudence).

342. See generally Kiran Iyer, *Justice Scalia, Justice Thomas and Fidelity to Original Meaning*, 12 DARTMOUTH. L.J. 55, 106-07 (2014) [hereinafter Iyer, *Fidelity*] (arguing briefly that Justice Thomas is far more willing to overrule non-originalist precedent than Justice Scalia).

343. *Id.* at 103-08.

344. See, e.g., *Kelo*, 545 U.S. at 505-07 (Thomas, J., dissenting); Iyer, *Fidelity*, *supra* note 342, at 80-89.

345. *Kelo*, 545 U.S. at 505-07 (Thomas, J., dissenting) (arguing that the requirement of public use is an independent predicate required to be satisfied for the Federal or a state government to exercise the power of eminent domain to take private property, notwithstanding the Court's established Fifth Amendment doctrine).

346. See *Adarand Constructors v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring) (arguing that the implication of a color-blind Constitution is that racial classifications, even racial classifications designed to benefit minorities, are invalid, concluding that "under our Constitution, the government may not make distinctions on the basis of race."); see generally Thomas, *Plain Reading*, *supra* note 49 (turning to the natural law principles of the Declaration of Independence to interpret the original provisions of the Constitution and the Bill of Rights).

347. *Kelo*, 545 U.S. at 505-06, 510-11 (Thomas, J., dissenting) (arguing that the Court's Takings Clause doctrine is inconsistent with the constitutional text and the natural law of private property, noting that "The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A. and giv[ing] it to B.'" (citation omitted)).

law.³⁴⁸ In each case, the differences arise from Justice Thomas's stance on the precedents comprising the Supreme Court's doctrinal jurisprudence.³⁴⁹ Justice Thomas's natural law originalism more willingly denies legitimacy to non-originalist precedent because it is often more obviously inconsistent with the natural law principles expressed in the Declaration. That manifest inconsistency with those principles results in that precedent being disregarded more easily and more often.³⁵⁰

Unsurprisingly, there are more significant differences between substantive natural law originalism and positivist originalism.³⁵¹ Barnett argues that the Commerce Power has been interpreted far too broadly and that in the process it has compromised natural law rights.³⁵² To support this argument, Barnett offers examples such as the Mann Act's prohibition of interstate travel for immoral purposes.³⁵³ More celebrated is Barnett's successful challenge to the enactment of the Affordable Care Act as being outside the Federal Government's authority under the Commerce Power.³⁵⁴ Barnett argued—and those arguments ultimately persuaded the Court—that a fundamental distinction should be drawn between the power to regulate action and the power to regulate inaction.³⁵⁵ There are reasons to question the import of this distinction,³⁵⁶ in any case, it required limiting long-established Commerce Clause jurisprudence.³⁵⁷

Nevertheless, the differences between positive law originalist jurisprudence and both forms of natural law originalist jurisprudence, on the one hand, and their critics, on the other, are far greater than the differences among the three strands of originalism.³⁵⁸ All of the principal forms of

348. See *Adarand*, 515 U.S. at 240; GERBER, *FIRST PRINCIPLES*, *supra* note 51, at 49-53.

349. See GERBER, *FIRST PRINCIPLES*, *supra* note 51, at 49-53.

350. Joel K. Goldstein, *Calling Them as He Sees Them: The Disappearance of Originalism in Justice Thomas's Opinions on Race*, 74 MD. L. REV. 79, 85-92 (2014) (arguing that while Justice Thomas has departed from an originalist methodology in his more recent opinions with respect to racial discrimination, the other central elements of his constitutional jurisprudence reflect a strong originalist stance—and a corresponding willingness to reverse non-originalist precedent); Iyer, *Fidelity*, *supra* note 342, at 55, 106-07. For example, Justice Thomas has signaled his willingness to reverse important parts of the Court's long-established Dormant Commerce Clause and Takings Clause jurisprudence. *Id.* at 106-07.

351. See Iyer, *Fidelity*, *supra* note 342, at 80-89.

352. BARNETT, *LOST*, *supra* note 41, at 274-318.

353. *Id.* at 313.

354. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012); see generally JOSH BLACKMAN, *UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE* (2013).

355. *Sebelius*, 132 S. Ct. at 2590-91 (“[W]e have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.”).

356. See generally LeDuc, *Beyond Babel*, *supra* note 217.

357. See *Sebelius*, 132 S. Ct. at 2617-19 (Ginsburg, J., concurring in part and dissenting in part).

358. SCALIA, *INTERPRETATION*, *supra* note 8, at 38; SUNSTEIN, *RADICALS*, *supra* note 17, at 26; see generally James E. Fleming, *Fidelity to Our Living Constitution*, 50 TULSA L. REV. 449, 451-54 (2015) (reviewing 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014)) (describing briefly some of the debate over originalism).

originalism have generally supported the recognition of broader individual rights to guns under the Second Amendment, more limited race-based affirmative action programs, and have generally questioned the privacy and equal rights jurisprudence of the Supreme Court.³⁵⁹ Most of the critics of originalism, including Tribe, Dworkin, and Sunstein, have generally endorsed affirmative action and the Supreme Court's expansive privacy and equal rights jurisprudence.³⁶⁰ Substantial common ground has existed principally with respect to reading the Second Amendment as creating significant individual rights to firearms.³⁶¹

B. Originalism's Critics and Their Objections to Originalism

Criticism of originalism comes from both positivists and non-positivists.³⁶² The dominant stance taken by originalism's critics is legal positivist.³⁶³ Legal positivists who criticize originalism include Richard Posner, Cass Sunstein, and Jefferson Powell.³⁶⁴ Critics of originalism who apparently eschew legal positivism include Laurence Tribe and Ronald

359. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 576-77, 625, 636 (2008); SCALIA, INTERPRETATION, *supra* note 8, at 43. See also *Adarand*, 515 U.S. at 240 (Thomas, J., concurring); *Gruiter v. Bollinger*, 539 U.S. 306, 349-51 (2003) (Thomas, J., concurring in part and dissenting in part). See, e.g., Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 1, 55 (Steven G. Calabresi ed., 2007) [hereinafter Calabresi, *Critical Introduction*].

360. See RONALD M. DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 121, 147-62 (1996) [hereinafter DWORKIN, FREEDOM'S LAW]; SUNSTEIN, RADICALS, *supra* note 17, at 81-82; Laurence H. Tribe, *Constitutional Scholars' Statement on Affirmative Action after City of Richmond v. J.A. Croson Co.*, 98 YALE L.J. 1711, 1712 (1989) (criticizing the Court's restrictions on affirmative action by announcing a strict scrutiny standard of review for affirmative action programs in *City of Richmond*); but see SUNSTEIN, ONE CASE AT A TIME, *supra* note 27, at 129-30, 132 (endorsing the Court's cautious, minimalist statements on affirmative action, including *City of Richmond* and *Adarand Constructors*, on the basis that by limiting the Court's role, the resolution of the conflicting views has been left with the political, democratic process).

361. See Cass R. Sunstein, *Second Amendment Minimalism: Heller as Griswold*, 122 HARV. L. REV. 246, 246-50 (2008) [hereinafter Sunstein, *Heller*] (arguing that the firearm regulatory law struck down in *Heller* was particularly intrusive and not representative of the nation's political views (a somewhat overly charitable assessment in light of the subsequent Second Amendment developments)).

362. See, e.g., LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 15 (1991) [hereinafter TRIBE & DORF, READING] (citing LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 11-12 (1985) [hereinafter TRIBE, CONSTITUTIONAL CHOICES]) (noting that constitutional decision-making requires making substantive value choices); RONALD DWORKIN, *The Forum of Principle*, in A MATTER OF PRINCIPLE 34-71 (1985) [hereinafter DWORKIN, MATTER OF PRINCIPLE]. Such reliance upon fundamental normative choices would appear inconsistent with legal positivism's separability thesis. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 71-72 (1978) (asserting that constitutional decisions inescapably require political choices).

363. See, e.g., POSNER, PROBLEMS, *supra* note 23, at 29. The late Ronald Dworkin is an important exception. See DWORKIN, EMPIRE, *supra* note 24, at 37-38.

364. Posner, *Bork and Beethoven*, *supra* note 17, at 1368; see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 886, 896-97, 948 (1985); see generally SUNSTEIN, RADICALS, *supra* note 17.

Dworkin.³⁶⁵ In Dworkin's case, his objections to legal positivism are express and highly articulated.³⁶⁶ Indeed, he occasionally characterizes himself as within the natural law tradition.³⁶⁷ Dworkin's fundamental objections to legal positivism do not include rejecting the positivist claim that law is known and determined. Dworkin denies that law is determined by legal rules, a position he attributes to Hart and legal positivism;³⁶⁸ he believes that the principles of moral and political philosophy figure centrally in the decision of constitutional cases.³⁶⁹ While he believes that even hard cases have unique right answers, he denies that they can be known with the precision that Hart's concept of a rule of recognition requires.³⁷⁰

Tribe's position is not so easy to articulate. Tribe appears to assert that constitutional decisions must be informed by normative choices.³⁷¹ Since those normative choices would appear to be, at least in part, moral choices,³⁷² Tribe must reject the separability thesis defended by legal positivism.³⁷³ It might be that Tribe believes his position is consistent with positivism, because the normative choices are in the nature of legal choices rather than moral choices.³⁷⁴ According to this argument, judges are required to make choices not by looking to a separate moral realm, but instead by looking to legal values. This characterization of the normative choices made in adjudication would preserve the separability thesis because legal authority would remain independent of moral argument and value. But this claim invokes a concept of legal values independent of moral and

365. See DWORKIN, *EMPIRE*, *supra* note 24, at 37-38; TRIBE, *CONSTITUTIONAL CHOICES*, *supra* note 362, at 11-12.

366. DWORKIN, *EMPIRE*, *supra* note 24, at 37-38, 104; DWORKIN, *MATTER OF PRINCIPLE*, *supra* note 362, at 37, 46.

367. Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 165 (1982) (explaining that his theory qualifies as a natural law theory because it looks to principles of morality that are a matter of the natural world, not merely a matter of positive law).

368. DWORKIN, *TAKING*, *supra* note 13, at 22-31.

369. DWORKIN, *EMPIRE*, *supra* note 24, at 285-86.

370. DWORKIN, *TAKING*, *supra* note 13, at 29-31, 81-130.

371. See TRIBE, *CONSTITUTIONAL CHOICES*, *supra* note 362, at 5-6 (arguing that constitutional interpretation and decision must be informed by normative choices).

372. See *id.* at 16-18, 26 (criticizing process-focused constitutional theories like that espoused by Ely for their failure to recognize and make the necessary substantive normative choices); see also Laurence H. Tribe, *Comment, in SCALIA, INTERPRETATION*, *supra* note 8, at 65, 72-73 [hereinafter Tribe, *Interpretation*] (denying the pervasive and systematic role for moral theory defended by Dworkin); TRIBE & DORF, *READING*, *supra* note 362, at 24-30 (criticizing what they characterize as hyper-integrated theories of the Constitution).

373. See generally COLEMAN, *PRACTICE*, *supra* note 5, at 104; Tribe, *Interpretation*, *supra* note 372, at 69.

374. See generally Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817, 855-56 (1986) (characterizing Tribe as importing "community values . . ." into his substantive constitutional jurisprudence and proposing to employ Freud's arguments to put Tribe's theory on a firm foundation).

ethical values to preserve the separability thesis; that move appears questionable.³⁷⁵ Certainly, peculiar legal values exist that have the requisite independence, and obvious examples include the values of certainty and ease of proof that have been associated with requirements for writings.³⁷⁶ But these legal values must not only exist—they must also be the exclusive source of value in constitutional judgments. Such a claim to exclusivity appears questionable. Thus, Tribe's assertion that constitutional interpretation and decision requires normative choices makes his account a non-positivist theory.

One important criticism of originalism attacks it as a positivist theory.³⁷⁷ Ronald Dworkin's criticism makes two principal arguments. First, he denies that the original understandings privileged by originalism exist.³⁷⁸ His easiest target was original intentions originalism.³⁷⁹ It is much harder to argue that there was not an original public understanding of the semantic or linguistic meaning of the constitutional text. Dworkin's theory argues that the understanding needed for public understanding originalism is both very subtle and complex to reconstruct and insufficient to determine the decision of contemporary constitutional controversies.³⁸⁰

Dworkin does not limit his criticism of originalism to the credibility of its premises, however.³⁸¹ Second, he offers a non-positivist theory of law and a competing interpretation of the Constitution's broad provisions.³⁸² Just as the originalists argue that their interpretation is the sole interpretation permitted, so, too, does Dworkin. Dworkin's claim to exclusivity is, admittedly, more implicit than express. Exclusivity follows from the theory itself. Law as integrity provides a comprehensive, unifying theory of the law, harmonizing it not only within itself, but also with political theory and morality.³⁸³ He offers his theory of law as integrity as the best theory to harmonize and synthesize the various streams of law, generally, and the Constitution in particular.³⁸⁴ Dworkin argues that law as integrity provides the best interpretive techniques to make sense of the open-ended

375. David A.J. Richards, *Originalism Without Foundations*, 65 N.Y.U. L. REV. 1373, 1376 (1990) (reviewing BORK, *TEMPTING*, *supra* note 8).

376. See BARNETT, *LOST*, *supra* note 41, at 100-03.

377. DWORKIN, *MATTER OF PRINCIPLE*, *supra* note 362, at 55-56, 58. This attack denies the separability thesis and may, in its commitment to objectivity, deny the social fact thesis as well.

378. See *id.* at 33-36, 57 (arguing in this early article against original intentions originalism that the concept of a shared, group intention is not well defined).

379. *Id.*

380. See Ronald Dworkin, *Comment*, in SCALIA, *INTERPRETATION*, *supra* note 8, at 117-18 [hereinafter Dworkin, *Interpretation*].

381. See DWORKIN, *MATTER OF PRINCIPLE*, *supra* note 362, at 36-37, 57.

382. See DWORKIN, *EMPIRE*, *supra* note 24, at vii-viii, 176-79, 184-85.

383. See, e.g., *id.* at 255-58. There is no room for any other theory of adjudication or interpretation; they are all preempted (and thus precluded) by Dworkin's general field theory of law.

384. See *id.* at 225-75, 355-99.

constitutional provisions like the Equal Protection Clause and the Due Process Clause.³⁸⁵ Law as integrity equally applies to simpler questions, such as the minimum age of candidates for elected federal office, potentially presented by Article I, Section Two.³⁸⁶ In those simpler cases, law as integrity theory makes little incremental contribution to traditional accounts of the decision because any controversy about such provisions would be unlikely to implicate profound political or moral questions.

Dworkin argues that the open-ended provisions of the Constitution, like those calling for equal protection of the laws, prohibition of cruel and unusual punishments, and preservation of the people's rights under the Ninth Amendment, require the application of moral theory to articulate the content of those rights.³⁸⁷ Moral theory thus plays a central role in Dworkin's theory of law as integrity.³⁸⁸ Law must be reconciled with broader conceptions of political and moral theory as sources of law. For Dworkin, this harmonization provides the surest path not only to intellectual consistency, but, more importantly, to legal and moral progress.³⁸⁹ Dworkin's claimed role for moral theory stands originalism on its head.³⁹⁰ For originalists like Judge Bork and Justice Scalia, one of the most compelling arguments for privileging the original understanding or expectations with respect to the Constitution is that all other interpretive methodologies lead to controversial and irreconcilable constitutional legal claims.³⁹¹

385. *Id.* at 355-99.

386. U.S. CONST. art. I, § 2, cl. 2. That section requires members of the House of Representatives to be at least 25 years old. *See* DWORKIN, *EMPIRE*, *supra* note 24, at 265-66 (arguing that law as integrity explains the adjudicative interpretive project for both hard and easy cases).

387. Moreover, according to Dworkin, Justice Scalia's response when confronting the open-ended language of equal protection is to abandon his semantic approach to interpretation and retreat to the expectations of the draftsmen. Dworkin, *Interpretation*, *supra* note 380, at 115, 125-26. There appears to be some merit in Dworkin's criticism. *See* André LeDuc, *What Were They Thinking: Reconceptualizing the Originalism Debate*, Sections II.A.2, III. (July 15, 2014) (unpublished manuscript) (on file with author).

388. *See* DWORKIN, *EMPIRE*, *supra* note 24, at 249-50 (discussing balancing the virtues of fairness and justice in legal decision); Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 *CONN. L. REV.* 205, 214 (1991) [hereinafter Sunstein, *What*]; *see generally* DWORKIN, *FREEDOM'S LAW*, *supra* note 360.

389. Without the incorporation of such philosophical sources of legal authority, law as integrity would be little more than a slogan for the American Law Institute or the Commission on Uniform State Laws. Were that to happen, given the origins of those institutions in legal pragmatism, law as integrity would be paradoxically reduced to a form of pragmatism. *See* DWORKIN, *EMPIRE*, *supra* note 24, at 160; *see also* Steven D. Smith, *The Pursuit of Pragmatism*, 100 *YALE L.J.* 409, 415-18, 448 (1990) (playfully exploring the possibility that *Law's Empire* is a sophisticated pragmatist text, ultimately concluding that Dworkin's work (along with that of other leading contemporary legal scholars) is problematic because it is "so aggressively unambitious.").

390. *See* DWORKIN, *FREEDOM'S LAW*, *supra* note 360, at 10-11, 127 (arguing that "the Constitution requires courts to exercise moral judgment . . .").

391. *See* SCALIA, *INTERPRETATION*, *supra* note 8, at 44-46; BORK, *TEMPTING*, *supra* note 8, at 251-59.

Dworkin's arguments for a critical role for moral theory in legal interpretation have been an evolving theme in his *oeuvre*.³⁹² Initially, Dworkin focused upon the inadequacy of positivist legal theory to account for legal controversies.³⁹³ In particular, Dworkin claimed that the reductive account of law that he attributed to Hart, which reduced legal content to rules, was both descriptively and normatively inadequate.³⁹⁴ As part of that critique of legal positivism, he also focused on the inadequacy of legal positivism's account of legal argument.³⁹⁵ His subsequent accounts have developed an affirmative account of legal controversy and argument.³⁹⁶ His later account of law as integrity emphasized that the best account of and approach to the most fundamental legal controversies and arguments comes from the nature of legal interpretation and the role of harmonization to the best reading.³⁹⁷

Dworkin's account of the proper method for interpreting the Constitution commits him to an ideal—perhaps a mythical ideal—in which judges articulate complex and comprehensive theories of justice and rights through which they interpret the meaning of the Constitution.³⁹⁸ While Dworkin tempers the implications of this theory, this aspect of Dworkin's integrity theory elicits near derision from Justice Scalia³⁹⁹ and strong criticism from others.⁴⁰⁰

Do judges need to be—or at least aspire to be—philosophers? There are good reasons to be skeptical of this claim on both philosophical and empirical grounds. As a philosophical matter, Dworkin's view apparently commits him to a view of philosophy that is at odds with the pragmatic and Wittgensteinian traditions that disclaim such a powerful role.⁴⁰¹ Dworkin defends his account on the basis that, contrary to the account given by legal

392. Compare DWORKIN, TAKING, *supra* note 13, at 14, with DWORKIN, EMPIRE, *supra* note 24, at 238-54.

393. See DWORKIN, TAKING, *supra* note 13, at 14 (arguing that legal authorities must also include legal principles that cannot be accommodated by the reductive account of law for legal positivism).

394. *Id.*

395. See *id.* at 22-28.

396. See DWORKIN, EMPIRE, *supra* note 24, at 379-97 (describing the decision of a hard constitutional case).

397. See *id.* at 225-27 (suggesting that attributing all legal authorities to a single author as an organizing fiction helps to create a legal system of internal consistency, coherence, and completeness).

398. See generally *id.* at 176-258.

399. See *id.* at 263-66; SCALIA, INTERPRETATION, *supra* note 8, at 44-45 (“What is it that the judge must consult to determine when, and in what direction, evolution has occurred? . . . Is it the philosophy of Hume, or of John Rawls, or of John Stuart Mill, or of Aristotle?”).

400. SUNSTEIN, LEGAL REASONING, *supra* note 27, at 49. The *ad hoc* nature of this accommodation may appear similar to Justice Scalia's acknowledgement of *stare decisis* to temper and dilute the implications of originalism. See SCALIA, INTERPRETATION, *supra* note 8, at 139-40.

401. Compare LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 124 (G.E.M. Anscombe trans., 3d ed. 1973) (1953) [hereinafter WITTGENSTEIN, INVESTIGATIONS], with DWORKIN, EMPIRE, *supra* note 24, at 90.

positivism, our law implicates moral theory in its most fundamental choices.⁴⁰² Our philosophical skepticism arises from at least two sources.⁴⁰³ First, as a metaphilosophical matter, to the extent that philosophy leaves everything as it is, as the later Wittgenstein puts it, the role Dworkin proposes for philosophy seems much too active and important.⁴⁰⁴ Dworkin's jurisprudence would restore philosophy to its classic pretension and would accord it a role as the ultimate arbiter of our claims to knowledge,⁴⁰⁵ in this case, it must harmonize the disparate and potentially conflicting themes, precedents, and theories of our constitutional law.⁴⁰⁶ Our skepticism that philosophy has such a place in our contemporary, non-foundationalist, secular intellectual culture makes us doubt that there is any such role to be claimed.⁴⁰⁷

Such a foundational role for philosophy is implausible. To the extent that we hold a pragmatic view of adjudication and conceive of law as fitting into more general social institutions and society, practical reasoning and an understanding of the consequences of our constitutional decisions appears more important than the project of articulating a comprehensive and consistent conceptual framework for those decisions. We ought to be far more interested in what works and what works better. According the abstract and conceptual discipline of philosophy an important, indeed, paramount place in this practical, functional project appears misguided.⁴⁰⁸

Moreover, Dworkin's ambitious undertaking of creating a single, unifying theory of American constitutional law seems an ill-advised project for attaining an illusory goal. As an empirical matter, his description does not capture the texture of judicial opinions much better than Justice Scalia's formal reductionism. Few judicial opinions offer derivations from first principles, even when considering fundamental questions of constitutional law.⁴⁰⁹ Dworkin's claim that these derivations are implicit would appear no

402. See DWORKIN, *EMPIRE*, *supra* note 24, at 160-61.

403. See *infra* notes 185-89 and accompanying text.

404. See WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 401, at § 124; see also DWORKIN, *EMPIRE*, *supra* note 24, at 90-95.

405. See generally Richard Rorty, *Keeping Philosophy Pure: An Essay on Wittgenstein*, in *CONSEQUENCES OF PRAGMATISM (ESSAYS: 1972-1980)* 19-36 (1982) (describing the Cartesian epistemological account that made this claim plausible but wrong).

406. See DWORKIN, *EMPIRE*, *supra* note 24, at 90-95.

407. See generally LeDuc, *Five Lessons*, *supra* note 148; see also 1 Richard Rorty, *The Priority of Democracy to Philosophy*, in *OBJECTIVITY, RELATIVISM, AND TRUTH: PHILOSOPHICAL PAPERS* 175 (1991).

408. Alternatively, one might cast philosophy as a much more therapeutic discipline with Wittgenstein and the pragmatists, but that is not consistent with Dworkin's realism, or with his philosophical ambitions. See generally RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (2011) (outlining a general theory of value); LeDuc, *Five Lessons*, *supra* note 148.

409. See generally LeDuc, *Constitutional Practice*, *supra* note 3 (offering a more detailed account of constitutional reasoning).

more persuasive than Posner's claim that law is implicitly wealth maximizing.⁴¹⁰ For all its philosophical sophistication, law as integrity ultimately offers no better account of legal argument than legal positivism.

It may be helpful to compare Dworkin's description of Justice Hercules's judicial style with that of actual justices. For example, Judge Hercules looks little like either Justice Douglas in *Griswold v. Connecticut*⁴¹¹ or Justice Scalia in *District of Columbia v. Heller*.⁴¹² Judge Hercules does not write like Justice Douglas because Justice Douglas wrote his opinions (and may well have thought through his decisions) in very intuitive, schematic ways. Hercules would be greatly in favor of a precisely reasoned approach befitting his philosophical training. Justice Scalia, by contrast, looks only to the dusty original understanding and expectations with respect to the Eighteenth Century constitutional text. He has little interest in the consequences of his decision, or the moral theories that may inform the choices. Judge Hercules (like his friend, Professor Dworkin) would find such an approach narrow, wooden, and, ultimately, unfaithful to the Constitution.⁴¹³

As a matter of description, the disparity between Dworkin's account of adjudication and actual practice may be explained in a variety of ways. After all, originalism deflects a similar criticism of its inadequate description of constitutional argument and decision with the claim that it is a normative, rather than a descriptive, theory.⁴¹⁴ Dworkin might offer this same defense—that his account is primarily a normative, rather than descriptive, account of law.⁴¹⁵ This is a natural move because of the self-consciously mythical flavor of Dworkin's description. This response would render the descriptive inadequacies of law as integrity effectively irrelevant.⁴¹⁶ But, as with originalism, accounting for our practices of

410. See BOBBITT, INTERPRETATION, *supra* note 84, at 174 (criticizing such claims that law must derive its results from such prior principles).

411. 381 U.S. at 479.

412. 554 U.S. at 570; see DWORKIN, EMPIRE, *supra* note 24, at 411-12; see also SCALIA, INTERPRETATION, *supra* note 8, at 44-45.

413. See DWORKIN, EMPIRE, *supra* note 24, at 359-63.

414. See, e.g., BORK, TEMPTING, *supra* note 8, at 159 (“There are times when we cannot recover the transgressions of the past, when the best we can do is to say to the Court, ‘Go and sin no more.’”).

415. Dworkin defends his theory, in part because it offers a better description of our legal practices. The argument that Dworkin offers primarily a normative theory would appear inconsistent with the descriptive superiority claims for his theory. They can be reconciled with the recognition that while Dworkin's theory of law as integrity is primarily a normative account of law and adjudication, it is also (according to Dworkin) a more accurate description, too. See DWORKIN, TAKING, *supra* note 13, at 24-28 (criticizing the claim he attributes to legal positivism that all legal disputes are disagreements about the application of a legal rule); DWORKIN, EMPIRE, *supra* note 24, at 37-44. But Dworkin's claim to offer a better description may be correct, even when the normative elements in his theory argue for changes to those practices.

416. Dworkin expressly acknowledges the idealizing nature of his account of judicial reasoning, but he does not regard it as a flaw. DWORKIN, EMPIRE, *supra* note 24, at 264-66.

adjudication under the theory of law as integrity is perhaps a little more complex than simply claiming to be a normative, rather than descriptive, account.⁴¹⁷

The more fundamental problem with Dworkin's description is not that it departs from the actual process of adjudication, but that his description is inconsistent with that process. Indeed, Dworkin's description commits him to methods that are at least potentially antithetical to a smoothly-running multi-judge appellate constitutional decision process.⁴¹⁸ Sunstein captures this criticism when he calls Judge Hercules an oddball.⁴¹⁹ While that epithet may be a little harsh, it captures the insight that Dworkin's theory fails to recognize: that an approximation of his idealized methodology may not yield a second-best solution.⁴²⁰ The impracticality of Dworkin's theory-intensive law as integrity may preclude a closer approximation of justice.⁴²¹

There are two principal arguments against Dworkin's account. The first objection is that Dworkin's idealized process disregards very real concerns as to courts' limited resources.⁴²² While Dworkin acknowledges this objection, his casual dismissal is unpersuasive.⁴²³

As Sunstein notes, the theory-intensive process that Dworkin's law as integrity theory demands will often yield a divisive approach to judicial decision-making that will make consensus very difficult to reach.⁴²⁴ The theoretical commitments that law as integrity must make require a depth of agreement that may be unobtainable in a modern, pluralistic society. But a judge committed to law as integrity will be deeply committed to that theoretical articulation and justification; she cannot compromise on outcomes alone, unlike Sunstein's minimalist, who is committed to the merits of incompletely theorized agreements and opinions.⁴²⁵ Judge

417. See BORK, TEMPTING, *supra* note 8, at 155 ("To suppose that [the great gap between the original understanding of the Constitution and our current constitutional law demonstrates the impossibility of originalism] is to confuse the descriptive with the normative.").

418. See DWORKIN, EMPIRE, *supra* note 24, at 264-66.

419. SUNSTEIN, LEGAL REASONING, *supra* note 27, at 49.

420. Dworkin claims that his model of judicial reasoning, even if obviously idealized, accurately captures what a judge should aspire to. See DWORKIN, EMPIRE, *supra* note 24, at 264-66.

421. See SUNSTEIN, LEGAL REASONING, *supra* note 27, at 49 (characterizing Hercules, somewhat puzzlingly, as a "usurper [and] even an oddball.") (emphasis added). Sunstein appears to characterize Hercules as a usurper because his theory-intensive style of judicial decision-making leaves no room for others. *Id.* But it is not clear why Sunstein chooses to emphasize Hercules's social behavior in this assessment.

422. See SUNSTEIN, LEGAL REASONING, *supra* note 27, at 49. Within the temporal and evidentiary constraints of constitutional litigation, at both trial and appellate levels, how would a judge ever be able to perform the idealized conceptualizing role attributed to Justice Hercules?

423. See DWORKIN, EMPIRE, *supra* note 24, at 264-66.

424. See generally SUNSTEIN, LEGAL REASONING, *supra* note 27.

425. See SUNSTEIN, RADICALS, *supra* note 17, at 27-30; SUNSTEIN, LEGAL REASONING, *supra* note 27, at 35-48.

Hercules will find it very hard to play well with others who have different moral and theoretical commitments.⁴²⁶

Some of originalism's most important critics are themselves legal positivists, of course.⁴²⁷ While legal positivists do not criticize originalism for its positivism, their two principal criticisms of originalism are seemingly made within the framework of legal positivism.⁴²⁸ First, legal positivist critics argue for a broader range of sources of constitutional argument.⁴²⁹ It is likely that this commits the critics to a broader ranging rule of recognition than that implicitly endorsed by positivist originalists, too.⁴³⁰

Prudential arguments about the constitutionality of firearm regulation demonstrate the challenge for the rule of recognition. Even the Court's originalist opinion in *Heller* anticipated that certain state regulation of firearms was permissible under the Second Amendment.⁴³¹ The initial enthusiasm for a "Take Your Unregistered Handgun to the Supreme Court Day" quickly faded in light of that reservation of regulatory authority.⁴³² Nevertheless, prudential argument might well support a more comprehensive regulatory regime and uphold laws like the Chicago ordinance struck down in *McDonald v. Chicago*⁴³³ in light of the apparent social costs of America's handgun violence epidemic.⁴³⁴ If the Court had made such a prudentialist decision, how would a rule of recognition operate to recognize the relevant constitutional law? Such a rule would have to operate more simply rather than replicating the arguments advanced in the opinion of the decision. Moreover, if Bobbitt is right that the outcome of constitutional controversies is not determined and that there is no algorithm that determines how a conflict between the disparate modes of argument is to be resolved, then the task of a rule of recognition appears likely impossible.⁴³⁵

426. See DWORKIN, *EMPIRE*, *supra* note 24, at 258-66.

427. See Posner, *Bork and Beethoven*, *supra* note 17, at 1368; SUNSTEIN, *RADICALS*, *supra* note 17, at 38-48. See generally BREYER, *ACTIVE LIBERTY*, *supra* note 22.

428. See generally BREYER, *ACTIVE LIBERTY*, *supra* note 22.

429. See generally *id.*

430. See generally Berman, *Rule of Recognition*, *supra* note 85.

431. *Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .").

432. See, e.g., Erwin Chemerinsky, *The Heller Decision: Conservative Activism and its Aftermath*, CATO UNBOUND (July 25, 2008), <http://www.cato-unbound.org/2008/07/25/erwin-chemerinsky/heller-decision-conservative-activism-its-aftermath> (questioning what types of gun regulations will now be permissible and criticizing Scalia's opinion for doing a "tremendous disservice to lower court judges across the country because it fails to give them any guidance as to the level of scrutiny to be applied.").

433. 561 U.S. 742 (2010) (striking down a typical regulatory firearm ordinance under the Second Amendment).

434. See generally *Heller*, 554 U.S. at 694-705 (Breyer, J., dissenting).

435. See BOBBITT, *INTERPRETATION*, *supra* note 84, at xi (describing conflict between the different modalities).

A second positivist puzzle arises with respect to originalism's critics having accepted a broader account of constitutional flux, which is captured in part by the critics' term *Living Constitution*.⁴³⁶ Thus, the critics' rule of recognition must not only incorporate a broader array of sources of law, but must also be sufficiently flexible to authoritatively recognize sources of change to the authoritative constitutional law that are denied by the originalists.⁴³⁷

The critics' acceptance of those sources of change raises the question of whether that acceptance is inconsistent with the positivist requirements for a rule of recognition. In particular, the critics endorse a rule that acknowledges the potential for constitutional flux based upon exogenous changes.⁴³⁸ Exogenous here means that the change to constitutional law arises from changes outside of that law; examples would include advances in technology that affect rights under the First Amendment⁴³⁹ or under the Fourth Amendment,⁴⁴⁰ or changes in our understanding of political or moral theory. Most controversially, such changes might include changes in the way we think about cruelty or common punishments, thereby impacting the kinds of punishments (like lashing, stocks, and capital punishment) that are potentially precluded under the Eighth Amendment.⁴⁴¹ For such critics, a rule of recognition for constitutional law would have to be able to recognize these changes as they occur.

Critics of originalism (like Tribe) argue that the meaning and force of the Constitution is not fixed, but evolves in response to these exogenous changes.⁴⁴² This evolution is the principal import of the metaphor of the *Living Constitution*.⁴⁴³ The pragmatists' rule of recognition is perhaps not

436. See generally William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (offering a critical account of the concept of the *Living Constitution* on the basis of a largely untheoretical, practical originalist approach).

437. See Sachs, *Legal Change*, *supra* note 9, at 855 (astutely highlighting this element in the controversy).

438. Compare Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1224 (1993), and Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 396 (1995), with Sachs, *Legal Change*, *supra* note 9, at 855 (arguing that originalism should be understood as a theory that asserts the continuation of law unless and until it is repealed or amended).

439. New media for communication raises the question of how First Amendment protections apply. See generally TRIBE & DORF, *READING*, *supra* note 362, at 78-79 (exploring the theoretical questions raised by the application of the First Amendment's protections to sound trucks).

440. New technology permits surveillance in powerful new ways. See generally *United States v. Jones*, 132 S. Ct. 945 (2012) (confronting the problem of determining the constitutional regulation of GPS tracking devices based on the original linguistic understanding of the Fourth Amendment).

441. See generally Scalia, *Originalism*, *supra* note 28.

442. See Tribe, *Interpretation*, *supra* note 372, at 68-72.

443. See William J. Brennan, Jr., *Speech to the Text and Teaching Symposium*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE, *supra* note 359, at 59-61 (defending a broader interpretative approach to constitutional decision against the claim that the original intentions with respect to the Constitution must control).

entirely consistent with what Hart contemplated, because the apparent peremptory nature of such a rule is severely qualified (if not lost) with the range of sources of law that the critics would admit. A rule of recognition, classically, permits the identification of law as a matter of its provenance in a perspicuous and, indeed, peremptory manner.⁴⁴⁴ But the question whether the critics' *Living Constitution* fails to satisfy the requirements of classical legal positivism is not easy to answer with confidence. By contrast, to the extent that Tribe asserts that judges must make political or other normative choices in constitutional cases, he appears to reject the separability thesis.⁴⁴⁵

The new positivist originalists claim to offer a stronger account of originalism that will move originalism beyond the classical criticisms of the debate. The critics of classical originalism have not yet weighed in with respect to the claims of the new positivist originalism. But the new positivist originalism faces similar kinds of criticism. From pragmatists like Posner and Sunstein the new positivist originalism faces criticism for its deontological stance. From non-positivists like Dworkin and Tribe, it faces criticism for its very positivism.

Additionally, two criticisms that are not historically part of the classical debate are particularly telling against the new positivist theory. The first is a criticism I have advanced against both classical originalism and its critics.⁴⁴⁶ I have argued that as a matter of metaphilosophy, philosophical argument cannot play the role in practical reason tacitly accorded it in the debate.⁴⁴⁷ As noted above, embedded in inclusive positivist originalism's doctrinal purity is a claim to employ philosophical argument—the jurisprudence of legal positivism—indirectly to criticize our constitutional jurisprudence and constitutional decision practice from outside that practice.⁴⁴⁸ That claim is subject to the same metaphilosophical objections that are available against classical originalism and its critics.

Second, the foundation of the new inclusive positivist originalism is unsound. While we can see the originalist duck in our constitutional jurisprudence, as hard as we stare, even aided by Baude's powerful exegetical optics, the rabbit of nonoriginalist law always reappears.⁴⁴⁹ Less metaphorically, Baude's reinterpretation of our Constitution as consistently

444. See HART, *CONCEPT*, *supra* note 5, at 94-95 (describing the rationale of introducing a rule of recognition as that of reducing uncertainty in the legal system); COLEMAN, *PRACTICE*, *supra* note 5, at 122, 138 (describing the peremptory character of law for Hart and exploring the extent to which the application of law forestalls inquiry and argument).

445. See generally Tribe, *Interpretation*, *supra* note 372.

446. See generally LeDuc, *Five Lessons*, *supra* note 148.

447. *Id.* at 153-54.

448. See Baude, *Our Law*, *supra* note 9, at 2355 (distinguishing originalist and nonoriginalist precedent).

449. See generally WITTGENSTEIN, *INVESTIGATIONS*, *supra* note 401, at 194.

originalist is more brilliant than compelling. It brings to mind Posner's criticism of other recent constitutional scholarship.⁴⁵⁰ The implicit suggestion in the redescription of *Miranda* that even the Warren Court was originalist⁴⁵¹ and that Robert Bork and Raoul Berger were mistaken in their alarms is implausible, if not ludicrous. Our law is not as systematically originalist as Baude asserts.⁴⁵² Without that reconstruction or reinterpretation of our constitutional case law as consistently originalist, Baude's proposed originalist constitutional ethnic cleansing of the few remaining outliers must fail.

C. Resolving the Paradox of the Congruence of Natural Law and Positive Law Theory

The substantial congruence of positive and natural law originalism and the substantial congruence of the criticism of originalism by its positive law and natural law critics are paradoxical. The congruence between natural law originalism and positive law originalism is, as a practical matter, substantial. Certainly the voting records of Justices Scalia and Thomas are very similar, despite their very different stances toward natural law.⁴⁵³ Their substantive constitutional doctrinal commitments are very similar, too.⁴⁵⁴ The traditional view of the fundamental importance of the distinction between natural law and positive law makes the absence of substantive differences (arising from those distinct theoretical stances in the debate) paradoxical.

One possible strategy to dissolve this paradox would be to challenge my claim that there is substantial congruence between natural law and positive law originalism, on the one hand, and their positive law and natural law critics, on the other. Without that practical congruence, the paradox does not arise. This response would argue that the congruence is no more significant, say, than the substantial congruence between the predictions made by Ptolemaic astronomical theory, on the one hand, and Copernican astronomical theory, on the other.⁴⁵⁵ Since the theories are explaining the same phenomenon, (here, the constitutional doctrine and decisions) the congruence in their outcomes hardly ought to be surprising. Perhaps the

450. See RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 277 (2016) (referencing the "flights of fancy . . ." of Tribe and Amar).

451. See Baude, *Our Law*, *supra* note 9, at 2378-79.

452. See *id.* at 2363-65.

453. See generally Bowers et al., *supra* note 14.

454. See GERBER, *FIRST PRINCIPLES*, *supra* note 51, at 47-63 (describing the critical constitutional doctrinal commitments of Justice Thomas's natural law originalism); Iyer, *Fidelity*, *supra* note 342, at 106-07.

455. See generally THOMAS S. KUHN, *THE COPERNICAN REVOLUTION: PLANETARY ASTRONOMY IN THE DEVELOPMENT OF WESTERN THOUGHT* (1957).

claim of congruence sets too high a bar in assessing which differences count.

But the originalist theory is not simply explaining the constitutional doctrine and decisions; the theory also seeks to change that doctrine and decision. In that respect, it is fundamentally different from scientific theories that simply explain and predict the natural phenomena. As constitutional and jurisprudential theories, we would properly expect that differences in the theories would result in differences in the law. We would expect that those differences would result in substantive doctrinal differences because the traditional motivation and purpose of originalist theory was to challenge the substantive constitutional jurisprudence of the Warren Court.⁴⁵⁶

An alternative explanation for this paradox is that the importance of the distinction between natural law and positive law has been exaggerated, at least as a matter of constitutional theory. The fundamental opposition between natural law and positive law is not as a matter of substance or content, but is instead as a matter of genealogy or legitimacy. Natural law arises from God or the nature of things, positive law arises as a matter of social fact; and the legitimacy of law under natural law and positive law theory, respectively, derives from the origin of that law with such respective source.⁴⁵⁷

The emphasis in the American jurisprudence of the nineteenth and twentieth centuries on provenance as the critical element in an account of law may perhaps be best understood with a historical explanation, drawing on the space of causes, rather than exclusively in the space of reasons. It may have been important in the nineteenth century, for example, to have an account of legal obligation that was grounded on secular theory rather than moral theory or religion.⁴⁵⁸ It may have been important to have an account of the Constitution and law that would appeal across the increasingly diverse American citizenry. But I am not the one to provide that explanation. Even without that historical account, however, there is nothing fundamental or necessary that makes an account of the origin of legal obligation central to jurisprudence or to the understanding of legal obligation and adjudication.

456. See LeDuc, Originalism, Therapy, and the Promise of the American Constitution, *supra* note 2, at 28-33.

457. See generally Bix, *Dividing Line*, *supra* note 55 (articulating the points of agreement and disagreement between legal positivism and natural law theory).

458. For such a historical account in a different constitutional context, see NOAH FELDMAN, *DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT* 58-59 (2005) (describing the 19th century growth of public education and the limits imposed on state support for religious education under the First Amendment).

As described above, the contrast between originalism and its critics with respect to their respective accounts of the provenance of constitutional law and the legitimacy of particular interpretative methodologies is important for those theories and for the debate. Originalism privileges the original linguistic understandings, intentions, and expectations;⁴⁵⁹ interpretations of the Constitution that accord with those privileged original states are correct—and legitimate. Critics of originalism deny that privilege and the corollary claims about interpretation and legitimacy. They argue that other kinds of constitutional argument—those not based upon the history or text of the Constitution—ought to be privileged in constitutional interpretation and decision.⁴⁶⁰ Pragmatists emphasize and privilege prudential arguments; structuralists emphasize and privilege the federal structure of the Republic under the Constitution and the centrality of separation of powers within the Federal government.⁴⁶¹ In some cases they even reject the model of interpretation as the foundation and predicate of constitutional decision.⁴⁶²

D. Can the Positive Turn Revivify Originalism and End the Debate?

Proponents of the new positivist originalism make strong claims for that theory.⁴⁶³ If those claims to avoid or rebut the traditional challenges to classical originalism are correct, then my claim that the originalism debate is at a dead end and that neither side can achieve a compelling argument in the debate would appear overstated or mistaken. If the new positivist originalism reaches that position through the jurisprudential arguments of legal positivism, then my claim regarding the role of philosophical argument in constitutional theory and decision would appear to be at risk, too. I will explore both elements in the new positivist originalist argument.

Turning first to the traditional anti-originalist arguments in the debate, as discussed in the next section, a powerful strand of criticism is based upon the originalist approach to consequences. There are two elements of that criticism. The first attacks originalism for its deontology, asserting that a constitutional theory ought to consider its consequences. Richard Posner

459. See, e.g., BORK, *TEMPTING*, *supra* note 8, at 144; SCALIA, *INTERPRETATION*, *supra* note 8, at 45.

460. See, e.g., BREYER, *ACTIVE LIBERTY*, *supra* note 22, at 74; SUNSTEIN, *RADICALS*, *supra* note 17, at 75-77.

461. See POSNER, *ECONOMICS*, *supra* note 32, at 6; see also POSNER, *PROBLEMS*, *supra* note 23, at 29; see generally CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969) [hereinafter BLACK, *STRUCTURE*].

462. See generally POSNER, *PROBLEMS*, *supra* note 23, at 455.

463. See generally Baude, *Our Law*, *supra* note 9; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9.

makes this argument.⁴⁶⁴ The new positivist originalism is fundamentally a deontological account; when the original understandings are knowable, they are controlling—regardless of whether they result in an outcome that we would choose today.⁴⁶⁵ Thus, this criticism remains apt.

The second strand in the argument directly engages the consequences of originalism. It rejects originalism on the basis that its consequences are undesirable.⁴⁶⁶ The consequences of the new inclusive positivist originalism are not wholly congruent with the consequences of some of the classical originalist theories. But the overlap is substantial and the differences would not make a difference in the consequentialist objections to originalism. While the new positivist originalism recognizes a subordinate place for non-originalist arguments, it claims an array of interpretive methods that purport to reduce the extent of the unknown original understandings.⁴⁶⁷ Thus, for example, the originalism of *Heller* and *McDonald* is common to both forms of originalism—and problematic for many critics.

Turning to the implications of the positive turn for the role of jurisprudential argument in constitutional theory and law, the new positivist originalists conceive of their positivist account as giving us reasons to endorse originalism and to reject the anti-originalists' criticisms.⁴⁶⁸ They assert that the principal reason to endorse the new positivist account is that it is the law.⁴⁶⁹ If originalism is the law, then any normative or theoretical arguments against its force are in the nature of a category mistake.⁴⁷⁰ Those arguments may be arguments that the law is unjust or unfair or that it should be changed, but they are not arguments against originalism as the law. The argument that originalism is the law is a positivist argument insofar as Baude, for example, asserts that there is a practice of making and accepting originalist arguments.⁴⁷¹ There is also an internal point of view toward such arguments that is part of the practice of making and accepting such arguments.⁴⁷²

But it is not enough that originalist arguments are practiced and endorsed; even Baude's inclusive positivist originalism has to establish that

464. See Posner, *Bork and Beethoven*, *supra* note 17, at 1380 (“The originalist faces backwards, but steals frequent sideways glances at consequences.”).

465. See Baude, *Our Law*, *supra* note 9, at 2355-59.

466. See SUNSTEIN, *RADICALS*, *supra* note 17, at 73.

467. Baude, *Our Law*, *supra* note 9, at 2357-58.

468. *Id.* at 2351-52.

469. See *id.* at 2351.

470. See *id.* at 2352. For the introduction of the concept of a category mistake, see GILBERT RYLE, *THE CONCEPT OF MIND* 18-23 (New Univ. of Chicago Press ed. 2002) (1949).

471. See Baude, *Our Law*, *supra* note 9, at 2403-05.

472. *Id.* at 2371 (looking to the Court's practice of justifying its decisions).

such arguments are privileged *vis a vis* other kinds of constitutional argument. Baude expressly recognizes this.⁴⁷³ He appears to make an almost empirical argument for the *predominance* of originalism.⁴⁷⁴ But beyond the predominance of originalist arguments, Baude asserts that there is a form of consistency principle that is invoked to challenge or question otherwise good precedents or doctrine that is not originalist.⁴⁷⁵ The nature and operation of this consistency principle is never clearly stated, either as to its force or its limits.

Finally, one way to measure the power of the positive turn in originalism is to ask whether it should have convinced classical originalism's critics and whether it actually has done so. There is no apparent groundswell of enthusiasm from originalism's critics. Cass Sunstein has not announced that the proponents of the positive turn have convinced him that inclusive positivist originalism is a preferred alternative to judicial minimalism. He is not likely to do so, because the kinds of pragmatist arguments that Sunstein offers⁴⁷⁶—based upon the demands of constitutional adjudication in a diverse democratic republic and the consequences of originalist theory—are not addressed, let alone rebutted, by the claims of the new positivist originalism.⁴⁷⁷ As described in the next section, the deontological arguments of the new positivist originalists simply fail to engage Sunstein's consequentialist stance. Larry Tribe has not announced that the legal positivist originalists have convinced him that we do not need to decide constitutional cases on the basis of normative choices. That is not to be expected either. Tribe believes that there is no coherent single principle of the Constitution; the new positivist originalists assert that the current doctrine reflects a consistent commitment to some form of original understanding.⁴⁷⁸ Tribe rejects that premise; unless the claim persuades Tribe, the implications that the new positivist originalists draw will be rejected, too. The new positivist originalism is not going to convince Judge Posner, either. He will reject its claims on at least two principal grounds. The first is the consequentialism that he shares, albeit from a somewhat different perspective, with Sunstein. Second, as a related matter, Posner will reject the new positivist originalist claim that the project of constitutional theory and decision is one of interpretation. Finally, the

473. *Id.* at 2376 (concluding that originalist arguments have a higher priority than arguments from nonoriginalist precedent).

474. *See generally* Baude, *Our Law*, *supra* note 9.

475. *See id.* at 2355.

476. *See generally* SUNSTEIN, *RADICALS*, *supra* note 17.

477. *See generally* Baude, *Our Law*, *supra* note 9; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9.

478. *See generally* Baude, *Our Law*, *supra* note 9; Pojanowski & Walsh, *Enduring Originalism*, *supra* note 9.

new positivist originalism is not going to convince Farber and Sherry; to them, it will just be another abstract, grand constitutional theory.⁴⁷⁹ Indeed, it is not clear that there are any significant critics in the classical debate who would be convinced by the new positivist originalist arguments.

If we ask the harder question of whether those critics should have been persuaded by the new positivist originalist arguments, the legal positivist originalist claim does not appear sufficiently powerful and responsive to those critics' stances. As noted in the preceding paragraph, the claims and arguments that the new positivist originalists make simply do not engage the premises or arguments advanced by the critics. Indeed, for a theory that purports to advance the debate over originalism, it is striking how casually oblivious the new positivist originalists are with respect to the critics' arguments in the classical debate.⁴⁸⁰ There is little reason to believe that the new positivist originalism will advance the debate.

In conclusion, the new positivist originalists' claim to clear a path beyond the impasse of the classical debate over originalism is unpersuasive. Even the most creative and imaginative of its proponents (like Baude and Sachs) do not even begin to achieve that goal. It is not their fault, at least in the sense that the goal is unattainable. They are perhaps too caught up in their new arguments and theoretical moves to fully appreciate the context in which those arguments are deployed, both with respect to the claims of traditional positivist originalism and with respect to the objections of its critics.

II. THE PRAGMATIC CHALLENGE TO ORIGINALISM

Originalism is committed to an account of constitutional law that, at least in a local sense, is not instrumental.⁴⁸¹ Some originalists defend the claim that an originalist theory of interpretation and decision results in constitutional law that is functionally superior to any alternative constitutional theory on a global basis (others do not). But with respect to any particular constitutional question it considers prudential or social welfare considerations irrelevant to its decision.⁴⁸² Originalists may or may not believe that privileging the original understanding, expectations, or intentions results in a *globally* better constitutional theory.⁴⁸³ In many

479. See generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002).

480. See generally Baude, *Our Law*, *supra* note 9.

481. See Posner, *Bork and Beethoven*, *supra* note 17, at 1380 ("The originalist faces backwards, but steals frequent sideways glances at consequences.").

482. See SCALIA, *INTERPRETATION*, *supra* note 8, at 41-44 (discounting prudential considerations in constitutional adjudication).

483. See, e.g., BARNETT, *LOST*, *supra* note 41, at 112 (arguing that the Constitution's claim to our commitment is grounded on its protection of natural rights); see generally ROSS, *supra* note 37.

ways, such a distinction echoes the distinction between rule utilitarianism and act utilitarianism, but some originalists may not be committed to the claim that privileging the original understandings maximizes the good as well as the right.⁴⁸⁴ In Randy Barnett's telling term, the Constitution need only be "good enough"⁴⁸⁵

Legal pragmatism endorses a very different, consequentialist account of constitutional law.⁴⁸⁶ As a result, legal pragmatism privileges prudential argument in constitutional practice.⁴⁸⁷ In this section, I will first fill in this sketch of the originalist and pragmatist stances with respect to deontological and consequentialist accounts of constitutional law. I will then turn to the implications of those stances for the debate.

A. *Originalism's Account*

Because originalism holds that the Constitution should be interpreted based upon the original understandings, intentions, and expectations of the constitutional text, constitutional cases should also be decided on the basis of the original understandings, intentions, and expectations. Judges addressing constitutional issues should not consider the potential consequences of their decisions as they determine the constitutional law.⁴⁸⁸ Originalism does not generally emphasize this anti-consequentialist stance, however, so seeing its centrality to the originalist canon requires looking at the arguments originalists make in support of their method of interpretation.

One of the clearest expressions of mainstream originalism's theoretical rejection of utilitarian or other prudential calculations as support for arguments in favor of constitutional interpretations or decisions appears when originalism defends constitutional decisions that appear problematic as a prudential matter.⁴⁸⁹ The rejection of such arguments is only theoretical because of originalists' willingness to tacitly employ such arguments, particularly when deferring to precedent. The principal

484. See DAVID LYONS, FORMS AND LIMITS OF UTILITARIANISM 9-17 (1965) (distinguishing rule utilitarianism, which endorses assessing the morality of actions on the basis of whether those actions conform to rules that maximize utility or welfare, from act utilitarianism, which makes those judgments on the basis of whether an act maximizes such utility or welfare); see, e.g., BARNETT, LOST, *supra* note 41, at 112 (arguing that a constitutional provision cannot be overridden by a court merely on the basis of considerations of justice).

485. BARNETT, LOST, *supra* note 41, at 113.

486. See generally COLEMAN, PRACTICE, *supra* note 5, at 6 n.6; POSNER, PROBLEMS, *supra* note 23, at 29; Farber, *Pragmatism*, *supra* note 19; Kende, *Pragmatism*, *supra* note 23.

487. See generally POSNER, PROBLEMS, *supra* note 23, at 29; Farber, *Pragmatism*, *supra* note 19.

488. See generally BARNETT, LOST, *supra* note 41; see also SCALIA, INTERPRETATION, *supra* note 8, at 44 (decrying the Court's erosion of the right of confrontation, despite the public support for the consequences of that development); BORK, TEMPTING, *supra* note 8, at 167-70 (denying that the Constitution must change to accommodate changes in political society).

489. See, e.g., *McDonald*, 561 U.S. at 742; *Heller*, 554 U.S. at 570.

arguments made for recognizing and following precedent are prudential, as when the importance of maintaining stability and protecting settled expectations are acknowledged as legitimate concerns. For example, in interpreting the Second Amendment and testing the constitutionality of gun control legislation, the originalist approach has expressly discounted the consequences of unregulated gun ownership.⁴⁹⁰ Similarly, when considering the interpretation of the Confrontation Clause of the Sixth Amendment, this approach does not take the psychological consequences of differing interpretations and applications into account.⁴⁹¹ For originalism, the proper judicial inquiry must be restricted to the historical inquiry into the original semantic and linguistic meaning, original intentions, and original expectations.⁴⁹²

Originalism's commitment to interpretation and decision on the basis of original understandings, expectations, and intentions also treats the interpretative task as central to constitutional adjudication. That commitment entails that pragmatic and instrumental arguments remain marginalized in adjudication.⁴⁹³ Prudential arguments may survive only in a weak form, crystallized in precedent that the originalist declines to overrule.⁴⁹⁴ Such precedential arguments have no further generative force to shape the development of the law and no longer figure in the Court's consideration of how to decide cases not squarely controlled by them.

B. The Pragmatist Challenge

Pragmatism argues that interpretation is only a part of the judge's task in appellate constitutional adjudication because the function of constitutional law is as a social instrument. The other potential roles for a judge would include, first, assessing the potential results of the various outcomes (across a range of potential axes such as fairness, efficiency, and

490. See *Heller*, 554 U.S. at 636; see generally *McDonald*, 561 U.S. at 742.

491. *Maryland v. Craig*, 497 U.S. 836, 867-70 (1990) (Scalia, J., dissenting) (characterizing inquiry into the psychological impact on children of physically facing the accused as inappropriate for the Court because it is irrelevant to the analysis of the original understanding); see SCALIA, INTERPRETATION, *supra* note 8, at 44.

492. See, e.g., Mitchell N. Berman, *Originalism and its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 388 (2007) [hereinafter Berman, *Originalism*] (arguing that originalists generally privilege the original linguistic meaning of the constitutional text, not the originally understood application of the provision); SCALIA, INTERPRETATION, *supra* note 8, at 144 (asserting that he privileges the original semantic import of the text).

493. See Berman, *Originalism*, *supra* note 492, at 399 (implicitly accepting that the task of constitutional decision begins with interpretation and exploring whether the originalist claim to privilege the original understanding of the constitutional text's meaning is persuasive).

494. See SCALIA, INTERPRETATION, *supra* note 8, at 139-40 (grudgingly acknowledging a place for non-originalist precedent while denying that such precedent is consistent with the theory and principles of originalism); BORK, TEMPTING, *supra* note 8, at 155-59 (suggesting that non-originalist precedent must sometimes be followed, and that such precedent should be read narrowly).

administrability) and, second, assessing the fit of a potential outcome or interpretation with other parts of the law (this latter role obviously resonates with Charles Black's concept of structural argument and with Ronald Dworkin's law as integrity analysis).⁴⁹⁵ On this account, interpretation is an important but not exclusive part of the judge's task. Neither task is one of interpretation, however. The first is focused upon the *causal* consequences of the decision in a variety of ways, all unrelated to the law itself. The second also focuses upon consequences, but they are *inferential* consequences that follow from reason.⁴⁹⁶ Neither is concerned with interpreting or translating the constitutional text.⁴⁹⁷ The critics assert that these are both proper and important elements in the project of constitutional adjudication. Outcome expectations originalism would appear to potentially consider both of these types of consequences, to the extent that the relevant Founders had expectations about the outcomes anticipated from the Constitution. This kind of originalism can privilege understandings that go well beyond the mere language of the constitutional text.⁴⁹⁸

There are two arguments for the legitimacy of these elements of adjudication. First, the inferential consequences of an interpretation or decision must be considered because of the effectiveness of formal and informal proof. If a proposition yields a logical contradiction or supports an inference to a proposition that we are unprepared to affirm, we recognize that those implications stand as an argument against that proposition.⁴⁹⁹ Second, the consequences of both constitutional decisions and opinions matter for outcome originalists and pragmatists. The decision outcomes matter because such outcomes determine whether justice was done at the most important and fundamental level. The opinion outcomes matter both because the opinions help to determine the outcome of future decisions and because the arguments offered in support of the decision that was made also matter for judging whether justice has been done. A case decided as a

495. See generally BLACK, STRUCTURE, *supra* note 461 (arguing that the structure of the federal republic created under the Constitution informs the interpretation of the Constitution); DWORKIN, EMPIRE, *supra* note 24, at 176-84.

496. See generally David Luban, *Time-Mindedness and Jurisprudence*, 101 VA. L. REV. 903, 912-13 (2015) [hereinafter Luban, *Time-Mindedness*] (introducing, very simply, some of the inferentialist theory of Robert Brandom); LeDuc, *Constitutional Practice*, *supra* note 3.

497. See generally Luban, *Time-Mindedness*, *supra* note 496; LeDuc, *Constitutional Practice*, *supra* note 3.

498. As explored in an earlier article, that approach offers a richer account of the Constitution and arguably captures the document more fully, but comes at the cost of an interpretation and application that is clearly far more dated and historical. See LeDuc, *Evolving Originalism*, *supra* note 134, at Part II.A.(6).

499. See generally GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING (1986) (arguing that individuals revise their commitments to claims through complex processes of reasoning, that practical reasoning must be distinguished from theoretical reasoning, and that a satisfactory account of practical reasoning cannot be reduced to an account of arguments).

matter of the applicable statute of limitations or as a matter of standing, for example, reaches a just result *vel non* in a very different way than a decision made on the constitutional merits. While those consequences are not all that matter (and this is what is wrong with a results-oriented jurisprudence), they cannot be disregarded without violating the purpose of law or the original role that the relevant provision was intended to play.

With respect to prudential arguments, the argument for consideration is even simpler. If the Court were faced with compelling prudential concerns (for example, a national emergency or crisis), it would likely act prudentially and interpret the Constitution in a manner that responded to the perceived threat or crisis, regardless of whether it would later come to regret its decision.⁵⁰⁰ The argument, or this claim, is both intuitive and historical.⁵⁰¹ The intuitive claim must be left to readers' own intuitions.⁵⁰² Historically, however, I suggest that times of crises during our constitutional history reveal just this approach. So, for example, during the crisis of the Second World War, we find Japanese-American citizens wrongly interned solely on the basis of their national origin and, in hindsight, the extra-constitutional reason of the pervasive racial paranoia of the time.⁵⁰³ Similarly, at the height of the Cold War we find the Supreme Court blessing the fevered execution of the Rosenbergs without hesitation.⁵⁰⁴ In 2000, the Court stepped in to settle the contested presidential election.⁵⁰⁵ The record in these circumstances may not be pretty, but even in hindsight it is both clear and understandable and reflects a pattern that is not likely to be broken. Originalism therefore must and does concede that it has offered an inaccurate descriptive account of our constitutional practice. But as originalism offers a purported normative account, that descriptive failure is not necessarily a significant flaw for originalism.

The pragmatists do not reduce the judge's mission to one of interpretation alone.⁵⁰⁶ It is not that they deny interpretation a place in the judicial enterprise; rather they seek to reduce interpretation to one element,

500. *Rosenberg v. United States*, 346 U.S. 273, 321 (1953); *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944).

501. *Rosenberg*, 346 U.S. at 321; *Korematsu*, 323 U.S. at 223-24.

502. See generally *Rosenberg*, 346 U.S. at 273; *Korematsu*, 323 U.S. at 214.

503. *Korematsu*, 323 U.S. at 223-24 (accepting the federal government's argument that the internment of United States citizens of Japanese descent was justified on the basis of national security).

504. *Rosenberg*, 346 U.S. at 321 (emergency session of the Supreme Court convened to authorize the immediate execution of convicted spies).

505. *Bush v. Gore*, 531 U.S. 98, 103 (2000). Indicative of the Supreme Court's own recognition of this case's limitations, it has yet to be cited as precedent.

506. POSNER, PROBLEMS, *supra* note 23, at 104-05 (describing the complexity of understanding linguistic communications and the nature of interpretation); Farber, *Pragmatism*, *supra* note 19, at 1332.

one technique in the judicial adjudication toolbox.⁵⁰⁷ Thus, the first pragmatist argument against the primacy of interpretation is based upon a radically different account of what law is.⁵⁰⁸ Pragmatism focuses upon what law is to do for us, not what we are to do for the law.⁵⁰⁹ Law, including constitutional law, is a social artifact, created by man to serve his needs; its obligations are the obligations we impose upon ourselves, not obligations arising from the natural world or a higher God.⁵¹⁰ The methods of judicial decision are then to be deployed in determining what the law ought to be in a particular case.⁵¹¹ That determination is to be based not upon the best interpretation of the original meaning or other meanings, but upon maximizing desirable social outcomes.⁵¹² The goal is justice, defined for Posner, at least at one time, as wealth maximization.⁵¹³ Wealth maximization and justice may sometimes turn on choosing the best interpretation of the Constitution's original meaning, much in the same way that law may sometimes be congruent in its force with the requirements of morality.⁵¹⁴ But in each case, that congruence is a contingent historical fact, not a necessary consequence of the nature of law. Such an approach may reduce transaction costs and increase efficiency by permitting planning in reliance on expectations,⁵¹⁵ but the inquiry is into expectations, efficiency, and wealth maximization.⁵¹⁶ The settled constitutional law of substantive due process may be more relevant than the original meaning or understanding of these provisions.

The pragmatist alternative to adjudication as interpretation sounds classical pragmatist themes.⁵¹⁷ Pragmatist theories of knowledge and

507. See POSNER, PROBLEMS, *supra* note 23, at 101-05, 259-61 (suggesting that common law adjudication is pragmatic and that statutory and constitutional law is interpretive).

508. See *id.* at 30.

509. *Id.* at 29 (“Legal rules are to be viewed in instrumental terms . . .”).

510. *Id.*; but see C. Edwin Baker, *In Hedgehog Solidarity*, 90 B.U. L. REV. 759, 810-11 (2010) (contrasting Dworkin's account of obligation with positivist accounts).

511. See POSNER, PROBLEMS, *supra* note 23, at 455 (arguing that judges are unable to decide hard cases on the basis of logic or science and instead “are compelled to fall back on the grab bag of informal methods of reasoning that I call ‘practical reason . . .’”).

512. See SUNSTEIN, RADICALS, *supra* note 17, at 72-73; POSNER, PROBLEMS, *supra* note 23, at 29.

513. POSNER, ECONOMICS, *supra* note 32, at 60-71.

514. See COLEMAN, PRACTICE, *supra* note 5, at 125 n.8.

515. See POSNER, PROBLEMS, *supra* note 23, at 358-59 (explaining how precedent helps parties predict outcomes and protect expectations); but see POSNER, PROBLEMS, *supra* note 23, at 87-100 (criticizing the use of precedent as without conceptual integrity). These two approaches to precedent can be reconciled, if at all, by a non-interpretative account of legal reasoning and precedent.

516. See POSNER, ECONOMICS, *supra* note 32, at 60-71.

517. Sunstein's account of legal reasoning emphasizes the place of analogy, and consistent with his endorsement of incompletely theorized agreements, accords formal, theoretical reasoning a lesser role. See SUNSTEIN, LEGAL REASONING, *supra* note 27, at 62-80 (“Analogical reasoning is crucial in constitutional cases.”).

language emphasize function and performance.⁵¹⁸ Knowledge is marked by an ability to manipulate the world;⁵¹⁹ language is important as a tool to aid that manipulation, not as a means to represent the world.⁵²⁰ Pragmatist theories of adjudication also emphasize function and performance and largely ignore classical questions of interpretation, representation, and theory building.⁵²¹

According to the pragmatist account, the appellate judge should determine the wealth-maximizing outcome of a case.⁵²² Because that determination must be made in a context in which legal authorities are to be applied and in a context in which permitting and supporting reliance on such authorities is an important way in which wealth is maximized, that determination of outcomes requires the application of those authorities and the articulation of the decision in the context of, and terms of, these existing texts and precedential authorities. But it need not follow that applying such rules first requires interpreting them.

Posner makes this argument most clearly in his hypothetical of a lower court confronting a case governed by authorities that have been effectively undermined, but never rejected, by subsequent higher court decisions.⁵²³ The signals that such precedents are moribund can take a variety of forms, from a failure to cite such cases when they might appear relevant, to the emergence of collateral lines of doctrine in tension with such authorities.⁵²⁴ The lower court that reads those signals and refuses to recognize those

518. Jules Coleman is at pains to distinguish a couple of strands of pragmatism relevant to law. The dominant branch flows from John Dewey and William James through Richard Rorty. See COLEMAN, *PRACTICE*, *supra* note 5, at 6 n.6. He instead suggests his own views stem from those of Wilfrid Sellars, Donald Davidson, Hilary Putnam, and Willard Quine. *Id.* This distinction is important to Coleman, one may speculate, because he wants to distance himself from the use that some in the legal academy have made of Rorty, within the Critical Legal Studies camp and elsewhere. See, e.g., SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 175-77 (1988). Coleman may exaggerate the differences among such pragmatists (given Rorty's own express debt to Sellars and his ambition to develop Sellars's work and Robert Brandom's project of synthesizing the pragmatic insights of Sellars and Rorty), but that question need not detain us. See ROBERT B. BRANDOM, *FROM EMPIRICISM TO EXPRESSIVISM: BRANDOM READS SELLARS* 5-6 (2015). For a modern example of such dominant pragmatic account, see generally RORTY, *MIRROR OF NATURE*, *supra* note 65.

519. It is partly this element of scientific knowledge that has so often made it the model for knowledge in the Western canon. But see generally MARTIN HEIDEGGER, *BEING AND TIME* (Joan Stambaugh trans., 1996) (mocking the traditional Western *instrumental* concepts of knowledge).

520. See, e.g., JOHN DEWEY, *RECONSTRUCTION IN PHILOSOPHY* 156-57 (1920) [hereinafter DEWEY, *RECONSTRUCTION*] ("The hypothesis that works is the *true* one . . .").

521. *Id.* at 87 ("[T]he interaction of organism and environment, resulting in some adaptation which secures utilization of the latter, is the primary fact, the basic category. Knowledge is relegated to a derived position, secondary in origin . . .").

522. See POSNER, *ECONOMICS*, *supra* note 32, at 60-71.

523. POSNER, *PROBLEMS*, *supra* note 23, at 227 ("[T]he prediction theory [of law] avoids a paradox created by the notion of law as a set of concepts."). Posner's observation captures the dimension of constitutional and other legal argument as a matter of social practice.

524. See *id.*

failing precedents as controlling the case at hand will produce a decision that will likely not be reversed; a lower court that merely interprets the authorities and applies them will likely be reversed because the canonical rules of interpretation would treat the contextually moribund precedent as controlling.⁵²⁵ Posner's example poses a forceful challenge to constitutional theorists who assign a priority and primacy to interpretation. Defenders of the primacy of interpretation must either argue that the lower court should follow the articulated rationale of the existing precedent and be reversed, or articulate a novel and seemingly counterintuitive account of how interpretation proceeds in Posner's hypothetical. Posner thus shows the difference between mere interpretation and the richer task of application of textual precedent in adjudication.⁵²⁶ Posner's assault on interpretation as the exclusive model of constitutional adjudication is wholly consistent with other pragmatist themes and offers a fundamental criticism of, and alternative to, originalism.

Posner's recent book, *Not a Suicide Pact*, presents a good example of how the pragmatist alternative to originalism could apply to current constitutional questions, such as the interpretation of the protections of privacy and free association, the limitations imposed on criminal procedure in the public discourse, and the threats posed by contemporary terrorism.⁵²⁷ Posner begins by rejecting the exclusive methodology of interpretation.⁵²⁸ He offers an affirmative vision of a Constitution that is flexible, and for which the scope of constitutionally protected rights expands or contracts as the Nation's circumstances permit or require.⁵²⁹

Posner's proposal is not an interpretation of the Constitution, nor does he attempt to characterize it so.⁵³⁰ His analysis proceeds without asking how the draftsmen or the ratifiers would have approached the problem of stateless terrorists with potential access to weapons of mass destruction. While attending to the text, Posner's goals for his analysis are balance, flexibility, and practicality.⁵³¹ While those attributes certainly sound like

525. *Id.*

526. *See id.* at 101-05, 259-61.

527. *See* POSNER, *SUICIDE PACT*, *supra* note 18, at 48-49 (arguing that certain flexibility in monitoring and collecting data on persons will protect public safety from modern terrorist threats without sacrificing rights and liberties more central to our way of life). For my fuller discussion of this work, *see* LeDuc, *Beyond Babel*, *supra* note 217, at 224-28.

528. *See* POSNER, *SUICIDE PACT*, *supra* note 18, at 18-27 (“[Supreme Court] justices tend to be pragmatic . . . hence forward-looking rather than slaves to history.”).

529. *See id.* at 31-32 (arguing that the relative harms and benefits for liberty and security are not incommensurable and can be compared).

530. *See id.* at 9.

531. *Id.* (“[C]onstitutional law is fluid, protean, and responsive to the flux and pressure of contemporary events. The elasticity of constitutional law has decisive implications for the scope of constitutional rights during an emergency.”).

virtues, it may not be clear what Posner means beyond an expressive claim. He emphasizes the differences between the national security challenges that the Republic faces today and those faced in the Eighteenth Century.⁵³² Highlighting the impossibility of anticipating today's challenges, he notes: "[t]he framers were smart, but they were not demigods."⁵³³

When choosing between possible techniques of government surveillance, interrogation, and detention, Posner would consider the costs and benefits to civil liberties and national security instead of looking to the original understanding.⁵³⁴ That analysis should focus firmly on the maximization of civil liberties and national securities, understanding that the two must be traded off from time to time.⁵³⁵ Posner's proposed method to measure and balance the values of national security and civil liberties forms the core of his analysis.⁵³⁶ His argument appears to be impossible as a textual matter because the constitutional text generally does not provide special rules for instances in which the national security of the Nation is at risk.⁵³⁷ That impossibility would not count as a flaw for Posner, however. Posner's methodology relies almost exclusively upon a prudential argument.⁵³⁸ He endorses that reading of the Constitution that produces the best results, as he defines and defends the notion of what is "best."⁵³⁹

Does Posner's methodology and substantive recommendations preclude an originalist interpretation? In theory, an originalist account could determine that the semantic understandings of those originally drafting or ratifying the Constitution were of constitutional provisions that were just so. An originalist account that focused upon expectations could not be harmonized with Posner's account, however, if he is right in his premise that the challenges of stateless terrorist organizations seeking weapons of mass destruction were never even remotely contemplated by the statesmen of the Eighteenth Century.⁵⁴⁰ Moreover, while it is theoretically possible that the original semantic intentions or understandings are consistent with the rules that Posner adumbrates, in fact, the text of the Constitution

532. *Id.* at 8 (describing the focus of the book as modern terrorism—the threat posed by non-state sponsored terrorists with weapons of mass destruction).

533. POSNER, *SUICIDE PACT*, *supra* note 18, at 18.

534. *Id.* at 9.

535. *Id.*

536. *Id.*

537. *See* U.S. CONST. amend. III (distinguishing between peacetime and wartime with respect to quartering troops in private homes).

538. *See* BOBBITT, *FATE*, *supra* note 19, at 61 (describing the prudential form of constitutional argument).

539. *See* POSNER, *PROBLEMS*, *supra* note 23, at 260.

540. *See* POSNER, *SUICIDE PACT*, *supra* note 18, at 2 (allowing his lengthy recitation of the species of modern weapons of mass destruction to make this point implicitly rather than expressly).

precludes such an interpretation.⁵⁴¹ In the context of national security, the semantic formulations of the constitutional provisions cannot be harmonized with such a balancing test.⁵⁴² The relevant provisions of the Fourth Amendment, First Amendment, and the War Powers Clause not only fail to expressly suggest a balancing of considerations, but there is, accordingly, no suggestion of what factors should be balanced, or how they should be balanced.⁵⁴³ So there is no account of semantic intent or understanding that could plausibly directly ground Posner's strategy.⁵⁴⁴ Nevertheless, Posner does make a modest appeal to the overall intentions and expectations of the Founders, arguing that they could not have intended to value particular rights and liberties so highly that they would choose to permit the Republic to fall rather than to temper the enjoyment of those rights.⁵⁴⁵

Pragmatism not only argues that there is a better approach to constitutional adjudication than mere interpretation, but it also argues that interpretation does not deliver the results claimed by the originalists. I will explore general objections to an exclusively interpretational account of appellate constitutional adjudication later.⁵⁴⁶ Pragmatism makes a particular criticism of interpretation.⁵⁴⁷ According to pragmatism, interpretation cannot deliver the best rendition of the Constitution; the Constitution is both too abstract and too practical for interpretation alone to suffice in constitutional adjudication.⁵⁴⁸ Pragmatists look beyond the text and beyond the toolbox of interpretation in their theory.⁵⁴⁹ But it is important to recognize that the pragmatist objections to originalist interpretation are not merely the theoretical objection that law, as a social tool, must take into account non-originalist information and authority, nor the practical

541. See U.S. CONST. amend. III.

542. See POSNER, SUICIDE PACT, *supra* note 18, at 9.

543. See U.S. CONST. art. I, § 8; U.S. CONST. amend. I; U.S. CONST. amend. IV. Of course, while the First Amendment uses the seemingly universal formulation that "Congress shall make no law . . .," First Amendment jurisprudence has always recognized exceptions and limitations, whether in limiting speech by members of the military, speech that is intended and designed to provoke violence, or speech that will create panic in the public space. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (creating an exception from the First Amendment protection for speech that creates a clear and present danger); *Chaplinsky v. N.H.*, 315 U.S. 568, 573 (1942) (upholding the conviction of an individual who insulted a governmental official in a public forum on the basis that such speech constituted "fighting words" outside the protection of the First Amendment); POSNER, SUICIDE PACT, *supra* note 18, at 9 (discussing the balancing test between civil liberties and national security interests).

544. See POSNER, SUICIDE PACT, *supra* note 18, at 9 (discussing the balancing test between civil liberties and national security interests).

545. See *id.*

546. See *infra* Part II.C.

547. See POSNER, PROBLEMS, *supra* note 23, at 455.

548. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1104-05 (1989) [hereinafter Farber, *Originalism*].

549. See POSNER, PROBLEMS, *supra* note 23, at 455.

objection that a more open-ended textual analysis and application produces better results.⁵⁵⁰ There is a third objection that the process of interpretation, whether originalist or otherwise, is inadequate to the task at hand—regardless of whether there is a better pragmatist methodology.⁵⁵¹

Interpretation fails as a theory of constitutional decision because the judge's task in deciding a case is not one of interpretation.⁵⁵² Her task is to get the best result.⁵⁵³ In law the best results are not obtained through interpretation any more than they are in science.⁵⁵⁴ That is not to say that law employs or should employ a *scientific* method.⁵⁵⁵ But, empirical evidence matters for the pragmatist far more than for the originalist.⁵⁵⁶ With respect to the consequences of decisions, the pragmatist believes empirical evidence speaks to the choice of interpretation, construction, or application of the constitutional provision at issue.⁵⁵⁷ So, for the pragmatist, interpretation ultimately and most fundamentally fails because constitutional adjudication requires application of the Constitution, not its interpretation. That application is not logically derivative of an interpretation.

Sunstein's challenge to originalism's commitment to an interpretative strategy and his associated defense of minimalism are fundamentally based upon the results obtained in judicial decisions.⁵⁵⁸ In so doing, he seeks a middle political ground.⁵⁵⁹ Thus, for example, Sunstein criticizes the reasoning of *Griswold*, suggesting that a narrower ground for invalidating

550. See Farber, *Originalism*, *supra* note 548, at 1104-05.

551. See *id.*

552. See SUNSTEIN, RADICALS, *supra* note 17, at 72-73 (criticizing originalism on the basis of the judicial decisions that the theory would support and the kind of constitutional jurisprudence that would result); POSNER, PROBLEMS, *supra* note 23, at 29.

553. See SUNSTEIN, RADICALS, *supra* note 17, at 72-73; POSNER, PROBLEMS, *supra* note 23, at 29.

554. See POSNER, PROBLEMS, *supra* note 23, at 454-57.

555. See generally DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (2006) (the project of putting law on the firm path of science has largely been abandoned since the legal realist reaction to the Langdellian project); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); see also Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in PRAGMATISM IN LAW AND SOCIETY 89, 91 (Michael Brint & William Weaver eds., 1991) ("Nobody wants to talk about a 'science of law' anymore."); but see BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 10-11 (1977) (articulating what he terms a *scientific* approach to constitutional analysis). Ackerman's terminology is puzzling, because what he dubs the scientific approach does not share the features of science generally identified by philosophers of science. See *id.* It is not experimental, for example, and it is not even clear that propositions of Ackerman's scientific approach are falsifiable, but the project of constituting law as a *fach* would appear to be at the core of Ackerman's notion.

556. Cf. Dan M. Kahan, *Foreward: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 39-40 (2011) (exploring the complex relationship between empirical evidence and conclusions drawn therefrom and policy stances for the Court).

557. See SUNSTEIN, RADICALS, *supra* note 17, at 72-73; POSNER, PROBLEMS, *supra* note 23, at 29.

558. See generally SUNSTEIN, RADICALS, *supra* note 17.

559. See generally *id.*

the Connecticut law was at hand.⁵⁶⁰ More generally, he suggests that the sweeping interventions of the Warren Court were inadvisable.⁵⁶¹ At times, Sunstein's comments take on a majoritarian tone, but it is not clearly articulated.⁵⁶² Sometimes, in the defense of "incompletely theorized" decisions, there is a suggestion that this approach is a consequence of the ethical and religious toleration proper in our republic because many fundamental disagreements are rooted in religious beliefs.⁵⁶³ Once we acknowledge and embrace the religious and political diversity of our citizens, the potential to ground political or judicial decisions on shared fundamental premises would appear lost.⁵⁶⁴

Sunstein's substantive criticism of originalism based upon the results obtained is simple: "We follow the Constitution because it is good for us to follow the Constitution. Is it good for us to follow the original understanding? Actually it would be terrible."⁵⁶⁵ Sunstein then proceeds to marshal a series of examples that he believes shows that the implications of originalism are unacceptable and unattractive—in a word, terrible.⁵⁶⁶ Three examples are perhaps sufficient to make Sunstein's point: First, consider state prohibitions on the sale of contraceptives.⁵⁶⁷ Since *Griswold*, courts have held such state legislation as prohibited by the United States Constitution.⁵⁶⁸ But, Sunstein considers the *Griswold* opinion to be an aggressive, perfectionist decision in its reasoning, although perhaps not in its result.⁵⁶⁹ Nevertheless, originalists have roundly criticized its holding that there is a broad right of privacy.⁵⁷⁰ Originalists look to the basic text of the Constitution and the Eighteenth Century world at the adoption of the

560. See *id.* at 83-84 (describing *Griswold* and its progeny).

561. See *id.* at 35-36 ("Many people continue to defend the Warren Court . . . But I have many doubts . . .").

562. See CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 353-54 (1993) [hereinafter SUNSTEIN, *PARTIAL*]. More recently, defending his theory of judicial minimalism, Sunstein has referenced the views of the majority of our citizens in assessing judicial approaches to firearm regulations. See, e.g., Sunstein, *Heller*, *supra* note 361, at 246-47. It is unclear how accurate Sunstein's characterization of the gun control ordinance presented in *Heller* was, in light of *Heller*'s progeny.

563. See SUNSTEIN, *LEGAL REASONING*, *supra* note 27, at 3.

564. The tension between democracy and diversity has been long acknowledged, and we tragically see that issue being played out today in the conflict between Israel and Palestine. See generally MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION (Amy Gutmann ed., 1994) (exploring the tension between identity, toleration, and respect in modern multicultural democracies).

565. SUNSTEIN, *RADICALS*, *supra* note 17, at 75. Sunstein made this argument as early as 1991. See Sunstein, *What*, *supra* note 388, at 206-07.

566. SUNSTEIN, *RADICALS*, *supra* note 17, at 75.

567. See *id.* at 83-84 (describing *Griswold* and its progeny).

568. *Griswold*, 381 U.S. at 497-98.

569. SUNSTEIN, *RADICALS*, *supra* note 17, at 98 ("Minimalists believe that *Griswold* should have [sic] decided on this basis [of desuetude] which is narrower, more plausible as a matter of constitutional text, and more democratic.").

570. See, e.g., BORK, *TEMPTING*, *supra* note 8, at 97-99.

Constitution to conclude that such a prohibition does not exist and such laws, if enacted, would be valid.⁵⁷¹

Sunstein is right in his claim about the originalist position. But is he right that it would be a terrible thing to leave to the states' constitutions and to state majorities the responsibility for and authority over this issue? All Sunstein says about that issue is that such a change would disrupt four decades of settled expectations, with a result that is not demonstrably an improvement.⁵⁷² That may be true, but that is not obviously a terrible outcome, even if undesirable. Sunstein's conclusion about the protection of a right to contraception is thus startlingly anemic; it hardly appears to be a *legal* conclusion at all. It appears more like a guarded *historical* conclusion. That is, the conclusion hardly has the certainty or precision that we ordinarily expect from statements of law, which are to tell us what the law is and what we must do. Sunstein's statement, by contrast, would appear sufficiently imprecise as to fail the requirement or goal that statements of law permit a peremptory application. At the very least, this cryptic statement requires careful parsing and analysis; at most, it may require imputed suppressed premises or further interpretive gloss.⁵⁷³ One possibility, of course, is that the sponginess of Sunstein's conclusion merely exemplifies his commitment to incomplete theorization;⁵⁷⁴ it demonstrates that a comprehensive, coherent articulation of principle is neither necessary nor inherently desirable in constitutional decision making.⁵⁷⁵

A similar issue arises with respect to the question of whether there is a constitutional right to abortion.⁵⁷⁶ The Supreme Court initially recognized the constitutional right to abortion about a decade after it struck down state laws restricting sales of contraceptives.⁵⁷⁷ *Roe v. Wade*⁵⁷⁸ presents minimalist critics of originalism with a difficult case.⁵⁷⁹ For originalists, *Roe* is one of the rallying cries raised against activist courts that disregard the original meaning of the Constitution.⁵⁸⁰ A bit simplistically, the *Roe* decision and opinion found a violation of so-called substantive due

571. *See id.*

572. *See* SUNSTEIN, RADICALS, *supra* note 17, at 104-09 ("As a matter of constitutional law, minimalists are far from sure that *Roe* was right. But they are willing to accept it, not in spite of but because of their essential conservatism.").

573. *See id.* at 106-07.

574. *See* SUNSTEIN, LEGAL REASONING, *supra* note 27, at 13-34.

575. *See* SUNSTEIN, RADICALS, *supra* note 17, at 98 (arguing that *Griswold* should have been decided on the narrower grounds of procedural due process).

576. *See id.* at 106-07.

577. *See* *Roe v. Wade*, 410 U.S. 113, 166 (1973).

578. 410 U.S. at 113.

579. *See* SUNSTEIN, RADICALS, *supra* note 17, at 106-07.

580. *See, e.g.*, BORK, TEMPTING, *supra* note 8, at 115 ("In the years since 1973, no one, however pro-abortion, has ever thought of an argument that even remotely begins to justify *Roe v. Wade* as a constitutional decision.").

process.⁵⁸¹ As with *Griswold*, minimalist concerns with the breadth of the *Roe* opinion lead Sunstein to proceed cautiously in his defense of that decision.⁵⁸² One of the elements of his analysis of *Roe* is to offer an alternative ground for decision.⁵⁸³ But, again he is surely right that originalists would generally deny any foundation to ground *Roe* and would instead reverse it.⁵⁸⁴ Like the defense of *Griswold*, that anemic defense of a mistaken *Roe*, made solely on prudential grounds of precedent, may be unpersuasive.⁵⁸⁵

Against that reversal, Sunstein makes his seeming pragmatic, prudential defense of precedent, as he did with *Griswold*.⁵⁸⁶ Sunstein argues that reversing *Roe*, even if it were erroneous, would be a mistake today, because many have come to rely on the availability of abortions within the limits outlined in *Roe*.⁵⁸⁷ Moreover, *Roe* would be sacrificed not on the basis of manifest legal error, but on the basis of equally speculative reservations about the breadth of the privacy doctrine inherent in the *Roe* opinion.⁵⁸⁸ Sunstein believes that those arguments for reversal are insufficient.⁵⁸⁹

The second example that Sunstein highlights is affirmative action.⁵⁹⁰ As he notes, there is a widespread belief in the appropriateness of affirmative action ranging from non-governmental organizations to a variety of federal, state, and local governments.⁵⁹¹ Sunstein notes that there is

581. See *Roe*, 410 U.S. at 167-68.

582. See SUNSTEIN, RADICALS, *supra* note 17, at 106-07. See generally John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (arguing that *Roe* suffered from the flaws in constitutional reasoning that the Warren Court critics had long (but erroneously) attributed to the Warren Court's constitutional jurisprudence).

583. See SUNSTEIN, RADICALS, *supra* note 17, at 107 (suggesting that the Texas statute could have been struck down as overly broad insofar as it provided no exception for a right of abortion in the case of compelling maternal health risk, rape, or incest).

584. See, e.g., BORK, TEMPTING, *supra* note 8, at 112 (“[T]he right to abort, whatever one thinks of it, is not to be found in the Constitution.”). Absent a constitutional right to the contrary, duly enacted state statutes limiting or regulating abortion must stand.

585. SUNSTEIN, RADICALS, *supra* note 17, at 108 (“[W]hen a decision [like *Roe v. Wade*] has become an established part of American life, judges should have a strong presumption in its favor.”). Of course, at the risk of being unduly harsh, it would appear that a similar defense would have been available for the *Dred Scott* decision. The centrality of the decision in *Dred Scott* or later, in *Plessy v. Ferguson*, would have insulated those decisions from reconsideration. See generally *Dred Scott*, 60 U.S. at 393.

586. SUNSTEIN, RADICALS, *supra* note 17, at 98-99.

587. *Id.* at 108.

588. *Id.* at 106-07.

589. *Id.* at 108.

590. *Id.* at 132.

591. See, e.g., *About*, HARV. L. REV., <http://harvardlawreview.org/about/> (last visited Feb. 29, 2016) (describing affirmative action procedures for selection of law review editors of the *Harvard Law Review* for 2016). See generally *Grutter*, 539 U.S. at 306 (upholding efforts of University of Michigan to boost minority enrollment in law school); *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979) (addressing steelworkers' unions' efforts to provide racial preference in jobs); *Regents of the Univ. of*

abundant historical evidence that the Reconstruction Congress did not understand the Fourteenth Amendment to prohibit affirmative action.⁵⁹² The contemporaneous Freedmen's Bureau was only the most visible permissible affirmative action taken against racial discrimination contemporary with the adoption of the Fourteenth Amendment.⁵⁹³ Nevertheless, Sunstein does not find that history is necessarily controlling.⁵⁹⁴ Dispositive or not, Sunstein faults originalists for not taking it seriously and, to the extent originalists have examined the historical record on these questions, he criticizes their methodology as sloppy.⁵⁹⁵ From this, Sunstein concludes that the Fourteenth Amendment does not clearly prohibit affirmative action and that a modest, minimalist Supreme Court would be highly deferential to reasonable affirmative action mechanisms adopted by the people and their organizations.⁵⁹⁶

The originalists generally do not dispute the positions Sunstein attributes to them.⁵⁹⁷ They offer two replies to the critical inferences that Sunstein would draw from such results. First, they deny that the Constitution offers us any choice with respect to these outcomes.⁵⁹⁸ According to their account, the requirement of legitimacy in constitutional interpretation and adjudication is fidelity to the original understanding.⁵⁹⁹

Cal. v. Bakke, 438 U.S. 265 (1978) (addressing efforts of the University of California to boost minority enrollments in medical school); SUNSTEIN, RADICALS, *supra* note 17, at 148.

592. See SUNSTEIN, RADICALS, *supra* note 17, at 138-40; see also Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 1-2 (1955); but see McConnell, *supra* note 230, at 957 (making a valiant, but ultimately unsuccessful, effort to rebut Bickel's claim that the drafters and adopters of the Fourteenth Amendment did not understand it to prohibit racially-segregated schools).

593. See SUNSTEIN, RADICALS, *supra* note 17, at 140.

594. See *id.* at 148-50 (concluding that affirmative action programs should be evaluated on the basis of their consequences).

595. See *id.* at 133-34 ("Fundamentalists are concerned above all with text and history. Do text and history support their attack on affirmative action? Actually they don't."). That is not a novel criticism of academic and judicial efforts to find answers to current constitutional questions in a study of history, of course. See, e.g., Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 CONST. COMMENT. 221, 221 (1999); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 92-93 (1997); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 119-20 (1965) (criticizing the Supreme Court's use of historical evidence and argument even before originalism); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 502 (1964) (criticizing the Supreme Court's use of historical evidence and argument even before originalism).

596. See SUNSTEIN, RADICALS, *supra* note 17, at 134-37, 143-44.

597. See BARNETT, LOST, *supra* note 41, at 99-100; but see Calabresi, *Critical Introduction*, *supra* note 359, at 37 (arguing that while certain Warren Court decisions went beyond the original understanding of the relevant constitutional provisions, like *Mapp* and *Miranda*, many of the individual rights protected against the States are indeed consistent with the original understanding at the time of the Fourteenth Amendment's adoption).

598. It does not matter on this account whether we like an unconstitutional result better than the result mandated by the Constitution. See SCALIA, INTERPRETATION, *supra* note 8, at 42-44.

599. See, e.g., Calabresi, *Critical Introduction*, *supra* note 359, at 9-14.

From this perspective, criticism of the results of an originalist interpretation is not relevant; there is no legitimate alternative.⁶⁰⁰

Second, originalists dispute that such decisions would create troubling adverse consequences.⁶⁰¹ For example, Randy Barnett, among others, describes how originalism will provide the means to restore the Lost Constitution.⁶⁰² Among the results that Barnett anticipates enthusiastically is the right of private carriers to compete with the Postal Service, the abolition of the draft (as a constitutional matter), the demise of the Mann Act, the legalization of mere possession or use of guns, or the possession of drugs or obscene materials.⁶⁰³ The environmental laws and Endangered Species Act also would apparently fail Barnett's restrictive reading of the Commerce Clause.⁶⁰⁴ For originalists less libertarian than Barnett, the potential reversal of the privacy precedents presents the clearest example of what originalism promises.⁶⁰⁵ Originalists argue that reversing key privacy precedents like *Roe v. Wade* and *Griswold v. Connecticut* would return to democratic majorities the power that had been allocated to them under the original Constitution.⁶⁰⁶ Originalists claim that striking down gun control legislation under the Second Amendment returns citizens' rights, which have been usurped by democratic majorities.⁶⁰⁷ Potential deaths and injuries caused by such unregulated handguns would appear irrelevant.⁶⁰⁸ Justice Scalia and Judge Bork deny that the fundamental test of originalism is whether it works.⁶⁰⁹ It would appear, therefore, that we have in

600. Lino A. Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1020 (1992) (challenging Posner's criticism of Bork's originalism on the basis that originalism is "almost self-evidently correct" in a democratic constitutional republic).

601. Calabresi, *Critical Introduction*, *supra* note 359, at 37 ("Sunstein's fifth big claim is that the right to privacy and *Griswold v. Connecticut* cannot be justified under originalism. And here, he is right. They cannot be justified. Those decisions should at a minimum not be extended any further, and ideally they should be overruled."); *but see* Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (making an originalist argument for a constitutional right to abortion).

602. *See generally* BARNETT, LOST, *supra* note 41. *But see* David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 975-76 (2008) [hereinafter Strauss, *Symposium Essays on Originalism*] (arguing that originalism cannot deliver the constitutional outcomes that political conservatives seek because the originalist sources are sufficiently indeterminate to support both liberal and conservative decisions). Strauss's argument is ultimately implausible because the Founders' stance was substantially conservative viewed from the perspective of the 21st century.

603. BARNETT, LOST, *supra* note 41, at 265-66, 313, 349.

604. *See* Barnett, *Trumping*, *supra* note 41, at 261 ("[W]hy should precedent . . . bother originalists overly much if it conflicts with the original understanding of the Commerce Clause?").

605. *See* Calabresi, *Critical Introduction*, *supra* note 359, at 37.

606. *See, e.g.*, BORK, TEMPTING, *supra* note 8, at 114-15.

607. *See* SCALIA, INTERPRETATION, *supra* note 8, at 136-37 n.13.

608. *See* *Heller*, 554 U.S. at 636.

609. *See* BORK, TEMPTING, *supra* note 8, at 95-100 (using *Griswold* as an illustration); *see also* SCALIA, INTERPRETATION, *supra* note 8, at 43-44 (using Sixth Amendment Confrontation Clause cases as an illustration).

Sunstein's criticism of originalism, as in Dworkin's criticism of originalism, what Bobbitt's helpful framework would call dueling modalities.⁶¹⁰

It may be that originalists would reply that their attentiveness to the original understanding of the Constitution is, at the end of the day, the preferred instrumental approach to constitutional law. That is, it may be argued that deference to the original understanding is the best way to preserve the minority's rights against majority rule, and that such privileging of the minority is, as the founders apparently believed, a superior social and legal outcome.⁶¹¹ Such a stance would be consistent with concerns with potential excesses of democratic majorities in the republican tradition.⁶¹² There are elements of Justice Scalia's argument that appear to make just this point. Thus, Justice Scalia raised the possibility that the changes to constitutional doctrine effected by the Warren Court may be rot, rather than progress.⁶¹³ By adopting the rule of looking to original understandings rather than contemporary understandings and judgments, we adopt a rule that will overall produce better outcomes, even if it fails to do so in all cases.

For example, when addressing the relaxation of the Confrontation Clause's requirements in child abuse trials, Justice Scalia acknowledges that such an approach is generally preferred by contemporaries, even while criticizing that approach as a matter of constitutional law.⁶¹⁴ But the result is also similar when the given choices for originalism in a particular case do not achieve the preferred instrumental outcome and arguments about utility or justice, or when any other facts that may be instrumentally deemed desirable for our flourishing, are to be disregarded.⁶¹⁵ But while there are hints of that argument, it is never made in a systematic way.⁶¹⁶ Instead, more often the wisdom of the Founders and their Constitution is simply invoked.⁶¹⁷ That is, the traditional form of the originalist argument is not that originalism delivers better constitutional answers, but that it delivers

610. See BOBBITT, *INTERPRETATION*, *supra* note 84, at xi (describing conflict between the different modalities).

611. See generally THE FEDERALIST NO. 10 (James Madison) (classic analysis of the problem of factions which also endorses the strategy of limiting the adverse effect of factions in a representative democracy); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) (offering a classic modern analysis of the problem of faction).

612. See generally J. G. A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975) (classical account of an important source of political theory for the Founders that is generally inconsistent with the natural rights and social contract theory of Locke).

613. See SCALIA, *INTERPRETATION*, *supra* note 8, at 40-41.

614. See *id.* at 43-44.

615. See *id.* (using Sixth Amendment cases as an illustration).

616. See *id.*

617. See *id.*

legal constitutional answers.⁶¹⁸ The best argument for the originalists' position is that the originalist Constitution is the law.⁶¹⁹

There is also a sense in which there is no apparent argument by which to rebut originalism for the pragmatist, or to rebut pragmatism for the originalist. This inability to engage appears consistently lost in the exchanges about originalism.⁶²⁰ The arguments are made in different modalities.⁶²¹ That conclusion may appear to commit us to Bobbitt's modal theory, and the view that conflict between or among the modalities cannot be resolved by any independent rule.⁶²² But Bobbitt does not deny that conflicts are resolved every day in the courts.⁶²³ So, even Bobbitt's theory does not explain the apparent phenomenon that the protagonists in this debate appear to talk past each other. Another explanation for our inability to choose between the competing originalist and pragmatist positions comes from pragmatism itself.⁶²⁴ Richard Rorty's essay about honest mistakes in practical reasoning and public life captures the sense that it is often simply too soon to tell what the right answers are for us as individuals and a society.⁶²⁵

Originalism disputes the pragmatists' premise that constitutional law may be reduced to a social tool and that the task of adjudication is to determine an application of the Constitution that maximizes the social good.⁶²⁶ Bobbitt's theory, for example, suggests that the two sides are simply making different kinds of arguments, one prudential, the other historical and textual.⁶²⁷ Even if one does not endorse Bobbitt's theory of argumentative modalities, it is unclear what argument would persuade an originalist of Posner's prudential methods, or Posner of the originalist methodology, and the debate offers no clues as to what such an argument might be.

618. See Sachs, *Legal Change*, *supra* note 9, at 857.

619. *Id.*; see generally SCALIA, INTERPRETATION, *supra* note 8.

620. See Strauss, *Symposium Essays on Originalism*, *supra* note 602, at 975 (arguing that original understandings are beside the point in constitutional interpretation and decision).

621. See BOBBITT, INTERPRETATION, *supra* note 84, at 31-42 (describing the unresolved conflict between the different modalities and the resulting indeterminacy of constitutional law).

622. See *id.*

623. See *id.* (describing how different modalities help courts resolve cases).

624. 4 RICHARD RORTY, *Honest Mistakes*, in PHILOSOPHY AS CULTURAL POLITICS: PHILOSOPHICAL PAPERS 66-68 (2007).

625. See *id.* This same sense of the uncertainty of history's verdict is captured in the justly celebrated, perhaps apocryphal anecdote of Kissinger's inquiry about the significance of the French Revolution to Zhou Enlai, who allegedly replied that it was too soon to tell.

626. See, e.g., SCALIA, INTERPRETATION, *supra* note 8, at 44 ("I have no doubt that the society is, as a whole, happy and pleased with [the decision in *Maryland v. Craig* limiting the Confrontation Clause in child abuse cases]. But we should not pretend that the decision did not *eliminate* a liberty . . .").

627. See BOBBITT, FATE, *supra* note 19, at 9-38 (describing the prudential, textual, and historical forms of constitutional argument); see generally LeDuc, *Anti-Foundational Challenge*, *supra* note 3.

The originalist may offer a variety of replies to such a challenge. First, originalism may argue that the history of the Court's willingness to act prudentially in times of national crisis has not served us well. Many do not consider the decisions cited above to be reflective of the Court's highest hour. The Court itself has tacitly recognized the flaws in *Korematsu v. United States*⁶²⁸ by its refusal to cite that case as precedent in its subsequent constitutional jurisprudence.⁶²⁹ So rather than seeing these cases as undermining the claims of originalism, the originalist may cite them as evidence for the claim that the proper interpretation of the Constitution must look to the original understandings, not policy or prudential considerations.⁶³⁰ Second, the originalist may acknowledge that prudential considerations will, in fact, likely dominate in constitutional decision-making in times of national crisis, but that it is better for such decisions to be recognized as unprincipled and ad hoc.⁶³¹ In that way they have less precedential force and do less damage to our constitutional doctrine. The failure of the Supreme Court to ever cite *Bush v. Gore*⁶³² confirms, on this view, the limited importance of that decision as a matter of constitutional law, regardless of whether the case is viewed as a departure from proper decision process. But there may also be a recognition that the decision was necessary, regardless of its result, because the election needed a timely outcome, and the time for that outcome had arrived.

That argument may strike some as perhaps almost a parody of Sunstein's argument for incompletely theorized agreements and decisions. It is almost a parody because the decision does not purport to be a minimalist, incompletely theorized decision. As a result, the decision is facially inconsistent with Sunstein's theory.⁶³³ On the other hand, despite being stillborn from the United States Reports (because it was never again cited by the Court), the decision itself, if not its reasoning, has had a significant impact on the Court (through the composition of its members) and on the Republic, at least over the immediate past.⁶³⁴

Finally, it may be helpful to briefly contextualize the debate between legal pragmatism and originalism within the framework of the positive

628. 323 U.S. at 214.

629. See generally Eugene V. Rostow, *The Japanese-American Cases—a Disaster*, 54 *YALE L.J.* 489, 490-91 (1945) (describing and criticizing the constitutional reasoning of the Japanese-American internment cases).

630. See SCALIA, *INTERPRETATION*, *supra* note 8, at 43-44 (using Sixth Amendment cases as an illustration).

631. See BOBBITT, *FATE*, *supra* note 19, at 9-38 (describing the prudential, textual, and historical forms of constitutional argument).

632. 531 U.S. at 98.

633. See SUNSTEIN, *LEGAL REASONING*, *supra* note 27, at 35.

634. See *id.*

law/natural law debate. As has been well recognized,⁶³⁵ Hart's classical statement of legal positivism eschewed a utilitarian, consequentialist derivation of legal positivism.⁶³⁶ Legal positivism was agnostic on such underlying moral claims.⁶³⁷ Originalism is largely deontological; while that is not required by its legal positivism, neither is it incompatible with it. Similarly, the consequentialist stance taken by originalism's critics is also consistent with (but not required by) legal positivism. In the case of natural law originalism and the natural law critics of originalism, the deontological stance is a necessary component, at least for classical natural law theories.⁶³⁸

C. Originalism and the Pragmatist Challenge

The debate between originalists and their pragmatist critics has not always placed itself in a jurisprudential context or articulated the premises on which it proceeds. Originalists are prepared to accept undesirable results that arise from the application of their interpretative canon; their pragmatic critics find such acceptance inconsistent with the fundamental mission of law, including constitutional law.⁶³⁹ Both sides in this theater of the debate rarely acknowledge how ineffective their arguments are in persuading the other side.⁶⁴⁰ Still less do they explore the reasons for the impasse.⁶⁴¹ Yet when we do, we see many reasons why the debate over originalism has proved so fruitless.⁶⁴²

635. See Dan Priel, *Toward Classical Legal Positivism*, 101 VA. L. REV. 987, 987-99 (2015) [hereinafter Priel, *Legal Positivism*] (describing Hart as abandoning reliance on utilitarianism in his theory of law between the delivery of the Holmes Lectures and the publication of *The Concept of Law*).

636. See generally HART, CONCEPT, *supra* note 5.

637. *Id.* at 253-54.

638. See generally WEINREB, NATURAL LAW, *supra* note 297, at 43-66 (describing the source of natural law in nature, not in a purposive human project of social ordering).

639. See generally Posner, *Against Constitutional Theory*, *supra* note 23, at 1 (classical legal pragmatist statement); see also Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1760-63 (2015) [hereinafter McConnell, *Time*] (canvassing the objection to interpretative theory but discounting its force). Professor McConnell's exciting article appeared after this article was written, so I will not be able to do justice to its argument here.

640. Justice Breyer has acknowledged that his argument will not convince fervent originalists. BREYER, ACTIVE LIBERTY, *supra* note 22, at 132 ("I hope that those strongly committed to textualist or literalist views—those whom I am almost bound not to convince—are fairly small in number.").

641. See *id.* Justice Breyer never explains why he believes that he will be unable to persuade the originalists of his claims. An obvious possibility would be that he questions the integrity with which they pursue the debate. It becomes an interesting and important question *why* he would fail to persuade if we concede that his opponents are rational persons of good will. The answer, I have urged, is that they (as well as Justice Breyer himself) are caught in a pathology of reason from which they may be freed, not with mere argument alone, but with therapy. See generally LeDuc, *Originalism, Therapy, and the Promise of the American Constitution*, *supra* note 2.

642. See generally LeDuc, *Originalism, Therapy, and the Promise of the American Constitution*, *supra* note 2 (arguing that the originalism debate is not interesting and robust, but pathological); LeDuc, *Five Lessons*, *supra* note 148; but see McConnell, *Time*, *supra* note 639, at 1745-46 (offering a pluralist

The reason for the inability of the two sides in the debate to convince the other is apparent when we consider the different premises they hold with respect to the nature of law. Originalism is committed to a non-instrumental account of constitutional law and adjudication. The only task for the judicial decision-maker is one of interpretation.⁶⁴³ For the pragmatist, the overriding functional, instrumental account of law extends to adjudication, arguing that the outcomes of constitutional controversies ought to be assessed in instrumental terms.⁶⁴⁴ That is perhaps why so many judges are comfortable characterizing themselves, admittedly often loosely, as pragmatists.⁶⁴⁵ Not only is legislation properly assessed on an instrumental basis, as is more widely recognized, but so too is adjudication.⁶⁴⁶ To the extent the two sides disagree implicitly about what they are trying to accomplish with constitutional law, it is hardly surprising that they cannot reconcile the two approaches of originalism and pragmatism.⁶⁴⁷

It might appear then that the key to resolving the debate about originalism is to first resolve the underlying dispute about the nature of law. If the two sides in the debate can reach agreement about what constitutional law is and what constitutional judicial decision-making ought to seek to do, would the debate over originalism have a potential resolution? There is reason to doubt that such a path would itself prove fruitful.⁶⁴⁸

The originalist and the pragmatist would likely never be able to reach agreement as to the role of instrumental or functional arguments in constitutional adjudication.⁶⁴⁹ Inconsistent positions on that question are

account of constitutional law to explain the fundamental difference between originalism and more pragmatic constitutional approaches on the basis of the time in the Republic's life in which particular constitutional issues arose).

643. See, e.g., McConnell, *Time*, *supra* note 639, at 1745, 1755; SCALIA, INTERPRETATION, *supra* note 8, at 37-41.

644. See SUNSTEIN, RADICALS, *supra* note 17, at 71-73 (arguing that theories of judicial interpretation must be judged on the basis of the results that they obtain in judicial decision).

645. See Kende, *Pragmatism*, *supra* note 23, at 636.

646. SUNSTEIN, RADICALS, *supra* note 17, at 71-73.

647. See McConnell, *Time*, *supra* note 639, at 1745-46 (arguing that constitutional theorists may be lumped into two categories: those that defend a particular approach to constitutional interpretation and decision, and those who suggest that the various methods constitute a smorgasbord from which a constitutional advocate may select as best fits the needs of a particular case, and arguing that a new syncretic approach is necessary).

648. See *supra* notes 571-79 and accompanying text.

649. See Gary Lawson, *Originalism Without Obligation*, 93 B.U. L. REV. 1309, 1313-14 (2013) [hereinafter Lawson, *Obligation*] (asserting a fundamental (if mistaken) distinction between originalist theories of interpretation and adjudication). Lawson, despite his self-confidence, displays a notable lack of sophistication, or at the very least, inattention to infelicitous expression. See, e.g., *id.* at 1316 (referring to an "externally directed communicative instrument . . ." to perhaps distinguish it from an internal document written in a private language). See also Farber, *Pragmatism*, *supra* note 19, at 1338-50 (arguing that neither the originalists nor their critics offers an adequate account of judicial review); McConnell, *Time*, *supra* note 639, at 1745-46 (characterizing the fundamental difference between originalism and more pragmatic constitutional approaches as their respective approaches to interpretative

fundamental features of the two conflicting positions.⁶⁵⁰ It is not clear how one could resolve such inconsistency.⁶⁵¹ Sunstein might propose judicial minimalism as the path for resolution, of course.⁶⁵² If the originalists and the pragmatists abandoned the project of grounding judicial decision on the principles of originalism and pragmatism, respectively, the conflict would dissolve. In Sunstein's strategy of judicial minimalism, principled distinctions can generally be disregarded, if not dissolved. Originalism, as we know it, would be lost, because that theory is committed to a principled, *theorized* decision.⁶⁵³ It is less clear whether pragmatism would be similarly lost; I have, after all, characterized Sunstein as a pragmatist. To the extent that pragmatism is identified with a stronger commitment to prudential argument, however, Sunstein's commitments would preclude it.⁶⁵⁴ Moreover, to the extent that pragmatism sometimes endorses highly principled arguments of a variety of types, Sunstein's minimalism would also appear inconsistent.⁶⁵⁵ So while judicial minimalism is effective for eliminating or modulating principled conflict in constitutional adjudication, it is not a strategy that can be reconciled with the demands of originalism and a full-throated pragmatism with its focus on prudential argument.⁶⁵⁶

III. CONCLUSION

When we contextualize the debate over originalism within the debate about legal positivism and the claims of legal pragmatism, we can shed important light on the controversy over originalism and the debate between positive and natural law. This syncretic approach to the question of how

methodologies: unique legitimate method or merely functional techniques to be deployed as appropriate).

650. See Farber, *Pragmatism*, *supra* note 19, at 1338-50; SCALIA, INTERPRETATION, *supra* note 8, at 43-44 (using Sixth Amendment cases on the right of confrontation as an example).

651. See Farber, *Pragmatism*, *supra* note 19, at 1338-50; SCALIA, INTERPRETATION, *supra* note 8, at 43-44.

652. See generally SUNSTEIN, ONE CASE AT A TIME, *supra* note 27; SUNSTEIN, LEGAL REASONING, *supra* note 27.

653. See generally Scalia, *Originalism*, *supra* note 28; Scalia, *Rule of Law*, *supra* note 94 (emphasizing the principled, rule-based model of justice in the republic).

654. See generally SUNSTEIN, LEGAL REASONING, *supra* note 27.

655. See generally LeDuc, Originalism, Therapy, and the Promise of the American Constitution, *supra* note 2, at nn.149-52 (questioning whether Sunstein's minimalism can be reconciled with the Court's decision in *Brown*).

656. See generally SUNSTEIN, LEGAL REASONING, *supra* note 27 (overview of judicial minimalism); see also Farber, *Pragmatism*, *supra* note 19, at 1338-50; Lawson, *Obligation*, *supra* note 649, at 1313-14 (distinguishing between originalist theories of interpretation and originalist theories of adjudication). Lawson's purported distinction between originalist theories of adjudication and interpretation is not as powerful as he suggests because the core claim of originalism is a methodological claim about how the Constitution should be interpreted. Originalism is not a theory of adjudication or action; that is a stance it shares with most of its critics.

these initially disparate lines of inquiry hang together generates eight principal conclusions.

First, we can draw some important taxonomic conclusions that are inconsistent with important recent theoretical work in originalism. Despite the suggestions that the positive turn in originalism is new, the dominant form of originalism has always been committed to legal positivism.⁶⁵⁷ There is also a minority strand of natural law originalism.⁶⁵⁸ That classification has historically gone largely unremarked.⁶⁵⁹ Positivist originalists have often been at pains to reject natural law originalism.⁶⁶⁰ Although the debate over the positivist element of originalism has occasionally been expressed,⁶⁶¹ it generally has not. There has been little attempt to contextualize the various forms of originalism or the debate over originalism with respect to the debate between legal positivism and natural law. Nor has there been any analysis of the implications of the criticism made against originalism with respect to the choice between positive law originalism and natural law originalism.

Second, the two forms of originalism are surprisingly similar in their substantive constitutional commitments.⁶⁶² That congruence may help explain the confusion in contemporary classification. The natural law originalists like Barnett would generally go further than the positivist originalists in overruling precedent, but that difference appears to be a contingent fact about the particular strands of contemporary originalism, not a necessary or inherent feature of the two forms of originalism.⁶⁶³ As Justice Scalia notes, his positivist originalism is inconsistent with non-originalist precedent, as a theoretical matter, and that precedent is accepted as a matter of practical accommodation.⁶⁶⁴ Although natural law

657. See SCALIA, *INTERPRETATION*, *supra* note 8, at 45; BORK, *TEMPTING*, *supra* note 8, at 144.

658. See, e.g., BARNETT, *LOST*, *supra* note 41, at 53-88; Thomas, *Plain Reading*, *supra* note 49, at 989.

659. See Berman, *Bunk*, *supra* note 39, at 14 (classifying 72 potential varieties of originalism without recognizing natural law originalism); but see Gardner, *Positivist Foundations*, *supra* note 39, at 8 (characterizing originalism as grounded on classical Lockean positivist premises).

660. See SCALIA, *INTERPRETATION*, *supra* note 8, at 134 (rejecting originalist reference to the Declaration of Independence).

661. Jed Rubenfeld, *Textualism and Democratic Legitimacy: The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1102-03 (1998) (arguing for a textualism that treats the Constitution as an atemporal legal text without expressly characterizing traditional textualists as positivists); see Easterbrook, *Dead Hand*, *supra* note 114, at 1119 (characterizing Rubenfeld as arguing that “textualists are positivists, and positivists can’t explain why things *ought* to be one way rather than another.”).

662. See Reva B. Siegel, *Heller and Originalism’s Dead Hand—In Theory and Practice*, 56 UCLA L. REV. 1399, 1412 (2009) (emphasizing the distinction between first and second generation originalism (which cuts across legal positivist/natural law lines) rather than the distinction between positive law and natural law originalism).

663. See generally LeDuc, *Privileged How?*, *supra* note 175.

664. SCALIA, *INTERPRETATION*, *supra* note 8, at 139-40 (accepting non-originalist precedent as a matter of accommodation, not as a matter of originalist theory).

originalists like Justice Thomas and Randy Barnett have been less accommodating of such precedent in practice, that difference is not rooted in theory.

Positive law and natural law originalisms are different only in very limited and relatively unimportant ways. The attenuation of the difference may be a result of the diminishing content attributed to natural law and the rise of natural law theory. The importance that has been accorded to the distinction between natural law and positive law in jurisprudence is not reflected in the significant differences in originalist constitutional theory. The failure of that distinction to make a difference, at least in the case of the United States Constitution, appears paradoxical in light of the accepted view of the source of law's importance.

The claims by Baude and Sachs to articulate a powerful new positivist version of originalism are untenable.⁶⁶⁵ Their originalism is admittedly more express in articulating its positivist premises.⁶⁶⁶ But those premises are implicit in the dominant form of classical originalist theory. The theory defended by the new positivist originalists does not offer new answers to the classical critics' objections. While the new positivist originalists advance strong claims that the progress in the debate is at hand, those hopes and aspirations cannot be realized.

The positivist claim that our law is already originalist⁶⁶⁷ is ultimately unpersuasive. There are powerful originalist themes in our constitutional doctrines and precedents. But there are also important constitutional cases that have been decided and doctrines that have been articulated on the basis of structural and prudential arguments, among others.⁶⁶⁸ In those instances, it is not accurate to call the law originalist.

Third, critics have challenged the implicit and now, express, legal positivist foundations of originalism.⁶⁶⁹ Critics of positivism have argued that law, particularly constitutional law, cannot be accounted for solely on the basis of social facts.⁶⁷⁰ Dworkin argues for the introduction of philosophical authorities and conceptual analysis into our constitutional interpretation and decision.⁶⁷¹ Originalists are hardly undone by those

665. See generally Baude, *Our Law*, *supra* note 9; Sachs, *Legal Change*, *supra* note 9.

666. See generally Baude, *Our Law*, *supra* note 9; Sachs, *Legal Change*, *supra* note 9.

667. See generally Baude, *Our Law*, *supra* note 9.

668. See, e.g., *Miranda*, 384 U.S. at 436 (prescribing mandatory warnings by the police in custodial interrogations as a prophylactic means to avoid uninformed waivers of the right against self-incrimination); *Korematsu*, 323 U.S. at 214 (upholding internment of Japanese-American citizens during World War II).

669. See, e.g., BARNETT, LOST, *supra* note 41, at 112-13.

670. See, e.g., COLEMAN, PRACTICE, *supra* note 5, at 142-43 (acknowledging that criticism without conceding to it).

671. DWORKIN, EMPIRE, *supra* note 24, at 90 ("Any practical legal argument, no matter how detailed and limited, assumes the kind of abstract foundation jurisprudence offers, and when rival

criticisms, however. Despite Dworkin's arguments, legal positivism, including its originalist version, has not yet been disproved to the satisfaction of its proponents.⁶⁷²

To the extent that originalism is flawed, that flaw does not result from originalism's positivist foundations. After all, natural law originalism reaches substantially similar constitutional results without positivist commitments. In the end, we can account for our constitutional law only as a rule of men. The social fact characterization of law that underlies all versions of originalism (except natural law originalism) remains a powerful account of our American constitutional law.⁶⁷³ Natural law originalism does not figure prominently in our constitutional jurisprudence at the turn of the millennium.

Fourth, there are close parallels between the criticisms of originalism made by positive law and natural law critics. Those parallels reinforce our sense of the paradox with respect to the distinction between natural law and positive law in American constitutional law theory and practice. For some of the critics, the objection to originalism is derivative of, at least in part, an objection to legal positivism. There is nothing particularly distinctive about originalism as a positivist theory. Positivist originalism emphasizes the separability thesis, which asserts that the authority of law arises independent of morality and that the semantic, historical focus of originalism emphasizes the nature of law as a matter of social fact—the Constitution's text and its public linguistic understanding or expected application.⁶⁷⁴

There is also nothing particularly distinctive about the criticisms made of originalism as a positivist theory. But many of originalism's critics are also legal positivists; they do not object to originalism as a legal positivist theory.⁶⁷⁵ Instead, their objection to originalism generally relates implicitly to the rule of recognition that originalism proposes. Neither the proponents of the Living Constitution nor the originalists generally articulate their stance as to the proper sources of constitutional law in terms of a rule of recognition. That is consistent with the general lack of attention to the jurisprudential context of legal positivism. Finally, not all natural law

foundations compete, a legal argument assumes one and rejects others."); *see generally* LeDuc, *Ontological Foundations*, *supra* note 1, at Section III.A.

672. *See generally, e.g.*, COLEMAN, PRACTICE, *supra* note 5.

673. *See* SCALIA, INTERPRETATION, *supra* note 8, at 45 (denying that moral philosophical argument can create constitutional legal obligation); BORK, TEMPTING, *supra* note 8, at 253-55.

674. *See* COLEMAN, PRACTICE, *supra* note 5, at 75-76.

675. *See* SUNSTEIN, RADICALS, *supra* note 17, at 14-19 (describing the constitutional doctrinal agenda of originalism); Posner, *Bork and Beethoven*, *supra* note 17, at 1382 (concluding that in a democratic republic, objections to the anticipated outcomes of a judicial appointment constitute an adequate basis for refusing to consent to the nomination on the part of democratic representatives).

critics of originalism criticize it on the basis of its legal positivism; Dworkin, in particular, eschews such attacks.⁶⁷⁶

Fifth, the apparent paradox that positivist and natural law originalisms are doctrinally substantially similar while positivist originalism and its positivist critics diverge doctrinally so significantly can also be resolved. The close parallels between the positivist and natural law originalisms demonstrate the insignificance of that distinction in the formulation of originalism and in the defense of originalism against its critics. The divide between natural law and positive law appears relatively unimportant in this context, because, as Justice Scalia remarked, the divide between the originalists and their critics looms so large.⁶⁷⁷ In that context, whether one should gloss the original understanding with the original natural law understandings of the relevant actors is comparatively unimportant.

Sixth, more fundamentally, the convergence of natural law originalism and positive law originalism reflects the relative unimportance of the distinction between natural law and positive law to the originalist interpretative project. That distinction is unimportant, because the originalist interpretative project is relatively indifferent to the correspondence between the constitutional law and morality; the task is one of articulating the historical understanding, intentions, and expectations with respect to the relevant constitutional text. Even when positivist originalists do not expressly consider the natural law foundations of those expectations, intentions, and understandings, they figure implicitly in the positivist account. As a result, the two methods, which seem radically different, converge in their substantive results.

In the case of the divide between positivist originalists and their positivist critics, the sources of law considered and the nature of arguments accepted as legitimate are so different that the tacit agreement that law is a matter of social fact and separable from moral argument is relatively unimportant. The shared positivist premises are overshadowed by the substantial differences as to which social facts are relevant in constitutional argument and reasoning, and thus are relevant in and for the Constitution itself. The relevant social facts for the originalists and for their critics are radically different, both as explored above and as argued in the literature of the debate more generally. The Living Constitution may be anathema to originalists, but as interpreted by its critics, at any point in time it is a matter of states of affairs in the world—or, put a little differently, a matter of fact.

Philip Bobbitt acknowledged the power of an expansive reading of the relevant social facts and the potential constitutional results that could

676. See generally Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

677. SCALIA, INTERPRETATION, *supra* note 8, at 38.

thereby be determined when he defended a role for ethical (but non-moral) argument, even while arguing for a limited role of that mode of argument.⁶⁷⁸ If ethical argument had a more substantial role that transcended a matter of social fact, or if natural law and other forms of moral argument had a more established place in our constitutional argument, reasoning, and law, then the differences between positive and natural law could be expected to be more substantial.⁶⁷⁹ Because those arguments do not play a more significant role in our contemporary constitutional law, it is not surprising that the choice between positivist and natural law accounts of our constitutional law has not played a significant difference in the debate.

Seventh, the paradoxes arising out of the unarticulated premises underlying the debate between consequentialist pragmatic critics and deontological originalists admit of an even more important resolution once those premises are articulated clearly. Many of originalism's critics are expressly consequentialist.⁶⁸⁰ How does a debate over constitutional interpretation and decision proceed when the two sides adopt such radically different positions as to the role of the consequences of decisions and interpretations? In particular, when the dueling metrics for assessing constitutional decisions and interpretations are seemingly incommensurable, how is a debate possible? The differences in the underlying analysis of constitutional law's role between the originalists and their pragmatist critics creates the paradox of a debate that purports to be about the proper methods of constitutional interpretation and reasoning that tacitly incorporates far more fundamental disagreements.

Of course, it would be possible to begin the originalism debate with a disagreement over the question of whether the metric for theories of constitutional decision and interpretation is consequentialist or deontological. Occasionally both the originalists and their critics advert to those questions. Originalism's critics often assert the importance of constitutional theories' consequences as a factor in choosing among competing theories.⁶⁸¹ But, in the case of the originalists, claims about consequences are more in the nature of asides than arguments.⁶⁸² It is worth

678. See BOBBITT, FATE, *supra* note 19, at 94 (acknowledging that his mode of ethical argument may be controversial and asserting that "ethical arguments are not *moral* arguments.").

679. *But see* Balkin & Levinson, *Grammar*, *supra* note 171, at 1784-85 (arguing that natural law arguments cannot be excluded from Bobbitt's classification of accepted modes of constitutional argument).

680. *See, e.g.*, SUNSTEIN, RADICALS, *supra* note 17, at 54; *see generally* POSNER, PROBLEMS, *supra* note 23.

681. *See, e.g.*, SCALIA, INTERPRETATION, *supra* note 8, at 40-41 (arguing that a non-originalist approach to the Constitution would undermine the constitutional structure of the Republic that limits pure democratic choice); SUNSTEIN, RADICALS, *supra* note 17, at 41.

682. *See, e.g.*, BARNETT, LOST, *supra* note 41, at 89 (characterizing the Constitution as "legitimate because of what it says."); Thomas, *Plain Reading*, *supra* note 49, at 995.

suggesting how a debate about whether to take consequences into account in constitutional decision might go.

An analogy may be found in the philosophical debate between advocates of consequentialist theories, like utilitarians, and defenders of deontological or anti-consequentialist theories of ethics.⁶⁸³ That debate offers such an argument as to the role and importance of consequences in assessing theory. But that analogy is troubling. The philosophical arguments over choosing between consequentialist and anti-consequentialist theories of ethics is long-standing and ongoing; there is no indication and there can be little hope that the debate will be resolved.⁶⁸⁴ The analogy with that controversy may suggest similar challenges for a debate between constitutional theories that dispute the role of consequences in articulating or choosing a correct theory. In moral theory, those arguments proceed from examples and intuitions intended to convince the protagonists about the nature of morality and moral concepts.⁶⁸⁵ For example, those arguments respectively defend or challenge the importance of consequences in assessing the morality of conduct. Corresponding kinds of arguments that would be relevant in the constitutional context would appear to concern the nature of our constitutional law and would attempt to answer the question of whether such law is consequentialist or deontological. One may wonder whether she could persuade a theorist committed to a consequentialist account to abandon prudential arguments, or persuade a deontological

683. See generally J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973) [hereinafter SMART & WILLIAMS, UTILITARIANISM] (classic modern statement of the arguments for and against utilitarianism).

684. See generally DEREK PARFIT, ON WHAT MATTERS (2011) [hereinafter PARFIT, ON WHAT MATTERS]; DAVID EDMONDS, WOULD YOU KILL THE FAT MAN?: THE TROLLEY PROBLEM AND WHAT YOUR ANSWER TELLS US ABOUT RIGHT AND WRONG (2014) [hereinafter EDMONDS, WOULD YOU KILL.] (exploring the puzzles of moral and ethical theory arising from various hypotheticals based upon Foot's moral hypothetical of an individual facing the choice of what action to take in the face of imminent harm to others); see also T.M. SCANLON, WHAT WE OWE TO EACH OTHER 2 (1998) (noting the fundamental difference between scientific claims about the world and moral judgments about what we should do); Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19, 21, 23 (2002) [hereinafter Foot, *The Problem of Abortion*] (describing the contrasting examples of the fat man stuck in the mouth of the cave with flood waters rising (in which the death of the man is required in the act undertaken to save the others) and the runaway trolley headed toward five persons on the track but approaching a manual switch that could send it on another track toward only one person (where the one might realize his danger and escape without prejudicing the effort to save the others)).

685. See generally EDMONDS, WOULD YOU KILL, *supra* note 684; PARFIT, ON WHAT MATTERS, *supra* note 684; SMART & WILLIAMS, UTILITARIANISM, *supra* note 683; see also BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY viii (1985); Foot, *The Problem of Abortion*, *supra* note 684, at 19, 23.

theorist that consequences could be controlling. Bobbitt, for example, thinks not.⁶⁸⁶

The originalists and their pragmatic critics take fundamentally opposing stances as to whether the proper decision of particular constitutional cases ought to be based upon the consequences of the alternative decisions. Before concluding that the debate is hostage to the resolution of the differences between the two camps on that question, we must first ask whether such premises ought to be treated as fundamental to a resolution of the debate.

The pragmatists and the originalists each want to discredit the other's methodology; each side wants the constitutional results that were obtained by the other on the basis of originalist or pragmatic arguments to be rejected. Where the different modes of argument do not yield inconsistent results, the choice among them does not make a substantive difference. Because both prudential and originalist arguments have figured prominently in the practice of constitutional argument and decision in the courts, the mission of both originalists and their pragmatic critics is ultimately to effect a substantial change to our constitutional practice and, thus, to our constitutional law.

If we reject the premise that a reformation can be achieved on the basis of the kinds of arguments that the originalists and their pragmatic critics offer, then we must temper the ambitions of each side in the debate. The most either can do is to defend the importance of their respective modes of argument and establish the non-exclusive nature of the opposing kinds of argument. If we discard the goal of finding a nuclear argument against either the originalist or pragmatist position, then the need to resolve the underlying dispute as to the nature of law as irreducibly functional or informed by non-teleological concerns also falls away.

Eighth, and finally, the import of this tacit conflict between the deontology of originalism and the consequentialism of its anti-originalist critics reveals a simple but fundamental impasse in the debate. Without even reaching the highfalutin ontological and anti-foundational arguments I have earlier developed, we see why the debate over originalism is fruitless and at a dead end. Here, we have a compelling, but more accessible argument to that same conclusion. Resolving the debate over originalism and choosing a winner requires a definitive conclusion as to the role of consequences in our constitutional decision theory and law. That resolution is unavailable, because the role of consequences in those contexts remains

686. See BOBBITT, *FATE*, *supra* note 19, at 233-40; BOBBITT, *INTERPRETATION*, *supra* note 84, at xi (describing the conflict between the different modalities and the absence of a decision procedure to resolve such conflicts).

unresolved and, seemingly, unresolvable. We can have no confidence that an answer to our questions about the importance or irrelevance of consequences is at hand.

Moreover, by contrast to the debate over originalism, our constitutional argumentative and decisional practice is, and has long been, agnostic on the merits of the competing claims of instrumental and deontological theories of law. Arguments from the structure of the Constitution and from the structure of the Republic and arguments from the original linguistic understandings are not principally instrumental or functional. Rather, they are principled deontological arguments from the premises about the structure of the Constitution and the Republic or from the linguistic understanding of the constitutional text. At most, they are only *indirectly* instrumental, because they assert arguments that do not look directly to the consequences of decision. By contrast, prudential arguments are directly functional: they assert the consequences of a decision as a ground for making that decision. All of these modes of arguments are part of our constitutional practice. Putting the debate over originalism in the context of the debates between legal positivism and natural law and between legal pragmatism and its critics shows why the debate cannot move forward. More importantly, by understanding the stalemate, we are freed from the need to continue the debate and can instead return to more productive and important substantive constitutional questions.