

THE FOUNDATIONS OF CONSTITUTIONAL THEORY

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Normative constitutional theory asks at least two distinct questions: How should judges and other officials approach constitutional decision-making? And what counts as a good reason—or “normative foundation”—for adopting a particular approach? The two questions are obviously related, but the first has filled libraries while discussion of the second has been largely unsystematic and ad hoc. There is no well-recognized taxonomy of the types of reasons on which an approach to constitutional decision-making might be premised. Nor is it widely appreciated that competing approaches might rest on the same type of normative foundation or that multiple normative foundations might be invoked to support a single approach to constitutional decision-making.

This Article proposes a taxonomy organizing the normative foundations of constitutional theory into four distinct categories: metaphysical, procedural, substantive, and positivist. This taxonomy clarifies that theoretical disagreement can concern the proper approach to constitutional decision-making, what counts as a good reason for adopting a particular approach, or both. It also permits analysis of the attractions and limitations common to each type of normative foundation, revealing significant points of overlap between apparently divergent approaches. Positivist originalism, for instance, may in some respects share more in common with positivist common-law constitutionalism than with metaphysical originalism. These points of overlap should serve as the basis for new and more productive discussion among theorists who have previously considered themselves completely at loggerheads.

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INTRODUCTION

Normative constitutional theory asks at least two distinct questions: How should judges and other officials approach constitutional decision-making? And what counts as a good reason for adopting a particular approach?¹ The two questions are obviously related, but the first has

1. Depending how broadly one defines normative constitutional theory, it also asks questions about optimal institutional design, the sociology and history of normative constitutional argument, the types of constitutional rhetoric and reasoning that are accepted as legitimate within different constitutional systems, and the logical structure and validity of particular constitutional arguments and doctrines. Some, but not all, of these questions overlap with the ones addressed in this Article.

attracted far more attention. Influential answers include originalism,² common-law constitutionalism,³ pragmatism,⁴ pluralism,⁵ popular constitutionalism,⁶ Thayerism,⁷ representation-reinforcement,⁸ and cosmopolitanism.⁹ Each of these approaches has its defenders, and those defenders, of course, offer reasons to adopt their preferred approach. In so doing, they take a position, generally implicit, on what counts as a good reason for preferring one approach over another. But discussion of this second question has been largely unsystematic and ad hoc. There is no well-recognized taxonomy of the types of reasons, what I shall call *normative foundations*, on which an approach to constitutional decision-making might be premised. Nor is it widely appreciated that competing approaches might rest on the same type of normative foundation or that multiple normative foundations might be invoked to support a single approach to constitutional decision-making. I do not wish to overstate the case. It is not that these issues have received no attention or that all theorists are confused about them, but they have not received the kind of systematic treatment they deserve.¹⁰

This Article makes two contributions. First, it carefully distinguishes between approaches to constitutional decision-making and the normative foundations underlying them, which I shall also call normative claims. Second, it proposes a taxonomy organizing the

2. See, e.g., JACK BALKIN, *LIVING ORIGINALISM* (2014); Lawrence B. Solum, *Semantic Originalism* (Ill. Public Law and Legal Theory Research Paper No. 07-24, 2008); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004).

3. See, e.g., David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Common Law Constitutional Interpretation*]; David Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717 (2003).

4. See, e.g., RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003).

5. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

6. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

7. See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 254–55 (2006).

8. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

9. See, e.g., Vlad Perju, *Cosmopolitanism in Constitutional Law*, 35 CARDOZO L. REV. 711 (2013).

10. Some of the best existing work discusses normative foundations in connection with a particular approach to constitutional decision-making or modality of constitutional argument. See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (same); Richard A. Primus, *When Should Original Meanings Matter?*, 107 Mich. L. Rev. 165 (2008) (cataloging normative arguments for originalism).

normative foundations of constitutional theory into four analytically distinct categories: metaphysical, procedural, substantive, and positivist.¹¹ By an *approach* to constitutional decision-making, I mean a more or less detailed theory of how judges and other constitutional decision-makers should approach their task. By normative *foundations* or *claims*, I mean the normative arguments or reasons advanced for adopting a particular approach.

Metaphysical claims contend that the correct approach to constitutional decision-making follows deductively from the nature or concept of law or interpretation or some other important feature of constitutional decision-making assumed to require no justification. The most familiar metaphysical claims are invoked to support originalism. For example, several leading originalists argue that originalism follows from the widely shared American commitment to written constitutionalism.¹² There is, however, no necessary connection between metaphysical arguments and originalism. Jed Rubenfeld, for instance, has argued that written constitutionalism entails an evolutionary approach that he calls the “paradigm-case method.”¹³

Procedural claims contend that the correct approach to constitutional decision-making follows from some ideal of procedural fairness or legitimacy that requires particular constitutional decisions to be made by particular institutional actors. Often, but not always, this ideal is democracy. An obvious and familiar example is the claim underlying John Hart Ely’s theory of judicial review as representation-reinforcement, which argues that judges should limit themselves to questions of process rather than substance, because doing so is necessary to preserve the democratic legitimacy of judicial review.¹⁴ Another example is the originalist argument from popular sovereignty, which holds that judges should be originalists because they exercise power only as agents of the constitutional ratifiers, who alone possess democratic authority to make constitutional law.¹⁵

11. Aretaic theories, grounded in virtue ethics, arguably constitute a fifth category. See, e.g., Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178 (2003). As yet, however, such theories have had at best a limited influence on constitutional theory, so I do not explore them any further here.

12. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 617 (1999); see also KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999); Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007).

13. JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT 180–95 (2001).

14. See, e.g., ELY, *supra* note 8, at 181.

15. See, e.g., Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998); WHITTINGTON, *supra* note 12, at 110–59.

Substantive claims contend that the correct approach to constitutional decision-making is determined by the moral desirability of the decisions it produces, however moral desirability is defined. Examples include the claims underlying Richard Posner's pragmatism¹⁶ and John McGinnis and Michael Rappaport's consequentialist version of originalism.¹⁷ Each of these approaches is premised at bottom on a claim that it produces better consequences than the alternatives and is, for that reason, normatively superior. Posner thinks judges will do best by attempting to maximize social welfare more or less directly.¹⁸ McGinnis and Rappaport think judges will produce better consequences by adhering to original meaning.¹⁹ Ronald Dworkin's moral reading²⁰ and various forms of libertarian originalism²¹ have the same basic structure, though they define morally desirable constitutional decisions quite differently.²²

Positivist claims contend that the correct approach to constitutional decision-making follows from the content of positive law, as defined by regularities of official behavior in a particular jurisdiction at a particular moment in time. Stephen Sachs's and William Baude's recent positivist defenses of originalism are obvious examples.²³ Both contend, as Baude puts it, that "originalism is our law," and from that premise, reason that originalism should guide the constitutional decisions of judges and other interpreters.²⁴ David Strauss's most recent elaboration of common-law constitutionalism can be read in a similar way, substituting that approach

16. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* (1995), POSNER, *supra* note 4.

17. See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* (2013).

18. See, e.g., POSNER, *supra* note 4.

19. See, e.g., MCGINNIS & RAPPAPORT, *supra* note 17.

20. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

21. See, e.g., Barnett, *supra* note 12.

22. All of the claims I categorize as "substantive" are consequentialist in the sense that they attach moral weight to the results of an approach to constitutional decision-making rather than the procedural legitimacy of the decision-maker. Cf. VERMEULE, *supra* note 7, at 6 (noting the breadth of consequentialism). I choose the term "substantive" over "consequentialist," however, because the boundaries of the latter are hazy, and it may strike some readers as odd—and therefore distracting—to extend that label to nonutilitarian, nonwelfarist theories like Barnett's libertarianism and Dworkin's liberal egalitarianism. By contrast, all of these claims are clearly substantive rather than procedural.

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

24. Baude, *supra* note 23, at 2367. "[J]udges have a duty to apply the law, and our current law, in this time and place, is this form of originalism." *Id.* at 2353; Sachs, *supra* note 23, at 886 (making a similar point, somewhat more tentatively).

for originalism.²⁵ Finally, Philip Bobbitt's and Richard Fallon's pluralist theories can and have been read, perhaps contrary to their authors' intent, as positivist defenses of a pluralist approach to constitutional decision-making.²⁶

The goal of this taxonomy is to promote clearer analysis and communication in constitutional theory. It does so in three ways:

First, it helps to clarify the nature of many theoretical disagreements. When a positivist originalist clashes with a positivist common-law constitutionalist, they are at least starting from common premises. By contrast, when a metaphysical originalist clashes with a positivist common-law constitutionalist or a substantive pragmatist, their disagreement is not merely about how judges should make constitutional decisions. It is also about what types of reasons count in answering this question. Constitutional theorists can also agree on the proper approach to constitutional decision-making while disagreeing about its normative foundations, which I call "hidden disagreement," or disagree on the proper approach while agreeing at the level of normative foundations, which I call "hidden agreement." Clear thinking about these questions does not strictly require the sort of taxonomy developed in this Article, but such a taxonomy makes clear thinking far easier.

Second, this taxonomy reveals the common attractions and limitations of different types of normative claims, attractions, and limitations that cut across competing approaches to constitutional decision-making. In some respects, positivist originalists may have more in common with positivist common-law constitutionalists than they do with positivist originalists. These points of overlap create the opportunity for a new and more productive dialogue—even collaboration—among theorists who have generally considered themselves completely at loggerheads.

Third, this taxonomy demonstrates that there is no necessary homology between constitutional approaches and their normative justifications. In other words, approaches and normative foundations need not resemble one another in their structure or internal logic. Legal process approaches to constitutional decision-making like Thayerism or representation-reinforcement sometimes rest on procedural foundations, but they can also rest on substantive foundations like welfarist consequentialism. Similarly, non-procedural approaches like originalism can rest on procedural foundations like popular sovereignty. This insight is interesting in its own right. More important, it has the potential to dispel much confusion. It is especially easy to conflate legal process

25. See David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What it Says?*, 129 HARV. L. REV. 1 (2015).

26. See *infra* Part IV.

approaches and procedural normative claims, which bear more than a passing resemblance but do not always travel together and are decidedly not interchangeable.

Parts I through IV of this Article more carefully define each of the four categories of normative claims, supply illustrative examples, and identify three attractions and limitations common to claims of each type. By “attractions” and “limitations,” I mean to encompass the genuine strengths and weaknesses of particular normative claims, as well as the strategic, rhetorical, and psychological attributes that help to explain or undercut their appeal. All of these are subjects of substantial interest that present themselves for analysis only when we focus systematically on the normative foundations of constitutional theory, as distinct from the approaches to constitutional decision-making those foundations are deployed to support. In each case, the list of attractions and limitations could be longer, but three—while somewhat arbitrary—is enough to capture the most important attractions and limitations common to each category and therefore enough to demonstrate the utility of my taxonomy. The payoffs of that taxonomy are further elaborated in Part V.

Several caveats are in order before I proceed. First, the examples offered in Parts I through IV are illustrative rather than comprehensive. I certainly do not and could not hope to address every important constitutional theory here. Nor could I do full justice to all the nuances of the theories I do discuss.

Second, the four categories of normative claims elaborated below are ideal types. The normative claims actually found in the wild do not always fit perfectly into any single category. Even where this is the case, however, the taxonomy developed in this Article provides a useful frame of reference.

Third, for purposes of this Article, I take for granted that approaches to constitutional decision-making require justification in the form of sound normative foundations. This proposition is widely accepted but not entirely uncontroversial. An important school of thought, influenced by Ludwig Wittgenstein, rejects the whole project of normative justification on the ground that constitutional practice is constitutive of its own

norms.²⁷ I believe this view mistaken, but engaging it here would take me too far afield.²⁸

Another important school of thought holds that normative justification emerges from a process of “reflective equilibrium,” rather than sound normative foundations. On this view, adapted from the political philosopher John Rawls,²⁹ an approach to constitutional decision-making is justified by its consistency with a set of “considered, contextual judgments about particular cases,” which are then reevaluated and revised in light of the theory.³⁰ I regard this view as more plausible, but again, engaging it here would take me too far afield.

Finally, the taxonomy developed in this Article is only one of many possible ways to carve up the terrain of constitutional theory. It makes no claim to finality or exhaustiveness. Like all taxonomies, it is a tool fashioned for a specific end. The test of its value is its utility in generating the payoffs elaborated in Part V.

I. METAPHYSICAL CLAIMS

Many normative constitutional theories are premised on metaphysical claims about the nature of law or interpretation or other important features of constitutional decision-making. These claims attempt to begin from common ground. Despite disagreement about the proper approach to constitutional decision-making, there are certain features of such decision-making that all or most constitutional theorists consider beyond question: 1) Judges should interpret, rather than make, the law; 2) Judges are bound to render constitutional decisions consistent with the legal content of the constitution; 3) The United States has a

27. The most prominent example is BOBBITT, *supra* note 5; *see also* Ian Bartrum, *Constitutional Value Judgments and Interpretive Theory Choice*, 40 FLA. ST. U. L. REV. 259 (2013) (elaborating the connections between Bobbitt and the later work of Wittgenstein); *see also* Lawrence Lessig, *The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be*, 85 GEO. L.J. 1837, 1838 (1997) (“[T]he idea that constitutional law or constitutional practice rests upon theory, in the way that my coffee-table rests upon the floor, is just wrong.”)

28. My reasons for skepticism are partially captured by Primus, *supra* note 10, at 184 (“Constitutional theory might properly take a reformist posture toward our practices, albeit one that simultaneously takes existing practice seriously.”); *see also* Bartrum, *supra* note 27 (endorsing Bobbitt’s account of constitutional law as a practice while attempting to preserve a role for normative justification).

29. *See* JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971) (explaining the notion of “reflective equilibrium”).

30. *See, e.g.*, Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 593–94 (1999). Think of the argument that any defensible approach to constitutional decision-making must be consistent with *Brown v. Board of Education*, 347 U.S. 483 (1954). *See, e.g.*, VERMEULE, *supra* note 7, at 280–81 (considering and rejecting this argument).

written constitution. Having identified one or more such bedrock normative commitments, a metaphysical claim proceeds to argue that its true or conceptual nature is consistent with only one approach to constitutional decision-making. Ergo, the claim concludes, constitutional decision-makers should follow that approach. This Part discusses several illustrative examples of metaphysical claims, most but not all of which are invoked to support originalism. It then explores the attractions and limitations of such claims.

A. Examples

1. THE NATURE OF INTERPRETATION

There is widespread agreement that judges and other constitutional decision-makers should interpret the Constitution, rather than modify, rewrite, or transform it. Building on this widely shared view, a number of prominent constitutional theorists have argued that only originalism is consistent with the nature of interpretation.³¹ When we talk about interpreting most written documents, they observe, we are almost always referring to the intentions of their original authors or the meanings that would have been assigned to them by their original audiences. If this is true of recipes, grocery lists, old letters, and the Articles of Confederation, why should it not also be true of the Constitution?³² The question is meant to be rhetorical. The upshot is that originalism is “not an approach to interpretation—one possible method in competition with other methods—it *is* interpretation.”³³ When careful, originalist proponents of such arguments concede that they speak only to the nature of interpretation, not to the legitimacy of the Constitution.³⁴ They cannot, that is, tell us whether judges (or anyone else) should interpret the Constitution or ignore it. But so long as we accept, as nearly everyone does, that judges should do the former and not the latter, originalism is not simply one way to interpret the Constitution. It is the only way. In other words, originalism is the logical entailment of a bedrock

31. See, e.g., Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629 (2005); Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 71 (2006); Saikrishna B. Prakash, *Overcoming the Constitution*, 91 GEO. L.J. 407 (2003); Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL'Y 485 (2008).

32. See, e.g., Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997).

33. Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak's Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1112 (2008).

34. Prakash, *Overcoming the Constitution*, *supra* note 31, at 420; see also Lawson & Seidman, *supra* note 31, at 71; Michael Stokes Paulsen, *How To Interpret the Constitution (and How Not To)*, 115 YALE L.J. 2037, 2056–57 (2006).

commitment that itself requires no justification. This is the hallmark of a metaphysical claim in the sense that I am using that term.

2. THE NATURE OF “BINDING LAW”

Just as there is widespread agreement that judges and other constitutional decision-makers should interpret the Constitution, there is widespread agreement that they should treat the Constitution as binding law. Building on this agreement, some originalists have argued that only originalism treats the Constitution as binding law.³⁵ As I have explained elsewhere, it is not entirely clear what originalists have in mind when making this claim.³⁶ Some, though not all, of them appear to conflate the Constitution with its original meaning.³⁷ If the two are identical, then originalism, by definition, is the only approach that treats the Constitution as binding law. Another possibility is that originalists who make this argument are implicitly assuming an Austinian conception of law as the command of an identifiable sovereign.³⁸ “On this view, which emphasizes the *law* in ‘binding law,’ the only way to treat the Constitution as law is to interpret it as the command of the Framers or Ratifiers—or perhaps the sovereign people they were taken to represent.”³⁹ A third possibility is that proponents of this argument have in mind rule-of-law values that equate law with constraint of official discretion.⁴⁰ On this view, which emphasizes the *binding* in “binding law,” only originalism can impose meaningful constraint on judges and other interpretive actors.⁴¹ Once the constitutional text is divorced from its original meaning, all bets are off. For present purposes, there is no need to decide among these alternative versions of the argument. The important point is all of them cast originalism as the logical entailment of a bedrock commitment to binding law that itself requires no justification.

35. See Lawson & Seidman, *supra* note 31, at 71; Paulsen, *supra* note 34, at 2056–57.

36. Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1083–87 (2010) (canvassing possible meanings).

37. *Id.* at 1084.

38. *Id.*

39. *Id.* This variation on the “binding law” argument obviously has a positivist element. What makes it a metaphysical, rather than a positivist, claim in my taxonomy is that it regards originalism as following *necessarily* from the positivist nature of law. The positivist claims discussed in Part IV, by contrast, are all premised on what their proponents take to be the content of positivist law in the United States circa 2016. They acknowledge that this content could be different in some other place or time and thus that the relationship between positivism and their preferred approaches is contingent, rather than necessary.

40. *Id.* at 1085.

41. *Id.*

Other conceptions of law, it should be noted, might serve as the basis for metaphysical claims of a very different nature. Ronald Dworkin, for example, famously argued that law, properly understood, is not the command of the sovereign or the conventions followed by officials.⁴² Rather, it is the principles that best fit and justify the existing legal landscape.⁴³ If this is true, the widely shared commitment to treating the Constitution as binding law certainly does not entail originalism (unless original meaning miraculously turns out to embody the principles that best fit and justify the existing legal materials, including two centuries of subsequent precedent). It might, however, entail something like Dworkin's own perfectionist moral-reading approach—one that strives to make the Constitution and the case law built upon it the best it can be. This argument, too, would be metaphysical: It casts Dworkinian perfectionism as the logical entailment of a bedrock commitment to binding law that itself requires no justification.

3. WRITTEN CONSTITUTIONALISM

Another widely shared view is that the United States is governed by a written constitution. Building on this view, several prominent originalists have argued that originalism is somehow part and parcel of—in fact, synonymous with—commitment to a written constitution.⁴⁴ The best version of this argument has two steps. First, originalism is capable of plausibly explaining the decision to treat a written constitutional text as authoritative over time. By fixing the meaning of the text, it offers one means of controlling official discretion and preserving the sovereign authority of those who ratified it. Second, no other interpretive approach is similarly capable. Unlike originalism, nonoriginalist interpretive methods bear no intelligible relation to the written text and can offer no satisfactory explanation of our continued commitment to it. If judges and other constitutional decision-makers are to employ such methods, the United States may as well have an unwritten constitution. Ergo, our bedrock commitment to written constitutionalism, which itself requires no justification, logically entails originalism.⁴⁵

42. RONALD DWORKIN, *LAW'S EMPIRE* 225 (1986) (“According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”).

43. *Id.*

44. *See supra* note 12 and accompanying text.

45. *See Coan, supra* note 36, at 1045 (sympathetically reconstructing the argument from writtleness in this way).

This is not the only possible metaphysical argument from writtenness. In an interesting philosophical account, Jed Rubenfeld has argued “[w]ritten constitutionalism can only be properly understood, it can only claim legitimate authority, as an effort by a nation to achieve self-government *over time*.”⁴⁶ It is not possible to do full justice to his richly textured argument here, but it can be fairly summarized as follows: Human beings exist in time and therefore, to be truly free, they must be able to make decisions and commitments that extend over time (decisions and commitments that necessarily conflict with the freedom of present majorities to do what they choose in any given moment).⁴⁷ In fact, Rubenfeld argues, our ability to make such decisions and commitments is the essence of human freedom.⁴⁸

Written constitutionalism, Rubenfeld argues, only makes sense as an attempt to realize this thick, historically grounded conception of human freedom in a political community.⁴⁹ Any approach to constitutional decision-making in a polity committed to a written constitution must, therefore, reflect the “nation’s struggle to lay down temporally extended commitments and to honor those commitments over time.”⁵⁰ According to Rubenfeld, the best and only way to do this is through the “paradigm-case method,” an evolutionary approach that takes as its starting point the particular case or problem that gave rise to a constitutional provision.⁵¹ The particulars of the paradigm-case method are complicated and not important for present purposes. The important point is that Rubenfeld takes this approach to follow deductively from a commitment to written constitutionalism.⁵²

46. Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1105 (1998).

47. *Id.*

48. See RUBENFELD, *supra* note 13, at 10.

49. Rubenfeld’s conception is “thick” in contrast to “thin” conceptions of human freedom as the power to act without constraint from moment to moment. In the context of American constitutional history, the latter is most famously associated with Noah Webster and Thomas Jefferson. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1133–34 (1998) (discussing Edmund Burke’s critique of Webster and Jefferson).

50. Rubenfeld, *supra* note 46, at 1105.

51. RUBENFELD, *supra* note 13, at 181.

52. Whether Rubenfeld’s argument is truly metaphysical (in the sense I am using that term here) could be fairly disputed on the ground that he does not take writtenness as given but rather offers a robust normative defense of his conception of it. This is a real distinction between Rubenfeld’s argument and the other metaphysical claims discussed in this Part. I still think it fair to classify his argument as metaphysical because of the extent to which it attempts to leverage a taken-for-granted commitment to writtenness. The really important point, however, is that nonoriginalist metaphysical arguments are perfectly possible as a conceptual matter.

B. Attractions

Metaphysical arguments have been part of American constitutional discourse for a long time. Indeed, they have been around since the very beginning. A good example, though it is an argument for judicial review rather than a particular approach to constitutional decision-making, is Chief Justice John Marshall's argument for writtenness in *Marbury v. Madison*.⁵³ There, Marshall famously wrote the following:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?⁵⁴

From these premises, Marshall infers that the power of judicial review follows from the American commitment to written constitutionalism. Academic arguments over constitutional decision-making are of more recent vintage. But it would be strange if a form of argument that has been around so long had nothing to recommend it. What might that be? Three mutually reinforcing possibilities suggest themselves.

The first is psychological. Metaphysical arguments are arguments from necessity, and such arguments hold a powerful appeal. In a world of uncertainty and ambiguity, they promise clarity, certainty, and inevitability. To persons already instinctively convinced of the rightness of an approach to constitutional decision-making, metaphysical arguments offer a soothing sense of reassurance. We can think of this as a form of confirmation bias.⁵⁵ Of course, any argument that aligns with our prior beliefs is likely to seem more attractive for that reason. In that sense, confirmation bias is pervasive and thus banal. But arguments that cast our prior beliefs as not only correct, but necessary, even inevitable, seem likely to exert an especially strong attraction. This is, to be clear, an empirical hypothesis, testable at least in principle and perhaps actually tested somewhere in the psychological literature. It is not a criticism of

53. 5 U.S. 137, 176–79 (1803).

54. *Id.* at 176.

55. See, e.g., Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (defining confirmation bias as “the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand”). *Id.* at 175.

metaphysical arguments or their proponents. Confirmation bias can and does reinforce sound conclusions as well as unsound ones.⁵⁶

A second attraction of metaphysical arguments is strategic. By this, I mean simply that they might be attractive because of their potency as tools of intellectual combat. To an extent, this attraction piggybacks on the psychological hypothesis elaborated above. If metaphysical arguments have a special psychological appeal beyond confirmation bias, that appeal is likely to extend to at least some portion of the audience constitutional theorists are seeking to convince. Additionally, the decisive, knockdown character of metaphysical arguments—their apparent power to justify by logical deduction a single correct approach to constitutional decision-making—may make them more strategically effective than substantive or procedural arguments that appeal to moral premises that are both contested and vague. The premises of metaphysical arguments, by contrast, are both widely shared (or appear to be) and relatively concrete. Given a choice, the strategic advantages of arguing from such premises seems fairly obvious. Again, this is a descriptive hypothesis. It is not a criticism of metaphysical arguments or their proponents.

A third attraction of metaphysical arguments is pragmatic. Because they proceed from widely shared premises, these arguments have at least the potential to make progress without resolving deep disagreements over the substance of political morality or prerequisites for legitimate democratic authority. Put differently, metaphysical arguments might serve as the basis for “incompletely theorized agreements” or “overlapping consensus” among persons of widely divergent comprehensive views.⁵⁷ Natural law adherents, deliberative democrats, welfarist consequentialists, and economic libertarians might all be able to agree that judges should interpret, not remake, the Constitution. Alternatively, they might all share a basic commitment to written constitutionalism, albeit for very different reasons. Metaphysical arguments based on these shared premises might enable persons who would otherwise be hopelessly divided to find common ground. Even if the result is not total agreement, a conversation revolving around shared, intermediate-level premises might be more productive and focused than one in which diverging comprehensive views play a large role.⁵⁸

56. *But cf.* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 939 (2016) (describing the attraction of metaphysical claims as a form of motivated cognition and “bad faith” in the Sartrean sense of self-deception).

57. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995) (defining and distinguishing these closely related terms).

58. As subsequent Parts will make clear, this is a key distinction between metaphysical and positivist claims, which both seek to cut off the search for normative foundations at a relatively shallow level of inquiry, and substantive and procedural

C. Limitations

Despite these attractions, metaphysical arguments are subject to several significant limitations. I will focus on three here. It bears emphasis that these limitations, like the attractions elaborated above, apply to all metaphysical arguments, regardless of what approach to constitutional decision-making they are invoked to support. They thus help to demonstrate the utility of mapping the normative foundations of constitutional theory.

First, metaphysical arguments mask the role of choice in constitutional decision-making and thus the need for moral justification. This is the dark side of their special psychological appeal. Fundamentally, the question of how judges and other officials should approach constitutional decisions is a question of political morality, writ small. These officials exercise real political power and can choose to exercise it in a range of different ways for a range of different reasons. The reality of this choice is underscored by the variety of approaches to constitutional decision-making actually employed by constitutional decision-makers around the world. In the United States, some judges are originalists or at least claim to be in their public pronouncements.⁵⁹ Others are pragmatists or pluralists or common-law constitutionalists. In Canada, the dominant metaphor for constitutional decision-making is “the Living Tree,” which is closely analogous to the American idea of “the living Constitution.”⁶⁰ In Germany, constitutional practice is deeply informed by an “objective order of values,” understood as apart from and higher than the written constitution.⁶¹ These are obviously extremely crude sketches, but the diversity of these approaches clearly demonstrates that no one of them is necessary or inevitable. It also strongly suggests that none of them are uniquely entailed by concepts of interpretation, binding law, or writtenness, which all of these constitutional orders embrace.⁶²

claims, which both make explicit recourse to first principles of political and moral philosophy. In this sense, substantive and procedural claims operate at a deeper, more foundational level than metaphysical and positivist claims. *See infra* Parts II–IV.

59. *See, e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997); Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 *YALE L.J.F.* 94 (2015).

60. Peter W. Hogg, *Canada: From Privy Council to Supreme Court*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 55, 83–85 (Jeffrey Goldsworthy ed., 2006).

61. Donald P. Kommers, *Germany: Balancing Rights and Duties*, in *INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY* 161, 179–83 (Jeffrey Goldsworthy ed., 2006).

62. *See* Coan, *supra* note 36, at 1066–69 (making this point).

Second, the normative force of metaphysical arguments may be more apparent than real. Even if proponents of metaphysical arguments succeed in demonstrating that their preferred approach to constitutional decision-making most closely tracks prevailing concepts of interpretation, writtenness, etc., it is not clear what significance that should hold for adherents of competing views. For example, even if originalists could demonstrate that their view better tied together the intuitions held by most practitioners, or that more practitioners held the originalist view of interpretation, that would provide no reason to abandon nonoriginalist views, so long as those latter views are not internally contradictory or otherwise logically untenable. To be sure, most adherents of nonoriginalist views are committed to interpreting, rather than rewriting or remaking, the Constitution. But nonoriginalists are committed to their understanding of this concept, not the originalist understanding. As such, that commitment could not, standing alone, provide a compelling reason to embrace the originalist view of interpretation, even if originalists were clearly in the majority.⁶³ The same goes for metaphysical arguments offered in support of other approaches to constitutional decision-making.

Third, even the most powerful metaphysical arguments have the potential to be self-defeating. Skeptics of such arguments always have the option to reject their premises, which are not defended but taken for granted, rather than accept their unpalatable conclusions. Indeed, this risk probably increases with the potency of the metaphysical argument in question. Commitment to a written constitution, for example, may well be nearly universal only because such commitment is perceived as consistent with a wide range of interpretive approaches. The more successful originalists are in exploding this perception, the less support written constitutionalism is likely to enjoy.⁶⁴ Instead of prompting conversion to originalism, the argument from writtenness might serve in effect as a *reductio* demonstrating the absurdity of treating the constitutional text as binding law over time. The risk of this self-defeating result is directly proportional to the strength of the argument that writtenness entails originalism. Again, the same goes for other metaphysical arguments. If the nature of interpretation strongly compels originalism and precludes more attractive approaches, then perhaps constitutional decision-makers would be better off abandoning their commitment to interpretation.

63. Coan, *supra* note 36, at 1074 n.154 (making this point).

64. Coan, *supra* note 36, at 1046 n.61 (making this point).

II. PROCEDURAL CLAIMS

Procedural claims contend that the correct approach to constitutional decision-making is a function of the legitimate authority of certain decision-makers and decision-making processes. On this view, good constitutional decisions are those which give effect to the authority of those decision-makers legitimately entitled to decide the issue in question, without regard to the substantive desirability or undesirability of the outcomes that result. Unlike metaphysical claims, this family of claims is openly grounded in political morality. It recognizes that constitutional decision-making is a choice and that, as such, the approach officials adopt in making such decisions requires affirmative justification. But instead of resting on controversial ideas of the good, procedural claims seek to justify the choice of constitutional approach by reference to formal ideals of procedural fairness and democracy, which they do not take for granted but openly defend on normative grounds. This Part discusses several illustrative examples of procedural claims, most but not all of which are invoked to support process-based theories of constitutional decision-making. It then explores the attractions and limitations of such claims.⁶⁵

A. Examples

1. ELY'S REPRESENTATION-REINFORCEMENT

Perhaps the most familiar and influential example of a procedural claim is the one underlying John Hart Ely's representation-reinforcement approach to constitutional decision-making, elaborated in his classic

65. All the procedural claims discussed in this Part are rooted in democratic legitimacy, as are the vast majority of such claims in U.S. constitutional theory. This is not, however, a necessary feature of this class of claims. In several recent papers and a book, Alon Harel and various co-authors have developed a procedural defense of judicial review, with corollary implications for constitutional decision-making, grounded in the individual right to a hearing. ALON HAREL, *WHY LAW MATTERS* 191–224 (2014); Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006); Alon Harel & Tsvi Kahana, *The Easy Core Case for Judicial Review*, 2 J. LEGAL ANALYSIS 227 (2010). A normative claim resting on the divine right of kings would likewise qualify as procedural. *Cf.* James VI and I, A Speech to the Lords and Commons of the Parliament at White-Hall (1610), in *DIVINE RIGHT AND DEMOCRACY: AN ANTHOLOGY OF POLITICAL WRITING IN STUART ENGLAND* 107 (David Wootton ed., 1986) (“The state of monarchy is the supremest thing upon earth. For kings are not only God's lieutenants upon earth, and sit upon God's throne, but even by God himself they are called gods.”). What unites these non-democratic claims with the democratic procedural claims discussed *infra* are their focus on the authority of a particular decision-maker or institution, as opposed to the quality of the resulting outcomes.

work *Democracy and Distrust*.⁶⁶ That approach directs judges to decide constitutional cases with an eye toward preserving a fair, competitive, and representative political process. In this sense, Ely's approach to constitutional decision-making could itself be described as procedural. It is often described as a "political process theory" or "process-based."⁶⁷ But I want to be very clear. It is not the nature of the approach that Ely defends—or the role that democratic representation plays in that approach—that causes me to classify his argument as procedural. Rather, it is the *reasons* he offers for adopting that approach.

Those reasons are basically democratic. To oversimplify greatly, Ely endorses Alexander Bickel's famous worry that an unelected judiciary is a "deviant institution in the American democracy."⁶⁸ Ely, therefore, concludes that it would be illegitimate for judges to make substantive value judgments about the desirability of the government actions they review.⁶⁹ Nevertheless, he believes that an unelected judiciary can maintain its democratic legitimacy only if it confines itself to policing the rules of the game and correcting malfunctions of the democratic process.⁷⁰ It is this appeal to democratic legitimacy, rather than good consequences or a substantive vision of justice, that makes Ely's argument procedural as I am using the term.⁷¹

66. ELY, *supra* note 8. Ely's work is the culmination and apotheosis of a legal process tradition that dates back at least to the New Deal era and encompasses such luminaries as Alexander Bickel, Herbert Wechsler, and Henry Hart. I discuss Ely here as a representative and exemplar of that tradition, though not all of its members grounded their process-based approaches to constitutional decision-making so squarely on procedural foundations. Among prominent legal process theorists, Wechsler and Bickel stand with Ely as particularly concerned with procedural legitimacy, while Hart and his co-author Albert Sacks grounded their legal process approach on more substantive, sequentialist foundations. *See, e.g.*, William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041, 2044–49 (2006) (contrasting proceduralist and instrumentalist elements of legal process tradition). As Eskridge makes clear, the proceduralist/instrumentalist divide persists among contemporary descendants of these early legal-process theorists. *Id.*

67. *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063–64 (1980) (describing Ely's approach as "process-based"); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747 (1991) (describing Ely's approach as a "political process theory").

68. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 18 (1962).

69. *See* ELY, *supra* note 8, at 70.

70. ELY, *supra* note 8, at 101–02 (defending a representation-reinforcement model of judicial review on the "overtly normative" ground that it is "entirely supportive of . . . American . . . representative democracy").

71. That a process-based constitutional approach would rest on procedural foundations might seem obvious, but it need not be the case. It would be perfectly possible to argue for Ely's approach on the grounds that social welfare is best served or moral rights best protected when judges confine themselves to representation

2. DEMOCRATIC THAYERISM

Another familiar procedural claim is the one underlying democratic versions of Thayerism. Named for its most forceful academic exponent, James Bradley Thayer, Thayerism is the view that judges should defer to the constitutional judgments of more democratically accountable actors, especially legislatures, except in cases where those judgments are clearly wrong.⁷² As Thayer himself defended this approach, it rested largely on consequentialist foundations. If courts stood ready to decide all constitutional questions de novo, he argued, this would sap the will and ability of legislators to exercise their own constitutional judgment.⁷³ The consequences would be unfortunate since courts were capable of addressing only a small fraction of constitutional questions.⁷⁴ Mark Tushnet has called this idea “judicial overhang” and it has occasionally been invoked to defend Thayerism on the substantive ground that it produces better constitutional decisions overall than the alternatives.⁷⁵

reinforcement. But those are not the arguments Ely makes on its behalf, at least not in *Democracy and Distrust*. Elsewhere, he has characterized his commitment to representative democracy as a kind of “applied utilitarianism.” John Hart Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 407 (1978). It is not easy, however, to reconcile this account with Ely’s critique of substantive constitutional review, which sounds far more in notions of procedural legitimacy than in any suggestion that courts will produce worse outcomes than more politically accountable decision-makers. Whatever views Ely himself may have endorsed on reflection, the important point for present purposes is that his representation-reinforcement approach can and frequently has been defended on procedural grounds. The complexity of Ely’s views also illustrates the difficulty of distinguishing at least some procedural claims from the substantive commitments with which they are intertwined. This difficulty has been exhaustively explored elsewhere and I do not dwell on it here. *See, e.g.,* Tribe, *supra* note 67, at 1070–71 (“If process is constitutionally valued, therefore, it must be valued not only as a means to some independent end, but for its intrinsic characteristics: being heard is part of what it means to be a person. Process itself, therefore, becomes substantive.”).

72. *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARV. L. REV.* 129 (1893).

73. *Id.* at 155–56.

No doubt our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the mind of legislators with thoughts of mere legality, of what the constitution allows. And moreover, even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.

74. *Id.* at 156 (“Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.”).

75. *See* Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 *B.U. L. REV.* 499, 504 (2009). *See also* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 *STAN. L. REV.* 155, 198 (2007) (sketching a tentative and highly qualified consequentialist argument for Thayerism grounded in the Condorcet Jury Theorem); VERMEULE, *supra* note 7, at 254–

For now, the important point is that this is not the only conceivable argument for Thayerism.

In particular, other practitioners and defenders of this approach have argued for it on essentially the same democratic grounds that Ely argued for his representation-reinforcement theory. Since judges are far less democratically accountable than legislatures, they should only exercise their power to overturn legislative judgments in truly exceptional circumstances. To do otherwise would be to arrogate to themselves a measure of political power that can only be legitimately exercised by democratically accountable institutions.⁷⁶ Justice Felix Frankfurter was an especially vociferous and consistent proponent of this argument during his tenure on the Supreme Court.⁷⁷ Franklin Roosevelt made a version of it in his 1937 radio address announcing the court-packing plan.⁷⁸ In more recent years, democratic Thayerism has attracted adherents among popular constitutionalists and their fellow travelers.⁷⁹ As with Ely's argument, what makes these arguments procedural is not the process-based approach to constitutional decision-making they recommend. It is the democratic reasons they offer for adopting that approach.

3. POPULAR CONSTITUTIONALISM

Popular constitutionalism is a loose-knit family of views bound together by a shared conviction that ordinary citizens should have significant input in constitutional decision-making. Some versions of popular constitutionalism are theories of institutional design more than of constitutional decision-making—proposals to abolish or radically curtail

88 (offering a consequentialist defense of Thayerism focused on decision costs, error costs, and uncertainty). For reasons of space, I do not address substantive Thayerism in my discussion of substantive claims in Part III. It is, however, an excellent example of a procedural approach that rests on a substantive foundation. It thus demonstrates that approaches to constitutional decision-making and their normative foundations need not be homologous.

76. See, e.g., Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621 (2012) (placing Thayer in a broader popular constitutionalist tradition grounded in the ultimate democratic authority of the people).

77. See Brad Snyder, *Frankfurter and Popular Constitutionalism*, 47 U.C. DAVIS L. REV. 343, 414–15 (2013) (“No Justice from the last fifty years has embraced judicial restraint more than Felix Frankfurter. Frankfurter's judicial restraint was a product of his Jeffersonian faith in the democratic political process and enlightened public opinion.”).

78. *The President's Address: Text of President's "Fireside Chat" Defending Court Reorganization Plan*, N.Y. TIMES, Mar. 10, 1937, at A1 (“In the last four years the sound rule of giving statutes the benefit of all reasonable doubt has been cast aside. The court has been acting not as a judicial body but as a policy-making body.”).

79. See generally, e.g., Kramer, *supra* note 76; Snyder, *supra* note 77;

judicial review, for example. Others are vague about precisely how their commitment to greater popular input should be operationalized. Some, however, make fairly specific, if not necessarily comprehensive, claims about how judges should decide constitutional cases.

Robert Post and Reva Siegel's "democratic constitutionalism" may be the best example. In an influential series of articles, Post and Siegel (and occasionally Siegel writing alone) argue that judges deciding constitutional cases can, do, and most important, *should* consider the constitutional views advocated by popular social movements and democratically elected legislatures.⁸⁰ The contributions of the women's movement to judicial interpretation of the Equal Protection Clause, culminating in the Supreme Court's decision in *U.S. v. Virginia* to subject sex discrimination to something like strict scrutiny, are their paradigm case.⁸¹ In this manner, Post and Siegel argue, the decisions of unelected judges acquire a legitimately democratic pedigree.⁸²

Of course, the key point for present purposes is not how Post and Siegel think judges should approach constitutional cases. It is the essentially democratic argument they offer in support of that approach. In this respect, they are representative of popular constitutionalists who concern themselves with constitutional decision-making. Like Post and Siegel, these theorists nearly always justify their calls for increased popular input not by consequentialist or metaphysical appeals but rather by a perceived need to render a Constitution adopted in 1789 (and interpreted chiefly by unelected judges) more democratically legitimate.⁸³ It bears repeating that this need not be the case. There are

80. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter *Legislative Constitutionalism*]; Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003). See also Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323 (2006); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) [hereinafter *Text in Contest*].

81. See, e.g., Siegel, *Text in Contest*, *supra* note 80, at 314 ("Outside the courthouse, the Constitution's text plays a significant role in eliciting and focusing normative disputes among Americans about women's rights under the Constitution—a dynamic that serves to communicate these newly crystallizing understandings and expectations about women's rights to judges interpreting the Constitution inside the courthouse door.").

82. See, e.g., Post & Siegel, *Legislative Constitutionalism*, *supra* note 80, at 2026–27 ("[L]egislative constitutionalism is a structural mechanism of democratic accountability. Among other functions, it serves to underwrite the continuing legitimacy of the very constitutional law that courts seek to enforce.").

83. See, e.g., Larry D. Kramer, *Popular Constitutionalism, circa 2004*, 92 CALIF. L. REV. 959, 960 (2004) ("Rather than worry about what judges do solely from concern for the domain of ordinary politics, the Court's new [popular constitutionalist]

both utilitarian and epistemic arguments for majoritarian decision procedures,⁸⁴ neither of which is procedural in the sense I am using the term here. But those are not the justifications offered by most popular constitutionalists.

4. POPULAR SOVEREIGNTY ORIGINALISM

We have already seen that many originalists premise their views on metaphysical foundations. The most venerable argument for originalism, however, is procedural. In a nutshell, this argument holds that constitutional decision-makers should be originalists because originalism is necessary to preserve the popular sovereignty of the ratifiers whose democratic endorsement gives the Constitution its legal force. Many have made this basic argument, but perhaps none more famously than James Madison, arguing against the Jay Treaty in the House of Representatives in 1796:

[W]hatever veneration might be entertained for the body of men who formed our constitution, the sense of that body could never be regarded as the oracular guide in the expounding [of] the constitution. As the instrument came from them, it was nothing more than the draught of a plan, nothing but a dead letter, until life and validity were breathed into it, by the voice of the people, speaking through the several state conventions. If we were to look therefore, for the meaning of the instrument, beyond the face of the instrument, we must look for it not in the general convention, which proposed, but in the state conventions, which accepted and ratified the constitution.⁸⁵

critics worry as much or more about judicial usurpation of the people's role as constitutional interpreters.”).

84. See generally, e.g., JEREMY BENTHAM, CONSTITUTIONAL CODE: FOR THE USE OF ALL NATIONS AND ALL GOVERNMENTS PROFESSING LIBERAL OPINIONS (1830), reprinted in CONSTITUTIONAL CODE: VOL. 1 (F. Rosen & J.H. Burns eds., 1983) (offering a utilitarian defense of democracy); Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277 (2001) (offering an epistemic argument for democracy); Cheryl Misak, *A Culture of Justification: The Pragmatist's Epistemic Argument for Democracy*, 5 EPISTEME 94 (2008) (same).

85. James Madison, Speech before the Committee of the Whole on Jay's Treaty (Apr. 6, 1796), in THE PAPERS OF JAMES MADISON DIGITAL EDITION 295–96 (J.C.A. Stagg ed., 1989), <http://rotunda.upress.virginia.edu/founders/JSMN-01-16-02-0195> [<https://perma.cc/GLG2-WWY8>]; Kurt T. Lash, *Originalism As Jujitsu*, 25 CONST. COMMENT. 521, 534 (2009) (“[T]oday the practitioners of originalism most often justify their efforts on the normative theory of popular sovereignty—the sovereign right of the people to establish fundamental law in a written and enforceable Constitution.”).

Constitutional decision-makers, the argument goes, are the people's agents, and exercise the judicial power only as such. For them to improvise a constitutional tune as they go along would be to exercise sovereign power without popular consent and thus to usurp the people's fundamental right to govern themselves. This is a quintessentially procedural argument as I have been using that term.

To be clear, the point is not that originalism is an inherently procedural approach to constitutional decision-making. Originalism as such neither requires nor permits constitutional decision-makers to make judgments about the legitimacy of their own or any other institution's interpretive authority. Nor does it permit or require them to defer to the decisions of any other institution about the requirements of original meaning. Rather, originalism directs decision-makers to adhere to the communicative content of the Constitution's original meaning, as they themselves interpret that meaning. Such an approach might be—and frequently has been—defended on various non-procedural grounds: that originalism produces good consequences or that it is required by positive law or the nature of interpretation, etc. But as the popular sovereignty argument for originalism demonstrates, it can also be defended on procedural grounds.

B. Attractions

Procedural claims have played a very important role in constitutional theory. This is no accident. Just as constitutions allocate political authority among and across different institutions, so too do approaches to constitutional decision-making. One classic reason for allocating institutional authority in a particular way is substantive and consequentialist—in the words of the Preamble to the U.S. Constitution, “to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare.”⁸⁶ The other classic reason is procedural—in the words of *Federalist* 49, “the people are the only legitimate fountain of power.”⁸⁷ The attractions of procedural claims in constitutional theory are numerous. I will focus on three.

First, procedural claims, unlike metaphysical claims, squarely confront the role of choice in constitutional decision-making and the consequent need for moral justification. They find that justification, for the most part, in the intrinsic and unique legitimacy of democratic decision-making as a system of political organization. Of course, different procedural claims are grounded on different conceptions of

86. U.S. CONST. pmbi.

87. THE FEDERALIST NO. 49 (Alexander Hamilton or James Madison).

democracy and draw different inferences from those conceptions. For present purposes, the important point is that they recognize the need to justify any approach to constitutional decision-making, a form of coercive political power, by reference to political morality. Their attempts to provide such justification may or may not be persuasive. But they address the right question.

Second, procedural claims, like metaphysical claims, might be pragmatically useful in facilitating agreement among persons of widely divergent substantive views. Indeed, this is a familiar reason for adopting decision procedures in the first place. If all concerned could agree on the correct decision or outcome in advance, no formal decision procedure would be necessary. Conversely, even in the face of serious disagreement over the correct decision or outcome, it is frequently possible to achieve broad or even complete agreement on a fair procedure for resolving the disagreement.⁸⁸ In some contexts, this might be a coin flip or lottery.⁸⁹ In others, it might be a majority vote.⁹⁰ Procedural arguments invoked to justify particular approaches to constitutional decision-making aspire to transcend substantive disagreement in a similar way. Even if we cannot agree on the scope of federal regulatory power or the nature of political equality, perhaps we can agree that disagreements about these issues can and should be resolved by democratically accountable officials—or, following Ely, that the rights of vulnerable minorities cannot be left to the tender mercies of majoritarian politics.⁹¹

Third, and relatedly, procedural claims find support in the jurisprudential literature connecting law and disagreement.⁹² To simplify greatly, this body of literature argues that the very purpose of law is to authoritatively settle—or mediate—substantive disagreements about the good. Justice Oliver Wendell Holmes’s famous dissent in *Lochner v. New York*⁹³ succinctly captures the basic flavor of this argument: “[A] constitution . . . is made for people of fundamentally differing views.”⁹⁴ Jeremy Waldron puts the point somewhat more generally: “[I]t is the function of law to build frameworks and orchestrate collective action in

88. For example, opposing football teams frequently disagree about particular calls, but all agree on the authority of the referees, as neutral third parties, to make the final determination.

89. See, e.g., BARBARA GOODWIN, JUSTICE BY LOTTERY 102–03 (1992).

90. See, e.g., Jeremy Waldron, *A Majority in the Lifeboat*, 90 B.U. L. REV. 1043 (2010) (conceding the inappropriateness of majority rule for allocating scarce space on a lifeboat, while defending it as a mechanism for communal decision-making).

91. See ELY, *supra* note 8, at 135.

92. See, e.g., JEREMY WALDRON, LAW AND DISAGREEMENT 7 (1999).

93. 198 U.S. 45 (1905).

94. *Id.* at 75–76 (Holmes, J., dissenting).

circumstances of disagreement.”⁹⁵ A corollary of this view is that persuasive normative arguments about law in general, and constitutional law in particular, must rest on procedural foundations. They must, that is, rest on claims about the legitimacy of the legal and constitutional process, rather than claims about the substantive justice of the outcomes it produces.⁹⁶ This is not a metaphysical claim that only procedural arguments are consistent with the true nature of law, though such a claim is certainly conceivable. Rather, it is a claim about the kinds of normative justifications that can suffice to justify the exercise of legal and constitutional authority in the face of pervasive disagreement.

C. Limitations

The attractions of procedural claims are real, but such claims are also vulnerable to several powerful lines of attack. Like the attractions elaborated above, these lines of attack are not limited to any particular procedural claim but apply to the class as a whole and, by extension, to all of its individual members. Again, I focus on three. To the extent possible, I avoid repeating the familiar array of objections to process-based constitutional theories, which mostly center on the impossibility of distinguishing substantive and procedural questions.⁹⁷ Some of those objections, if sound, merely undercut *approaches* that require constitutional decision-makers to distinguish questions of substance from those of process without speaking to the adequacy of normative *claims* grounded in procedural legitimacy.⁹⁸ Others do speak to the adequacy of such normative claims,⁹⁹ but I do not wish to relitigate those old debates here.

First, procedural claims are in tension with a widely shared view that government institutions and practices should be judged by their

95. WALDRON, *supra* note 92.

96. *See id.* at 7–8.

97. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 213 (1997) (“Despite the long tradition of denial by judges and commentators, judicial review requires remaking public policy made by the political process.”); Tribe, *supra* note 67, at 1064 (“The process theme by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values—the very sort of theory the process-perfecters are at such pains to avoid.”).

98. Recall that process-based approaches to constitutional decision-making may or may not rest on procedural foundations. Conversely, procedural normative claims may or may not be invoked to support process-based approaches. This point and its significance are elaborated at greater length at *infra* Part V.C.

99. Of particular note is the objection that all procedural claims must, at bottom, rest on a substantive value such as dignity or autonomy. *See, e.g.*, Tribe, *supra* note 67, at 1069–70.

impact on social welfare or aggregate utility.¹⁰⁰ On this view, particular institutional or procedural arrangements might be helpful, even essential, to promoting the public good. But it is this instrumental value, rather than the intrinsic rightness or fairness of those arrangements, that provide their ultimate justification. Of course, this view might be wrong. Social welfare might be only one relevant consideration in judging government institutions and practices or they might entirely irrelevant. But for committed welfarists, of which there are many, procedural claims are likely to hold little appeal.

Second, procedural claims are also in tension with a large family of nonwelfarist views, including various strains of libertarianism and egalitarianism, that prioritize substantive justice over procedural legitimacy. On this family of views, the substantive justice of constitutional decisions is more important than the procedural legitimacy of the institutions and officials who make those decisions.¹⁰¹ This view, too, could be wrong. Procedural legitimacy might be more important than—or as important as—substantive justice. Or perhaps procedural legitimacy is all that can be hoped for from a system of constitutional decision-making whose very purpose is to mediate inevitable and irresolvable conflicts over the content of substantive justice.¹⁰² But for theorists committed to the priority of substantive justice over procedural legitimacy, procedural claims are likely to hold little appeal.

Third, procedural claims have a tendency to morph into the practical equivalent of metaphysical claims. Many procedural claims rest on theories of democracy (or other theories of procedural legitimacy) defended at a fairly abstract level. In theory, their willingness to offer such a defense distinguishes them from metaphysical claims, which by definition, rest on premises so widely shared that they are not taken to require a defense. In practice, however, this often proves to be a distinction without a difference. Once an abstract ideal of democracy is accepted by all interlocutors, it functions much like the concepts of writtenness or binding law or interpretation. Like metaphysical arguments premised on those concepts, procedural arguments premised on abstract theories of democracy have 1) limited normative power to persuade adherents of competing conceptions of democracy; and 2) the potential to be self-defeating.

As an illustration, consider a procedural argument reasoning from a well-defended but abstract ideal of democracy to strong majoritarianism

100. See, e.g., ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* 3–4 (1995); Ronald Dworkin, *In Praise of Theory*, 29 *ARIZ. ST. L.J.* 353, 365 (1997); Barbara H. Fried, *Can Contractualism Save Us from Aggregation?*, 16 *J. ETHICS* 39, 41 (2012).

101. See, e.g., Barnett, *supra* note 12, at 640, 646; DWORKIN, *supra* note 20, at 15–19.

102. See WALDRON, *supra* note 92, at 7–8.

to some form of popular constitutionalism. Even if proponents of this argument succeed in demonstrating that strong majoritarianism is the most democratic approach, it is not clear what significance that would hold for adherents of, for example, liberal or social conceptions of democracy, with strong protections for the rights of minorities or the economically vulnerable (and approaches to constitutional decision-making consistent with these conceptions). So long as those views are not internally contradictory or otherwise logically untenable, the fact that majoritarianism is more democratic provides little obvious reason to prefer it. To be sure, most adherents of liberal and social democracy are committed to democracy as an abstract ideal. But they are committed to their understanding of this concept, not the majoritarian understanding. Indeed, if embracing strong majoritarianism is a logical entailment of embracing democracy, this may cause adherents of social and liberal theories of democracy to reconsider their commitment to that ideal.

III. SUBSTANTIVE CLAIMS

Substantive claims are, in some sense, the opposite of procedural claims. Instead of resting on formal ideals of fairness and democracy, substantive claims contend that the correct approach to constitutional decision-making is determined by the moral desirability of the decisions it produces, however moral desirability is defined. In other words, the best approach to constitutional decision-making is the one that produces the best constitutional decisions (as opposed to the one that allocates decision-making authority to the most legitimate decision-maker). Many substantive claims define the best constitutional decisions as those that produce the greatest utility or maximize social welfare, but substantive claims also come in nonwelfarist variants. What unites the two is their focus on constitutional decisions, rather than the authority or legitimacy of constitutional decision-makers. This Part discusses several illustrative examples of substantive claims. It then explores their attractions and limitations.

A. Examples

1. POSNERIAN PRAGMATISM

Perhaps the most straightforward example of a substantive claim is that underlying Richard Posner's "everyday pragmatism."¹⁰³ That

103. See POSNER, *supra* note 4, at 53 (identifying "everyday pragmatism" with the "insistence on subjecting every claim to a close examination of its concrete consequences").

approach directs judges to decide constitutional (and other) cases with an eye toward producing good consequences, both systemic and case-specific: “In the capacious, forward-looking account of interpretation that I am calling pragmatic, the social consequences of alternative interpretations are decisive.”¹⁰⁴ In this sense, Posner’s approach to constitutional decision-making could itself be described as substantive. It directs judges to self-consciously maximize the quality of their decisions. But as with the procedural character of Ely’s representation-reinforcement approach, it is not this feature of Posner’s pragmatism that interests me here. Rather, it is the *reasons* he offers for adopting that approach.

Like the approach itself, those reasons are basically pragmatic or consequentialist. Posner thinks judges should strive to produce good results because pursuing such results directly is the best way to actually achieve them.¹⁰⁵ And actually achieving good results is the standard by which any approach to constitutional decision-making should be judged. Quoting Benjamin Cardozo, Posner writes: “The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.”¹⁰⁶ Cardozo’s language—especially, “final cause”—contains echoes of Aristotle, the great metaphysician. But Posner invokes it in service of a thoroughly substantive argument that any approach to constitutional decision-making must be justified by moral reasons.¹⁰⁷

2. COMMON-LAW CONSTITUTIONALISM

Another familiar substantive claim is that underlying David Strauss’s common-law constitutionalism.¹⁰⁸ As its name suggests, common-law constitutionalism is the view that judges in constitutional cases should proceed incrementally, guided by the collective wisdom of previous generations as distilled in the two centuries of case law interpreting the Constitution.¹⁰⁹ Strauss’s particular version of common-law constitutionalism has a second important strand, which emphasizes the utility—and therefore, the authority—of clear constitutional text as a

104. Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365, 1380 (1990).

105. *Id.*

106. *Id.* (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921)).

107. *Id.* at 1368 (criticizing Robert Bork for “fail[ing] to produce convincing *reasons* why society should want its judges to adopt originalism as their interpretive methodology in constitutional cases.”).

108. See Strauss, *Common Law Constitutional Interpretation*, *supra* note 3.

109. *Id.* at 891–92.

focal point for social coordination.¹¹⁰ The idea here is that it is more important for some questions to be settled than for them to be settled right and that clear constitutional text can usefully perform this settlement function.¹¹¹

Both strands of Strauss's common-law constitutionalism rest on fundamentally substantive foundations. The reason he believes judges should follow an incremental, common-law approach is that such an approach is conducive to a desirable social stability and benefits from the wisdom embodied in a long tradition.¹¹² In short, such an incremental common-law approach is likely to produce better constitutional decisions than would judges acting only by their own best lights. Similarly, the reason Strauss believes judges should treat clear constitutional texts as controlling is that such an approach enables those texts to serve as focal points for socially beneficial coordination. It is more important that many issues—for example, legislative apportionment, presidential eligibility—be settled than that they be settled right. The salience of the Constitution's clear textual provisions makes them uniquely suited to promoting such settlement.¹¹³ At bottom, Strauss agrees with Posner that an approach to constitutional decision-making is a means to the end of social welfare. They simply disagree about which approach—judicial pragmatism or common-law constitutionalism—is the most effectual means to that end. Both approaches thus rest on substantive foundations.

3. MCGINNIS AND RAPPAPORT'S CONSEQUENTIALIST ORIGINALISM

Substantive arguments for originalism are something of a rarity, but John McGinnis and Michael Rappaport's consequentialist defense of originalism is an important exception.¹¹⁴ Like other originalists, McGinnis and Rappaport contend that judges and other constitutional decision-makers should regard themselves as bound by the original meaning of the Constitution. But rather than grounding this view on metaphysical, procedural, or positivist foundation, they argue that

110. *See id.* at 891.

111. *Id.* at 907.

112. *Id.* at 891 (“The central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time.”). Strauss's argument owes an obvious—and acknowledged—debt to Edmund Burke. *Id.* at 893. Strauss also argues that Burke may owe a debt to the common law and its leading “ideologists” Hale, Blackstone, and Coke. *Id.*

113. *Id.* at 911 (“On the conventionalist account, the Constitution is a focal point of this kind: our culture has given it a salience that makes it the natural choice when cooperation is valuable. But its salience and general acceptability, rather than its authority or optimality, are the most important reasons for accepting it.”).

114. *See* MCGINNIS & RAPPAPORT, *supra* note 17.

originalism is the approach to constitutional decision-making that produces the best consequences.¹¹⁵

The nub of their argument is that supermajoritarian amendment and ratification procedures produce better constitutional rules than majoritarian procedures. They particularly emphasize the power of supermajoritarian procedures to protect minority rights,¹¹⁶ promote long-term decision-making,¹¹⁷ build consensus,¹¹⁸ and increase the attention and deliberation afforded to proposed constitutional changes.¹¹⁹ All of these benefits, they contend, require a judicial commitment to originalism to preserve the fruits of the supermajoritarian amendment process. The particulars and the persuasiveness of this argument are not important for present purposes. The key point is that, like Posner and Strauss, McGinnis and Rappaport believe judges should adopt whatever approach to constitutional decision-making produces the best results. That makes their claim substantive, as I am using the term.

4. DWORKIN'S MORAL READING

Ronald Dworkin's famous moral reading approach to constitutional interpretation also rests on substantive foundations.¹²⁰ On this view, judges should decide constitutional cases according to the set of principles that best fit and justify the conventional legal materials of American constitutional law—principles Dworkin sums up as “liberal egalitarianism.”¹²¹ The reason he favors this approach is that he believes it is the best way to achieve the “overall aim” of “a structure of law and community that is egalitarian.”¹²² In other words, he believes his moral reading approach to constitutional decision-making will produce the best constitutional decisions, with best defined as consistent with the requirements of liberal egalitarianism rather than welfarism or utilitarianism.¹²³ This distinguishes Dworkin's substantive claim from the

115. *Id.* at 11 (“The theory provides a normative defense of originalism from a consequentialist perspective. Thus, we argue that interpreting the Constitution according to a meaning established in the past will improve human welfare in the present.”).

116. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 734–35 (2002).

117. *Id.* at 784–85.

118. *Id.* at 741.

119. *Id.* at 739–40.

120. See generally DWORKIN, *supra* note 20.

121. See Ronald Dworkin, *Liberalism*, in PUBLIC AND PRIVATE MORALITY 113–43 (Stuart Hampshire ed., 1978) (discussing Dworkin's incorporation of egalitarian principles in his approach to liberalism). See also Ronald Dworkin, *supra* note 100, at 364.

122. Dworkin, *supra* note 100.

123. DWORKIN, *supra* note 42, at 184–86.

others I have discussed to this point, all of which are broadly welfarist in nature. But for present purposes, this distinction is unimportant. What makes all these claims substantive in my sense of that term is their common insistence that any approach to constitutional decision-making must be justified by the quality of the decisions it produces.

5. LIBERTARIAN ORIGINALISM

Another nonwelfarist approach that fits this description is Randy Barnett's libertarian originalism.¹²⁴ Like McGinnis and Rappaport and other originalists, Barnett contends that judges should follow the original meaning of the constitutional text in rendering their constitutional decisions, to the extent that original meaning is determinate and applicable.¹²⁵ Where original meaning runs out, Barnett argues that judges should construe the Constitution to promote liberty defined in the terms of classical liberalism.¹²⁶ Most important for present purposes, he defends both aspects of his preferred approach on the ground that they are the best way to produce just constitutional decisions, with justice defined as the protection of "the natural rights people have before they form a legal system and which they retain unless they consent to their alienation."¹²⁷ Like Dworkin's liberal egalitarianism, Barnett's libertarianism is decidedly not utilitarian or welfarist, but as already explained, that is not the crucial issue. What makes his argument substantive is its focus on the moral desirability of the decisions produced by a libertarian originalist approach.

B. Attractions

As this collection of examples demonstrates, substantive claims have played a very important role in constitutional theory. This is hardly surprising. Constitutions are generally established to improve the functioning of government—in the words of the preamble to the U.S. Constitution, "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and] promote the general Welfare."¹²⁸ The point of constitutional decision-making is to

124. BARNETT, *supra* note 2.

125. *Id.*

126. *Id.* at 128 ("[V]ague [constitutional] terms should be given the meaning that is most respectful of the [liberty] rights of all who are affected, and rules of construction most respectful of these rights should be adopted to put general constitutional provisions into legal effect.")

127. Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 146 (2003).

128. U.S. CONST. pmb.

carry a constitution into effect. It follows naturally, if not inevitably, that an approach to constitutional decision-making should be evaluated based on the quality of decisions it produces. The attractions of such a view are numerous. I will focus on three here.

First, like procedural claims, substantive claims squarely confront the role of choice in constitutional decision-making and the consequent need for moral justification.¹²⁹ This indeed is their central defining characteristic. Their attempts to provide such justification may or may not be persuasive. They disagree among themselves both on ultimate questions of political morality and on what follows from agreed upon principles. Some substantive claims must, therefore, be wrong. But they address the right question.

Second, substantive claims are consistent with a widely shared view that government institutions and practices should be judged by the desirability of their consequences, however defined.¹³⁰ There are obviously substantial disagreements among adherents to this view, just as there are substantial disagreements among the substantive claims surveyed in this Part. But all who subscribe to some form of consequentialism agree that the proper standard for evaluating institutional arrangements and practices, including the correct approach to constitutional decision-making, is whether they make things better rather than worse (as opposed to whether they proceed from procedurally legitimate sources). This is exactly the question that substantive claims seek to answer.

Third, unlike metaphysical and procedural claims, substantive claims are not question-begging or self-defeating. The difference between substantive and metaphysical claims is especially stark. Metaphysical claims assume agreement on some fundamental feature of constitutional decision-making, whose presumed desirability becomes ripe for reconsideration once it is understood to entail an approach that some interlocutors will find deeply unappealing.¹³¹ Substantive claims do nothing of the sort. They openly defend their commitment to evaluating approaches to constitutional decision-making according to the principles of political morality. They also openly defend a particular conception of political morality and the inferences that lead from that conception to a

129. See, e.g., CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE 19* (2009) ("Any approach must be defended by reference to its consequences, not asserted as part of what interpretation requires.").

130. See POSNER, *supra* note 4. This is a good time to remind the reader that all of the claims I categorize as "substantive" are consequentialist in the sense that they attach moral weight to the outputs of an approach to constitutional decision-making rather than the procedural legitimacy of the decision-maker.

131. See *supra* Part I.

particular approach to constitutional decision-making. Any one or all of these defenses might be unpersuasive. But if they are persuasive, there is no risk that they will undermine, rather than support, the conclusion argued for.

C. Limitations

For all of these attractions, substantive arguments are subject to several significant limitations. I will focus on three here. As in each of the previous Parts, it bears emphasis that these limitations, like the attractions elaborated above, apply to all substantive arguments, regardless of what approach to constitutional decision-making they are invoked to support. They thus help to demonstrate the utility of mapping the normative foundations of constitutional theory.

First, substantive claims run the risk of collapsing constitutional theory into political morality. Once political morality is admitted to be the relevant measuring stick, approaches to constitutional decision-making begin to seem superfluous. To take just two examples, why should interpreters follow original meaning or common-law constitutionalism, as reasonable but obviously imperfect mechanisms for achieving good results, rather than pursuing such results directly?¹³² The question is not unanswerable. Some approaches suggest that judges *should* pursue substantively good results more or less directly. Think of Posner and Dworkin. Other approaches might be defended on grounds resembling rule consequentialism. Perhaps constitutional decision-makers, with their particular institutional limitations and biases, will do better by following original meaning or common law methods than they would by pursuing good results directly. In any event, the challenge is a real one and one that every substantive claim must confront.

Second, there is pervasive disagreement about the questions of political morality that substantive claims place front and center. This limitation is the flip side of the appeal of procedural and (as will be seen) positivist claims. Just among the examples of substantive claims surveyed in this Part, the depth of this disagreement is evident. Three of those claims rest on broadly welfarist conceptions of political morality; one rests on a liberal egalitarian conception; and another on a classical

132. See, e.g., Andrew Coan, Comments to *Originalism and the Supreme Court*, SCOTUSBLOG (Oct. 7, 2011, 10:21 AM), <http://www.scotusblog.com/community/originalism-and-the-supreme-court/> [https://perma.cc/SBB2-B3PD] (making this point about originalism); cf. Coan, *supra* note 36, at 1040 n.47 (“If an originalist approach were sufficiently unattractive substantively, but so was jettisoning the Constitution, the normatively best option might be for judges to ignore even an explicit instruction to be originalists and instead apply some other interpretive approach to the remainder of the constitutional text.”).

liberal or libertarian perspective. There are certainly points of overlap among these conceptions but also deep disagreements. If those disagreements must be overcome in order to resolve so pedestrian a question as the proper approach to constitutional decision-making, we may be waiting a long time for an answer. Of course, this might simply be the way it is. But the depth and intractability of disagreement over the structure and principles of political morality are nevertheless a challenge for proponents of substantive claims.

Third, and relatedly, substantive claims run headlong into in the jurisprudential literature connecting law and disagreement. As discussed above, there is an important body of literature arguing that the very purpose of law is to authoritatively settle—or mediate—substantive disagreements about the good.¹³³ On this view, substantive claims cannot possibly supply an adequate normative justification for an approach to constitutional decision-making because the whole purpose of constitutions is to provide a framework for collective decision-making and conflict resolution among people of fundamentally different substantive views.¹³⁴ Again, this argument is not unanswerable. Perhaps the function it ascribes to law is mistaken. Perhaps fundamental moral disagreements go all the way down and cannot be transcended by any procedural argument or arrangement. But the challenge is fundamental and all substantive claims must confront it.

IV. POSITIVIST CLAIMS

Positivist claims contend that the correct approach to constitutional decision-making follows from the content of positive law. Superficially, such claims closely resemble metaphysical claims. Just as there is wide agreement that judges should interpret rather than rewrite the Constitution or that the U.S. has a written rather than an unwritten constitution, there is wide agreement that judges and other officials charged with making constitutional decisions should follow the law. If the law embraces a particular approach to constitutional decision-making, it follows that this is the approach officials should adopt. The key distinction between positivist and metaphysical arguments is that positivists view the approach to constitutional decision-making dictated by positive law to be contingent, rather than necessary. If the concept of interpretation or written constitutionalism entails originalism, it does so in all places and at all times. But the content of positive law is determined by contingent social facts that vary from jurisdiction to jurisdiction and across historical time. The approach to constitutional

133. See discussion *supra* Part II.B.

134. See WALDRON, *supra* note 92, at 7.

decision-making it dictates could—and presumably does—vary across the same dimensions. This Part discusses several examples of positivist claims. It then explores the attractions and limitations of such claims.

A. Examples

1. POSITIVIST ORIGINALISM

The most *au courant* and perhaps also the most explicit positivist claim is that advanced by Stephen Sachs and William Baude in a pair of recent articles.¹³⁵ Like other originalists, Sachs and Baude think that judges and other interpreters are bound to follow the original meaning of the Constitution.¹³⁶ What makes their view distinctive is the reason they offer for taking this position. Following the tenets of orthodox legal positivism, Sachs and Baude argue that the content of law is a function of social facts—specifically, regular patterns or customs “accepted as common public standards of official behaviour by its officials.”¹³⁷ Whatever the content of these patterns or customs in other times and places, Sachs and Baude argue that the relevant community of officials in the early twenty-first century United States treats the original meaning of the Constitution as authoritative.¹³⁸ On this view, originalism “isn’t just about recovering the meaning of ancient texts, a project for philologists and historians. Instead, it’s about determining the content of our law, *today*, in part by recovering Founding-era doctrine.”¹³⁹ In other words, contemporary Americans might still “take as our own the Founders’ law.”¹⁴⁰ If they do, Sachs argues, this “is the best reason to be an originalist.”¹⁴¹

Two features of this argument are especially important for present purposes. First, in order to make their argument plausible, Sachs and Baude are forced to define originalism down. No one thinks that all or even most constitutional decisions of U.S. courts rest on a correct originalist interpretation of the Constitution, so how can original meaning be the positive law of the United States? Sachs and Baude offer subtly different answers to this question, but at bottom, they both emphasize the conceptions of constitutional authority American courts publicly espouse over the sincerity or rigor with which those conceptions

135. Baude, *supra* note 23; Sachs, *supra* note 23.

136. Baude, *supra* note 23; Sachs, *supra* note 23.

137. H.L.A. HART, *THE CONCEPT OF LAW* 116 (2d ed. 1994).

138. *See generally* Baude, *supra* note 23; Sachs, *supra* note 23.

139. Sachs, *supra* note 23, at 821–22.

140. *Id.* at 874.

141. *Id.* at 822.

are applied.¹⁴² If American courts publicly insist that their constitutional decisions are grounded in, or at least consistent with, original meaning (and rarely or never admit the contrary), that is enough to make originalism “our law.”¹⁴³ Second, as Baude makes particularly explicit, the positivist argument for originalism depends on a moral norm of judicial—and, more broadly, official—law-following, which stands outside of positive law.¹⁴⁴ That norm, as Baude acknowledges, is defeasible, not absolute.¹⁴⁵ In at least some circumstances, most theorists would agree that judges and other officials are justified in refusing to follow positive law.¹⁴⁶ But those circumstances are the exception rather than the rule.¹⁴⁷ If originalism is our law and if judges and other officials are, in the main, obligated to follow that law, originalism is the correct approach to constitutional decision-making.

2. POSITIVIST COMMON-LAW CONSTITUTIONALISM

At least partially in response to Baude and Sachs, David Strauss has recently developed a positivist or quasi-positivist argument for common-law constitutionalism.¹⁴⁸ Common-law constitutionalism, as explained above, calls on judges to decide constitutional cases incrementally, using common-law reasoning and drawing on the collective wisdom embodied in two centuries of prior case law interpreting the U.S. Constitution. Strauss’s original and highly influential defense of this approach was substantive and broadly welfarist.¹⁴⁹ In a nutshell, he defended common-law constitutionalism on the ground that it produces better decisions than alternative approaches. In his recent *Harvard Law Review* Foreword, however, Strauss attempts to demonstrate, far more comprehensively than in his earlier work, that common-law constitutionalism is the best

142. See generally Baude, *supra* note 23; Sachs, *supra* note 23.

143. See Sachs, *supra* note 23, at 820 (“What matters for our understanding of the law isn’t just everyday practice, but the premises that are implicit in our legal arguments, the claims about the structure of our law that we’re willing publicly to accept and defend.”); Baude, *supra* note 23, at 2371 (“[T]he point is to look to how the Supreme Court justifies its rulings, as evidence of what counts as a legally sufficient justification in our current system of constitutional law.”).

144. Baude, *supra* note 23, at 2392–95 (describing this judicial duty and its justifications).

145. *Id.* at 2395.

146. *Id.* at 2395 (conceding that judicial obligation to follow the law is “not at all absolute”).

147. Positivist arguments are obviously not calculated to appeal to philosophical anarchists. See, e.g., ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (2d ed. 1998) (arguing against the existence of any moral obligation to obey the law as such).

148. Strauss, *supra* note 25.

149. See Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, *supra* note 3; Strauss, *Common Law Constitutional Interpretation*, *supra* note 3.

descriptive account of American constitutional law.¹⁵⁰ In other words, common-law constitutionalism is our law in the same sense that Sachs and Baude attempt to argue that originalism is our law. The nub of his argument is that the constitutional text is routinely ignored in ordinary constitutional litigation and, when it is not ignored, is “treated in more or less the same way as precedents in a common law system.”¹⁵¹

Strauss is less explicit than Sachs and Baude in drawing normative conclusions on this basis. He still offers a quite explicit substantive defense of common-law constitutionalism, separate and apart from his descriptive account.¹⁵² But at several points in his argument, he seems at least implicitly to attach independent normative significance to the status of common-law constitutionalism as positive law.¹⁵³ Whether or not Strauss holds this view, it is clearly a conceptually possible view, for which his work provides significant support and which, while arriving at a different conclusion, shares the same positivist structure as Sachs’s and Baude’s arguments for originalism. If common-law constitutionalism is our law and if judges and other officials are, in the main, morally obligated to follow that law, common-law constitutionalism is the correct approach to constitutional decision-making.

3. POSITIVIST PLURALISM

A third positivist claim is the one sometimes associated with Philip Bobbitt’s and Richard Fallon’s pluralist accounts of American constitutional decision-making.¹⁵⁴ Broadly speaking, both Bobbitt and Fallon describe the practice of American constitutional law as pluralist in the sense that multiple modalities of constitutional argument are widely accepted as legitimate, among them arguments from text, structure, history, and precedent.¹⁵⁵ Bobbitt’s and Fallon’s precise descriptions of this practice differ in important ways, as do the conclusions they draw from these descriptions. Neither of their arguments is positivist in any straightforward sense. Fallon presents his “constructivist-coherence” account as an “interpretive” attempt to explain and justify existing

150. *See generally* Strauss, *supra* note 25.

151. *Id.* at 4–5.

152. *Id.* at 52–55 (offering a substantive justification for common-law constitutionalism grounded in “sovereignty, adaptation, and settlement”).

153. *See, e.g., id.* at 61 (noting the importance of an accurate descriptive account of American constitutional law to applying that law in good faith); *id.* (describing common-law constitutionalism as the “true nature” and the “true genius” of American constitutional law).

154. BOBBITT, *supra* note 5; FALLON, JR., *supra* note 5.

155. BOBBITT, *supra* note 5, at 3–4 (discussing these modalities); FALLON, JR., *supra* note 5, at 1189 (same).

practice.¹⁵⁶ Bobbitt argues that the pluralist grammar of constitutional practice requires (and permits) no justification because it is constitutive of that practice, from which it is impossible to step outside.¹⁵⁷ Both, however, offer descriptive accounts of the norms reflected in American official practice that could easily be recast as positivist accounts of the content of American constitutional law. Indeed, they frequently are so cast. As one able theorist has summarized Bobbitt's argument, "Perhaps certain forms of argument simply constitute the activity of constitutional reasoning as sanctioned and accepted by the relevant community."¹⁵⁸ If that is the case, and if judges and other officials are generally under a moral obligation to follow the law, then pluralism of some sort is the correct approach to constitutional decision-making. Whether or not Bobbitt and Fallon would sign on to this argument, what matters for present purposes is that such a claim is conceptually possible and shares the same positivist structure as the other claims discussed in this Part.

B. Attractions

Explicitly positivist normative claims are relatively new to constitutional theory.¹⁵⁹ Historically, constitutional theorists have been far more concerned with the question of how judges and other officials *should* make constitutional decisions than with the question of how they actually *do* make such decisions. Such descriptive accounts as these were rarely engaged directly with positivist jurisprudence. The positivist turn of recent originalist theory has changed this, and positivist normative claims, both originalist and nonoriginalist, seem likely to grow in number and importance. Such claims have several significant attractions.

One is pragmatic. Like metaphysical claims, positivist claims proceed from a widely shared premise—that judges and other officials are generally obligated to follow the law. This means that they have at least the potential to make progress without resolving deep disagreements over the substance of political morality or prerequisites for legitimate democratic authority. If judges and other officials are

156. Fallon, Jr., *supra* note 5, at 1192.

157. BOBBITT, *supra* note 5, at 6; *see also* Bartrum, *supra* note 27, at 260 (elaborating and criticizing this aspect of Bobbitt's argument).

158. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 183 (2008); *see also* Baude, *supra* note 23, at 2404–05 (treating Bobbitt's account as a positivist argument for interpretive pluralism, while acknowledging its ambiguity).

159. Of course, legal positivism itself is not new. What is new is the self-conscious defense of approaches to constitutional decision-making on the ground that they are compelled by the present content (as opposed to the essential nature) of positive law.

generally obligated to follow the law, it remains only to figure out what the law is, a relatively tractable question of social fact. Even if the result is not total agreement, a conversation revolving around the regularities of official behavior comprising positive law might be more productive and focused than one in which diverging comprehensive views play a large role. This seems to be what William Baude has in mind when he observes that existing “debates about originalism are at a standstill” and that a positivist turn “can reorient the debates and allow both sides to move forward.”¹⁶⁰

A second, related attraction is strategic. In intellectual combat, having the law on your side is not quite as good as having God on your side, but it offers important rhetorical advantages. So long as all interlocutors agree that judges and other officials should follow the law, proponents of positivist claims are freed of the burden to supply a deep, normative defense of their preferred approach; they need only carry the more manageable burden of demonstrating that their approach is the law.¹⁶¹ Another rhetorical advantage of pressing a positivist claim is that such claims have a way of shifting the burden of persuasion to the other side. Theorists tend to accord existing legal practice a kind of presumptive validity. This presumption might not be especially strong and it might not have any particularly defensible intellectual basis. Indeed, it may simply be an instance of status quo bias.¹⁶² But claims requiring a radical change to existing practices are almost certain to be greeted by greater skepticism than those requiring little or no change.¹⁶³ This is one reason that proponents of substantive and procedural claims have often felt compelled to argue that their claims are broadly consistent with existing practice.¹⁶⁴ For positivist claims, this rhetorical strength is baked right into the cake.

160. Baude, *supra* note 23, at 2349, 2351.

161. *Id.* at 2352 (“Similarly, originalists need not show that originalism is the first-best legal arrangement as a normative matter so long as we agree that government officials should obey the law.”).

162. See, e.g., William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (defining status quo bias as an irrational preference for the alternative perceived as maintaining the status quo).

163. Cf. Baude, *supra* note 23, at 2393 (“Proponents of various interpretive methodologies each attempt to burden shift, claiming that their methodology is required by, or at least part of, ‘the law,’ and the other side is attempting to change the law.”); Sachs, *supra* note 23, at 819 (“If originalism is just a law reform project, it loses much of its rhetorical force.”).

164. See, e.g., Post & Siegel, *Legislative Constitutionalism*, *supra* note 80 at 1947 (“[W]e do not understand ourselves to be proposing some novel or innovative constitutional regime.”); Strauss, *Common Law Constitutional Interpretation*, *supra* note 3, at 888 (“The common law approach captures the central features of our practices as a descriptive matter.”).

A third attraction is, for lack of a better word, temporal. A principal challenge for American constitutional theorists is to justify adherence to a Constitution whose crucial provisions were all drafted and ratified by dead people.¹⁶⁵ This is the so-called “dead hand problem.”¹⁶⁶ Although this problem has often been framed as an objection to originalism, it extends in principle to any approach that treats an ancient constitutional text as authoritative.¹⁶⁷ Much of constitutional theory consists of attempts, more or less direct, to explain why such a text should carry any contemporary legal force.¹⁶⁸ Positivist claims offer an apparently new explanation: The Constitution is binding not because of its ratification by long-dead founders, but because of its acceptance by present-day Americans “for reasons of our own.”¹⁶⁹

C. Limitations

These attractions are substantial and are likely to make positivist claims an increasingly important subject of theoretical discussion. Like all other categories of claims, however, positivist claims are also subject to several significant limitations. The most important involve, in one way or another, the difficulty of deriving an “ought” from an “is,” as all positivist claims attempt to do.

First, any positivist claim must consider and persuasively refute the possibility that American law is simply indeterminate on the question of how judges and other officials should approach constitutional decision-making. The very existence of plausible, competing positivist claims lends weight to this possibility. If “our law” can be plausibly understood as consistent with originalism, pluralism, and common-law constitutionalism, perhaps that law does not prescribe or rule out any of them. It is a well-accepted tenet of positivist jurisprudence that positive law may contain gaps or open areas, in which no generally accepted norm controls. If that is the case here, the choice among competing

165. See, e.g., Strauss, *Common Law Constitutional Interpretation*, *supra* note 3, at 880 (describing this as “the central problem of written constitutionalism”).

166. See, e.g., Primus, *supra* note 10, at 192–95 (describing the problem and its implications for originalism).

167. See Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1127 (1998) (“[T]he dead hand argument, if accepted, is fatal to any form of constitutionalism.”).

168. See, e.g., Strauss, *Common Law Constitutional Interpretation*, *supra* note 3, at 898 (presenting common-law constitutionalism as “at least a colorable answer” to the dead-hand problem).

169. See, e.g., Baude, *supra* note 23, at 2408 (“The original meaning of the Constitution continues to control precisely because we the living continue to treat it as law and use the legal institutions it makes, and we do so in official continuity with the document’s past.”).

approaches to constitutional decision-making—at least those which are consistent with positive law—must be governed by extralegal considerations. A judge’s obligation to follow the law is no help because there is, by hypothesis, no law to apply.

Second, the positivist imperative to locate legal norms in existing practice sharply limits the extent to which those norms can be invoked to criticize or reform the practice from which they are derived. This is not as big a problem for pluralists and common-law constitutionalists, who tend to be fairly comfortable with existing practice. But even these theorists sometimes criticize the over-emphasis on text, at the expense of precedent, or the over-emphasis of one legitimate modality of interpretation at the expense of another.¹⁷⁰ Positivist originalists face an even bigger problem. The rhetoric of American constitutional decision-making is arguably consistent with their view that original meaning is the ultimate criterion for constitutional law,¹⁷¹ but the constitutional canon contains a great many decisions that most originalists regard as mistaken.¹⁷² Positivist originalists argue that judges recognizing originalism as our law should be better originalists going forward.¹⁷³ But as Richard Primus has pointed out, this argument “cannot simply emerge from pointing to our present practices because it is a response that calls for those practices to change.”¹⁷⁴ The same point applies to common-law constitutionalist and pluralist critiques of judicial practice, at least to the extent that those critiques are grounded in positive law.

This objection is not unanswerable. Perhaps there is a principled positivist argument for privileging judicial rhetoric over actual judicial

170. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 22 (1991) (criticizing elevation of any one modality over others); Strauss, *Common Law Constitutional Interpretation*, *supra* note 3, at 888 (“The common law approach makes sense of our current practices in their broad outlines; but at the same time, it suggests some ways in which our practices might be modified.”); Strauss, *supra* note 25, at 19–20 (criticizing constitutional fundamentalism as inconsistent with common-law constitutionalism).

171. See Richard Primus, *Is Theocracy Our Politics?*, 116 *COLUM. L. REV. SIDEBAR* 44, 51 (2016) (“Even in the cases canonically adduced as anti-originalist decisions, the Court refrains from saying that some other source of authority trumps original meanings.”).

172. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 852 (1989) (“It would be hard to count on the fingers of both hands and the toes of both feet, yea, even on the hairs of one’s youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean.”); Primus, *supra* note 171, at 49–50 (“[M]ost experts think that the Court has frequently decided cases in ways that contradict original meanings.”); *id.* (describing Court’s frequent deviations from originalism as “common ground” among originalists and nonoriginalists).

173. See generally Baude, *supra* note 23; Sachs, *supra* note 23.

174. Primus, *supra* note 171, at 51.

decisions.¹⁷⁵ Or perhaps the positive law of constitutional decision-making can be defined capaciously enough to encompass many or even most of the apparently deviant results.¹⁷⁶ But both of these retorts have their downsides. The first injects positivism with a more overtly normative character, sacrificing some of the appeal of a more purely descriptive approach. The second dilutes the approach to constitutional decision-making that positive law is supposed to prescribe. If everything the Supreme Court does is originalist or pluralist or common-law constitutionalist in the relevant sense, those terms lose much of their meaning and nearly all of their critical edge. I do not mean to take a side on these difficult questions, merely to flag them as challenges common to positivist claims.

Third, positivist arguments are subject to a kind of chicken and egg problem. Judges are obligated to follow the law but the law, as defined by legal positivism, is what judges (and other relevant officials) do. To be sure, this way of putting it ignores many nuances, but it also captures something essential about positivist claims in constitutional theory. Those claims are, at bottom, based on the obligation of judges to continue doing whatever judges do, at both the level of primary rules and secondary rules.¹⁷⁷ But those rules themselves are defined by regularities of official behavior, as it were, all the way down. A secondary rule which requires judges to adhere to original meaning until that meaning is changed through the formal amendment process exists—and imposes obligations—only so long as judges (and other relevant officials) act like it exists. If today's originalist regularity is replaced by a pluralist regularity tomorrow, the fact that originalism used to be our law can provide no basis for criticizing judges for following our new law of pluralism. Arguments for or against making (or maintaining) such a change must come from outside the positive law. Or so it might be argued.

175. See Baude, *supra* note 23, at 2371 (attempting to construct such an argument); Sachs, *supra* note 23, at 820, 854–55 (same).

176. See generally Baude, *supra* note 23, at 2354–63 (describing and defending a capacious approach of “inclusive originalism”); Strauss, *Common Law Constitutional Interpretation*, *supra* note 3, (attempting to reconcile common-law constitutionalism with the prominent role accorded the constitutional text and original meaning in certain cases).

177. See Leslie Green, *Introduction* to H.L.A. HART, *THE CONCEPT OF LAW*, at xx (3d ed. 2012) (distinguishing “primary rules that guide behaviour by imposing duties or conferring powers on people” from “secondary rules that provide for the identification, alteration, and enforcement of the primary rules”).

V. PAYOFFS

Why go to the trouble of developing this taxonomy? The short answer is to promote clearer analysis and communication in normative constitutional theory. The taxonomy does this in three ways: it clarifies the nature of many theoretical disagreements; it creates possibilities for productive dialogue among otherwise opposed theorists; and it underscores that there is no necessary homology between approaches to constitutional decision-making and their normative foundations.

A. Theoretical Disagreements

Disagreements in constitutional theory are, of course, rampant. In some sense, disagreement is the whole ballgame. The taxonomy developed in this Article clarifies that not all theoretical disagreements are created equal but nor are they all unique snowflakes. Instead, such disagreements come in three distinct types, each of which gives rise to different challenges and opportunities. First, theorists can disagree at the level of approach while agreeing at the level of normative foundations. Second, they can agree at the level of approach while disagreeing at the level of normative foundations. Finally, of course, they can disagree at both the level of approach and normative foundations. These three types of disagreements can be usefully organized into the following simple, two-by-two matrix, the top left cell of which recognizes the fourth logical possibility—namely, comprehensive agreement at both the levels of approach and foundation.¹⁷⁸

Agree Approach/Agree Foundation ("Comprehensive Agreement")	Disagree Approach/Agree Foundation ("Hidden Agreement")
Agree Approach/Disagree Foundation (Type II) ("Hidden Disagreement")	Disagree Approach/ Disagree Foundation ("Comprehensive Disagreement")

1. HIDDEN AGREEMENTS

Theorists who disagree at the level of approach may nevertheless agree at the level of normative foundation. I call these "hidden agreements" because they are frequently obscured by the different conclusions their parties reach about the proper approach to

178. I will not discuss comprehensive agreement at any length but the taxonomy has some relevance even for this case to the extent that it clarifies the different types of disagreement into which comprehensive agreement might conceivably morph.

constitutional decision-making. Such agreements can be broad or narrow. If theorists agree both on what counts as a good reason for preferring one approach to another and about which particular reason of that type is most persuasive, their agreement is broad. If they agree only about the type of reason but not the particular reason, their agreement is narrow. Broad hidden agreements are especially important but even narrow ones are significant.

The best example of a broad agreement is that among substantive pragmatists, originalists, and common-law constitutionalists. The approaches favored by these theorists are starkly different but all agree that the best approach to constitutional decision-making is the one most likely to maximize overall welfare (or some close cognate). In other words, they agree not only that any approach requires a substantive justification but also on the particular form of substantive justification—welfarism—that is most persuasive. The significance of this agreement is hard to overstate. While these theorists have real disagreements, they are all reasoning from a common premise. If and when they recognize this, which the taxonomy should help them to do, they are in a fairly good position to engage in a productive discussion. To do so, they need not resolve deep, intractable questions of political morality. They need only make progress on the contingent, largely empirical question, of which approach to constitutional decision-making is likely to maximize overall welfare. That question is hardly trivial but it seems likely to be more tractable than deeper normative questions. At the very least, the taxonomy clarifies that it is the former, rather than the latter, that divides substantive pragmatists, originalists, and common-law constitutionalists.

A good example of a narrow hidden agreement is that between Richard Posner's pragmatism and Ronald Dworkin's moral reading. Both of these approaches rest on substantive foundations, but Posner and Dworkin define good decisions quite differently. In other words, they agree about the type of normative justification required (substantive) but disagree about which reason of that type is most persuasive (welfarism, in Posner's case, or liberal egalitarianism, in Dworkin's). While this agreement is much narrower than it might be, it still bounds their disagreement in important ways. Metaphysical, procedural, and positivist claims can be placed to one side at the outset. The only questions in dispute between these two theorists are how best to produce good constitutional decisions and how to define good decisions in the first place. It would be an understatement to describe these as formidably difficult questions, and the taxonomy developed in this Article offers no particular help in resolving them. It does, however, help to identify and isolate them as the real questions in dispute.

2. HIDDEN DISAGREEMENTS

Other theorists agree at the level of approach but disagree at the level of normative foundation. I call these “hidden disagreements” because they are frequently obscured by the overlapping conclusions their parties reach about the proper approach to constitutional decision-making. The best examples of such disagreements are probably those that divide metaphysical, procedural, substantive, and positivist originalists. All of these theorists favor the same general approach to constitutional decision-making but they do so for very different reasons.

The significance of this disagreement depends mostly on the strength of the inferences that connect each of these strains of originalism with its normative foundation. Does originalism really follow from, say, a commitment to written constitutionalism? Or does some other approach—or no approach at all—follow from that commitment? We could ask the same questions about welfarism, popular sovereignty, or positivism. If the inferences connecting these normative foundations to originalism are uniformly strong, originalists of different schools can safely think of themselves as happy allies bound by an overlapping consensus or incompletely theorized agreement. But if that is not the case, or might not be the case, these hidden disagreements can be far more troublesome. Substantive originalists, for example, are committed to embracing the approach to constitutional decision-making that produces the best consequences. If they are (or might be) mistaken in thinking that to be originalism, their justification for supporting originalism is precariously contingent, rendering their agreement with other types of originalists of dubious value.¹⁷⁹ At a minimum, the taxonomy developed in this Article should help to alert constitutional theorists to the destabilizing potential inherent in such hidden disagreements.

A related issue arises when a single theorist embraces an approach to constitutional decision-making for multiple reasons. With the possible exception of metaphysical claims, there is nothing intrinsically exclusive in any of the four categories of normative claims elaborated in Parts I

179. A related possibility—one more likely to be conceded by originalist theorists—is that the types of originalism that follow from different normative claims might be subtly, or even very substantially, divergent. *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 17, at 17 (arguing for “original-methods originalism” on the grounds that this approach is best suited to lock in the consequentialist benefits of the supermajoritarian amendment process); Baude, *supra* note 23, at 2352–53 (arguing for a broadly “inclusive originalism” on the grounds that this approach is most consistent with the actual practice of relevant U.S. officials). The same goes for other approaches. This is another important reason to pay attention to hidden disagreements. *Cf.* Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59 (2017) (arguing that different justifications for considering historical gloss in constitutional decision-making imply different methodological approaches).

through IV. In other words, it is at least theoretically possible for an approach to be justified by more than one type of claim. Moreover, there seems to be a common psychological tendency to conclude that all available arguments point in the direction of one's preferred conclusion.¹⁸⁰ In any case, it is easy to imagine theorists embracing an approach to constitutional decision-making for multiple reasons. Randy Barnett, for example, seems to premise his originalism on both metaphysical (the argument from writtenness) and substantive (libertarian) foundations.

As with theorists who embrace the same approach for different reasons, this sort of normative eclecticism is unlikely to create problems if the inferences connecting these normative foundations to originalism are strong. Indeed, if correct, Barnett's metaphysical and substantive arguments might mutually reinforce one another. On the other hand, if one or both of those arguments is flawed, they might turn out to support divergent approaches. Perhaps originalism follows from writtenness but not from a substantive libertarianism. In that case, Barnett would be forced to choose between his metaphysical and substantive commitments. My taxonomy cannot resolve such an internal conflict, but it should help to make constitutional theorists more alert to the possibility.

3. COMPREHENSIVE DISAGREEMENT

Still other theorists disagree at both the level of approach and foundation. For obvious reasons, I call these "comprehensive disagreements." Examples are easy to come by. Metaphysical originalists comprehensively disagree with substantive pragmatists who comprehensively disagree with procedural popular constitutionalists who comprehensively disagree with positivist common-law constitutionalists. In some sense, this category of disagreements is the least interesting and the one on which my taxonomy casts the least light. But recognizing the existence of this category and accurately identifying examples of it is still an important prerequisite to clear-headed theoretical analysis. The biggest risk of failing to do so is that theorists will end up talking past each other, assuming that they can productively discuss the merits of competing approaches to constitutional decision-making without recognizing that they are proceeding from incompatible premises. Theorists who disagree in this fashion might be able to make progress by shifting their discussion to the level of normative foundations. Alternatively, they might be able to make progress toward overlapping consensus or incompletely theorized agreement by examining the

180. Cf. Fallon, Jr., *supra* note 5, at 1236.

inferences connecting their preferred normative foundations to their preferred approaches. But whether or not such progress is possible, failing to recognize the comprehensive character of their disagreement is a recipe for confusion and wasted time. My taxonomy should help constitutional theorists avoid this intellectual quagmire.

B. Common Attractions and Limitations

The principal task of any taxonomy is to sort its objects into *useful* categories. In the context of constitutional theory, this means identifying similarities among apparently disparate arguments, theorists, or ideas that cast those arguments, theorists, and ideas in a new and helpful light. There are any number of ways in which this might be done. The taxonomy developed in this Article identifies categories of normative claims that not only have a common logical structure but also, by virtue of that structure, share characteristic attractions and limitations. Many of these attractions and limitations have been identified and ascribed to particular normative claims in isolation, but by grouping those claims together with other like claims, my taxonomy reveals that their attractions and limitations are not idiosyncratic. Rather, they are characteristic of a whole category of normative claims and attach to particular claims by virtue of their membership in that broader category. This insight is important for its own sake. It suggests that we can learn something new by conceiving of, say, metaphysical or procedural claims as a class, that we could not learn from analyzing individual claims of these types in isolation. It also suggests the possibility that apparently opposed theorists might profitably shift focus from their differences at the level of approach to the attractions and limitations their normative claims share in common.

The category of substantive claims is a good illustration. The approaches defended on substantive grounds are varied and conventionally conceived of as rivals or competitors—originalism, pragmatism, common-law constitutionalism, etc. By shifting the focus to the level of normative foundation, my taxonomy reveals that the substantive variants of each of these approaches have much in common. They squarely face up to the need to justify any approach to constitutional decision-making in political morality; they take account of consequences, to which many, probably most, theorists assign important normative weight; and they are not self-defeating in the manner of metaphysical arguments. On the other hand, they run the risk of collapsing constitutional theory into political morality. They also run the risk of bogging down constitutional theory in deeply contested questions of political morality, and, relatedly, they must respond to the challenge posed by the literature on law and disagreement. These common

attractions and limitations, however, come into focus only when we stop viewing these approaches as fundamentally rivalrous and shift our focus to their common normative foundations. This shift of focus, in turn, creates an opportunity for productive dialogue among substantive theorists of different stripes, particularly with respect to the common limitations and challenges that beset them all.

The same is true even of categories whose members are less likely to be seen as rivalrous. Originalist arguments from writtenness, interpretation, and the nature of law are commonly seen as family relations, in part because they are all invoked to support the same approach to constitutional decision-making. But recognizing these arguments as resting on the same fundamental type of normative foundation, one with its own characteristic attractions and limitations, reveals a deep structural similarity that goes well beyond the approach that these arguments are invoked to support. It also helps to distinguish the strengths and limitations of these arguments from those associated with other types of normative claims made in support of originalism. These distinguishing characteristics, in turn, highlight opportunities for dialogue and collaboration among the proponents of these arguments, especially with respect to their common limitations. The taxonomy makes this sort of analysis possible.

C. No Necessary Homology

Every approach to constitutional decision-making rests on some normative foundation, even if that foundation is confused or merely implicit. By distinguishing between approaches and foundations and organizing the latter into distinct categories, the taxonomy developed in this Article demonstrates that there is no necessary homology between the two. In other words, a normative foundation need not resemble the approach it is invoked to support and vice versa. A procedural normative claim like popular sovereignty can be invoked to support a non-procedural approach to constitutional decision-making like originalism. Conversely, a substantive normative claim like welfarism can be invoked to support a procedural approach to constitutional decision-making like Thayerism.

This insight has especially important application to categories of normative claims that have close cognates at the level of approach. Legal process approaches, for example, direct constitutional decision-makers to consider questions of institutional authority and, frequently, to defer to other institutions when deciding constitutional cases. This gives them more than a passing resemblance to procedural normative claims. Even their names are alike. Similarly, consequentialist and pragmatist approaches direct constitutional decision-makers to make decisions with

an eye to maximizing overall welfare. This gives them a strong resemblance to substantive normative claims—or at least to the welfarist subset of them. Unless we carefully distinguish between the levels of approach and normative foundations, it is all too easy to casually lump all “process theories” or “consequentialist theories” together.

This is a recipe for confusion. Many legal process approaches, like Ely’s representation-reinforcement, rest on democratic procedural foundations.¹⁸¹ But others, like Adrian Vermeule’s Thayerism¹⁸² or Neil Komesar’s comparative institutional analysis,¹⁸³ rest on substantive consequentialist foundations. These theories may well have some important features in common, but they are very far from interchangeable. It is especially important to recognize that, for better or worse, not all process theories are justified on democratic grounds. The reason is straightforward. The critiques of process-based approaches (e.g., that it is impossible to separate questions of procedure and substance in deciding constitutional cases) are different from the critiques of procedural normative claims (e.g., that social welfare, not procedural legitimacy, is the master criterion of political morality). The former applies to legal process approaches without regard to their normative foundations; the latter applies to procedural normative claims without regard to the approach they are invoked to support. The arguments in favor of these approaches and normative claims are also distinct.

The potential confusion surrounding consequentialist theories is somewhat different. The chief problem is not that consequentialist or pragmatist approaches rest with any frequency on nonconsequentialist or non-substantive foundations. It is theoretically possible to imagine non-substantive foundations for a consequentialist approach to constitutional decision-making, but I know of no theorist who defends a consequentialist approach on such a ground.¹⁸⁴ Instead, the risk is that consequentialist claims at the level of normative foundation will be casually assumed to translate into consequentialism at the level of approach.

As Part III is at pains to demonstrate, this is most definitely not the case. Consequentialist normative claims are sometimes invoked to support consequentialist approaches. But they are also invoked to support

181. See ELY, *supra* note 8, at 101–04.

182. See VERMEULE, *supra* note 7.

183. See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994).

184. As to theoretical possibility, I have in mind an argument that fallible judges will produce more democratically legitimate decisions or more accurately approximate original meaning (and thus positive law) by pursuing good consequences rather than pursuing either of these ends directly. Neither seems very plausible.

originalism and common-law constitutionalism, among other approaches. It is important to recognize this for the same reason it is important to recognize that not all legal process approaches rest on procedural foundations. The critiques of consequentialist approaches (e.g., that judges are institutionally ill-equipped to predict or evaluate the consequences of their decisions) are different from the critiques of substantive normative claims (e.g., that procedural legitimacy, not social welfare, is the master criterion of political morality). The arguments in favor of these approaches and normative claims are also distinct. The taxonomy developed in this Article should help to keep constitutional theorists alert to the possibility of such divergence between approaches and their normative foundation.

CONCLUSION

Constitutional theory has too long muddled through without a clear or systematic account of its own normative foundations. A close examination of those foundations reveals them to be far less diverse and far more orderly than the dizzying multitude of competing approaches to constitutional decision-making might suggest. At the same time, constitutional theorists are very far from having a single common conversation based on shared premises. To the contrary, as the taxonomy developed in this Article demonstrates, at least four distinct types of normative claims play an important role in contemporary theoretical debates. Each of these types has been invoked to support a wide range of approaches to constitutional decision-making. Each also has its own attractions and limitations. Constitutional theorists would do well to pay them greater attention.