

JUSTICE SOUTER'S COMMON LAW

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The first-year law-school curriculum aims to teach students the "common law method." But exactly what sort of judicial reasoning that method permits and requires has long been the subject of debate. There are multiple models of common law reasoning, not just one. This Article identifies one such model that legal scholars have yet to recognize as a distinct theory of common law adjudication. It is an approach I ascribe to former Justice David Souter.

Seeing Justice Souter as a common law judge is hardly novel; in fact, it is the conventional wisdom about him. But in my view, Souter's understanding of the process of case-by-case adjudication reflects deeper philosophical commitments—and, for that reason, carries with it more radical implication—than has been appreciated. To support this claim, I compare Souter's understanding of the common law to two better known rivals—Professor Ronald Dworkin's "law as integrity" and Judge Richard Posner's legal pragmatism. I then show how each of the three models flows from its own more general model of practical reasoning.

The upshot of this comparative analysis is a clearer view of a model of common law reasoning that combines elements of the other two but that rejects an assumption common to them both. Like Dworkin's, Souter's model sees legal principles embodied in case law; but like Posner's, it is empiricist and pragmatist in spirit. It can coherently combine these elements only because, unlike either of its rivals, Souter's model treats factual and evaluative forms of reasoning as continuous with each other, rather than dichotomous. In rejecting the fact/value dichotomy, Souter accords a much greater role to history in

* Professor of Law, University of Virginia. I would like to thank the following people for helpful comments and conversations on this and earlier drafts: Josh Bowers, Richmond Campbell, Noah Feldman, Deborah Hellman, Elijah Millgram, Dan Priel, Fred Schauer, Kenneth Winston, and participants in the University of Virginia Faculty Workshop. The origins of this article lie in a series of discussions about Justice Souter I had with Joel Johnson, who also directed me to some of the key sources I rely on throughout the article. I thus want to give a special thanks to Joel for those discussions and for his comments on this and earlier drafts.

common law reasoning than do either Posner or Dworkin. The result is an understanding of common law adjudication that is at once more traditional and more radical than either of its more famous counterparts. I examine that more radical dimension at play in some of Justice Souter's most famous and controversial opinions, including the joint opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey.

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[O]ur cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world.

- Justice David Souter¹

INTRODUCTION

It may be a virtue of the common law that courts and legal scholars have long disagreed about what its virtues are or whether it has any. If institutions must adapt in order to survive, the diversity of understandings as to what sort of reasoning the “common law method” requires and permits may be what has enabled it to endure for so long as a technique for adjusting legal doctrine over time. This Article is about one such understanding—one I ascribe to former Justice David Souter—that scholars have yet to recognize as a distinct and independent theory of common law adjudication.

Seeing Souter as a quintessential common law judge is hardly a novel idea; it is more or less the conventional wisdom about his jurisprudential approach while on the bench.² But Souter’s own particular interpretation

¹ Justice David H. Souter, Harvard Commencement Address (May 27, 2010), <http://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/> [<https://perma.cc/8Y62-CY3Z>].

² Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* 45 (2007) (“Like Harlan, Souter put his faith in the common law, the accumulated wisdom of judges and courts going back to the Middle Ages.”); *id.* at 245 (observing that Justice Harlan and Judge Hand were “judicial hero[es]” of Souter and suggesting that Souter’s description and praise of Hand’s style of jurisprudence—one marked by a “suspicion of easy cases, skepticism about clear-edged categories, modesty in the face of precedent, candor in playing one worthy principle against another, and the nerve to do it in concrete circumstances on an open page”—could be an “autobiography for David Souter”); Tinsley E. Yarbrough, *David Hackett Souter: Traditional Republican On The Rehnquist Court* 196 (2005) (“Souter considers judge-made law inevitable and largely defined through a balancing of competing societal and individual interests. But the force of precedent is also a major part of the common law tradition.”); Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 *N.Y.L. Sch. L. Rev.* 5, 10 (1991) (observing that “Justice Harlan exemplifies the type of judicial character that the common law model places at the center of the constitutional stage” and comparing Justice Souter to Harlan); Liang Kan, Note, *A Theory of Justice Souter*, 45 *Emory L.J.* 1373, 1383–84 (1996) (comparing Souter to Harlan and noting the latter’s role as a model for the former); see also *Nomination of then-Judge David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings*

of the common law tradition is philosophically deeper, and potentially more radical, than has been appreciated.³ His judicial philosophy flows from, and mutually reinforces, a distinctive model of practical reasoning. Put differently, Souter's particular view of common law adjudication fits with a more general view about what sorts of inferences are legitimate when deciding a case.⁴ That model of practical reasoning is controversial, so whether my analysis has the effect of bolstering Souter's approach or undermining it is an open question—and not one this Article answers. Instead, it sets itself to the prior analytical task of showing that Souter's interpretation of the common law method qualifies as its own discrete theory of adjudication worthy of a full hearing.

We may begin that task by first observing that the common law has long been understood to represent a “third way” between opposing theories of law and adjudication.⁵ Whereas the legal formalist insists that

Before the Senate Comm. on the Judiciary, 101st Cong. 140 (1990) (statement of David H. Souter) (“I think my best approach to the problem of how to keep from a totally undisciplined and totally nonobjective approach to the search for meaning is very much like what Justice Harlan described.”).

³ Since his retirement, some scholars have documented Souter's contributions to particular cases or lines of doctrine. See, e.g., Scott Dodson, Justice Souter and the Civil Rules, 88 Wash. U. L. Rev. 289, 290 (2010); Scott P. Johnson, The Judicial Career of Justice David H. Souter and His Impact on the Rights of Criminal Defendants, 13 Wyo. L. Rev. 263, 264 (2013) (criminal procedure); Rene Reyes, Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience, 43 Conn. L. Rev. 303, 306 (2010); Lisa M. Slepnickoff, A Bigger and Better Market-Participant Exception?: Examining Justice Souter's Revision of the Market-Participant Exception to the Dormant Commerce Clause in *Department of Revenue of Kentucky v. Davis*, 55 S.D. L. Rev. 356, 357 (2010). But none has attempted to offer an account of his overall jurisprudential vision. For earlier efforts to do so, see Tinsley E. Yarbrough, David Hackett Souter: Traditional Republican on the Rehnquist Court (2005); Kan, *supra* note 2.

⁴ See Elijah Millgram, Practical Reasoning: The Current State of Play, in *Varieties of Practical Reasoning 2* (Elijah Millgram ed., 2001) (describing debates about practical reasoning as ones about “what inference patterns are legitimate methods of arriving at decisions”). Such debates differ from substantive disputes in moral theory, such as that between deontological and consequentialist theories. But the two are related. As Millgram puts it, “since a moral theory is (very roughly) a theory about what one should do, and a theory of practical reasoning is a theory of how to figure out what to do, the two kinds of theories are related as a theory of product to a theory of *process*.” *Id.* at 1 (emphasis added).

⁵ Gerald J. Postema, Philosophy of the Common Law, in *The Oxford Handbook of Jurisprudence and Philosophy of Law* 599 (Jules Coleman and Scott Shapiro eds., 2002) (“The common law conception, I think, represents a view of law that is in important respects incompatible with both orthodox natural law thought and with orthodox legal positivism. It

judges be constrained by clear rules, and the pure functionalist argues that judges should be free to decide cases according to their best all-things-considered judgment, the common lawyer charts a middle course: judges are properly constrained by legal materials (in the form of past cases) yet also justifiably retain a certain degree of freedom to reinterpret those materials (by narrowing rules and distinguishing cases) in order to do justice to the parties or to develop the relevant doctrine.⁶

Even among those who embrace the common law model of adjudication, however, views vary. Consider, for instance, the views of Judge Richard Posner and Professor Ronald Dworkin.⁷ Both Posner and Dworkin articulate and defend a common law model of adjudication that rejects a narrow rule-formalism.⁸ But there the similarities end.⁹ Posner considers legal indeterminacy to be a pervasive phenomenon; Dworkin defends the “right-answer” thesis.¹⁰ Posner thinks judges should be free to make policy in the interstices of law; Dworkin thinks they are constrained by the demands of principle or “integrity.”¹¹ Posner downplays the value of general principles, such as fairness or equality, which he considers too vague to do much work in guiding judicial decision making; Dworkin sees them as arguably the judge’s most important guides.¹² Finally, for Posner, history serves primarily a critical function by showing how a particular doctrine was designed to satisfy

represents a distinctive approach to understanding the nature of law and legal reasoning, a third way of conceptualizing the phenomena of modern law.”).

⁶ This process is sometimes referred to as the “artificial reason” of the common law. See Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 *Oxford U. Commonwealth L.J.* 1, 10 (2003) (explaining that the common law was understood to be a forum of “artificial reason” where that term conveyed “the sense of being the product of reflective practical experience, as opposed to untutored individual intuition or a natural capacity for deductive reasoning exercised in abstraction from the concrete details of ordinary life”); Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 *Tex. L. Rev.* 35, 39 (1981) (“It is my thesis that the elaboration of these principles cannot sensibly be viewed as an exercise in either economics or moral philosophy. Rather, this has been a legal development, one which has taken place according to what Lord Coke called ‘the artificial Reason’ of the law.”).

⁷ See, e.g., Ronald Dworkin, *Law’s Empire* (1986); Richard A. Posner, *Law, Pragmatism and Democracy* (2003).

⁸ See *infra* Part I.

⁹ Well, not exactly. As I argue below, Posner and Dworkin share the view that reasoning about facts is crucially different from reasoning about values. See *infra* Part II.

¹⁰ See *infra* Part I.

¹¹ See *infra* Part I.

¹² See *infra* Part I.

some social need no longer pressing; for Dworkin, such historical explanations are unhelpful for, if not irrelevant to, the judge's task.¹³

Posner and Dworkin's approaches each represent a different branch of the common law tradition. Posner is the hard-headed legal realist, who takes the world as it really is, embraces scientific methods, and has little patience for vague, woolly-headed notions that do little except induce emotional responses. Dworkin is the romantic idealist who maintains a faith in the existence of moral principles and the power of philosophical reasoning to enable people (including judges) to apply them in the actual world.¹⁴ One seeks to "disenchant" the legal world, the other to "re-enchant" it.¹⁵ The Legal Realist versus the Legal Process theorist.¹⁶

The contrasts drawn are increasingly like caricatures, but they help to frame the analysis of Souter's judicial philosophy that follows. My claim, in short, is that Souter attempts to forge yet another "third way" within the common law model of adjudication (itself a third way, as just noted) between the poles Dworkin and Posner represent. His approach is one that seeks to draw insights from legal realism *and* legal-process theory and aims to reconcile the conflicting demands of moral philosophy *and* history—justification *and* explanation—in judicial reasoning. It does so not simply by combining the two views into an incoherent muddle but rather by staking out a distinctive understanding of the common law that rejects a philosophical assumption common to

¹³ See *infra* Part I.

¹⁴ Cf. Brian Leiter, In Praise of Realism (and Against "Nonsense" Jurisprudence), 100 *Geo. L.J.* 865, 867 (2012) (characterizing the dispute between Dworkin and Posner as "a dispute between Moralists and Realists, between those whose starting point is a theory of how things (morally) ought to be versus those who begin with a theory of how things really are").

¹⁵ Compare Yishai Blank, The Reenchantment of Law, 96 *Corn. L. Rev.* 633, 658 (2011) (citing Posner as one, among many, who was "busily disenchanting the judiciary" by stripping judges of "charismatic or traditional authority" and instead looked to "extralegal knowledge (law and economics and other law and social studies)") with *id.* at 660 (suggesting that "much of Dworkin's enterprise could be characterized as reenchanting the legal field, not so much because it reconstructs the field such to legitimate, justify, and stabilize it, but because Dworkin's law almost replaces religion in the modern world").

¹⁶ Compare Leiter, *supra* note 14, at 872 (characterizing Posner as a realist who "strip[s] away the obfuscating doctrinal rationales judges offer to identify the real, nonlegal considerations influencing the decisions") with Vincent A. Wellman, Dworkin and the Legal Process Tradition: The Legacy of Hart & Sacks, 29 *Ariz. L. Rev.* 413, 414 (1987) (arguing that many of Dworkin's jurisprudential themes, including the distinction between policies and principles in adjudication, can be found in the Hart and Sacks teaching materials).

the other two: although Posner and Dworkin disagree fiercely about the proper role of moral philosophy in adjudication, they agree that reasoning about values differs critically from reasoning about facts.¹⁷ It is that assumption that Souter's approach challenges.

Challenging the so-called "fact-value dichotomy" is not uncontroversial.¹⁸ But that is just the point. Beneath Souter's old-fashioned personal and judicial style lay a provocative theory of human rationality.¹⁹ That theory both reinforces, and was reinforced by, his own interpretation of the common law tradition. It may well underlie the understandings of other judges and scholars, who also straddle the two branches of the tradition. It is hard to know because few legal theorists (let alone judges) speak to fundamental metaphysical and epistemological questions. But if it does underlie others' views, that fact would make the goal of rendering explicit the philosophical assumptions and implications of Souter's judicial philosophy all the more worth pursuing.

Achieving that goal is no trivial task because Souter has not (or not yet) laid out his views as a full "theory" of adjudication. But toward the end of his tenure on the Supreme Court, and in the years following, he gave several speeches and presentations in which he articulated his vision of the judicial role.²⁰ The views expounded there initially seem reasonable, if relatively conventional. Yet after scratching the surface, one begins to see a deeper, more unified, and more interesting theory of adjudication lurking beneath. That conclusion is even harder to resist

¹⁷ See *infra* Part II.

¹⁸ Nor is the rejection of it idiosyncratic. Philosophers, particularly in the pragmatist tradition, have often criticized the dichotomy. See, e.g., Hilary Putnam, *The Collapse of the Fact/Value Dichotomy and other Essays* 1–2 (2002); *Facts and Values: The Ethics and Metaphysics of Normativity* 2 (Giancarlo Marchetti & Sarin Marchetti eds., 2017) (collecting essays critical of the distinction, drawing on three traditions of thought, "pragmatism, critical theory and analytic philosophy"); see also Elijah Millgram, *Practical Induction* 1 (1997); Iris Murdoch, *The Sovereignty of Good* 1–2 (1970).

¹⁹ See Toobin, *supra* note 2, at 43 (observing that Souter had the "habits of a gentleman from another century," such as writing with a fountain pen and reading briefs in the sunlight).

²⁰ Souter, *Commencement*, *supra* note 1; Souter, *Constitution Day at Harvard*, Interview with Professor Feldman at 16 min (September 17, 2009), <http://www.c-span.org/video/?288993-2/former-justice-souter-constitution> [<https://perma.cc/5SGQ-5K8P>] [hereinafter Souter & Feldman]; Souter, *Conference on Humanities in Civil Society* at 25 min (March 9, 2009), <http://www.c-span.org/video/?284498-1/humanities-civil-society> [<https://perma.cc/3WCW-G6MB>] [hereinafter Souter, Humanities].

when those comments are read in light of a few of his most controversial judicial opinions, to which his later comments sometimes make oblique reference.²¹

In relying mainly on Souter's extra-judicial comments and just a handful of his published opinions, this Article's argument is vulnerable to the objection that in the mine run of cases, Souter's decisions are inconsistent with the theory I ascribe to him.²² I do not think that is true, but I do not defend that descriptive claim here because my thesis does not, strictly speaking, depend on its truth. My aim is to answer the *analytical* question of whether Souter has developed, over the course of his career on the Supreme Court and after, a distinct and coherent understanding of common law adjudication.

My argument that he has done so begins in Part I. This Part sets out in more detail the views of Posner and Dworkin on adjudication, and then compares them both to Souter's view. It focuses specifically on the different roles each theorist envisions moral principles and history playing in common law adjudication. Dworkin and Posner are not, of course, the only important theorists of Anglo-American-style adjudication. But they serve as useful foils in part because their views

²¹ The opinions I have in mind, discussed below, are his opinion for the Court in *Old Chief v. United States*, 519 U.S. 172 (1997), see *infra* Part II; his dissent in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), see *infra* Part III; and the joint opinion (co-authored with Justices O'Connor and Kennedy) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), see *infra* Part III. Toobin reports that Justice Souter was responsible for the portion of the *Casey* joint opinion dealing with stare decisis, which is the part of the argument relevant to my interpretation. Toobin, *supra* note 2, at 54 ("Souter would write next, about the importance of stare decisis, and O'Connor would write the final section, explaining why the spousal notification provision of the Pennsylvania law had to be struck down."). See also Yarbrough, *supra* note 2, at 177 ("In an important portion of the joint opinion, primarily drafted by Justice Souter, the trio concluded that principles of stare decisis counseled against *Roe*'s reversal."). That conclusion is further supported by the main argument of this Article, which shows the way in which *Casey*'s stare-decisis analysis coheres with Souter's other statements, both on and off the Court.

²² The method is not unlike those who seek to understand the nature of law by focusing on the sorts of "hard" cases that reach the Supreme Court, premised on the idea that those cases require judges to make explicit what is sometimes left unsaid. See, e.g., Dworkin, *Empire*, *supra* note 7, at 15-30 (discussing four cases to illustrate general points about the nature of law and adjudication). But see Frederick Schauer, *Easy Cases*, 58 S. Cal. L. Rev. 399, 407 (1985) (criticizing the tendency of constitutional theorists to focus on hard cases and arguing that we learn much about the function the Constitution serves by looking instead at easy cases).

are well known and in part because each writer is unusually explicit in explaining the philosophical grounds of his approach.²³

Part II then examines in more detail those philosophical understandings. It distinguishes among three different models of practical reasoning, each of which is embraced by Posner, Dworkin, and Souter, respectively. Posner endorses an instrumentalist model of reasoning; Dworkin adopts a view he calls “value holism;” and Souter embraces what I call “holistic pragmatism.”²⁴ Justifying my attribution of this last model to Souter—which sees judgments of facts and judgments of value as interdependent on one another—will require an excursion into some intellectual history, taking us all the way back to Souter’s undergraduate thesis. We will then be ready to explain how Souter’s understanding of practical reasoning informs his understanding of the nature and function of common law adjudication.

Part III delivers that explanation. Briefly put, Souter’s holistic pragmatism underlies (1) his adoption of what he calls a “historical way of looking at the world,” (2) his particular model of common law reasoning, and (3) the relationship between the two. The result is a model of common law reasoning that is both more traditional and more radical than the two rival models considered. It is more traditional because it analogizes the judge who draws out rules from cases to that of the scientist who develops theories based on her observations;²⁵ it is more radical because, by taking that analogy seriously, it seems to authorize courts to look beyond legal doctrine to the actual *historical* explanations of their own past decisions.

Souter’s model, which sees history itself as a form of practical reasoning, follows Dworkin in valuing integrity as a legal ideal. But it shares with Posner a skepticism about the capacity of principles to dictate clear results in particular cases. This seemingly paradoxical

²³ For less explicit examples, see David A. Strauss, *The Living Constitution* 3 (2010) (laying out a theory of constitutional adjudication based on the common law but not digging into any of the epistemological and metaphysical questions discussed below); Stephen Breyer, *Making Our Democracy Work: A Judge’s View* 82 (2010) (endorsing a view of adjudication Breyer describes as “pragmatist” without taking on any of the philosophical questions discussed below).

²⁴ The label comes from Morton White, *A Philosophy of Culture: The Scope of Holistic Pragmatism* 77 (2002), for reasons which will become apparent. See *infra* note 164.

²⁵ This was once a more common view. See Charles L. Barzun, Note, *Common Sense and Legal Science*, 90 Va. L. Rev. 1051 (2004).

combination of views explains some of Souter's best-known opinions, including his joint opinion's controversial justification for upholding *Roe v. Wade* in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁶ More surprisingly, it suggests why the *Casey* opinion may have envisioned its own future overruling.

In a brief conclusion, I sum up what I take to be Souter's contribution to the common law tradition. He offers a twist on the old idea that the common law judge seeks to reconcile antinomies or opposing values.²⁷ Souter shows that she must also aim to reconcile competing epistemological perspectives—one historical, the other philosophical—on legal doctrine and principles. If we understand Souter in this way, it may also go some distance in explaining why he so maddened both conservative and liberal judicial activists for years.²⁸

Before commencing, though, a brief methodological caveat is in order, which I hope will help frame the inquiry and forestall certain objections. In claiming that the models of common law reasoning discussed below derive from deeper models of practical reasoning, I follow a well-worn path of legal philosophers who have based their analyses of law's nature in terms of its role in practical reasoning.²⁹ But I make no claims about the nature of law and mostly ignore the jurisprudential literature focused on that question. Nor do I intervene in the more concrete debates over constitutional theory.

Many of Souter's comments about, or applications of, the common law method of adjudication arise in the context of constitutional law

²⁶ *Casey*, 505 U.S. at 846; *Roe v. Wade*, 410 U.S. 113 (1973).

²⁷ See, e.g., Benjamin N. Cardozo, *The Paradoxes of Legal Science* (1928), reprinted in *Selected Writings of Benjamin Nathan Cardozo* 251, 254 (Margaret E. Hall ed., 1947) ("The reconciliation of the irreconcilable, the merger of antitheses, the synthesis of opposites, these are the great problems of the law We have the claims of stability to be harmonized with those of progress. We are to reconcile liberty with equality, and both of them with order."); Lon L. Fuller, *Reason and Fiat in Case Law*, 59 *Harv. L. Rev.* 376, 377 (1946) (discussing the "antinomy of reason and fiat as it affects case law" and arguing "that it is better to accept frankly a state of unresolved conflict or tension in our reasoning than to purchase consistency at the cost of needed premises").

²⁸ See *infra* note 297.

²⁹ See, e.g., John Finnis, *Natural Law and Natural Rights* 18 (1980) (developing a theory of natural law based on principles of practical reason); Joseph Raz, *Practical Reason and Norms* 15–35 (1990) (offering an account of the nature of reasons and using it to ground a positivist theory of law); Scott Shapiro, *Legality* 118–20 (2011) (using a theory of practical reasoning in which plans figure centrally to explain the positivist nature of law).

where the use of the common law method remains controversial.³⁰ As a result, the view I ascribe to Souter is open to the objection that it fails to constrain judges adequately, is inconsistent with democratic theory, or both.³¹ Combining the two sorts of objections, the view offered here may be accused of failing to treat the original Constitution as a binding source of “law.”³² And yet, once again, I do not address that question or intervene in the relevant debates.³³

My justification for these omissions is that my goal here is very specifically to trace out the differences among three models of common law reasoning, which are in some ways quite similar, both substantively and methodologically. All three of the jurists are broadly anti-formalist in their substantive judicial approach, downplaying the imperative to constrain judges through formal rules. Perhaps relatedly, none of them understands his defense of that approach to depend on a prior conceptual

³⁰ For discussions of the role of common law reasoning or *stare decisis* in the constitutional context, see Richard H. Fallon Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. Rev. 1107 (2008); John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 Duke L.J. 503, 504 (2000); Deborah Hellman, *The Importance of Appearing Principled*, 37 Ariz. L. Rev. 1107, 1108 (1995); John O. McGinnis and Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. Rev. 803 (2009); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723 (1988); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 Va. L. Rev. 1, 3 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of *Roe* and *Casey*?*, 109 Yale L.J. 1535, 1537 (2000); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 Tex. L. Rev. 929, 930–40 (2008).

³¹ For a classic statement of such concerns, see Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 9–14 (1997). For a more recent restatement, see Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L. Rev. 1 (2015).

³² This suggestion is made by those who call for a “positive turn” in constitutional theory. In their view, such a turn leads to originalism. See William Baude, *Is Originalism Our Law?*, 115 Colum. L. Rev. 2349, 2351 (2015) (“We ought to ask: Is originalism our law? If not, what is? This question has been called ‘one of the two most difficult questions in legal philosophy.’ But if it can be answered, it has the potential to reorient the debates and allow both sides to move forward. This move is the ‘positive turn.’” (internal citation omitted)); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 Harv. J.L. & Pub. Pol’y 817, 819 (2015) (“This inquiry points the way toward what we could call ‘positive’ defenses—claims that originalism, as a matter of social fact and legal practice, is actually endorsed by our positive law.”).

³³ I have done so elsewhere. See Charles L. Barzun, *The Positive U-Turn*, 69 Stan. L. Rev. 1323 (2017).

analysis of the nature of law.³⁴ Of course, those methodological assumptions and views of the judicial role may be mistaken (or misapplied, say, to the constitutional context). If so, they pose as much of a problem for Dworkin and Posner as for Souter. For the purposes of my analysis, I accept them as common assumptions so that we may better attend to the still-important and salient differences among the three models.

I. THREE MODELS OF COMMON LAW REASONING

Let us first sketch those three models. The purpose here is, first, to see the way in which Posner and Dworkin offer quite different and competing accounts of how judges do and ought to decide cases. Doing so will reveal how Souter's approach combines elements of both. To repeat: Posner's and Dworkin's approaches are hardly the only theories of common law adjudication. But they are famous, they are well argued for, and they effectively stand in for broader traditions of thought.³⁵

First, though, I should clarify what I mean by "models of common law reasoning." Each of these accounts is an abstract description of the kinds of materials, methods, and values on which judges properly rely when deciding cases in an Anglo-American system of law in which previous court decisions constitute a primary, even if not exclusive, source of law. Again, I must put aside the question of whether the common law model is the proper one in the constitutional context in

³⁴ Richard A. Posner, *The Problematics of Moral and Legal Theory*, 111 *Harv. L. Rev.* 1637, 1653 (1998) (criticizing the way in which debates about the nature of law are framed in universalist terms). Dworkin does offer an account of the nature of law, but for him it is bound up with his normative vision of how judges should decide cases (the issue I take up in this Article). See Dworkin, *Empire*, *supra* note 7, at 111 (criticizing philosophies of law for being "mainly about the [metaphysical] grounds [of law] and almost silent about the [normative] force of law" and so instead offering a full political theory of law). Once again, the methodological shift is familiar to common lawyers. See Postema, *Philosophy*, *supra* note 5, at 601 ("Common law conventionalism shifts theoretical attention from laws—the authoritative directives produced by lawmaking institutions—to the process of practical reasoning with and within law.").

³⁵ Also, the same caveat mentioned above in reference to Souter's overall career applies to my treatments of Posner's and Dworkin's views: both jurists have written a great deal over the years, and their views may have changed. I have drawn from the works in which they give the most explicit attention to the issues discussed, but in any case, I am more concerned with distinguishing among analytically distinct models of reasoning than with ensuring that I offer the best overall account of the theorist's views.

order to better distinguish among three rival accounts of anti-formalist, common law judging.

A. Judge Posner and Legal Pragmatism

Judge Posner's legal pragmatism is based on what he calls "everyday pragmatism," which he describes as a mood or intellectual sensibility that is "practical and businesslike."³⁶ The pragmatist judge is concerned primarily with the concrete consequences of his decisions rather than their formal justification.³⁷ Such consequences include the "systemic consequences" of a decision, which may count in favor of adhering to a formal rule in a given case. But situations in which such systemic consequences control a decision are relatively rare; case-specific considerations typically dominate.³⁸ And precisely because he is aware that his decision is based on the local, particular circumstances of the case, the pragmatist judge should strive to make narrow decisions rather than broad ones.³⁹ Above all, he should strive to make his decisions "reasonable."⁴⁰

Legal pragmatism is also empiricist in spirit. Although, as we will see, Posner takes pains to deny that his form of judicial pragmatism depends in any significant way on philosophical pragmatism, it shares with philosophical pragmatism a trust in concrete experience and a distrust of "abstract theory and intellectual pretensions."⁴¹ It thus embraces theory insofar as it enables judges to better predict the consequences of their decisions—Posner particularly has in mind economic theory—but it is "contemptuous of moralizers and utopian dreamers."⁴² Specifically, Posner holds in low esteem judges who invoke abstractions such as "fairness, justice, autonomy, and equality" as the basis of their decisions.⁴³ Posner elaborates this point in a passage worth quoting in full:

³⁶ Posner, *Law, Pragmatism*, *supra* note 7, at 49–50.

³⁷ *Id.* at 52 ("The everyday pragmatist uses common sense to resolve problems, the pragmatist philosopher explains why this is a sensible procedure.").

³⁸ *Id.* at 59.

³⁹ *Id.* at 60.

⁴⁰ *Id.* at 59.

⁴¹ *Id.* at 59, 60, 52 (discussing abstract theory, empiricism, and independence).

⁴² *Id.* at 50, 78 (moralizers, economics).

⁴³ *Id.* at 79.

Pragmatists think that if the constitutional issue is, say, whether the children of nonnaturalized immigrants should be entitled to a free public education, or whether per-pupil expenditures on public school education should be equalized across school districts, or whether prayer should be allowed in public schools, the constitutional lawyer should study education, immigration, public finance, and religion rather than inhale the intoxicating vapors of constitutional theory the better to manipulate empty slogans (such as “the wall of separation [between church and state]” and question-begging vacuities (such as “equality” and “fundamental rights”). What sensible person would be guided in such difficult, contentious and fact-laden matters by a philosopher or his law-professor knock-off?⁴⁴

In other words, better to attend to the particular social, political, or economic circumstances in which the cases arise than to seek guidance in vague ideals.

Posner’s skepticism as to the capacity of such abstract ideals to determine case outcomes helps explain the proper role of history for the pragmatist judge. According to Posner, legal pragmatism is “historicist” in that it tends “to seek explanations for beliefs in their historical circumstances.”⁴⁵ This attitude is reflected in Holmes’s famous dictum that “the life of the law has not been logic; it has been experience.”⁴⁶ Holmes understood that the content of law was mostly shaped by a society’s particular needs at a given time. Such a recognition was for Holmes (and remains for Posner) an antidote to the formalist myth that law is an “autotelic body of thought.”⁴⁷

Posner thus denies that judges owe a special duty of fidelity to past case law or any principles it may be said to embody. Instead, the pragmatist judge regards “adherence to past decisions as a (qualified) necessity rather than as an ethical duty.”⁴⁸ The past “is a repository of

⁴⁴ *Id.* at 79–80.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 57 (quoting Oliver Wendell Holmes, Jr., *The Common Law* 1 (1881)).

⁴⁷ *Id.* at 57–58. See also Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 *U. Chi. L. Rev.* 573, 583–88 (2000) (discussing Holmes’s understanding of history at greater length).

⁴⁸ Posner, *Law, Pragmatism*, *supra* note 7, at 60.

useful information, but it has no claims on us.”⁴⁹ Instead, whether it has any value for the pragmatist judge depends entirely on the consequences of making use of it “for now and the future.”⁵⁰ In short, for Posner, the function history serves is primarily a critical one: it recognizes “the extent to which particular legal doctrines may be historical vestiges rather than timeless truths.”⁵¹

B. Dworkin and Law-as-Integrity

Dworkin offers a very different vision of the common law judge's role and responsibilities. In fact, in *Law's Empire*, his most elaborate statement of his jurisprudential views, Dworkin frames his own account as an alternative to a model of law and adjudication similar to the one just described.⁵² Dworkin describes a “pragmatist” conception of law, which, like Posner's legal pragmatism, does not count “consistency with the past as valuable for its own sake.”⁵³ Dworkin thus sets himself the task of explaining why judges do have a duty to ensure such consistency. He seeks to offer an account of why the government's coercive force may only be justifiably deployed when doing so is consistent with the “individual rights and responsibilities flowing from past political decisions.”⁵⁴

Dworkin's answer is a vision of law and adjudication he calls “law as integrity.” According to this view, the source of a judge's duty to maintain some consistency with past decisions is best understood as reflecting the commitment to treat citizens equally.⁵⁵ Such equality, however, requires not merely equal treatment according to rights explicitly provided for in those earlier decisions; it also requires equal

⁴⁹ Id. at 6. In a recent interview, Judge Posner was more blunt: “I don't like that old stuff, I don't like looking backwards.” Book TV: Richard Posner (C-SPAN2 Oct. 4, 2016), at 24–25 min, <https://www.c-span.org/video/?415557-1/william-domnarski-discusses-richard-posner> [<https://perma.cc/4R9F-E7VH>].

⁵⁰ Posner, *Law, Pragmatism*, supra note 7, at 6.

⁵¹ Id. at 72.

⁵² Dworkin, *Empire*, supra note 7, at 151–75 (Ch. 5: “Pragmatism and Personification”). Dworkin also offers law-as-integrity as an alternative to a view he calls “conventionalism.” See id. at 114–50 (Ch. 4: “Conventionalism”).

⁵³ Id. at 95.

⁵⁴ Id. at 93.

⁵⁵ Id. at 95–96.

treatment according to “the principles of personal and political morality the explicit decisions presuppose by way of justification.”⁵⁶

A judge practicing law-as-integrity is, according to Dworkin, more constrained than Posner’s pragmatist judge. Whereas the latter may base her decision on whatever considerations bear on making a “reasonable” outcome, Dworkin’s ideal judge—one whom he famously dubs “Hercules”—does not consider himself free to make such all-things-considered determinations.⁵⁷ Instead, Hercules sees himself as constrained by a demand to make his decisions both “fit” the relevant legal materials and offer the best justification of those materials according to the moral principles they embody.⁵⁸

Dworkin recognizes that the law contains multiple principles, so that it may not always be clear in a given case which one should be given priority over another. But he denies that this fact warrants the skeptical conclusion that the law is thereby rendered deeply incoherent. Rather, it just requires the court to make a judgment about which principle better fits and justifies the relevant legal materials. So, whereas Posner sees principles as being essentially vacuous and hence incapable of guiding judicial decision-making, Dworkin thinks judges can and should treat them as carrying genuine normative force even when multiple principles apply to a particular case.⁵⁹

Dworkin also disagrees with Posner about the proper role of history. Indeed, history matters for Dworkin in nearly the opposite way as it does for Posner. As we saw, Posner’s use of history is almost exclusively critical. It can show us that some legal doctrine takes the form and substance it does because it reflects, in Holmes’s words, “the assumptions of a dominant class.”⁶⁰ Dworkin, though, sees such

⁵⁶ Id. at 96.

⁵⁷ Id. at 239.

⁵⁸ Id. at 230–31. Dworkin frames law-as-integrity as a claim about what law is—or, as he puts it, as a “conception” of law. For that reason, whether the principles justifying Hercules’s decisions are moral or legal in nature matters a great deal for debates about the nature of law. For Dworkin, they are moral principles, which is why his account counts as a denial of legal positivism. But to repeat the point made in the Introduction, I take no stand here on that question, so not much hangs on whether we understand principles in the law as moral or legal or both.

⁵⁹ Id. at 269.

⁶⁰ Oliver Wendell Holmes, *The Path of the Law*, 1 *Boston L. Sch. Mag.*, Feb. 1897, at 1, 10.

debunking efforts as deeply misguided. The reason is that judges are not concerned with questions of causal *explanation* at all. The judge's interest is "practical," rather than "historical."⁶¹ He seeks "arguments about which [legal] claims are sound and why," rather than arguments about "how history and economics have shaped their consciousness."⁶² Dworkin thus takes to task those critical legal historians who "describe law genetically by tracing different pieces of legal doctrine back to the interests and ideologies that originally placed each in the law or molded or retrained it." Such efforts to undermine legal doctrine by pointing to the causes that shaped it reflect, according to Dworkin, "a serious misunderstanding of the kind of argument necessary to establish a skeptical position: the argument must be interpretive rather than historical."⁶³ For Dworkin, an "interpretive" argument is one that tries to *justify*, not explain, the relevant legal doctrines and practices.⁶⁴

C. Justice Souter and . . . What?

Justice Souter's understanding of the common law method combines elements of each of the two views just described. Like Dworkin, Souter thinks a court should strive for principled decision-making, even when there are competing principles in the law. But like Posner, he characterizes his own judicial philosophy as "pragmatist" and "empirical," emphasizing the importance of "facts." At the same time, though, Souter affords a role to history that is quite unlike either of the other two.

While on the bench, Souter offered his most explicit articulation of the common law method in his separate opinion in *Washington v. Glucksberg*.⁶⁵ In concurring with the Court's decision to uphold Washington's ban on assisted suicide, Souter discussed at length Justice Harlan's famous dissent in *Poe v. Ullman*, which, according to Souter, described well how the Court should conduct judicial review under the

⁶¹ Dworkin, *Empire*, supra note 7, at 13.

⁶² *Id.*

⁶³ *Id.* at 273. Dworkin later seems to withdraw the charge of confusion. See Ronald Dworkin, *Justice for Hedgehogs*, 144, 452 n.35 (2011) (referring to this earlier interpretation as "uncharitable"). I discuss this shift below. See *infra* note 251.

⁶⁴ Dworkin, *Empire*, supra note 7, at 66.

⁶⁵ 521 U.S. 702, 752 (1997) (Souter, J., concurring in the judgement).

due-process clause.⁶⁶ Harlan had emphasized that when exercising such power, the judge must appreciate the “balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”⁶⁷ The process of decision-making requires the judge “to assess the relative ‘weights’ or dignities of the contending interests, and to this extent the judicial method is familiar to the common law.”⁶⁸ And when making such judgments, common law courts tend to be suspicious of “all-or-nothing analysis” pitched at a high level of abstraction.⁶⁹ Instead, they should proceed slowly and carefully, “seeking to understand old principles afresh by new examples and new counterexamples.”⁷⁰

Souter elaborated on this understanding of the common law after his retirement in speeches and public discussions. For instance, in an interview with Professor Noah Feldman on the occasion of “Constitution Day” at Harvard University, Souter discussed his own judicial philosophy at some length, describing it as a form of “pragmatism.” He first clarified that by this term he did not mean to describe a view that authorized judges to decide the case “on a kind of functional ground that gets me to whatever that better answer is,” which he considered “essentially antithetical to what we like to call principled judicial decision-making.”⁷¹ Instead, his view embraced two different sorts of pragmatism, one of which was “essentially the common law” method of reasoning, as exemplified by Judge Learned Hand, Justice John Marshall Harlan II, and others.⁷² It is one that proceeds to reason from the “bottom-up” rather than “top-down,” because it recognizes that for every principle that cuts in favor of one outcome, there is often another that cuts the other way.⁷³ So it issues the following sort of directive to

⁶⁶ See *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting); *Glucksberg*, 521 U.S. at 764–65.

⁶⁷ *Glucksberg*, 521 U.S. at 765 (quoting *Poe*, 367 U.S. at 543 (Harlan, J., dissenting)).

⁶⁸ *Id.* at 767. Souter goes on to qualify this point by noting that such weighing is only the first step of the analysis. Since the judge must not usurp legislative power, the Court is only authorized to strike an act down “when the legislation’s justifying principle, critically valued, is so far from being commensurate with the individual interest as to be arbitrarily or pointlessly applied that the statute must give way.” *Id.* at 768.

⁶⁹ *Id.* at 770.

⁷⁰ *Id.*

⁷¹ Souter, Feldman, *supra* note 20, at 16–18 min.

⁷² We will return to Souter’s other meaning of pragmatism in Part II.

⁷³ Souter, Feldman, *supra* note 20, at 19–21 min.

judges: "Have great respect for fact because your first job is to decide the case, not to embody principles . . . make sure you are being honest in your assessment and your respect for the facts first."⁷⁴ For this reason, it is a "go-slow" approach that is "accretionary" in its attitude towards legal change.⁷⁵

Underlying Souter's bottom-up, go-slow approach of the common law is a humility born of his particular understanding of history and the judge's role in it. History is important because it reminds us of the limitations on, and partiality of, all human knowledge, including that of judges. In an address Souter delivered as part of a conference entitled "The Humanities in a Civil Society" in 2009, he gave a brief explanation of what he called a "sense of history" or an "historical way of looking at the world."⁷⁶ There he drew on the transition from *Plessy v. Ferguson*⁷⁷ to *Brown v. Board of Education*⁷⁸ in order to explain how dramatic constitutional understandings could change (and have) over time. We need not conclude from such dramatic shifts, Souter explained, that the *Plessy* Justices were deeply immoral or "psychologically obtuse" if we understand the historical context in which they lived.⁷⁹ It was a period of intense racism, but that racism "was abetted by quite serious claims to scientific support."⁸⁰ The case was also decided after Reconstruction, when the Court's power to enforce its own judgments was relatively weak. Contrast that with 1954, by which time the racist science of the *Plessy* era had been discredited, the Justices themselves had witnessed the rise and fall of Nazism, and the Court was institutionally much stronger.⁸¹

The phenomenon is a general one, according to Souter. Later judges may come to "see things that earlier judges did not see" because what a judge perceives depends "on the common experience that he assimilates and brings with him to the bench."⁸² And yet judges are not very good at seeing how their own perceptions are shaped by the society in which

⁷⁴ Id. at 20–21 min.

⁷⁵ Id. at 24–26 min.

⁷⁶ Souter, Humanities, supra note 20, at 23–37 min.

⁷⁷ 163 U.S. 537 (1896).

⁷⁸ 347 U.S. 483 (1954).

⁷⁹ Souter, Humanities, supra note 20, at 30–32 min.

⁸⁰ Id. at 31–32 min.

⁸¹ Id. at 32–33 min.

⁸² Id. at 24–26 min.

they live or, therefore, why they might view something so differently than did their predecessors. That is why historians are needed.⁸³

In Souter's commencement address at Harvard, delivered the following year, he made clear how such a "sense of history" informed his own judicial philosophy.⁸⁴ There Souter criticized what he called the "fair reading" model of constitutional interpretation, according to which judges need only make a fair reading of the relevant constitutional provision and then simply apply the rule contained in that provision to facts viewed "objectively."⁸⁵ The problem with that view was that it failed to recognize the extent to which the "meaning" of the facts relevant to constitutional analysis change over time. Again, he looked to *Brown*: The *Brown* Court "found a meaning in segregating the races by law that the majority of their predecessors in 1896 did not see."⁸⁶

The upshot, for Souter, was that the judge must be comfortable with living in uncertainty. He concluded his speech by acknowledging his own "longings for certainty," but said that he maintained his "belief that in an indeterminate world [he] cannot control, it is still possible to live fully in the trust that a way will be found leading through the uncertain future."⁸⁷ Constitutional precedents, he explained, "can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world."⁸⁸

Returning to *Glucksberg*, we should not be surprised that Souter refused to decide the constitutional question posed by assisted suicide once and for all. He emphasized the significance of the plaintiffs' interest in "the traditional right of medical care," an interest that is particularly strong "when death is imminent."⁸⁹ So he explicitly refused to decide "[w]hether that interest might in some circumstances, or at some time, be seen as 'fundamental.'"⁹⁰ It was sufficient that the state's interests in the present case were sufficiently strong to "defeat the present claim."⁹¹ Thus did Souter employ the method of common law as

⁸³ Id. at 25–27 min.

⁸⁴ Souter, Commencement, *supra* note 1.

⁸⁵ Id.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ *Glucksberg*, 521 U.S. at 781 (Souter, J., concurring in the judgement).

⁹⁰ Id. at 782.

⁹¹ Id.

he understood it—a method that seeks to mark out “an evolving boundary between the domains of old principles.”⁹² It recognizes that “tradition is a living thing,” but it is “one that moves by moderate steps carefully taken.”⁹³

These short summaries leave many important issues out. Nevertheless, they suffice to show that Souter offers an interpretation of common law adjudication distinguishable from the other two examined. He describes his view as “pragmatist,” as Posner does, but he remains committed to an ideal of “principled” adjudication in the manner of Dworkin. And yet he offers an understanding of history quite different from them both.

The question is what to make of these differences. Do they reflect any deeper differences of philosophical outlook? Or is Souter’s view just an old-fashioned and untheorized hodge-podge of the other two? Some evidence supports the latter conclusion. Souter himself makes no claims to originality, tying himself explicitly to the common law tradition of Hand, Harlan, and Holmes.⁹⁴ Nor does he lay out his approach as a “theory” of common law or constitutional adjudication. But the burden of the rest of this Article is to defend the former answer: the similarities and differences identified between his account and those of Dworkin and Posner are best explained by Souter’s embrace of a model of practical reasoning that differs in important respects from those embraced by the other two.

II. THREE MODELS OF PRACTICAL REASONING

The differences among Posner, Dworkin, and Souter with respect to the role of principles and history in common law adjudication reflect deeper philosophical differences about how people should rationally go about deciding what to do—namely, what sources of information and patterns of inference may rationally be relied upon when deciding how

⁹² *Id.* at 770.

⁹³ *Id.* (quotations and citations omitted).

⁹⁴ Souter, Feldman, *supra* note 20, at 21–22 min.

to act.⁹⁵ Each model of common law reasoning discussed in Part I depends upon (or mutually reinforces) a more general model of practical reasoning. The task of this Part is to describe those models and to ascribe them to each of our three protagonists.

But first, another caveat: the philosophical issues implicated in the discussion that follows are bountiful, difficult, and deep. There exist large bodies of philosophical literature on the nature of practical rationality, the epistemology and metaphysics of values, and the relationship between scientific and moral reasoning. I hardly scratch the surface of those issues and ignore most of the literature that does. The reason is not that my argument is immune from philosophers' challenges. Far from it. But my purpose here is just to sketch enough of the three positions to see how they differ, without (yet) scrutinizing the merits of each one.

A. Instrumentalism (Posner)

The first model of practical reasoning, which sometimes goes by “means-end rationality” or “instrumentalism,” is the least philosophically controversial and the easiest to understand.⁹⁶ It is the least controversial because it is entirely consistent with a naturalistic

⁹⁵ See Millgram, *Practical Reasoning*, *supra* note 4, at 1 (“Practical reasoning is reasoning directed towards action: figuring out what to do, as contrasted with figuring out how the facts stand.”). The term is in some ways misleading. Philosophers typically contrast “practical reasoning” (about what to do) from “theoretical reasoning” (about what to believe), but the holistic-pragmatist account I ascribe to Souter in some ways rejects the distinction between the two. See R. Jay Wallace, *Practical Reason* 1–3, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/archives/sum2014/entries/practical-reason/> [<https://perma.cc/36KH-8T2D>] (“Practical reason is the general human capacity for resolving, through reflection, the question of what one is to do. Deliberation of this kind is practical in at least two senses. First, it is practical in its subject matter, insofar as it is concerned with action. But it is also practical in its consequences or its issue, insofar as reflection about action itself directly moves people to act.”). “Moral epistemology” is another possible term. See Dworkin, *Hedgehogs*, *supra* note 63, at 100 (using the concept of a moral epistemology in his analysis and describing it as “our account of good reasoning about moral matters”). But that does not quite fit either, in part because we are interested in other sorts of normative reasoning beyond moral reasoning (such as, obviously, *legal* reasoning), and in part because talk of an “epistemology” of morals seems to imply that moral values are capable of being known when that is one of the central questions in dispute.

⁹⁶ Wallace, *supra* note 95, at 11 (“Among the substantive norms of practical reason, those of instrumental rationality have seemed least controversial to philosophers.”).

metaphysical picture—that is, one that posits no mysterious entities inconsistent with current scientific theories.⁹⁷ This view divides up the considerations bearing on a practical decision into “means” and “ends” and treats the capacity of the former to achieve the latter as the only criterion of rationality. Thus, whereas one can have more or less rational (and testable) *beliefs* about which actions will produce which results (“means”), what results one chooses to pursue (“ends”) are purely a question of what a person *desires*.⁹⁸ Put differently, we can reason about facts (or “means”) but not about values (or “ends”). Largely because this model does not depend on any controversial metaphysical views about the nature of values (or controversial epistemological views about how we come to know those values) it has been described as the “default view” among philosophers and is implicit in various social sciences, most obviously economics.⁹⁹

Judge Posner's account of adjudication assumes an instrumentalist conception of practical reasoning. The pragmatist regards knowledge as a “tool for coping” and “uses common sense to resolve problems.”¹⁰⁰ One can use concepts and analytic methods as tools (means) for solving problems, but one cannot reason about what are the right problems to be solved (ends). As Posner says, his kind of pragmatist “seems to come down to ‘[j]ust the facts, ma'am,’ thus bringing us right up to the fact-value gap.”¹⁰¹ As he puts it elsewhere, “[m]oral dilemmas involve disputes about ends; fruitful deliberation, the sort of reasoning that

⁹⁷ Id. But see Elijah Millgram, *Specificationism*, in *Reasoning: Studies of Human Inference and its Foundations* 731, 742 (Jonathan E. Adler & Lance J. Rips eds., 2008) (“The academic industry engaged in analyzing causation is good evidence that causation is philosophically mysterious itself; means are causes, and causes are philosophically mysterious; so means to ends are philosophically mysterious, too.”).

⁹⁸ Millgram, *Practical Reasoning*, supra note 4, at 5 (observing that instrumentalism is often tied to a “belief-desire psychology”). This view is sometimes associated with David Hume. See also Michael Smith, *The Humean Theory of Motivation*, 96 *Mind* 36, 36 (1987) (characterizing a Humean theory of motivation as one that claims “that motivation has its source in the presence of a relevant desire and means-end belief” (emphasis omitted)). But see Elijah Millgram, *Was Hume a Humean?*, 21 *Hume Stud.* 75, 75–76 (1995) (challenging the view that Hume himself held the view of motivation and practical reasoning Smith ascribes to him).

⁹⁹ Millgram, *Practical Reasoning*, supra note 4, at 4. See also Wallace, supra note 95, at 11.

¹⁰⁰ Posner, *Law, Pragmatism*, supra note 7, at 42, 52.

¹⁰¹ Id. at 55.

moves the ball down the field, is deliberation over means."¹⁰² Thus, the only basis for criticizing moral principles rationally is by showing that they are ineffective tools for accomplishing certain social goals.¹⁰³

Moreover, Posner adopts an instrumental conception of practical reasoning for the same reason it tends to be popular with philosophers and social scientists: it assumes a naturalistic, Darwinian picture of the world and humans' place within it.¹⁰⁴ That fact explains not only why our "intellectual capabilities [are] oriented toward manipulating our local physical and social environment," but also why we "cannot be optimistic about our ability to discover metaphysical entities, if there are any (which we cannot know), whether through philosophy or any other mode of inquiry."¹⁰⁵

At times, Posner seems to suggest a broader understanding of practical reasoning. In an earlier article, he endorsed a method—or rather a "grab bag of methods, both of investigation and of persuasion"—which he called simply "practical reason."¹⁰⁶ The grab bag includes "anecdote, introspection, imagination, common sense, intuition . . . empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, 'induction' . . . 'experience.'"¹⁰⁷ And more recently, he has insisted that pragmatist judges are sympathetic to "rhetoric" as a mode of argument.¹⁰⁸ But elsewhere it seems that Posner conceives of these methods as tools for persuasion, rather than as forms of genuine reasoning.¹⁰⁹

¹⁰² Posner, *Problematics*, *supra* note 34, at 1680. See also *id.* at 1669.

¹⁰³ *Id.* at 1668 ("What scholars can do—but this owes nothing to moral theory—is to criticize moral codes by showing that they lack functionality, instrumental efficiency, or rationality.").

¹⁰⁴ Posner, *Law, Pragmatism*, *supra* note 7, at 4 ("The first and perhaps most fundamental thesis of philosophical pragmatism, at least of the brand of philosophical pragmatism that I find most congenial . . . is that Darwin and his successors in evolutionary biology were correct that human beings are merely clever animals.").

¹⁰⁵ *Id.* at 4–5.

¹⁰⁶ Richard A. Posner, *The Jurisprudence of Skepticism*, 86 *Mich. L. Rev.* 827, 838 (1988).

¹⁰⁷ *Id.*

¹⁰⁸ Posner, *Law, Pragmatism*, *supra* note 7, at 60.

¹⁰⁹ *Id.* at 29 (observing that the rhetorical approach belongs to the tradition of the ancient sophists, who were "not interested in discovering truth" but instead in "crafting persuasive appeals to the imperfect understanding, the opinions and even the prejudices, of particular audiences"). See also Posner, *Jurisprudence*, *supra* note 106, at 847 ("I am led to wonder

B. Value Holism and Independence (Dworkin)

If the instrumentalism Posner embraces is a relatively uncontroversial model of practical reasoning, the same cannot be said of Ronald Dworkin's model. Or perhaps more precisely, Dworkin's underlying *justification* for the model—an assertion of the “independence of value” is both idiosyncratic and controversial.¹¹⁰ Let me explain.

We saw in Part I that Dworkin's model of law-as-integrity requires that, in any given case, the judge ought to adopt the interpretation of the relevant materials that best fits and justifies those materials. Dworkin makes clear elsewhere in *Law's Empire* that law-as-integrity and its rival conceptions of law, “conventionalism” and “pragmatism,” are best understood as interpretations of legal practice that themselves purport to “fit” and “justify” legal practice as a whole. For this reason, although law-as-integrity is “more relentlessly interpretive” than the other two conceptions of law he considers and rejects, *all* conceptions of law are constructive interpretations, which aim to put legal practice in its “best light.”¹¹¹

Years later, in his magnum opus, *Justice for Hedgehogs*, Dworkin generalized the point even further, arguing that legal practice was just one social practice among many for which such an interpretive stance is appropriate.¹¹² Others include history, literature, and morality itself.¹¹³ Just as judges must constructively interpret the law in order to correctly

whether the highly inductive, case-oriented, analogy-saturated ‘Socratic’ method actually teaches legal reasoning at all.” (emphasis omitted).

¹¹⁰ For criticism of Dworkin's meta-ethical views, see Tristram McPherson, *Against Quietist Normative Realism*, 154 *Phil. Stud.* 223, 223–224 (2011); Eliot Michaelson, *Justice for Unicorns*, 112 *Proc. of Aristotelian Soc.* 351, 351 (2012); Russ Shafer-Landau, *The Possibility of Metaethics*, 90 *B.U. L. Rev.* 479, 479–480 (2010); Michael Smith, *Dworkin on External Skepticism*, 90 *B.U. L. Rev.* 509, 509 (2010); Daniel Star, *Moral Skepticism for Foxes*, 90 *B.U. L. Rev.* 497, 497 (2010).

¹¹¹ Dworkin, *Empire*, supra note 7, at 226. This suggestion itself is controversial. It is largely why H.L.A. Hart responded to Dworkin's criticism of his philosophical account of law in part by denying that he shared Dworkin's normative theoretical goals. See H.L.A. Hart, *The Concept of Law* 241 (3rd ed. 2012) (“It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conceptions of legal theory.”).

¹¹² Actually, this broader view was already present in *Law's Empire*. In Chapter 2, “Interpretive Concepts,” Dworkin discusses at length interpretation in other domains, particularly literature. See Dworkin, *Empire*, supra note 7, at 45–86.

¹¹³ Dworkin, *Hedgehogs*, supra note 63, at 102.

ascertain its meaning, so must participants in these practices—which in the case of morality means everyone—make judgments of value in order to assess what any given object of interpretation (a poem, a work of art, or a concept such as “equality”) actually *means*.¹¹⁴ Succinctly put, they must engage in acts of this form of constructive interpretation.¹¹⁵

The worry with this approach to making judgments of value (whether aesthetic, moral, or legal) is that it seems to countenance the subjectivity of an interpreter’s judgments about the practices in question. The claim would be that the interpreter is not genuinely discovering the meaning of the object of interpretation but instead imposing her own purposes or values upon it. It thus seems vulnerable to a deep, skeptical challenge.

Dworkin’s response to this challenge is what has proven so controversial among meta-ethicists.¹¹⁶ His basic move is to deny the admissibility of the kind of argument that grounds this skepticism regarding the subjectivity of value judgments. As we saw above, the core motivation for adopting an instrumentalist conception of practical reasoning is that it is consistent with a naturalistic or scientific metaphysical picture according to which the values or ends people pursue are reducible to (subjective) human psychological states, namely desires. But Dworkin denies that any metaphysical, evolutionary, scientific, or historical account that purports to demonstrate the subjectivity of value judgments about objects within some interpretive domain is capable of undermining any particular (necessarily evaluative) interpretation of an object or concept within that domain.

Why? Because, according to Dworkin, such domains of value stand “independent” of domains of fact. Such independence follows from what Dworkin calls “Hume’s principle.”¹¹⁷ According to Hume, no empirical propositions about “the state of the world” or the “course of history” or the “truth about human nature” can generate normative conclusions

¹¹⁴ Id. 134–35.

¹¹⁵ In *Justice for Hedgehogs* Dworkin refers to this as a “value account of interpretation,” rather than “constructive interpretation,” but the method envisioned is essentially the same in that both require the interpreter to put the object of interpretation in its best light. Compare Dworkin, *Hedgehogs*, supra note 63, at 135 with Dworkin, *Empire*, supra note 7, at 65–66.

¹¹⁶ See sources collected in supra note 110. Dworkin had set forth some of these views in an earlier article. See Ronald Dworkin, *Objectivity and Truth: You’d Better Believe it*, 25 *Phil. & Pub. Aff.* 87, 88–89 (1996). But I draw on his more recent formulation in *Justice for Hedgehogs*.

¹¹⁷ Dworkin, *Hedgehogs*, supra note 63, at 17.

about “what ought to be” without some additional normative premise.¹¹⁸ Dworkin recognizes that philosophers typically draw a skeptical conclusion from this sort of fact/value dichotomy, but he draws the opposite conclusion. Hume’s principle, “properly understood, supports not skepticism about moral truth but rather the independence of morality as a separate department of knowledge with its own standards of inquiry and justification.”¹¹⁹

There are, then, for Dworkin, “two great domains of intellectual activity.”¹²⁰ One domain is that of science, which concerns itself with understanding and explaining the social and natural world. The other domain is that of “interpretation,” which involves ascertaining meaning through the imposition of value.¹²¹

This “dualism of understanding” that Dworkin draws between the realms of science and fact, on the one hand, and interpretation and value, on the other, carries two important implications. The first is the one already mentioned: it defuses a certain form of skepticism (what Dworkin calls “external” skepticism) about some domain of interpretation according to which the subjectivity of value judgments follows from certain metaphysical, scientific, or historical explanations (for example, that our “values” are just brain adaptive dispositions that enabled humans to survive in groups millions of years ago).¹²² Once we appreciate this “crucial distinction between the explanation and the justification of a moral conviction” and realize that “[t]he former is a matter of fact, and the latter of morality,” we can see that “[m]orality stands or falls on its own credentials.”¹²³ Thus, for instance, a principle,

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id. at 123.

¹²¹ Id. at 102 (“I argue that the interpretive process—the process of seeking meaning in an event or achievement or institution—differs in important ways from scientific investigation.”).

¹²² Id. at 31 (“Some external skeptics rely on social facts of the kind I described earlier: they say that the historical and geographical diversity of moral opinions shows that no such opinion can be objectively true, for example. But the most sophisticated external skeptics rely, as I said earlier, on metaphysical theses about the kind of entities the universe contains.”).

¹²³ Id. at 79–80.

such as equality or dignity, “can be neither vindicated nor impeached except through its own connivance.”¹²⁴

The second implication is that in the interpretive domain (as compared to the explanatory, metaphysical one) the truth of any proposition depends on all the others in that domain. Dworkin calls this view “value holism,” which he describes as a “faith that all true values form an interlocking network, that each of our convictions about what is good or right or beautiful plays some role in supporting each of our other convictions in each of those domains of value.”¹²⁵ In brief, the combination of value holism and the independence of value means that moral propositions depend for their justification on *every other, but only every other*, moral proposition.¹²⁶

We can now finally see how Dworkin’s view of practical reasoning differs so markedly from Posner’s and does so in a way that explains their quite different views about the role of principles in judicial decision-making. For Posner, since human minds evolved in such a way as to allow human beings to manipulate the world and control their environment, we properly ought to place more faith in our ability to reason about practical “means” rather than ultimate “ends.” Thus, he thinks judges should follow their instincts and seek to achieve reasonable outcomes based on the particular facts at hand (or rely on the social sciences to tell them how best to achieve those outcomes).¹²⁷

¹²⁴ Id. at 79. One way of describing this position is a “quietist” one. See Charles Barzun, *Metaphysical Quietism and Functional Explanation in Law*, 34 *Law & Phil.* 89, 91 (2015) (characterizing Dworkin’s metaethical views in that way). See also McPherson, *supra* note 110. But Dworkin himself rejects that label. See Dworkin, *Hedgehogs*, *supra* note 63, at 67. Whatever the label, the important point is to see that it is best understood as a *meta-metaphysical* position because it is a position about the proper role of metaphysics in philosophical reasoning (in this case, moral reasoning). See Barzun, *Quietism*, *supra*, at 92.

¹²⁵ Dworkin, *Hedgehogs*, *supra* note 63, at 120.

¹²⁶ Id. at 120–21. Of course, moral judgments will depend on facts as minor premises in a syllogistic argument in which the moral principle is the major premise. But the point is that our moral convictions cannot be undermined by pointing to historical or evolutionary explanations for why we have them.

¹²⁷ Cf. Posner, *Law, Pragmatism*, *supra* note 7, at 4 (observing that Darwinist theory explains why “our intelligence is primarily instrumental”); id. at 60 (explaining that the legal pragmatist sees legal reasoning as “forward-looking” and “believes that no other general analytic procedure distinguishes legal reasoning from other practical reasoning”); id. at 77 (endorsing the use of abstraction and theory when it is used “as a tool of empirical science,” rather than “as a stopping point”).

Dworkin, meanwhile, sees interpreting law as a social practice that requires judges to engage in evaluative interpretation, constantly striving to make the body of law as coherent as possible with the principles and purposes which the judge thinks make best sense of that practice. Whereas Posner dismisses principles as vague concepts that serve only to mask the true motives for a legal decision, Dworkin sees principles as all-important because achieving coherence with them is the only way to justify such decisions. That is just what it means to reason in the “interpretive” domain.

But Dworkin and Posner agree on one thing. They both insist that there is an important difference between reasoning about facts (or “means”) and reasoning about values (or “ends”). It is precisely that distinction that a third model of practical reasoning rejects.

C. Intellectual-Historical Interlude: Quine, White, and the Collapse of the Analytic-Synthetic Distinction

In order to see how and why one might challenge that distinction, it will be helpful to take a brief detour through a bit of intellectual history. This may strike the reader as a digression, but bear with me—the madness has method to it. The story not only exposes the philosophical differences between the third model of practical reasoning and these first two, it also provides some historical evidence in support of my claim that Souter adopts that third model.

i. W.V.O. Quine and meaning holism

W.V.O. Quine, who was a Harvard philosophy professor in the postwar period, is widely regarded as one of the most important philosophers of the twentieth century.¹²⁸ Quine is most famous for having successfully attacked the so-called “analytic-synthetic” distinction, which was associated with the then-dominant strain of empiricist philosophy at the time, logical positivism.¹²⁹ The logical positivists

¹²⁸ Christopher Lehmann-Haupt, *W. V. Quine, Philosopher Who Analyzed Language and Reality, Dies at 92*, *New York Times* (Dec. 29, 2000), <http://www.nytimes.com/2000/12/29/arts/w-v-quine-philosopher-who-analyzed-language-and-reality-dies-at-92.html> (describing Quine as “one of the most influential philosophers of the 20th century”).

¹²⁹ Cheryl Misak, *The American Pragmatists* 157 (2013) (explaining that logical empiricism arose in the 1920s in Vienna but came to influence American philosophy in part

distinguished between “analytic” statements, which are true or false as a matter of definition or tautologically (for example, “all bachelors are unmarried males”), and “synthetic” statements, whose truth depends on facts about the world (for example, “all mammals have hair”).¹³⁰ Any statement that was neither analytic nor empirically falsifiable was literally meaningless. This category of meaningless statements included not only metaphysical statements (for example, “every universal includes particulars”), but also ethical ones (for example, “slavery is wrong”).¹³¹

Quine’s argument against the analytic-synthetic distinction gets technical fairly quickly, but the basic idea was to deny that the notion of “analyticity” could be given any clear meaning. Consider the statement that “a bachelor is an unmarried male.” Why is that statement analytically true? Well, because “bachelor” is synonymous with “unmarried male.” But what does it mean to be “synonymous”? We cannot say that the statement is “necessarily” or “analytically” true, because that is the concept we are trying to elucidate.¹³² And yet if we answer by saying, “because that’s what the dictionaries say,” then the distinction collapses because the truth of the statement depends on facts in the world (namely, what the dictionaries say) and is therefore

through the emigration of German and Austrian philosophers after World War II). See also Richard Creath, *Logical Empiricism*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2017), <https://plato.stanford.edu/entries/logical-empiricism/> (“Logical empiricism is a philosophic movement rather than a set of doctrines, and it flourished in the 1920s and ‘30s in several centers in Europe and in the ‘40s and ‘50s in the United States.”).

¹³⁰ See Alfred Jules Ayer, *Language, Truth and Logic* 78 (1946) (“I think that we can preserve the logical import of Kant’s distinction between analytic and synthetic propositions . . . if we say that a proposition is analytic when its validity depends solely on the definitions of the symbols it contains, and synthetic when its validity is determined by the facts of experience.”).

¹³¹ *Id.* at 5 (“The principle of verification is supposed to furnish a criterion by which it can be determined whether or not a sentence is literally meaningful. A simple way to formulate it would be to say that a sentence had literal meaning if and only if the proposition it expressed was either analytic or empirically verifiable.”); *id.* at 107 (explaining that the reason why “fundamental ethical concepts are unanalysable, inasmuch as there is no criterion by which one can test the validity of the judgements in which they occur,” is that “they are mere pseudo-concepts”).

¹³² W.V. Quine, *Two Dogmas of Empiricism*, 60 *Phil. Rev.* 20, 23 (1951) (“We still lack a proper characterization of this second class of analytic statements, and therewith of analyticity generally, inasmuch as we have had in the above description to lean on a notion of ‘synonymy’ which is no less in need of clarification than analyticity itself.”).

synthetic, not analytic.¹³³ The result is that *all* statements are subject to the test of experience insofar as they depend on facts about linguistic usage. Hence Quine's famous dictum that "no statement is immune to revision."¹³⁴

But Quine's argument cuts both ways. That is, if erasing the analytic-synthetic distinction rendered more (indeed all) statements subject to the test of experience, it also showed that conducting such tests was far more complex than previously thought. Empiricists had long argued that individual statements could be directly "falsified" by sense experience, but Quine showed why that was impossible.¹³⁵ Just as the truth of allegedly analytic statements like "all bachelors are unmarried males" depend on facts (that is, ones about linguistic usage), so, too, does the truth of allegedly synthetic statements like "all mammals have hair" depend on the meaning of the terms involved. Only we now see that the "meaning" of some statement depends on facts about how a linguistic community uses the terms that comprise it. That is, the meaning of a proposition depends on the role it plays in the relevant language itself. This means that one cannot test the truth of any one statement on its own. Instead, one tests the experience against the whole web of statements with which the words are inferentially connected.¹³⁶

¹³³ Id. at 24.

¹³⁴ Id. at 40.

¹³⁵ See, e.g., Ayer, *supra* note 130, at 66 ("[O]ne may assert with regard to any two of one's visual sense-contents, or with regard to any two of one's tactual sense-contents, that they are elements of the same material thing if, and only if, they are related to one another by a relation of direct, or indirect, resemblance in certain respects, and by a relation of direct, or indirect, continuity. . . . [T]his means that no visual, or tactual, sense-content can be an element of more than one material thing."). The problem of relating sense experience to the external world was called the problem of reductionism, and the idea that it could be accomplished was the second dogma of empiricism that Quine attacked (the first being the analytic-synthetic distinction). Quine, *Two Dogmas*, *supra* note 132, at 20.

¹³⁶ Quine, *Two Dogmas*, *supra* note 132, at 38 ("My countersuggestion [sic], . . . is that our statements about the external world face the tribunal of sense experience not individually but only as a corporate body."); *id.* at 39 ("My present suggestion is that it is nonsense, and the root of much nonsense, to speak of a linguistic component and a factual component in the truth of any individual statement. Taken collectively, science has its double dependence upon language and experience; but this duality is not significantly traceable into the statements of science taken one by one.").

The upshot of this analysis is a philosophical view called “meaning holism.”¹³⁷ For Quine, it entailed a blurring of the distinction so popular with the logical positivists, between empirically grounded “science” and obscure “metaphysics.” As he famously put it, physical objects and “the gods of Homer” differ only in degree with respect to their “epistemological footing.”¹³⁸ That is because “[b]oth sorts of entities enter our conception only as cultural posits.”¹³⁹ Thus, Quine argued that epistemological considerations alone cannot determine whether any particular “recalcitrant experience” should lead one to abandon previously held beliefs, as the empiricist tradition had long held. Instead, one must look to “pragmatic” considerations about what kinds of belief are useful for certain purposes.¹⁴⁰

Still, for Quine, science was the paradigm of knowledge and a discipline whose findings remained ultimately subject to the test of sensory experience (albeit, as a *whole*). Evaluative domains, such as morality, however, had no comparable sensitivity to empirical findings, with the result that “we can judge the morality of an act only by our moral standards themselves.”¹⁴¹

1. Instrumentalism (again)

One can draw two quite different lessons about how to engage in practical reasoning from Quine’s view. First, one can conclude, with

¹³⁷ Henry Jackman, Meaning Holism, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2014), <https://plato.stanford.edu/entries/meaning-holism/> (explaining that the meaning of holism “is often traced to Quine’s claims that ‘It is misleading to speak of the empirical content of an individual statement’ and that ‘the unit of empirical significance is the whole of science’” (citation omitted) (quoting Quine, *Two Dogmas*, supra note 132, at 39–40)).

¹³⁸ Quine, *Two Dogmas*, supra note 32, at 41.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 43 (“In repudiating such a boundary [between the analytic and synthetic] I espouse a more thorough pragmatism. Each man is given a scientific heritage plus a continuing barrage of sensory stimulation; and the considerations which guide him in warping his scientific heritage to fit his continuing sensory promptings are, where rational, pragmatic.”).

¹⁴¹ W.V. Quine, “On the Nature of Moral Values,” in *Theories and Things* 63 (1981) (“The empirical foothold of scientific theory is in the predicted observable event; that of a moral code is in the observable moral act. But whereas we can test a prediction against the independent course of observable nature, we can judge the morality of an act only by our moral standards themselves.”).

Quine, that because moral beliefs (or any judgments about what to do) are not themselves susceptible to sensory confirmation, they lack the status of true knowledge. Better to look to science for knowledge about the empirical world in order to predict more accurately future experience and to manipulate our environment in ways that serve our interests—whatever those interests are.

This view is the just instrumentalist conception of practical reasoning discussed above, which we ascribed to Judge Posner. No surprise, then, that Posner endorses Professor Brian Leiter's vision of a "naturalized jurisprudence"—a phrase Leiter coined in order to draw an explicit analogy to Quine's "naturalized epistemology."¹⁴² Posner's legal pragmatist welcomes only theories that "seek to guide empirical inquiry" and which can be useful as "tool[s] of empirical science."¹⁴³ He has no use for "abstraction as a stopping point" of the sort one finds in "moral, philosophical, and legal theory."¹⁴⁴ One can reason productively (i.e., scientifically) about (factual) means, but not about (moral or legal) ends.¹⁴⁵

¹⁴² Posner, *Law, Pragmatism*, supra note 7, at 77. See Brian Leiter, *Naturalizing Jurisprudence* 2–3 (2007) (discussing Quine's influence on philosophy and arguing that the legal realists were encouraging a similar kind of development in legal theory). Depending on how it is interpreted, naturalized epistemology either calls for traditional philosophy to be replaced by empirical, scientific inquiry or, in a weaker form, to proceed in a way that is continuous with empirical methods and thus constrained by its findings. See Ronald J. Allen and Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 *Va. L. Rev.* 1491, 1494 (2001) (drawing the distinction between the two interpretations and attributing the former, stronger view to Quine).

¹⁴³ Posner, *Law, Pragmatism*, supra note 7, at 77.

¹⁴⁴ *Id.*

¹⁴⁵ See Richard A. Posner, *Reply to Critics of The Problematics of Moral and Legal Theory*, 111 *Harv. L. Rev.* 1796, 1803 (1998) ("The relevant distinction is between reasoning over ends and reasoning over means. I argue in my *Lectures* that the latter is productive and the former unproductive."). I should clarify that Posner is quite clear that he does *not* consider his form of "everyday" pragmatism to depend on any philosophical understanding of pragmatism, let alone Quine's, specifically. See Posner, *Law, Pragmatism, and Democracy*, at 51–52 ("The everyday sense of 'pragmatic,' . . . is consistent with the philosophical sense although independent of it."). But he acknowledges that philosophical pragmatists try to justify his sort of everyday pragmatism, and it is that underlying justification I am exploring here. See *id.* ("The everyday pragmatist uses common sense to resolve problems; the pragmatist philosopher explains why this is a sensible procedure.").

2. Value holism (again)

But that is not the only lesson one can draw from Quine's analysis. Professor Mark Greenberg, for instance, offers a different interpretation. He argues that Quine demonstrated (as against the logical positivists, particularly Rudolph Carnap) that the validity of scientific reasoning could not be secured from the "outside" by reference to an epistemological foundation (that is, bedrock "observations").¹⁴⁶ Instead, scientific practice can only be justified by looking to the practice itself—namely the practical advantages it affords us in enabling us to predict and control our environment. So if you extend Quine's logic to other domains of inquiry, Greenberg suggests that the lesson is that the justification for propositions within some domain of knowledge must come from *within* that domain.¹⁴⁷

In other words, it leads to a view akin to Dworkin's "value holism." Recall that, for Dworkin, the only sort of justification for the truth of propositions in interpretive domains such as law, art, or morality, that one can get (or needs) is one grounded on the coherence of those propositions with all of the others in that domain. On this view, such a conclusion follows from Quine's suggestion that knowledge consists in a "web of belief."¹⁴⁸ It is just that the web in this case is a web of moral, legal, or aesthetic beliefs, not scientific ones.

We can now see why the two models of practical reasoning are in a sense two sides of the same coin. They both agree with Quine in concluding moral judgments and theories can only be assessed "by our moral standards themselves."¹⁴⁹ What they *disagree* about is whether that poses a problem for morality. The instrumentalist thinks it does, and so focuses on "means," rather than "ends," whereas the value holist

¹⁴⁶ Mark Greenberg, *Naturalism in Epistemology and the Philosophy of Law* 4 (2011), [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=987523##\[https://perma.cc/AP4E-CYND\]](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=987523##[https://perma.cc/AP4E-CYND]).

¹⁴⁷ See *id.* at 5 ("Quine took the conclusion that belief in scientific theories cannot be justified to provide a *reductio ad absurdum* of the foundationalist project, including its understanding of what epistemic justification requires. Foundationalism cannot be an appropriate project if it leads to the conclusion that belief in scientific theories . . . is not justified by the evidence [T]he closest parallel in the legal case to Quine's position would therefore be the rejection of the philosophical positions that lead to the indeterminacy thesis.").

¹⁴⁸ W.V. Quine & J.S. Ullian, *The Web of Belief*, (2nd e. 1978).

¹⁴⁹ Quine, *Theories and Things*, *supra* note 141, at 63.

thinks it does not pose a problem because such judgments can be rendered true (or false) as a matter of coherence (or lack thereof) with other moral propositions. But that disagreement should not mask the shared underlying assumption that Quine was right that only facts, not values, are subject to the test of experience.

ii. Morton White and fact-value holism

Not all philosophers, however, agree with Quine on this point. One in particular who did not was his friend and colleague at Harvard, the philosopher Morton White.¹⁵⁰ White agreed with Quine that the analytic-synthetic distinction was unsustainable, and for essentially the same reasons. In Quine's famous article, "Two Dogmas of Empiricism," Quine even credits White with developing much of the argument he makes there.¹⁵¹

But White took the argument further than did Quine. Whereas Quine considered sensory experience (that is, observations) to be the only sort of experience that could justify the revision of one's web of beliefs, White argued that one's "moral feelings" or "feelings of obligation" should also count as a validating form of experience.¹⁵² As White put it in a recent book, "Quine differentiates more sharply than I do between an observation sentence like 'That's a rabbit' and the sentence 'That ought not to be done' or 'That's outrageous', its counterparts in my view of the confirmation of ethical beliefs."¹⁵³ Under this view, one's "web of beliefs," throughout which one seeks overall coherence, includes

¹⁵⁰ White is probably best known outside philosophical circles for his work of intellectual history, *Social Thought in America: The Revolt Against Formalism* (1948). But he also wrote several books of analytic philosophy during a career that spanned over half a century. See, e.g., White, *Culture*, supra note 24; Morton White, *What is and What Ought to be Done: An Essay on Ethics and Epistemology* (1981); Morton White, *Foundations of Historical Knowledge* (1965); Morton White, *Toward Reunion in Philosophy* (1956).

¹⁵¹ See Quine, *Two Dogmas*, supra note 132, at 20 n. 1 (observing that an earlier essay of White's "says much of what needed to be said on the topic") (citing Morton White, "The Analytic and the Synthetic: An Untenable Dualism," in John Dewey: *Philosopher of Science and Freedom* 316–30 (Sidney Hook ed., 1950)).

¹⁵² See White, *Culture*, supra note 24, at 159 ("I think that we sometimes reject or alter a descriptive statement in response to an adverse moral feeling."). See also White, *What Is*, supra note 150, at 40 ("I believe in the existence of moral feelings such as this with as much confidence as I believe that there is a sensory experience to which we appeal when we attribute a color to a physical object.").

¹⁵³ White, *Culture*, supra note 24, at 154–55.

judgments about facts (based on one's sensory experience) and judgments about values (based on one's "moral feelings").¹⁵⁴

We will examine in a moment the implications of this sort of fact-value holism and provide some examples of how this reasoning might work.¹⁵⁵ But why, the skeptical (and now impatient) reader may ask, should we care about White's views at all? He is hardly the philosophical giant Quine is. So why bother with his, perhaps idiosyncratic, views?

The answer is that it turns out Morton White was the thesis advisor to both Ronald Dworkin and David Souter when each was an undergraduate at Harvard in the 1950s and 1960s, respectively.¹⁵⁶ And although White may not have had much of an influence on Dworkin,¹⁵⁷ he seems to have had one on Souter. For one thing, Souter's undergraduate thesis, which analyzes Oliver Wendell Holmes' version of legal positivism and Lon Fuller's critique of it, discusses at some length the question of whether, or in what sense, moral questions are capable of being characterized in empirical terms.¹⁵⁸ Although Souter does not offer his own answer to that question, he concludes his thesis by raising the question of whether Fuller's "natural law" critique will "rest content" with its controversial suggestion that conformity with

¹⁵⁴ Id.

¹⁵⁵ I take that term from Richmond Campbell, "Feminist Epistemology Naturalized," in *Feminist Interpretations of W.V. Quine* 350 (Lynn Hankinson Nelson & Jack Nelson eds., 2003), though Campbell does not use it to apply specifically to White's view.

¹⁵⁶ Morton White, *A Philosopher's Story* 319 (1999).

¹⁵⁷ It may be more accurate to say that Dworkin may have moved away from White's view, because his senior thesis does show a similar approach to White's. Compare Ronald Dworkin, *An Essay in Analytic Ethics* 101 (April 6, 1953) (unpublished thesis, Harvard College) (on file with author) ("Perhaps it is not too much of an exaggeration to suggest that 'factual' sentences are now being said to have many of the properties traditionally assigned to ethical sentences. Surely the gap between observation and verification, to be filled in by attention to the pragmatics of consistency and convenience, by reference to aesthetic considerations, or to a scientific 'tone of the times,' is suggestive of the 'non-cognitive' gap between experience and the grounding of a moral judgment.") with Morton White, *Reunion*, supra note 150, at 20 ("Once logicians and epistemologists begin to speak about justifying conceptual frameworks by reference to considerations of expediency, as some do, and once others begin to counter by appealing to intuition or conscience, as they do, we can see that we are entering a subject which might well profit from the two thousand years or so of moral philosophy in which very similar questions have been discussed.")

¹⁵⁸ David Souter, *Holmes' Legal Positivism and the Criticism From a Current Position of Natural Law* 14, 42 (April 10, 1961) (unpublished thesis, Harvard University) (on file with author).

basic rule of law practices will, as a sociological matter, lead to substantively just law.¹⁵⁹

More tellingly, in his interview with Professor Feldman almost fifty years later, Souter described his own judicial philosophy as one that embraces philosophical (not just judicial) pragmatism. He explained that for him, this means that all “normative propositions,” including constitutional principles, are “essentially pragmatic in origin” because they are ultimately justified by the results they produce.¹⁶⁰ He then mentioned the recent book of White’s, quoted above, observing that in it, White argued that normative propositions are “verifiable or disprovable” empirically.¹⁶¹ Like value judgments more generally, Souter then explained, constitutional principles about the structure of government and the rights of individuals have “a pragmatic basis.”¹⁶²

D. A Third Model: Holistic Pragmatism

We are finally in a position to flesh out this third model of practical reasoning, which, following White, we will call *holistic pragmatism*.¹⁶³ What does that mean? Let us start with pragmatism. Pragmatism is one of those “isms” that has a dizzying number of meanings. But here it is best understood to refer to a tradition of thought, which traces its origins to the work of Charles Pierce, William James, and John Dewey,¹⁶⁴ that considers *experience* to be the most important test of adequacy for philosophical concepts, doctrines, and distinctions.¹⁶⁵

¹⁵⁹ See *id.* at 47–48 (“For on the facts which emerge in the search for this knowledge [of the relations between law that is and law that ought to be] will depend whether current natural law thought will rest content with the assertion of a nearly inevitable coincidence of law with good law or instead revert to a position nearer that of the traditional natural law schools, to include general acceptance in the very conception of valid law.”).

¹⁶⁰ Souter, Feldman, *supra* note 20, at 17 min.

¹⁶¹ The book to which he was referring is White, *Culture*, *supra* note 24.

¹⁶² Souter, Feldman, *supra* note 20, at 18 min.

¹⁶³ Earlier White dubbed his view “Corporatism.” See, White, *What Is*, *supra* note 150.

¹⁶⁴ White, *Culture*, *supra* note 24, at xiv (listing James and Dewey, among others, as his philosophical influences).

¹⁶⁵ Christopher Hookway, *Pragmatism*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2013), <https://plato.stanford.edu/entries/pragmatism/> (describing the “pragmatist maxim” as a “distinctive rule or method for becoming reflectively clear about the contents of concepts and hypotheses: we clarify a hypothesis by identifying its practical consequences”).

As we have seen, though, pragmatists disagree amongst themselves about what counts as “experience.” Both Quine and White are typically classed as pragmatists, but they disagreed as to whether one’s immediate moral reactions to a set of facts or circumstances qualified as the sort of “experience” that could validate a moral principle or judgment.¹⁶⁶ For the same reason, Posner and Souter may both be seen as pragmatists in the context of law even though they take very different views on the role of principles and history in adjudication.¹⁶⁷

i. Holistic pragmatism vs. value holism

If the “pragmatism” part of holistic pragmatism lies in its emphasis on experience as the proper test of adequacy, the “holistic” part implies a pervasive interdependence among all of one’s beliefs or judgments. Combining the two ideas means that when one experiences a “feeling of obligation” or “moral feeling” in response to a set of facts or circumstances, that experience can justify revising one’s other beliefs, including the moral principles to which one is committed. Such a reasoning process more or less describes the method of “reflective equilibrium,” originally articulated by Professor Nelson Goodman, but made famous in the ethical realm by John Rawls.¹⁶⁸ In fact, White endorsed reflective equilibrium as essentially an application of “holistic pragmatism” in the ethical sphere, observing in the process that in *A*

¹⁶⁶ See Misak, *The American Pragmatists*, supra note 129, at 209 (describing White, along with Quine as “the next generation in the Harvard family of pragmatism” after Josiah Royce, William James, and George Santayana).

¹⁶⁷ See Charles L. Barzun, Jerome Frank, Lon Fuller, and a Romantic Pragmatism, 29 *Yale J.L. & Human.* 129, 132–33 (2017) (distinguishing between two different traditions of legal pragmatism and assigning Posner and Souter to each, respectively).

¹⁶⁸ John Rawls, *A Theory of Justice* 48–53 (1971); Norman Daniels, *Reflective Equilibrium*, in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta ed., 2013), <https://plato.stanford.edu/entries/reflective-equilibrium/> (“The method of reflective equilibrium consists in working back and forth among our considered judgments (some say our ‘intuitions,’ though Rawls (1971), the namer of the method, avoided the term ‘intuitions’ in this context) about particular instances or cases, the principles or rules that we believe govern them, and the theoretical considerations that we believe bear on accepting these considered judgments, principles, or rules, revising any of these elements wherever necessary in order to achieve an acceptable coherence among them.”). The original use of this method, though not its name, appeared in application to the problem of induction in Nelson Goodman, *Fact, Fiction and Forecast* 63 (1955).

Theory of Justice Rawls cites White's own earlier work as support for the approach.¹⁶⁹

Reflective equilibrium is a popular model of practical reasoning these days among moral, political, and even legal philosophers.¹⁷⁰ And in some ways, it is quite similar to the value holism we saw Dworkin articulate and defend.¹⁷¹ But there are two crucial differences between White's holistic pragmatism, on the one hand, and Dworkin's value holism (and other, more traditional, versions of reflective equilibrium), on the other. First, for White, such emotional or "intuitive" reactions to facts serve an epistemologically foundational role in the theory—that is, they serve an analogous role to what Quine understood observations to play in the sciences.¹⁷² But Dworkin explicitly rejects that view, which he calls the "causal impact hypothesis," as a "pointless myth."¹⁷³ In his view, the idea that our moral intuitions directly validate our moral

¹⁶⁹ White, *Culture*, supra note 24, at 170 (citing Rawls, *A Theory of Justice*, at 579 n. 33, which itself cites White, *Reunion*, supra note 150 in Rawls's discussion of justification, as "a development of this conception to include explicitly moral thought and judgment"). See also Norman Daniels, *Justice and Justification: Reflective Equilibrium in Theory and Practice* (1996) (further developing a method of reflective equilibrium).

¹⁷⁰ Millgram, *Specificationism*, supra note 97, at 741 (referring to reflective equilibrium as a "recently popular . . . approach to rationality").

¹⁷¹ Dworkin, *Hedgehogs*, supra note 63, at 119 (explaining that his claim is not just that "we can bring our discrete moral judgments into some reflective equilibrium," but also "that there are no genuine conflicts in value"). There is a difference, though not one particularly important for our purposes. Whereas Dworkin's value holism insists that all of one's moral principles—equality, fairness, democracy—when properly understood, are consistent with one another, the method of reflective equilibrium need only insist that perceived value conflicts may be adjudicated by reference to some further principle. See id.

¹⁷² See White, *Culture*, supra note 24, at 160 ("In my view, a coherence theory is not the lot of ethics, for if descriptive science retains some title to a correspondence theory of truth 'thanks to its link with observation', then ethics retains some title to a correspondence theory of truth thanks to its links with *sensory observation and a feeling of obligation*." (quoting Quine, *Theories and Things*, supra note 141, at 63)). This is the minority view among theorists of reflective equilibrium, see Daniels, *Reflective Equilibrium*, supra note 168, but White is not the only one to endorse this approach. See Jeffrey McMahan, *Moral Intuition*, in *Blackwell Guide to Ethical Theory* 114 (H. LaFollette ed., 2000) ("I do not think that moral inquiry can proceed by deducing conclusions about particular cases from self-evident moral principles. Rather, the order of discovery is the reverse of the order of justification. Although the deeper principles are explanatorily prior, we have to work our way to them via our intuitions in much the way that scientists work towards general principles via perceptual data." (emphasis omitted)).

¹⁷³ Dworkin, *Hedgehogs*, supra note 63, at 72–74.

convictions requires a bizarre epistemology of which we cannot make adequate scientific sense.¹⁷⁴

Second, and more important, according to White, not only may the moral feelings activated by particular facts justify a revision in one's *ethical* beliefs; they may also justify revising one's *descriptive* or factual beliefs. This idea would run directly afoul of the "independence of value" to which Dworkin is committed. But under White's view, both normative judgments (about what one should do or what is good and bad) and descriptive beliefs (about what exists in the world) are justified by reference to the same overall web of belief. At the same time, both kinds of judgments ultimately respond to the test of experience, broadly conceived. Therefore, not only can our sensory observations rationally lead us to revise our moral principles (for example, by observing the consequences of applying those principles), so may our moral reactions to facts rationally lead us to revise how we describe and understand the world we live in.

Three examples illustrate the idea. First, White imagines an argument about the morality of abortion that proceeds according to the following sort of reasoning¹⁷⁵:

P1: Killing human beings is always wrong.

P2: Every live fetus is a human being.

P3: Mary killed her fetus when she had an abortion.

C: Therefore, what Mary did was wrong.

Suppose that John has the strong intuition that what Mary did was *not* wrong.¹⁷⁶ According to White, such an intuition qualifies as the kind of "recalcitrant experience"¹⁷⁷ that scientists use to revise their scientific

¹⁷⁴ Id. at 85 ("We can find no place in an integrated epistemology for a special moral faculty that enables people to 'intuit' the fairness or injustice of affirmative action or the wickedness or wisdom of abortion.").

¹⁷⁵ White, *Culture*, supra note 24, at 158. I have abbreviated White's example slightly for simplicity.

¹⁷⁶ I should emphasize that this example is only intended to illustrate the *form* of reasoning White envisions, not to say anything substantively about the morality of abortion. For the example could just as easily work the other way. John may revise his prior factual belief that the fetus was *not* a human being to better accord with his moral intuition that abortion *is* morally wrong.

¹⁷⁷ Quine, *Two Dogmas*, supra note 132, at 40.

theories.¹⁷⁸ John must then decide which premise in the argument is mistaken. According to White, he may rationally choose to revise *either* an ethical principle to which he is committed (P1) *or* a factual description of the world (P2).¹⁷⁹ If he takes the second route, John may reason thusly: “Killing another human being is always wrong, but I don’t think Mary’s decision to have an abortion was wrong. Therefore, it must be that, contrary to what I had assumed, a live fetus is *not* a human being.” Such reasoning is perfectly rational, on White’s view, if John has more confidence in the correctness of both the relevant ethical principle (P1) and his emotional reaction to the particular facts (C) than he does in the correctness of his description of the minor premise of his syllogism (P2).

White makes a similar point about free will. Whether humans have genuine choice about what to do or whether, instead, their beliefs and conduct are the product of deterministic causal forces in the world, is typically regarded as a metaphysical question, susceptible to metaphysical argument and, perhaps, scientific evidence. But White argues that if one concludes that accepting the truth of determinism means that no one is ever morally responsible for their actions,¹⁸⁰ and if one confidently believes that people *can* be, at least under some circumstances, morally responsible for their actions, then that moral commitment would authorize someone to conclude that determinism is false for that reason.¹⁸¹

¹⁷⁸ As White says in an earlier work, referring to the same example, “this is analogous in a certain respect to a physicist’s amending or rejecting a previously accepted logical belief because of certain data of quantum mechanics.” White, *What Is*, supra note 150, at 31. There he also uses the phrase “recalcitrant feeling of obligation” to make the comparison to Quine’s phrase clear. *Id.* at 47.

¹⁷⁹ White, *What Is*, supra note 150, at 61.

¹⁸⁰ Such an inference is precisely the one denied by so-called “compatibilists” about free will. Not surprisingly, Dworkin embraces compatibilism. Dworkin, *Hedgehogs*, supra note 63, at 12. It is not surprising because Dworkin’s whole approach to legal and moral reasoning is compatibilist in the sense that it sees normative inquiry as compatible with virtually any scientific or metaphysical view. My own view is that William James—who took a view more like White’s—was right when he described compatibilism (or what he called “soft determinism”) as a “quagmire of evasion.” See William James, *The Dilemma of Determinism*, in William James, *The Will to Believe and Other Essays in Popular Philosophy* 149 (1896).

¹⁸¹ White, *What Is*, supra note 150, at 69 (“[T]he corporatism I have advocated not only permits our normative beliefs to affect the descriptive, that is to say, non-normative beliefs

White's third example involves drawing an analogy to a phenomenon well known to lawyers: jury nullification. According to legal orthodoxy, when a jury in a criminal case renders a verdict of guilt or innocence, it must apply the terms of the statute to the description of the facts it finds in a more or less syllogistic manner. So if the jury accepts the prosecutor's view of the facts, then it will convict; if not, it will not convict. But White observes that sometimes a jury will "reject the prosecutor's description of the facts after reacting negatively to the normative conclusion of a legal syllogism."¹⁸² So just as in the abortion example above, the jury will effectively reject a factual minor premise ("the defendant's girlfriend co-defendant knew the bag contained drugs") on the grounds that the conclusion to which it leads ("she will be sentenced to five years in prison")¹⁸³ strikes the jury as morally unacceptable.¹⁸⁴

White emphasizes that the jury-nullification example is only an analogy to holistic reasoning. It may well be that the jury in such a case does not *literally* revise its understanding of what the defendant did or knew. Instead, it simply refuses to issue a guilty verdict on the ground that it concludes that the punishment does not fit the crime.¹⁸⁵ Still, the analogy is sufficiently close to enable us to see how one of Souter's

we may hold in natural science but it also permits our normative beliefs to affect the descriptive beliefs we may hold in metaphysics.").

¹⁸² *Id.* at 49.

¹⁸³ The examples in the parentheses are mine, not White's. Please forgive the clichéd use of the so-called "girlfriend defense."

¹⁸⁴ White, *What Is*, *supra* note 150, at 49. Such a process of juror reasoning may be a common feature of criminal adjudication, and even one that the legal system itself in some way protects by barring governmental appeals in criminal cases and making it difficult to impeach jury verdicts. See Andrew D. Leipold, *Rethinking Jury Nullification*, 82 *Va. L. Rev.* 253, 263 (1996) (arguing that various "rules prohibiting error-correcting devices in criminal cases can be traced to the nullification doctrine").

¹⁸⁵ The difference matters in part because White's core claim, but *not* the jury-nullification analogy, depends on the assumption that one can, to some extent at least, "choose" what to believe—a view called epistemic or doxastic voluntarism. See White, *What Is*, *supra* note 150, at 78 ("I have been working in the tradition of what may be called voluntarism . . . We are not *forced* by experience or feeling to build any one of these [linguistic] structures just as we are not forced by clay to fashion it into a pot."). Doxastic voluntarism is controversial among epistemologists. See John Heil, *A Companion to Epistemology* 257 (Jonathan Dancy, et al., eds., 2010) ("Acquiring a belief resembles catching cold. You might be able voluntarily to bring it about that you hold a certain belief . . . just as you might voluntarily bring it about that you catch cold. But believing appears not to be voluntary. Not everyone agrees.").

most famous opinions might be seen as an application of holistic pragmatism.

ii. Holistic pragmatism in action: Old Chief v. U.S.

Old Chief was a criminal defendant charged with possessing a firearm while having a prior felony conviction.¹⁸⁶ Prior to trial, he had offered to stipulate that he had committed a felony and so moved for an order preventing the government from telling the jury any facts about his previous felony conviction (except that it was for a crime punishable by imprisonment for more than one year).¹⁸⁷ Old Chief argued that presenting any further evidence about the previous conviction would carry a risk of prejudice that substantially outweighed its probative value, in violation of Federal Rule of Evidence 403.¹⁸⁸ With Justice Souter writing for a five-member majority, the Supreme Court ultimately agreed with Old Chief, concluding that Rule 403 required the trial court to consider the relative probative value of a piece of evidence as compared to alternatives and that, here, the relative probative value of the prior conviction was low.¹⁸⁹

But the important part of *Old Chief* is what Souter wrote in dicta about the government's argument that it had a right to prove its case in its own way. That is true as a general matter, Souter wrote, because "making a case with testimony and tangible things not only satisfies the formal definition of an offense, but tells a colorful story with descriptive richness."¹⁹⁰ Then, in a paragraph famous (or infamous) among evidence scholars, Souter elaborated on why such "descriptive richness" is, in general, an important part of the trial process:

Evidence . . . has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an

¹⁸⁶ *Old Chief v. United States*, 519 U.S. 172 (1997).

¹⁸⁷ *Id.* at 174–75 (prior felony was an assault causing serious bodily injury).

¹⁸⁸ *Id.*; see also Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

¹⁸⁹ *Old Chief*, 519 U.S. at 191.

¹⁹⁰ *Id.* at 187.

honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them. *Jury duty is usually unsought and sometimes resisted, and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal.* When a juror's duty does seem hard, the evidentiary account of what a defendant has thought and done can accomplish what no set of abstract statements ever could, not just to prove a fact but to establish its human significance, and so to implicate the law's moral underpinnings and a juror's obligation to sit in judgment. Thus, the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault.¹⁹¹

Souter thus concluded that the general idea that a prosecutor may prove her case in her own way rests on "good sense," because "[a] syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it."¹⁹²

Old Chief is controversial among evidence scholars because it seems to license precisely the kind of inference—one aimed at triggering the fact-finder's emotional reaction to the facts—that the rules of evidence consider "prejudicial."¹⁹³ But it can also be seen as an example of the sort of fact-value holism that White defends. Critically, Souter characterizes fact-finding as, in part, a form of *practical* reasoning (about what to do), rather than merely theoretical reasoning (about what to believe). Each juror must assess the weight of the evidence in determining what the defendant did, but, in issuing a verdict, the jury is

¹⁹¹ Id. at 187–88 (emphasis added).

¹⁹² Id. at 189.

¹⁹³ See, e.g., Dan Simon, A Third View of the Black Box: Cognitive Coherence in Legal Decision making, 71 U. Chi. L. Rev. 511, 566 (2004) ("In the ever-elusive domain of balancing probativeness against prejudicial impact, the Court seems to be shifting the ground toward a more lax inclusion of potentially prejudicial evidence, under which prosecutors may 'tell a story of guiltiness.'"); D. Michael Risinger, John Henry Wigmore, Johnny Lynn Old Chief, and Legitimate Moral Force: Keeping the Courtroom Safe for Heartstrings and Gore, 49 Hastings L.J. 403, 456 (1998) (criticizing Souter's dicta in *Old Chief* on various grounds, including that "keeping the jury interested and engaged is a value, but it would seem weak to justify the excesses of our usual 'heartstrings and gore' practices").

implicitly authorizing (or refusing to authorize) the state to take certain actions that cause the defendant harm. That is why the jury's task is an essentially moral one. "Jury duty is usually unsought and sometimes resisted," Souter explained, "and it may be as difficult for one juror suddenly to face the findings that can send another human being to prison, as it is for another to hold out conscientiously for acquittal."¹⁹⁴ Nevertheless, jurors have an "obligation to sit in judgment."¹⁹⁵

Once it is clear that, in rendering a verdict, jurors are engaged in a form of practical reasoning, the legitimacy of appealing to one's emotional reactions in rendering a verdict becomes more plausible. According to White's holistic pragmatism, the "feelings of moral obligation" that one experiences upon encountering a set of facts or circumstances are critical to our interpretation of those facts.¹⁹⁶ So if those feelings are only capable of being stimulated through vivid, concrete or narratively inflected descriptions, then such descriptions may be warranted. As Souter says, "the persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them."¹⁹⁷

Souter's reasoning is thus the logical counterpart to White's analogy to jury nullification. White suggested that a jury might rationally revise its characterization of a factual minor premise in light of its recalcitrant moral reaction to those facts if it balks from the implications of applying the law syllogistically.¹⁹⁸ That possibility is precisely what the *Old Chief*

¹⁹⁴ *Old Chief*, 519 U.S. at 187.

¹⁹⁵ *Id.* at 187–88.

¹⁹⁶ White, *Culture*, *supra* note 24, at xi ("I also came to believe that ethics may be viewed as empirical if one includes feelings of moral obligation as well as sensory experiences in the pool or flux into which the ethical believer worked a manageable structure.").

¹⁹⁷ *Old Chief*, 519 U.S. at 187. Some scholars have suggested that Quine provides philosophical support for some aspects of the *Old Chief* dicta. See, e.g., Michael S. Pardo, Comment, Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism, 95 *Nw. U. L. Rev.* 399, 401, 407 (2000) (characterizing the *Old Chief* dicta as endorsing a form of reasoning he dubs "evidentiary holism" and finding support for that view the work of Quine). See also Allen and Leiter, *supra* note 142, at 1494 (looking to Quine for philosophical support of a theory of juridical proof they call "relative plausibility theory," but without specifically mentioning *Old Chief*). But the fact that Souter envisions the jury's task as partly one of practical, not just theoretical, reasoning, suggests to me that White's form of fact-value holism provides a better description of the reasoning process.

¹⁹⁸ See White, *What Is*, *supra* note 150, at 48–49 ("Thus a jury which shrinks from the thought of electrocuting or hanging the accused will often issue a verdict on the ground that

Court suggests prosecutors might justifiably try to counteract.¹⁹⁹ They are, for just that reason, permitted to show the “human significance” of the facts relevant to a dispute in such a way as to reduce the likelihood the jury will have such a recalcitrant experience.²⁰⁰

Let me reiterate that I do not claim to have given an adequate *defense* of holistic pragmatism as the best model of practical (or theoretical) reasoning. There are crucial difficulties and ambiguities. What exactly White means by the notion of “moral feelings,” for instance, seems a bit obscure. Does he mean some kind of non-cognitive causal input, or an already-conceptualized propositional judgment?²⁰¹ And regardless of which it is, does not a lot depend on how one characterizes or *frames* the particular facts?²⁰² What kind of faculty is responsible for these sorts of experiences? Do humans have a “moral sense”? Finally, the view seems to license post-hoc rationalizations of the worst sort (“I believe in the value of an unregulated market; therefore, man-made climate change is a hoax by the Chinese”).

These are fair questions. Holistic pragmatism, like the other models of practical reasoning considered here, is controversial.²⁰³ But offering a defense of the view is not my concern. Rather, my purpose has been (1) to identify holistic pragmatism as a discrete method of practical reasoning, distinguishable from instrumentalism and value holism, and (2) justify my ascription of holistic pragmatism to Justice Souter. Having done that, we are now in a position to answer the questions left open in Part I.

the accused did *not* commit murder if capital punishment is mandatory for murderers.”) (emphasis in original).

¹⁹⁹ See Risinger, *supra* note 193, at 456 (“Justice Souter apparently has no faith that juries will be up to convicting obviously guilty persons without substantial irrelevant and often inflammatory concrete context to establish human significance.”).

²⁰⁰ *Old Chief*, 519 U.S. at 187–88.

²⁰¹ See Daniel M. Hausman, Book Review, Morton White, What Is and What Ought to Be Done: An Essay on Ethics and Epistemology, 80 J. Phil. 312, 313 (1983) (pointing out this difficulty).

²⁰² *Id.* at 314.

²⁰³ For a discussion of some of the ambiguities in instrumentalism, see Millgram, Specificationism, *supra* note 97, at 742. For criticism of Dworkin, see sources collected in note 110, *supra*.

III. SOUTER'S THIRD MODEL OF COMMON LAW REASONING

Those questions arose from the fact that we saw Souter endorse what seemed like a relatively traditional understanding of common law reasoning, albeit one that blended elements of Posner-style pragmatism and Dworkin-style law-as-integrity. Like Posner, Souter praised the virtues of empiricism and pragmatism; but like Dworkin, he saw the law as containing fundamental principles. At the same time, Souter seemed to accord history a deeper, more epistemic role than either of the other two. Those similarities and differences left us wondering whether there was any deeper unity or coherence to Souter's combination of views or if, instead, he merely was giving voice to a jumble of miscellaneous observations and judicial inclinations.

Now we have the seeds of a possible answer. Souter seems to have embraced a species of fact-value holism, which (following Morton White) we have dubbed holistic pragmatism. According to this view, one seeks an overall coherence of belief including one's factual *and* normative judgments. So one hypothesis is that this understanding of practical reasoning underwrites both Souter's understanding of history and his approach to common law adjudication—and explains how the two fit together.

This Part attempts to vindicate that hypothesis. It does so first by showing how adopting a “historical way of looking at the world” entails taking a certain stance on social change. In particular, it means seeing social change as presumptively—but *only* presumptively—constituting moral progress. It then shows how Souter's understanding of common law reasoning calls for judges to adopt that stance. The result is a distinctive model of common law reasoning that is at once more traditional and more radical than either of the alternatives under examination. It is a view that sees law as containing often competing constitutional and moral principles (*pace* Posner), but—in part *because* such principles are often competing—it denies that judges should decide cases *by reference* to those principles (*pace* Dworkin). The reason is that the proper scope and weight of those principles often only become clear in hindsight.

A. Social Change and Moral Progress

In Part I, we saw Souter argue that learning history yields genuine moral insight because it shows us that moral attitudes have changed over

time. The transition from the *Plessy* to *Brown* constitutional regimes, for instance, reflects the fact that society made an advance in moral understanding with respect to racial oppression. The *Brown* Justices came to “see things” about race in America that the *Plessy* Justices did not see as a result of their more limited knowledge and experience. Because of that knowledge and experience, the *Brown* Justices better understood than did those in *Plessy* which sorts of social practices are consistent with the Constitution’s demand for equality and which are not. But does history teach us that we have experienced moral progress more generally?

i. Souter on moral progress

Yes and no. Souter’s view seems to be that we may reasonably *presume* that moral progress has occurred but that that presumption is always open to challenge. In this way, societal changes in moral outlook are like those of an individual. As Souter observed in one of his last dissents written as a Supreme Court Justice:

Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally.²⁰⁴

We tend to think that our current individual moral convictions mark improvements over our earlier beliefs, largely because they are based on more experience. By a similar logic, as society acquires new information about the world and the human (and non-human) beings that populate it, our moral attitudes understandably change in light of them. As Souter wrote in the same case, “the accumulation of new empirical knowledge” may influence our judgments of what is and what is not permissible governmental action.²⁰⁵

²⁰⁴ Dist. Attorney’s Off. for the Third Judicial Dist. v. Osborne, 557 U.S. 52, 105 (2009) (Souter, J., dissenting). The relevant issue in *Osborne* was whether the respondent, who had been convicted of sexual assault, had a constitutional due process right to subject the state’s DNA evidence to his own testing in a post-conviction Section 1983 suit.

²⁰⁵ Id. at 104.

Talk of “empirical knowledge” suggests that Souter envisions new scientific facts altering our moral judgments. And that may happen. But for the holistic pragmatist, we now know, inferences can legitimately go the other way as well. Since, for the holistic pragmatist, “experience,” and the “empirical” knowledge based on it include not just “sensory stimulation[s]” (Quine’s phrase)²⁰⁶ but also one’s “feelings of moral obligation” (White’s phrase),²⁰⁷ those emotional attitudes can affect our understandings of facts as well. Hence Souter’s observation that, like an individual, society must take time to work through some moral issue “intellectually *and emotionally*.”²⁰⁸ No doubt that is why Souter explained in his interview with Professor Feldman that reasoning in this holistic-pragmatist sort of way is something that is “engaged in by society” even more so than judges.²⁰⁹

A good example (my own, not Souter’s) of this process may be moral views about homosexual conduct. Social attitudes about homosexuality have obviously changed dramatically over the last few decades. So, too, have views about whether one’s sexuality is something hardwired into our genes.²¹⁰ But it seems unlikely that scientific findings about any biological basis of homosexuality is what has changed people’s moral views. Rather, it seems far more likely that as more and more people have realized that their brothers and sisters and sons and daughters are gay, the more their views about the *nature* of homosexuality have changed. Thus, we see something akin to White’s analysis of the free-will question in Part II: one revises a scientific or metaphysical view about the reality of human choice in some domain of conduct in light of one’s moral conviction about whether that domain is properly amenable to moral judgment.

But since such progress comes about through experience—sensory and intuitive—it is not *guaranteed* that our later moral views will be better ones. This means that our own moral views are always subject to

²⁰⁶ Quine, *Two Dogmas*, supra note 132, at 43.

²⁰⁷ White, *Culture*, supra note 24, at 158.

²⁰⁸ *Osborne*, 557 U.S. at 105 (emphasis added).

²⁰⁹ Souter, Feldman, supra note 20, at 19 min.

²¹⁰ Jeffrey M. Jones, *Majority in U.S. Now Say Gays and Lesbians Born, Not Made*, Gallup (May 20, 2015), <http://www.gallup.com/poll/183332/majority-say-gays-lesbians-born-not-made.aspx> [<https://perma.cc/V5HE-D42L>] (showing a change from about 14% in 1978 to over 50% in 2015 in the percentage of those polled who believe that homosexuality is innate).

revision upon reflection. And here is the key point: for the holistic pragmatist, such reflection involves not only checking our moral commitments against the particular judgments their application would entail—as required by the method of reflective equilibrium—but also looking to the *process* by which the change in view came about.²¹¹ For instance, if an individual begins to question her commitment to free-market libertarianism as a political ideal, it might matter to her whether, upon reflection, she thinks she developed that view from reading works of philosophy in college or instead because parroting such views made her accepted among her colleagues at the investment bank where she took her first job.²¹² This kind of reasoning is analogous to the scientist who, when scrutinizing whether her theory is a good one, not only tests it empirically but also confirms that the observations and experiments upon which she originally developed her theory were properly conducted.

Similarly, on the societal level, it matters *why* social attitudes have changed. So, for example, Souter does not just observe that social views about race changed between *Plessy*'s time and *Brown*'s. He explains why they did so. By 1954, the scientific support for racism that existed in the late nineteenth century had eroded; the *Brown* Justices had seen the military become integrated without great difficulty or social unrest; and, lastly, those Justices had lived through the rise and fall of the Nazi regime and had seen the nightmare that racialized thinking could lead to.²¹³ That is why it matters in assessing some new moral claim whether, as Souter put in his *Osborne* dissent, society has had “the chance to take part in the dialectic of public and political back and forth” about such a claim.²¹⁴ The implication is that, unless or until we are persuaded that the process by which the new moral claim came about was one in which

²¹¹ Cf. Millgram, Practical Induction, *supra* note 18 (discussing how individuals make decisions through practical reasoning).

²¹² If the reader finds this example politically biased, feel free to substitute “socialist” for “libertarian” and “food co-op” for “investment bank.”

²¹³ Souter, Humanities, *supra* note 20, at 31–32 min.

²¹⁴ *Osborne*, 557 U.S. at 105 (2009). Here Souter is making a specific claim about the conditions under which a court properly recognizes a constitutional claim. I raise that issue below. See *infra* note 215.

it was adequately tested—by the “back and forth” of public debate—we may not be ready to endorse such a claim.²¹⁵

Something like this, I take it, is what Souter means by a “historical way of looking at the world.”²¹⁶ It describes an epistemic posture that maintains a trust in the capacity of experience—in both the narrow (sensory) and broad (intuitive) senses—to improve our moral judgments, both individually and as a society as a whole. But that trust is tempered by an awareness of the degree to which one’s own convictions—as well as society’s more generally—result from particular historical contingencies. Put differently, it is a posture which treats as open the question of whether any given shift in social attitudes amounts to what the philosopher Charles Taylor calls an “epistemic gain.”²¹⁷

ii. Posner and Dworkin on moral progress

Now this may all sound like relatively bland fare—the kind of thing your American History teacher tells you on the last day of class. But it is a view flatly rejected by both Posner and Dworkin. Posner denies it outright, which is no surprise since such a rejection follows from his instrumentalism. For him, all normative systems, including both law and morality, are best understood as tools human societies use to achieve particular social goals, most notably their own survival.²¹⁸ Since the best

²¹⁵ If so, then we might want to know, as a general matter, what sorts of political institutions will be good ones for ensuring that the truth outs. For some suggestions along these lines, see Allen Buchanan, *Political Liberalism and Social Epistemology*, 32 *Phil. & Pub. Affairs* 95, 99 (2004) (arguing that certain “key liberal institutions,” such as institutions protecting freedom of thought and expression, merit-based systems of epistemic authority, and “a broad culture of basic moral egalitarianism” are valuable because they reduce the risks of false beliefs in moral and prudential matters).

²¹⁶ Souter, *Humanities*, *supra* note 20, at 23–37 min.

²¹⁷ Charles Taylor, *Philosophical Arguments* 42 (1995) (suggesting that, in the scientific context, progress may be demonstrated when we are able “to show that the passage from one to the other represents a gain in understanding. In other words, we can give a convincing narrative account of the passage from the first to the second as an advance in knowledge” (emphasis omitted)). Taylor credits this focus on transitions which count as epistemic gains to Alasdair MacIntyre, *Epistemological Crises, Dramatic Narrative, and the Philosophy of Science*, 60 *The Monist* 453 (1977). See also Charles L. Barzun, “Skinner, Taylor, and Practical Reasoning in Law & History” (unpublished manuscript) (on file with author).

²¹⁸ Posner, *Problematics*, *supra* note 34, at 1641 (“Relativism suggests an *adaptationist* conception of morality, in which morality is judged—non-morally, in the way that a hammer might be judged well or poorly adapted to its function of hammering nails—by its contribution to the survival, or other goals, of a society.”).

means by which to achieve such goals inevitably depend on the particular facts of the society, any talk of “progress” is misplaced. “I do not shrink from the implication of my analysis that there is no moral progress in any sense flattering to the residents of wealthy modern nations,” Posner explains.²¹⁹ There are only effective and ineffective moral codes, not better or worse ones.

Dworkin, meanwhile, sees any judgment of moral progress to rest entirely on moral premises, not historical ones. Historical accounts purporting to explain why we have experienced moral progress are superfluous:

[W]e are entitled to no more confidence in our judgment of progress when we can offer [various historical] explanations [of progress] than when we can say only that earlier generations did not “see” some moral truth that we do. In either case we are relying finally on our conviction and on the moral case that we believe supports it *We would need some independent judgment that our contemporary views were improvements before we could claim that moral truth figured in the explanation of the progress we claim, and that independent judgment of improvement, on its own, is all we could mean by progress.*²²⁰

The conclusion that we have experienced moral progress is thus entailed by our moral judgments alone. To believe that one’s own moral convictions are more enlightened than those of our predecessors *just is* to believe in moral progress.

Like Posner’s, Dworkin’s view is unsurprising given what we have learned. It follows from the “independence of value,” which, remember, he asserts in an effort to deny that facts and explanations can undermine or impeach our own moral convictions. Causal explanations of how our moral judgments came to be held only bear on those judgments if we assume their validity depends in some way on our trust in the process by

²¹⁹ Id. at 1653. Posner states that his “analysis also suggests that no useful meaning can be given to the expression ‘moral progress,’” id. at 1641, but he qualifies that claim in his Reply to Critics, saying that he no longer doubts “that one can speak intelligibly of moral progress.” But he insists that “always one is speaking from a particular standpoint, rather than *sub specie aeternitatis*.” Posner, Reply, supra note 145, at 1815. Interestingly, this response is not unlike Dworkin’s response, only Dworkin denies the intelligibility of making moral judgments from any other standpoint. See Dworkin, Hedgehogs, supra note 63, at 87.

²²⁰ Dworkin, Hedgehogs, supra note 63, at 87 (emphasis added).

which we came to hold them, in the same manner that our empirical beliefs about the world depend on our observations of it.²²¹ But as we saw in Part II, Dworkin rejects the analogy between moral intuitions and sensory experience, so, naturally, he rejects the inference premised on it as well. “Facts about how someone tested his moral opinions are indeed pertinent,” Dworkin insists, “[b]ut nothing turns on the best causal explanation of how he came to the opinions he tests or, indeed, of how he decided what tests to use.”²²²

In neither Posner’s nor Dworkin’s view, then, would the questioning libertarian have reason to consider how she came to embrace free-market principles. For Posner, the only question for her to ask is what her goals are and whether, given those goals, adopting free-market principles helps her achieve them.²²³ For Dworkin, her inclination to reflect on her own history in that way is evidence that she is suffering the “symptom of not fully grasping the independence of value.”²²⁴ They each would make the same points at the societal level as well: for Posner, the only way to evaluate a society’s moral code (if at all) is through (forward looking) instrumental reasoning,²²⁵ for Dworkin, the only way is to evaluate them in light of one’s own *moral* convictions. Neither would find much profit in a “historical way of looking at the world.”

B. Common Law Adjudication

But let’s get back to Souter. For it is not yet clear how exactly this historically sensitive posture bears on his theory of common law adjudication, which is our chief concern. Souter provided a clue when he explained to Professor Feldman that, in his view, the pragmatist judge “accepts” the way in which social values change over time in the way just described.²²⁶ It seems, then, that for Souter, the judge’s task when

²²¹ Id. at 70.

²²² Id. at 80.

²²³ See Posner, *Problematics*, supra note 34, at 1670 (describing as “doomed efforts” the goal of making economics “a source of moral guidance” and that “[w]hat the economist can say, . . . is that if a society values prosperity (or freedom or equality), these are the various policies that will conduce to that goal”).

²²⁴ Dworkin, *Hedgehogs*, supra note 63, at 82.

²²⁵ Posner, *Problematics*, supra note 34, at 1668.

²²⁶ Souter, *Feldman*, supra note 20, at 22 min.

deciding constitutional cases is to identify and apply the subset of such societal values we call constitutional principles. There are two implications of this view—one, quite traditional; the other, a bit more radical.

i. Bottom-up reasoning

First, the traditional part. If history works in the manner Souter describes, whereby social attitudes change over time both in light of new empirical information and new social experiences that engage moral sentiments or emotions, then it might mean common law courts should try to follow those changing attitudes by deciding cases consistent with them. In the constitutional context, that would mean deciding cases according to society's current understanding of the relevant constitutional principles.

This view is not uncontroversial, particularly in the constitutional context, where it stands opposed to constitutional originalism.²²⁷ But it is hardly a novel suggestion. The idea that the common law derives its authority from its ability to track social and commercial customs goes back centuries.²²⁸ It is the foundational assumption of the nineteenth-century historical school of jurisprudence²²⁹ and is implied by the various organic metaphors courts and scholars have long evoked to describe the common law method: “evolving boundar[ies],”²³⁰ the “living constitution,”²³¹ “[t]hat tradition is a living thing.”²³² It is even

²²⁷ That is, unless the Framers intended for courts to treat the Constitution like common law, then it would be consistent with originalism. That possibility is contemplated in Baude, *supra* note 32, at 2351, and Sachs, *supra* note 32, at 857.

²²⁸ Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 *Yale L.J.* 1651, 1700 (1994) (“[Common-law theorist John Selden] argued that all law originates, historically, in customary law. Indeed, the English common law was itself conceived by him and his colleagues to be essentially customary law, in the sense that it was the embodiment of the patterns and norms of behavior developed by the common lawyers over many generations and centuries.”). Berman says this view only took hold in the seventeenth-century. *Id.* at 1655.

²²⁹ *Id.* at 1737 (describing Friedrich Carl von Savigny as the founder of the historical school and explaining that he “considered law an integral part of the common consciousness of the nation, organically connected with the mind of the people” (*Volksgeist*)).

²³⁰ *Washington v. Glucksberg*, 521 U.S. 702, 770 (Souter, J., concurring in the judgement)

²³¹ Strauss, *supra* note 23, at 3.

²³² *Poe v. Ullman*, 367 U.S. 497, 542 (Harlan, J., dissenting).

(in my view) implied in the “process” of the legal-process theory associated with Professors Hart and Sacks.²³³

If the job of courts is to track evolving societal values, including in constitutional cases, there are two reasons to think they might succeed in doing so. First, simply by virtue of the fact that Justices are part of society, their judgments will likely reflect those of the society in which they live.²³⁴ Second, they may impose on themselves a demand to make narrow decisions, proceeding slowly, so as not to deviate too far from societal understandings and values.

We have already seen that Souter endorses precisely that demand upon judges, which he sees as an essential feature of the common law method. Now we can also see it as an application of holistic pragmatism. It involves, according to Souter, a “go-slow” approach, which involves “bottom-up” common law reasoning, rather than “top-down” reasoning.²³⁵ Whereas under the latter approach, the judge applies a major premise (rule) to a minor premise (facts) to deduce a conclusion, “bottom-up” reasoning of the sort Souter articulates requires that the judge have “great respect” for the facts of the case, which themselves provide an “empirical basis” for decisions.²³⁶

²³³ Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 Va. L. Rev. 1, 43 (2013) (arguing that the “process” in “legal process” refers to “the process of ‘interaction of means and end,’ of fact and value, of ethics and science, by which a society fulfills its purposes” and that is “more akin to growth or development” (emphasis omitted)). Professor Postema argues that what he calls “common law conventionalism” constitutes a theory of law according to which such convergence between the law and the practices of the community is a condition of the existence of law. See Postema, *Philosophy*, supra note 5, at 602 (observing that, under this view, law “depends for its existence on substantial congruence and continuity with broader practices in the community”).

²³⁴ See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 5 (2004) (arguing that, in the constitutional context, judicial decisions tend to track the dominant social and political views of the time).

²³⁵ Souter, *Commencement*, supra note 1; Souter, *Feldman*, supra note 20, at 19 min, 25 min.

²³⁶ Souter, *Feldman*, supra note 20, at 18–23 min. It is also an approach that relies on analogical reasoning. See Gerald Postema, *A Similibus ad Similia: Analogical Thinking in Law*, in *Common Law Theory* 115 (Douglas E. Edlin ed., 2007) (arguing that a “top-down model” of decision-making “fails in particular as a characterization of analogical reasoning” because “in such reasoning the cases and relations among them exert an influence over the rules or principles that might be articulated to capture their significance.”). See also Postema, *Philosophy*, supra note 5, at 618 (observing that the tendency of positivists to focus on the authoritative nature of law “encourages us . . . to think of precedent in terms of rules, as ill-drafted statutes, rather than as examples”).

How can the facts of a case provide an empirical basis for a Court's decision? And what is the "meaning" of a set of facts? White defends the rationality of revising a moral principle in light of the "recalcitrant experience" of feeling in response to a set of facts as "*moral feelings*."²³⁷ The common law judge may experience something akin to a "*legal feeling*," or intuition, upon learning the facts of the case before her—what Karl Llewellyn colorfully called a judge's "*horse sense*."²³⁸ If that intuition is powerful enough, the judge may have more confidence in the right outcome in a particular case than in the applicable rule, thereby leading her to revise, alter, or abandon the rule altogether.²³⁹ The process is akin to the demand that a scientist allow for the possibility that the results of a new experiment will alter her scientific theory—or that a jury allow for the possibility of nullification.²⁴⁰

²³⁷ White, *What Is*, supra note 150, at 36–39.

²³⁸ Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 121 (1960) (observing that the "justice-duty works . . . through the facts" and that properly attending to the equities in the particular case "draws on that most uncommon knowledge which I call horse sense, the balanced shrewdness of the expert in the art").

²³⁹ *Id.* (observing that the old saying that hard cases make bad law "reminds us that the thrust may be enough to twist an otherwise good rule out of shape"). Cf. Souter, *Feldman*, supra note 20, at 28 min. ("That's why I espouse the common law method, which gets down to nitty gritty kinds of factual issues to provide a premise for deciding which of the competing principles has the better argument in the given case."). We can illustrate formally the distinction between this sort of reasoning and traditional "top-down" reasoning by comparing the two approaches in the table below, where "R applies to F" describes the application of a standard syllogism in which a Rule-as-currently-formulated (R) applies to a set of Facts (F), yielding a Judgment in the particular case (J).

"Top-Down"	"Bottom-up"
P1: If R applies to F, then J P2: R applies to F C: Therefore, J	P1: If R applies to F, then J P2: R applies to F C: Therefore, J OR P1. If R applies to F, then J P2: \neg J C: Therefore, \neg (R applies to F)

Using the terminology of logic, we would say that the "top-down" approach assumes that the proper form of argument is modus ponens (If P, then Q; P; therefore, Q), whereas the "bottom-up" approach allows for the possibility the proper form is either modus ponens or, instead, a modus tollens argument (If P, then Q; \neg Q; therefore, not \neg P). Both are logically valid forms of argument.

²⁴⁰ In this way, *Old Chief v. United States*, 519 U.S. 172 (1997), can be seen as a validation of "bottom-up reasoning" in the fact-finding context.

Once again, this idea is hardly novel. To the contrary, the idea that the exposure to the concrete facts of an actual dispute best enable judges to reconcile the inevitably competing interests and values at stake is arguably a (if not *the*) foundational premise of the common law.²⁴¹ Courts should proceed piecemeal, learning from concrete experience, and reasoning by analogy to other particular cases, rather than relying on broad principles or abstractions.²⁴² The process is inductive, rather than deductive. “It is the merit of the common law,” Holmes famously observed, “that it decides the case first and determines the principle afterwards . . . [I]n fact lawyers, like other men, frequently see well enough how they ought to decide on a given state of facts without being very clear as to the ratio decidendi.”²⁴³ And Holmes was hardly the only one (or first) to make such an observation.²⁴⁴

²⁴¹ That is not to say it is justified. For a skeptical view, see Frederick Schauer, *Do Cases Make Bad Law?*, 73 U Chi. L. Rev. 883, 890–901 (2006) (arguing that judges may be prone to cognitive errors when making policy decisions based on a set of concrete facts before them).

²⁴² Postema, *Common Law II*, supra note 6, at 16 (“[Hale] firmly believed that general principles are uncovered through reflection on particular cases, and not through abstract reasoning alone. In his typical common law manner, he thought that theory, if we may call it that, is always driven by cases, and never decisions and cases by theory.”); Strauss, supra note 23, at 41–42 (“The science of government being . . . so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life . . .” (quoting Edmund Burke)).

²⁴³ Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 Am. L. Rev. 1, 1 (1870).

²⁴⁴ Benjamin Cardozo, *The Nature of the Judicial Process* 117 (1921) (“The ends to which courts have addressed themselves, the reasons and motives that have guided them, have often been vaguely felt, intuitively or almost intuitively apprehended, seldom explicitly avowed. There has been little of deliberate introspection, of dissection, of analysis, of philosophizing.”); John Stuart Mill, *A System of Logic* 144 (New York, Harper & Bros. Pub., 8th ed. 1881) (“Almost every one knows Lord Mansfield’s advice to a man of practical good sense, who, being appointed governor of a colony, had to preside in its courts of justice, without previous judicial practice or legal education. The advice was to give his decision boldly, for it would probably be right, but never to venture on assigning reasons, for they would almost infallibly be wrong.”); 1 James Wilson, *The Works of James Wilson* 458 (James DeWitt Andrews ed., Chicago, Callaghan and Company 1896) (“In all sciences, says my Lord Bacon, they are the soundest, that keep close to particulars. Indeed a science appears to be best formed into a system, by a number of instances drawn from observation and experience, and reduced gradually into general rules; still subject, however, to the successive improvements, which future observation or experience may suggest to be proper.”).

Note that the justification for this approach is both epistemic and moral. Insofar as the judge allows her judgments to be informed by her relatively rough, commonsensical reactions to the facts of legal cases—along with a willingness to analogize to previous decisions—such judgments are likely to be the product of the social values the law is tasked with tracking (because the judge is part of society) and the values already contained in the legal doctrine itself (insofar as the judge analogizes to other, previously decided cases). This process stands in contrast to a “top-down” form of reasoning that might result from the judge’s fidelity to either some positive rule of law or a particular moral, political, or economic theory. At the same time, precisely because her judgments aim to match those of society, they are a more democratically legitimate source of legal authority.

A good example of this kind of reasoning can be found in Souter’s dissent in *Osborne*, already mentioned. Souter agreed with the Court in denying that the respondent, who had been convicted of sexual assault in a state court, had a “substantive” due process right to the State’s DNA evidence because Souter was not yet convinced that there had been a sufficient “chance to take part in the dialectic of public and political back and forth about a new liberty claim.”²⁴⁵ For that reason, he did not join the other three dissenters, all of whom found such a substantive right.²⁴⁶ Instead, he concluded that the petitioner deserved relief because a close reading of the record demonstrated that the reasons Alaska had offered for not allowing him access to DNA evidence did not hold up under scrutiny.²⁴⁷ Souter thus justified relief on the narrower ground that Osborne’s procedural due process rights had been violated, a conclusion he based on the particular facts in the record, rather than (as the other dissenters did) in a general “interest in being free from physical detention by one’s own government.”²⁴⁸

This view of the common law, however, does not deny that the law contains legal principles. Rather, it suggests that those principles are implicit in the particular decisions in the law, against which judges

²⁴⁵ Dist. Attorney’s Off. for the Third Judicial Dist. v. *Osborne*, 557 U.S. 52, 105 (2009) (Souter, J., dissenting).

²⁴⁶ Id. at 93 (Stevens, J., dissenting). Stevens’s dissent was joined in its entirety by Justices Breyer and Ginsburg.

²⁴⁷ Id. at 107 (Souter, J., dissenting).

²⁴⁸ Id. (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality opinion)).

perpetually check them. In this way, as scholars have observed, the common law method is not unlike that of reflective equilibrium, discussed above, in which the moral reasoner checks her general theories against her considered judgments or intuitions about particular cases.²⁴⁹ Dworkin's law-as-integrity model works in very much this way: Hercules searches for the principles which best fit and justify the past cases.

But there is an important dis-analogy between the common law method and reflective equilibrium. The latter involves comparing one's intuitions about particular cases to *one's own* moral commitments and vice-versa. The common law judge, however, compares her understanding of the relevant legal principles against the particular judgments made *by other (previous) courts* and the principles of law which they purport to reflect. Thus, those previous judgments seem capable of being mistaken by the judge's own lights in a way that the moral intuitions of a person engaging in reflective equilibrium are not.

ii. Historical explanations of past decisions

Now, in one sense, there is nothing surprising about this dis-analogy between reflective equilibrium and common law reasoning. It may just be the difference between moral and legal reasoning. You need not be a legal positivist to think that the latter, but not the former, necessarily takes into account various institutional *facts* in a way that moral reasoning does not.²⁵⁰ Still, the particular way Souter's "sense of history," grounded by his holistic pragmatism, deals with this difference is what leads to the more radical dimension of his model of common law reasoning.

The best way to see this dimension is, again, to compare holistic pragmatism to Dworkin's value holism. Under Dworkin's view, since

²⁴⁹ See, e.g., Mitch Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural Born Citizenship Clause 2* (2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458108 [<https://perma.cc/9LC7-NGZQ>].

²⁵⁰ See, e.g., Dworkin, *Empire*, *supra* note 7, at 92–93; Mark Greenberg, *The Moral Impact Theory of Law*, 123 *Yale L.J.* 1288, 1288 (2014) ("Legal institutions—legislatures, courts, administrative agencies—take actions that change our moral obligations . . . by changing the morally relevant facts and circumstances, for example by changing people's expectations, providing new options, or bestowing the blessing of the people's representatives on particular schemes.").

law is an evaluative, interpretive domain, the principles in the law are a result of judges' constructive (or what he later calls "value") interpretations—that is, the law consists of those principles that judges think best justify past decisions and render them most coherent. So, in one sense, the judge aims to reconcile her moral judgment (about which principles best justify past decisions) with a factual judgment (about what principles best "fit" them). But genuinely historical questions about what causally explain those decisions are irrelevant to that inquiry for the reasons we've seen—they belong to the factual domain of knowledge.²⁵¹

By contrast, for Souter, historical questions about how some belief or conviction came to be are relevant to one's own *moral* deliberations because, for the holistic pragmatist, one's judgments about explanations and justifications are interdependent. And given that, as just noted, common law reasoning depends even more explicitly on historical facts, it would stand to reason that such historical questions would matter even more for a court's deliberations about whether and to what extent past decisions embody particular principles. What the judge will want to know, in part, is whether the *process* by which the earlier decision was made was the proper one—just as the scientist seeks to ensure that previous experiments were conducted under the right conditions. Briefly put, by the lights of holistic pragmatism, a judge would have good reason to wear a historian's hat. As it turns out, in two of his most well-known opinions, Souter did just that.

1. Seminole Tribe v. Florida

The first is Souter's dissent in *Seminole Tribe v. Florida*. That case involved the question of whether the Eleventh Amendment barred Congress from authorizing federal courts to take jurisdiction over cases

²⁵¹ Dworkin actually seems to hedge on this point—in my view, to the point of inconsistency. He describes historical accounts as examples of "explanatory interpretation," which itself is a form of value interpretation. Dworkin, *Hedgehogs*, supra note 63, at 138. That is why he retracts his earlier condemnation of critical legal historians as confused—a point mentioned above, see supra note 35. *Id.* at 144. At one point he even suggests that scientific interpretation of data might plausibly be thought of as a form of explanatory interpretation. *Id.* at 124 n. 2. But if that were the case, then the "embracing dualism of understanding" that distinguishes the domains of science and interpretation would be erased. *Id.* at 123.

in which a state was sued by one of its own citizens.²⁵² In holding that the Amendment did bar congressional abrogation of sovereign immunity, Chief Justice William Rehnquist relied heavily on the 1890 case of *Hans v. Louisiana*,²⁵³ which had first interpreted the Eleventh Amendment to apply to suits brought by a state's own citizens.²⁵⁴

Justice Souter disagreed. After offering his own competing interpretation of the Eleventh Amendment, he sought to undermine the *Hans* decision. Relying on historical sources, Souter did so by pointing out that had the *Hans* Court interpreted the Eleventh Amendment properly, it would have been in the position of trying to enforce a judgment against Louisiana that was, in practice, nearly impossible since, by 1890, the Union army had pulled out of the South, ending Reconstruction.²⁵⁵ Souter thus argued that the *Hans* Court declined jurisdiction over the suit in order to pay lip service to the plaintiff's right without having to actually enforce any remedy for its violation.²⁵⁶ "So it is," Justice Souter concluded, "that history explains, but does not honor, *Hans*."²⁵⁷

Souter's use of such history is, to put it mildly, unorthodox.²⁵⁸ But again, it makes sense on holistic-pragmatist assumptions. Since factual judgments and normative judgments—in this case, constitutional judgments—are interdependent, it follows that an explanation about *why* the *Hans* Court decided the way it did might inform our constitutional analysis about whether it reached the right result. Here, it does so in a negative way: Souter's historical explanation, which looked to the political circumstances in which *Hans* was decided, undermined or "impeached" the decision as a source of legal authority.²⁵⁹

None of this implies, however, that the underlying constitutional reasoning is inappropriate or irrelevant. Explanation and justification,

²⁵² *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 76 (1995).

²⁵³ 134 U.S. 1, 14–15 (1890).

²⁵⁴ *Seminole Tribe*, 517 U.S. at 54–55, 64–65, 68–69.

²⁵⁵ *Seminole Tribe*, 517 U.S. at 120–21 (Souter, J., dissenting).

²⁵⁶ *Id.* at 121 (Souter, J., dissenting).

²⁵⁷ *Id.* at 122 (Souter, J., dissenting).

²⁵⁸ Writing for the majority, Chief Justice Rehnquist chastised Souter for his "extralegal explanation" of a prior decision, which he insisted did a "disservice to the Court's traditional method of adjudication." *Id.* at 68–69.

²⁵⁹ See Charles L. Barzun, *Impeaching Precedent*, 80 U. Chi. L. Rev. 1625, 1638–42 (2013).

are, after all, *interdependent*. Souter thus denied that “historical circumstance may undermine an otherwise defensible decision.” Rather, it was only “because *Hans* is so utterly indefensible on the merits of its legal analysis that one is forced to look elsewhere in order to understand how the Court could have gone so far wrong.”²⁶⁰ The reason “one is forced to look elsewhere”—from an inadequate legal justification to historical explanation—is precisely because holistic pragmatism demands that justifications and explanations interact in a way that makes sense of one’s overall web of belief.

2. Planned Parenthood v. Casey

An even better example is the joint opinion’s stare-decisis analysis in *Planned Parenthood v. Casey*. Whereas the logic of Souter’s historical explanation for *Hans* in *Seminole Tribe* would also undermine an originalist, or “top-down,” style of reasoning (as I have argued elsewhere²⁶¹), *Casey* shows even more vividly how Souter’s historical sensibility informs his understanding of constitutional adjudication. That is because it demonstrates the way in which the constitutional principles are themselves sometimes a product of history.

As every law student knows, *Casey* was the Court’s 1992 decision that affirmed the “essential holding” of *Roe*, while, at the same time, relaxing that decision’s prohibitions on abortion regulation. For our purposes, the relevant part of the “joint opinion”—co-authored by Justices O’Connor, Kennedy, and Souter—is its stare-decisis analysis in which it explains why it decided not to overrule *Roe*.²⁶²

The task the joint opinion set for itself was to explain why *Roe* was not like *Plessy v. Ferguson* or *Lochner v. New York*,²⁶³ two cases that had famously been overruled by subsequent cases and have long been considered wrongly decided (constituting part of the “anti-canon”).²⁶⁴

²⁶⁰ *Seminole Tribe*, 517 U.S. at 122–23 n.17 (Souter, J., dissenting).

²⁶¹ Barzun, *Impeaching Precedent*, *supra* note 259, at 1648–52.

²⁶² As noted above, we have good reason to think that Souter was the chief author of this portion of the opinion. See *supra* note 21.

²⁶³ 198 U.S. 45 (1905).

²⁶⁴ See Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379, 380–81 (2011). But *Lochner*, unlike *Plessy*, still has its defenders. See, e.g., David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* 3 (2011); Richard A. Epstein, *How the Progressives Rewrote the Constitution* 89–92 (2006).

The joint opinion distinguished those cases on the ground that there had been a change in the “facts” or the “understanding of the facts” between those cases and the cases that overruled them, *Brown v. Board of Education* and *West Coast Hotel v. Parrish*,²⁶⁵ respectively. So, for instance, the nation’s experience in the Great Depression had demonstrated decisively that an unregulated market economy could not satisfy “minimum levels of human welfare,” an assumption on which *Lochner* had been premised.²⁶⁶

Because they were based on changed understandings of facts, *Brown* and *West Coast Hotel* could be plausibly understood as “applications of constitutional principle to facts as they had not been seen by the Court before.”²⁶⁷ But no such changed facts or understanding of facts had occurred since *Roe*. Therefore, the Court could not justify overruling it on the same principled ground that had justified the Court’s previous decisions in *Brown* and *West Coast Hotel*. Instead, the best explanation one could offer for a decision to overrule *Roe* would be the Court’s “present doctrinal disposition to come out differently from the Court of 1973.”²⁶⁸

Like Souter’s *Seminole Tribe* dissent, here we see the joint opinion using history in an unconventional manner.²⁶⁹ But while the history there undermined one of the Court’s precedents, in *Casey*, the social and economic changes to which the joint opinion refers (albeit briefly) were examples of *learning* through social and economic experience. Recall Souter’s suggestion in *Osborne* that understandings of arbitrary government could change in light of “new empirical knowledge.”²⁷⁰ In his subsequent remarks, Souter observed that scientific understandings of race had changed between the time of *Plessy* and *Brown*.²⁷¹ But it

²⁶⁵ 300 U.S. 379 (1937).

²⁶⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 862 (1992).

²⁶⁷ *Id.* at 864.

²⁶⁸ *Id.*

²⁶⁹ Once again, Chief Justice Rehnquist criticized this sort of reasoning. In his view, the *West Coast Hotel* Court “simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that “[t]he Constitution does not speak of freedom of contract.” *Id.* at 961-62 (Rehnquist, C.J., dissenting) (quoting *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

²⁷⁰ *Dist. Attorney’s Off. for the Third Judicial Dist. v. Osborne*, 557 U.S. at 52, 104 (2009) (Souter, J., dissenting).

²⁷¹ Souter, *Humanities*, *supra* note 20, at 31–32 min.

seems unlikely that social attitudes about racial segregation or labor regulation changed as a result of people's exposure to purely scientific or empirical facts in the conventional sense. We now know, though, that the holistic pragmatist defines "empirical" in a broad sense to include not just sensory experience but one's "moral feelings" that are triggered by, or occur spontaneously with, such sensory experiences. Hence Souter's references to the "meaning of facts,"²⁷² the "understanding of the facts,"²⁷³ the "human significance" of facts,²⁷⁴ and the need for the individual, and society generally, to work out changes in perspective "intellectually and *emotionally*."²⁷⁵

Again, Souter is not suggesting here that one's justification depends exclusively on such historical explanations. Rather, one's ultimate constitutional judgment depends, under this view, on *both* historical explanation and independent constitutional reasoning. Such interdependence is less obvious in *Casey* than in *Seminole Tribe* since its historical explanations buttress, rather than undermine, the relevant decisions. But again, Souter's extra-judicial comments help fill in the gaps. How do we know *Brown* was constitutionally justified as a matter of our own independent understanding of the Constitution? Souter's answer is telling. In his Harvard commencement address, he concluded his discussion of the transition from *Plessy* to *Brown* with what he called a "rhetorical question":

Did the judges of 1954 cross some limit of legitimacy into law making by stating a conclusion that you will not find written in the Constitution? Was it activism to act based on the current meaning of facts that at a purely objective level were about the same as *Plessy*'s facts 60 years before? Again, you know my answer.²⁷⁶

The rhetorical quality of Souter's question is precisely the point. Souter is, in effect, reminding his audience that they *know* that *Brown* was rightly decided—with more confidence than they know almost anything else about the Constitution. And it is that fact that helps support both our own, modern understanding of the principle of racial

²⁷² Souter, Commencement, *supra* note 1.

²⁷³ *Casey*, 505 U.S. at 862–63.

²⁷⁴ *Old Chief v. United States*, 519 U.S. 172, 187–88 (1997).

²⁷⁵ *Osborne*, 557 U.S. at 105 (Souter, J., dissenting) (emphasis added).

²⁷⁶ Souter, Commencement, *supra* note 1.

equality that we see *Brown* as embodying *and* our conclusion that the Court's (and society's) increasing appreciation of that principle forms part of the best historical explanation for it.²⁷⁷

C. *Law-as-Integrity—in Hindsight*

And yet, had Souter asked exactly that question shortly after *Brown* came down, it may not have been rhetorical. In fact, about fifty years before Souter gave his commencement speech, just across Harvard Yard, a progressively-minded law professor also talked about *Brown*, but he concluded his talk with a different question for his audience of law students:

Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think there is, but I confess that I have not yet written the opinion.²⁷⁸

Wechsler's words demonstrate that one can only assume such a high degree of confidence in the particular judgment that *Brown* is correctly decided—that, indeed, it is a paradigmatic application of equal protection principles—with the perspective of hindsight.²⁷⁹

²⁷⁷ This kind of reasoning explains the oft-observed fact that for any constitutional theory to be considered at all credible today it must explain why *Brown* was rightly decided. See Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. Chi. L. Rev. 1819, 1840 (2016) (observing that early versions of originalism were abandoned in favor of versions that could explain and justify *Brown*).

²⁷⁸ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 34 (1959). Wechsler had delivered the talk as the Oliver Wendell Holmes Lecture at Harvard Law School in April 1959. *Id.* at 1.

²⁷⁹ Note that Wechsler did not even think equal protection was the strongest argument for *Brown*, which is why he suggested the freedom of association rationale just quoted. Of course, many people, including many judges and legal scholars, recognized *Brown* to be rightly decided—even clearly so—when it was announced. See, e.g., Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 427 (1960). Indeed, that is precisely the joint opinion's point in *Casey*—that by the time of *Brown*, segregation had been revealed to be clearly a racially discriminatory regime. See *Casey*, 505 U.S. at 863 (citing Black, *id.*). The point, though, is that *Brown* has only become a paradigm case of constitutional equal protection with the advantage of hindsight. On paradigm cases, see Dworkin, *Empire*, *supra* note 7, at 88–90. See also Jed Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* 178–95 (2001) (offering a theory of constitutional

This fact helps explain why Souter is able to give a seemingly paradoxical answer to the issue that divides Dworkin and Posner. On the one hand, he agrees with Dworkin that the common law—and the Constitution, insofar as its principles are treated as a form of common law—contains important legal principles and that the judge properly strives to render his decisions consistent with those principles. Thus, Dworkin applauds the Court's decision in *Casey* as an example of the Court recognizing the value of integrity (while ignoring the stare decisis argument discussed above entirely).²⁸⁰

On the other hand, Souter agrees with Posner that judges should not necessarily try to decide cases by deductively applying broad principles.²⁸¹ The reason, as we have already seen, is that there are so often competing values and principles cutting in the other direction.²⁸² No surprise, then, that Posner praises the Court's decision in *Glucksberg* for reasons very similar to those Souter offered in his concurrence in that case: there were open factual questions about the effects of a regime of assisted suicide that justified the concerns the state had offered there.²⁸³ This was a quite different outcome, and form of reasoning, than

interpretation based around paradigm cases). This conclusion may have an interesting parallel to the history and philosophy of science. Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *Criticism and the Growth of Knowledge* 170, 185 (Imre Lakatos and Alan Musgrave eds., 1970) (arguing that the sort of "crucial experiments" that traditionally have been thought to be essential to progress in the sciences "can be recognized as such among the scores of anomalies only with hindsight, in the light of some superseding theory" (emphasis omitted)).

²⁸⁰ See Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 124–25 (1996) (arguing that *Casey* properly upheld *Roe* on the ground that the Justices must be constrained by a "respect for the integrity of its decisions over time" if it is to be "understood as an institution of law and not just another venue for politics"). Dworkin also discusses both *Roe* and *Casey* extensively in Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* 148–76 (1993), but nowhere does he discuss the joint opinion's stare decisis analysis.

²⁸¹ Souter, Feldman, *supra* note 20, at 19–20 min. (describing as "top down" reasoning the approach of those who "start with principles usually of great breadth and they look for cases in which they can express those opinions and embody them in judgments").

²⁸² Souter, Feldman, *supra* note 20, at 28 min.

²⁸³ See Posner, *Problematics*, *supra* note 34, at 1700 n. 130 (characterizing as "welcome" Dworkin's subsequent "recognition that the empirical experience with euthanasia, notably in the Netherlands, where it is quasi-legal and quite common, is relevant to the constitutional question"). Dworkin discusses the Netherlands's experience largely in his discussion of Souter's concurrence, which relied on it heavily. See Ronald Dworkin, *Assisted Suicide: What the Court Really Said*, *N.Y. Rev. Books*, Sept. 25, 1997.

Dworkin had advocated for in the so-called “philosophers’ brief,” which argued that such a right was entailed by the principles embodied in the Due Process Clause.²⁸⁴

Now we can see why Souter’s model of common law reasoning calls for this hybrid approach. Since, as is consistent with traditional common law theory, the Court’s role is to reflect and enforce current societal values and constitutional norms, it should decide cases narrowly and at a low level of generality when there is uncertainty and disagreement about those values, as there so frequently is. When it does so, it may legitimately take into account the particular interests involved and the specific “policy” considerations that seem to bear on the issue. But the Court does so with the hope and expectation that, someday, future judges will be able to look back and discern a pattern in, or logic to, its previous decisions. Such an approach is just a more general version of the common law idea that only subsequent courts can say what a previous decision’s “holding” was.²⁸⁵ On this view, Dworkin is right that integrity is the proper ideal. But it is an ideal—perhaps like heroism or happiness—that is less likely to be obtained if one aims directly at it.

To this approach there is an obvious objection, which is that it lacks criteria for a judge deciding cases—a point Professor Feldman kept pressing Justice Souter on during their interview.²⁸⁶ The worry is not simply that such a view fails to provide the judge with a practical decision-procedure to do her job. We have already seen, after all, that Souter denies that such a “top-down” approach is the proper one for judges to employ. Rather, the concern here is that it implies a form of historical relativism. It seems to envision the Court’s role as one of validating social change, irrespective of the nature or direction of that change. It neither sees the constitutional tradition as progressively moving forward with expanding conceptions of liberty and equality (as

²⁸⁴ The brief was later published as an article. See Ronald Dworkin, Thomas Nagel, Robert Nozick, John Rawls, Thomas Scanlon, Judith Jarvis Thomson, et al., *Assisted Suicide: The Philosophers’ Brief*, N.Y. Rev. Books, Mar. 27, 1997.

²⁸⁵ See *United States v. Rubin*, 609 F.2d 51, 69 n. 2 (2d Cir. 1979) (Friendly, J., concurring) (“A judge’s power to bind is limited to the issue that is before him; he cannot transmute dictum into decision by waving a wand and uttering the word ‘hold.’”). It was for just this reason that the judge I clerked for would often strike the words “we hold” from drafts of opinions.

²⁸⁶ Souter, Feldman, *supra* note 20, at 28 min.

living constitutionalists insist),²⁸⁷ nor does it see the Constitution as a source of constraint on change (as originalists maintain).²⁸⁸ It thus seems to lack any normative baseline or standpoint from which to evaluate constitutional change.

The answer to this objection is that, under Souter's view, there *are* rational grounds for judging whether the Court's interpretation of constitutional values has gone in the wrong direction, constitutionally speaking; it is just that we can often only discern them after the fact because they depend, in part, on adopting "the historical way of looking at the world."²⁸⁹

The point may be illustrated by explaining an apparent inconsistency in my discussion of Souter's *Seminole Tribe* dissent and the *Casey* joint opinion. In *Seminole Tribe*, Souter treats the *Hans* Court's concern with its own institutional power as a distorting influence, preventing it from interpreting the Eleventh Amendment correctly. And yet *Casey*'s joint opinion cited its own concern with the court's institutional legitimacy as a reason for upholding *Roe*. It worried that overturning *Roe* would make it appear as if it were acting politically, thereby undermining the Court's reputation as a principled decision-making body, which would itself undermine its power to enforce its judgments.²⁹⁰ But in offering its concern with its own appearance as a rationale, it seemed to be acting in an *unprincipled* manner.²⁹¹ So is Souter not being inconsistent with

²⁸⁷ See, e.g., *id.* at 29 min. (Professor Feldman asked Souter whether his own jurisprudence does not suggest that "when you are figuring out which direction to go, you look . . . at a broader sweep, a directional sweep, that's pushing in one direction or another . . . for example . . . in the direction of greater liberty, relative to authority . . . [If so,] that seems . . . [to be] an important force . . . and those who espouse living constitutionalism say it openly.").

²⁸⁸ Scalia, *supra* note 31, at 40–41 ("A society that adopts a bill of rights is skeptical that 'evolving standards of decency' always 'mark progress,' and that societies always 'mature,' as opposed to rot."). Cf. Toobin, *supra* note 2, at 44 (drawing a similar contrast and observing that Souter fits into neither category).

²⁸⁹ Souter, *Humanities*, *supra* note 20, at 35 min.

²⁹⁰ *Casey*, 505 U.S. at 866–68.

²⁹¹ Hence, Justice Scalia's response to the joint opinion's legitimacy argument. *Id.* at 997–98 (Scalia, J., concurring in the judgement and dissenting in part) ("The only principle the Court 'adheres' to, it seems to me, is the principle that the Court must be seen as standing by *Roe*. That is not a principle of law (which is what I thought the Court was talking about), but a principle of Realpolitik—and a wrong one at that."). But see Deborah Hellman, *supra* note 30, at 1139–51 (1995) (arguing that the Supreme Court properly takes into account its own

respect to the permissibility of deciding cases according to such institutional, "political" considerations?

Not necessarily. The difference lies in the timing. Souter argued that the *Hans* Court's concern with its own institutional power distorted its judgment with respect to the meaning of the Eleventh Amendment and, for that reason, should no longer be treated as a binding source of law. But those same pressures are also in some ways exonerating. Remember, for instance, that the Court's institutional weakness at the time of *Plessy* was among the many factors Souter listed that can explain the difference between *Plessy* and *Brown* without assuming that the *Plessy* Justices were "morally cretinous."²⁹² *Plessy*, after all, was decided only six years after *Hans*. Those Justices not only lived in a completely different cultural and social world, they also worked for a much weaker institution which could not easily impose its constitutional vision on reluctant states, which may have affected the Court's inclination to decide the case in the State's favor.

I think, then, Souter might well acknowledge that some future Court may—and perhaps *should*—treat *Casey* in just the way he treated the *Hans* decision. Such a court, writing at a time of greater moral consensus on the abortion issue than ours, might say something like the following:

The *Casey* decision was the product of a Court that found itself in the midst of a "culture war"—one which the Court itself perhaps had unwittingly helped instigate—and saw no easy way out. The country was still in the midst of an intense public debate over the single most difficult and intractable moral issue of its time, so the Court tried to strike a delicate balance, sticking by its controversial prior decision upholding a right to abortion, while, at the same time, allowing states to regulate it more extensively. The motives of the Justices of the joint opinion were thus understandable enough. Still, the fact is that the decision was more of an effort to maintain the Court's institutional credibility than it was a decision of constitutional principle. (Amazingly, the joint opinion says as much explicitly). Therefore, the holdings of *Casey* inconsistent with this opinion are hereby overruled.

reputation for being principled on the ground that doing so may be necessary to ensure that it can enforce its judgments generally and thus legitimately).

²⁹² Souter, *Humanities*, supra note 20, at 31 min.

For now we can see more clearly than that Court did the full constitutional significance of the *liberty/equality* rights of the *fetus/woman* implicated in the abortion issue, especially given that we now recognize that the fetus is/is not a human being.

In my view, the possibility of such an opinion being written is implied by Souter's statement that "our cases can give no answers that fit all conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world."²⁹³

CONCLUSION

Justice Souter has been characterized, by himself and others, as a proponent of, and believer in, the common law method. The description is fair, but what the "common law method" is and where its virtues lie are questions about which judges and scholars have long disagreed. I have argued that Justice Souter articulated and applied a model of common law reasoning similar to, but crucially different from, Posnerian legal pragmatism and Dworkinian law-as-integrity. Like those models, Souter's derives from a more general philosophical view about how one should reason about what to do. According to the sort of holistic pragmatism Souter embraces, normative (and legal) judgments and factual (historical) explanations are interdependent.

The result is a model of common law reasoning deeply imbued with a "sense of history." Like Dworkin's, it values integrity in the law, but it is more skeptical than Dworkin of judges' ability to discern the correct application of broad, often conflicting, principles at the time new applications arise. So it encourages judges to base their decisions on the more local, contextual interests at stake, as Posner encourages. At the same time, it is always open to the judge to evaluate the process by which some decision, line of doctrine, or deeper principle came to be held. In this way, it sees history itself as a form of practical reasoning.

Souter's approach can thus be seen as a variation on a traditional common law theme. The common law judge has long been seen as someone tasked with reconciling competing social values—liberty

²⁹³ Souter, Commencement, *supra* note 1. Cf. Lakatos, *supra* note 279, at 194 ("We may appraise research programmes, even after their 'elimination,' for their heuristic power: How many new facts did they produce, how great was 'their capacity to explain their refutations in the course of their growth'?" (emphasis omitted)).

versus security, change versus stability.²⁹⁴ Souter explicitly adopts that view: it is part of his justification for taking a “bottom-up” approach to decision-making.²⁹⁵ What is less explicit, but also present, is the more controversial idea that, at least in some cases, the common law judge is forced to compare not only competing social values or principles but also competing epistemological frameworks or postures. She must not only try to assess the normative force of the relevant principles (as Dworkin encourages), but also step back and consider how those principles likely came to feel pressing as a historical matter; she must consider not only the (legal) *substance* or content of the doctrine, but also the (historical) *process* by which that doctrine came to be; she must balance the claims of history against those of political and moral philosophy. In short, she must be a judge, yes, but one with a “sense of history.”²⁹⁶

Seeing Souter himself in this way may tell us something about his legacy as a Justice. Souter famously disappointed conservative activists by siding with the liberal Justices on a range of controversial issues during his tenure on the Court.²⁹⁷ At the same time, though, he has also come under fire from liberal law professors, who see his judicial

²⁹⁴ See Cardozo, *supra* note 27, at 254.

²⁹⁵ See *supra* text accompanying note 73.

²⁹⁶ It might be objected that what is really at issue here is the role of narrative in legal reasoning. The Old Chief dicta, for instance, produced a wave of scholarly commentary on the role of narrative in legal reasoning. See, e.g., Peter Brooks, *Narrative Transactions—Does the Law Need a Narratology*, 18 *Yale J.L. & Human.* 1, 23 (2006) (“Souter appears to recognize what a few scholars within and without the legal academy have argued, that the law’s general assumption that it solves cases with legal tools of reason and analysis that have no need for a narrative analysis could be mistaken.”). But conceptualizing Souter’s model of reasoning as a narrative one would not help us distinguish it from either of the other models. Posner has emphasized the value of judges employing literary techniques and styles in their opinions. See Richard A. Posner, *Law and Literature* 9 (1988). And Dworkin famously used the heuristic of a “chain novel” to explain the kind of reasoning the common law judge should engage in. Dworkin, *Empire*, *supra* note 7, at 228–32; see also *id.* at 225 (explaining that according to law-as-integrity, legal claims “interpret contemporary legal practice seen as an unfolding political narrative”). So employing the concept of narrative does not get us very far in explaining what is distinctive about Souter’s approach.

²⁹⁷ See Toobin, *supra* note 2, at 7 (observing that Souter “almost immediately turned into a lost cause for the conservatives”). Examples include, among others, affirmative action (see, e.g., *Grutter v. Bollinger*, 539 U. S. 306 (2003)), gay rights (see, e.g., *Lawrence v. Texas*, 539 U. S. 558 (2003)), separation of church and state (see, e.g., *McReary County v. ACLU*, 545 U. S. 844 (2005)), and, of course, abortion (see, e.g., *Casey*, 505 U.S. 833 (1992)).

temperament as too cautious and even “defensive.”²⁹⁸ The result is that he is unlikely to serve as a jurisprudential exemplar for (or vehicle of) any political movement on either side of the ideological spectrum—especially not in these hyper-partisan times.

Nor should that come as a surprise. Souter’s common law judicial philosophy *is* cautious, and now we see why: its posture is backward looking, albeit with an eye to the present. It is progressive insofar as it sees social change as presumptively justified; but it is conservative in its reluctance to decide cases on the basis of abstract principles, preferring to remain—to use a phrase beloved by legal historians these days—close to the ground.

That kind of judicial outlook does not make for visionary politics or jurisprudence. It makes for decisions like *Casey*, which activists on both sides love to hate. But whether that stance qualifies as a judicial virtue is another question. At the very least, it places Souter in a long tradition of Anglo-American legal thinkers who have seen, in the figure of the common law judge deciding a difficult case, a vivid illustration of the human predicament.

²⁹⁸ Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism, Balkinization* (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html> [<https://perma.cc/YF5Z-A2VJ>] (insisting that those who seek to abandon “defensive-crouch liberal constitutionalism” should not take Souter as a model justice); Jedediah Purdy, *The Anti-Trump Left Is Now the Only Hope for Moderates*, *The New Republic* (Feb. 6, 2017), <https://newrepublic.com/article/140426/anti-trump-left-now-hope-moderates>. [<https://perma.cc/VLX3-SHE3>] (observing that Souter wrote “not in the ringing moral language of liberalism militant, but in the cautious tones of jurisprudence, carefully preserving what had gone before him” and concluding that the “tragedy is that the institutions and practices that [those who embrace Souter’s style of conservatism] want to defend may already be too vandalized—too ‘politicized,’ as they might say—to play the role this political stance assigns them”).