LIBERALISM AND DISAGREEMENT IN AMERICAN CONSTITUTIONAL THEORY

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For forty years, American constitutional theory has been viewed as a clash between originalists and non-originalists. This depiction misunderstands and oversimplifies the nature of the debate within constitutional theory. Although originalism and non-originalism describe important differences between families of constitutional methodologies, the foundations of the disagreement among theorists are the justifications that they offer for those methodologies, not the methodologies themselves. Once the debate is refocused on the justifications that theorists offer for their constitutional methodologies, it becomes clear that the debate within constitutional theory is ultimately a debate about liberalism as a political theory. Specifically, it is a debate about two propositions that are central to the liberal tradition: individualism and rationalism. Viewed in this way, constitutional theorists often thought to be opposed to each other are, in fact, allies in the debate over liberalism, even if they disagree about whether their shared theoretical premises imply an originalist or non-originalist methodology. Conversely, theorists often seen as allies profoundly disagree about the premises of their constitutional theories because they disagree about liberalism. Reorienting American constitutional theory to focus on the disagreement over liberalism will help us identify which constitutional theory is best and better understand the outcomes in important constitutional cases.

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INTRODUCTION

The story of American constitutional theory over the last forty years has been the battle between originalism and non-originalism. In the academy, the field of constitutional theory has been organized into these

two camps[1] since Paul Brest first coined the term "originalism" in 1980.[2] In our politics, the originalism/non-originalism dichotomy has been a defining feature of judicial confirmation battles since the Reagan Administration.[3] The conflict between originalism and non-originalism has accordingly been described as "the great debate" in constitutional theory,[4] with the future of constitutional law depending on which side

[1] See, e.g., Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 26 (Apr. 3, 2019) (unpublished manuscript) (on file with author), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/27DK-CPBY] ("normative constitutional theory is currently in a state of dialectical impasse" between originalists and non-originalists); Jack M. Balkin, Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time, 98 Tex. L. Rev. 215, 245 (2019) (describing originalism and living constitutionalism as "the two major schools of modern constitutional theory"); David Singh Grewal & Jedediah Purdy, The Original Theory of Constitutionalism, 127 Yale L.J. 664, 666 (2018) (book review) ("The conflict between various versions of 'originalism' and 'living constitutionalism' has defined the landscape of constitutional theory and practice for more than a generation, and it shows no sign of abating."); Joel K. Goldstein, History and Constitutional Interpretation: Some Lessons from the Vice Presidency, 69 Ark. L. Rev. 647, 647 (2016) ("In recent times, the principal demarcation in academic discussions of constitutional theory and judicial decision-making separates originalists and living constitutionalists."); Louis J. Virelli III, Constitutional Traditionalism in the Roberts Court, 73 U. Pitt. L. Rev. 1, 11 (2011) ("Constitutional theory is often described as consisting of two distinct and entrenched camps: 'living constitutionalism' and 'originalism.'"); David A. Strauss, The Living Constitution 7–49 (2010) (framing his argument in terms of originalism versus living constitutionalism); Thomas B. Colby & Peter J. Smith, Living Originalism, 59 Duke L.J. 239, 241 (2009) ("For the last several decades, the primary divide in American constitutional theory has been between those theorists who label themselves as 'originalists' and those who do not."); Brannon P. Denning, Brother, Can You Paradigm?, 23 Const. Comment. 81, 81 (2006) (book review) (describing the debate between originalism and non-originalism as having "dominated constitutional theory since at least the mid-twentieth century"); Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, *in* A Matter of Interpretation: Federal Courts and the Law 3, 38 (Amy Gutmann ed., 1997) ("[T]he Great Divide with regard to constitutional interpretation is not that between Framers' intent and objective meaning, but rather that between *original* meaning (whether derived from Framers' intent or not) and *current* meaning."); Michael P. Zuckert, The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?, 11 Const. Comment. 227, 236 (1994); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 251–59 (1990) (framing his argument in terms of originalism versus "revisionist" non-originalism).

[2] Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 204 (1980); see Lawrence B. Solum, Originalism and Constitutional Construction, 82 Fordham L. Rev. 453, 459 (2013) (identifying Brest's 1980 article as having coined the term "originalism").

[3] Johnathan O'Neill, Originalism in American Law and Politics: A Constitutional History 133–89 (2005).

[4] Lawrence B. Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243, 1244 (2019).

emerges triumphant.[5] This binary and zero-sum way of understanding American constitutional theory has been prominent in recent years, with Donald Trump's three Supreme Court appointments seen as potentially ushering in a new era of originalist jurisprudence at the Court.[6] In both law and politics, then, understanding the debate within American constitutional theory as a battle between originalism and non-originalism—a way of understanding the debate that I will call the "Standard Approach" to constitutional theory—is so common that it is rarely questioned.[7]

Yet, there is a general sense that, for all its fervor, the argument between originalists and non-originalists has become exhausted.[8] While the first few decades of the debate between originalists and non-originalists featured significant advances,[9] recent developments have

[5] See, e.g., Strauss, supra note 1, at 12–18; Tobin Harshaw, Kennedy, Bork and the Politics of Judicial Destruction, N.Y. Times: Opinionator (Aug. 28, 2009, 7:23 PM), https://opinionator.blogs.nytimes.com/2009/08/28/weekend-opinionator-kennedy-bork-and-the-politics-of-judicial-destruction/ [https://perma.cc/3F28-XDP9] (describing Senator Ted Kennedy's "Robert Bork's America" speech).

[6] See, e.g., Jess Bravin, Brent Kendall & Jacob Gershman, What Trump Pick Amy Coney Barrett Could Mean for Future of the Supreme Court, Wall St. J. (Sept. 26, 2020, 5:19 PM), https://www.wsj.com/articles/what-trump-pick-amy-coney-barrett-could-mean-for-future-of-the-supreme-court-11601155192 [https://perma.cc/P3R9-AKLS].

[7] But see Keith E. Whittington, Originalism: A Critical Introduction, 82 Fordham L. Rev. 375, 404 n.120 (2013) ("I wish it went without saying that I do not believe that constitutional theory can simply be reduced to this particular dichotomy between originalists and nonoriginalists.").

[8] Jonathan L. Marshfield, Amendment Creep, 115 Mich. L. Rev. 215, 224 (2016) (describing "the tired normative debate regarding the best method of constitutional interpretation"); Richard H. Fallon, Jr., The Many and Varied Roles of History in Constitutional Adjudication, 90 Notre Dame L. Rev. 1753, 1753 (2015) (describing "increasingly tired, stylized debates of the form 'Originalism: For or Against?'"); William Baude, Is Originalism Our Law?, 115 Colum. L. Rev. 2349, 2351 (2015) (asserting that the debate over originalism is "at a standstill"); Brannon P. Denning, The New Doctrinalism in Constitutional Scholarship and *District of Columbia v. Heller*, 75 Tenn. L. Rev. 789, 794 (2008) (describing "the stalemated (and stale) debates between originalists and nonoriginalists"). Some might disagree and say that the debate remains fruitful, but even if one thinks the current debate is robust, my argument below should prompt a reevaluation of whether the current framing of the debate is the most productive form that the debate could take within constitutional theory, or whether instead we would be better served by reframing the debate in the manner suggested below. See infra Section II.C.

[9] See generally Keith E. Whittington, The New Originalism, 2 Geo. J.L. Pub. Pol'y 599 (2004) (describing the development of originalism in response to non-originalist criticisms in the 1980s and 1990s); see also O'Neill, supra note 3, at 133–216 (same).

largely consisted—with rare exceptions[10]—of refinements of each side's previous arguments.[11] Many of these refinements are insightful and important, to be sure, but they have generally failed to change the contours of the debate.[12]

But what if we have been misunderstanding the nature of the debate within American constitutional theory? What if the fundamental disagreement within American constitutional theory is *not* between originalists and non-originalists, and our focus on that (though real and important) distinction has obscured our ability to see more profound areas of agreement and disagreement among theorists that transcend the originalism/non-originalism dichotomy? What if, in short, the Standard Approach is impeding constitutional theory?

I want to suggest that this is indeed the case. The debate within American constitutional theory is not, ultimately, about originalism and non-originalism; it is about liberalism. I do not mean "liberalism" as that term is understood in contemporary American political discourse, where the term "liberal" is associated with the Democratic Party and its policy proposals. Liberalism, as I am using the term, refers instead to a politico-theoretical tradition that has its roots in the Renaissance[13] and includes among its foremost theorists figures like John Locke and John Stuart Mill.[14] It could be argued that the American Constitution is a "liberal" constitution in this sense of the word,[15] since it was influenced by Lockean thought,[16] and many in both the Republican and Democratic

[10] William Baude and Stephen Sachs have recently proposed a genuinely novel argument in favor of originalism that relies on legal positivism. See Stephen E. Sachs, Originalism as a Theory of Legal Change, 38 Harv. J.L. Pub. Pol'y 817, 822–38 (2015); Baude, supra note 8, at 2363–91.

[11] See Steven D. Smith, That Old-Time Originalism, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 223, 224–42 (Grant Huscroft & Bradley W. Miller eds., 2011) (describing the increasingly abstruse refinements of originalist theory).

[12] The development that arguably has changed the contours of the debate is the introduction of the interpretation/construction distinction, but that distinction has mostly tended to confuse the debate. See infra Subsection I.B.1.

[13] Anthony Arblaster, The Rise and Decline of Western Liberalism 95 (1984). Some might date the birth of liberalism to the immediate aftermath of the Renaissance, see John Gray, Liberalism, at xi, 9 (2d ed. 1995), though the distinction is somewhat arbitrary.

[14] Alan Ryan, The Making of Modern Liberalism 21–26 (2012).

[15] Patrick J. Deneen, Why Liberalism Failed 101 (2018); Gray, supra note 13, at 22–24.

[16] Louis Hartz, The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution 3–32 (reprt., 2d Harvest ed. 1991) (1955); Patrick J. Deneen, Better Than Our Philosophy: A Response to Muñoz, Pub. Discourse (Nov. 29, 2012), https://www.thepublicdiscourse.com/2012/11/7156/ [https://perma.cc/VB83-7JVD]. The

parties could be considered "liberals" insofar as they implicitly or explicitly begin from certain philosophical premises that are antecedent to their disagreements about things like marginal tax rates.[17] My argument, then, is that the debate within American constitutional theory is, at its deepest level, a debate about political theory.

Specifically, it is a debate about some of the core philosophical propositions associated with the liberal tradition, and although there are undoubtedly many such propositions that are debated within American constitutional theory, the two most salient in that debate are individualism and rationalism. These are contested terms, and I will describe them more fully below.[18] By "individualism," I mean the view that the individual has primacy over society, in the sense that the obligation to obey political authority must be grounded in the individual's *choice* to submit to that authority.[19] The idea of individualism is well-captured by state-of-nature theorists in the liberal tradition, who derive political principles from a hypothetical world before the advent of government.[20] Rationalism is closely related to this view and asserts the primacy of individual reason above all other sources of knowledge, such as tradition or custom.[21] In Michael Oakeshott's famous description, for a rationalist, "there is no opinion, no habit, no belief, nothing so firmly rooted or so widely held that he hesitates to question it and to judge it by what he calls his 'reason.'"[22] These beliefs about the human person are controversial, and they are opposed by philosophical conservatism, among other intellectual traditions.[23]

The politico-theoretical debates about individualism and rationalism are, I will argue, at the core of the debates within American constitutional

extent of Locke's influence on the American Founding is, however, contested. See, e.g., Robert R. Reilly, For God and Country, XVII Claremont Rev. of Books 44, 47 (2017); Nathan Schlueter, Sustainable Liberalism, Pub. Discourse (Dec. 7, 2012), https://www.thepublicdiscourse.com/2012/12/7322/ [https://perma.cc/5YUP-WJQ9].

[17] Deneen, supra note 15, at 43–63.

[18] See infra Section II.A.

[19] See Yuval Levin, The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left 91–125 (2014); Arblaster, supra note 13, at 21–23.

[20] See infra Subsection II.A.1.

[21] See infra Subsection II.A.2.

[22] Michael Oakeshott, Rationalism in Politics, *in* Rationalism in Politics and Other Essays 5, 6 (1991).

[23] As discussed below, I will assume, solely for the sake of clarity of presentation, that philosophical conservatism is distinct from liberalism. See infra Section II.A.

theory,[24] and they reveal agreements and disagreements among theorists that cut across the originalism/non-originalism divide.[25] Whereas Robert Bork (an originalist) and David Strauss (a non-originalist) might be thought of as polar opposites under the Standard Approach, they in fact share key philosophical premises, and, conversely, Bork and Jack Balkin, despite both being originalists under the Standard Approach, are in fact deeply opposed to each other philosophically.[26] Recognizing these cross-cutting agreements and disagreements about the premises of constitutional theory will make it more likely that we will be able to identify which theories are sounder than others and provide us with insight into the deeper basis for disagreement among theorists about cases like *Obergefell v. Hodges*[27] and, though arising in a statutory context, *Bostock v. Clayton County*.[28]

For example, subsurface disagreements about liberalism explain why, at an intuitive level, it seems strange to classify Bork and Balkin as being part of the same school of thought: Bork and Balkin have radically opposed understandings of human reason. Balkin stakes the legitimacy of the Constitution on its ability to reflect human progress through changes in constitutional meaning, a faith in progress that assumes an exalted view of individual reason.[29] By contrast, Bork's anti-rationalism comes through in his skepticism of abstract theorizing and attempt to ground his theory in our constitutional tradition.[30] These philosophical differences lead to an irreconcilable, *intra*-originalist methodological dispute: Balkin's rationalistic theory leads him to a methodology that places minimal constraints on judges, while Bork's anti-rationalism leads him to a methodology with a much more modest judicial role.[31] Bork and Balkin are ultimately disagreeing about *liberal rationalism*, and in light of such a profound disagreement, the strangeness of thinking of them as allies becomes understandable.

But it is often difficult to see these unexpected areas of agreement and disagreement among theorists—and the important questions they raise—because of the focus on the originalism/non-originalism dichotomy that

[24] See infra Section II.B.
[25] See infra Section II.B.
[26] See infra Section II.C.
[27] Obergefell v. Hodges, 576 U.S. 644 (2015); see infra Section II.C.
[28] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020); see infra Section III.A.
[29] See infra Section II.B.
[30] See infra Section II.B.
[31] See infra Section II.C.

results from the Standard Approach. And this is a major reason—perhaps *the* reason—why constitutional theory has reached an impasse. The Standard Approach, by dividing constitutional theory into originalism and non-originalism, causes us to focus on methodologies—that is, decision procedures for adjudicating constitutional disputes—rather than focusing on the justifications that theorists offer *for* their methodologies.[32] That is not to say that the Standard Approach ignores justifications; nor is it to say that theorists should cease categorizing theories as originalist or non-originalist. But viewing constitutional theory through a methodological lens causes debates about justifications to become distorted, with justifications being viewed as either originalist or non-originalist.[33] Perhaps ironically, by focusing on methodologies, the Standard Approach prevents us from seeing the extent to which some theorists disagree *about methodologies*.[34] A principal goal of this Article is to demonstrate the problems with the Standard Approach's emphasis on methodologies and the advantages of a justifications-based approach to constitutional theory.

Indeed, since that is a threshold task, it is where this Article will begin. In Part I, I will describe the Standard Approach to constitutional theory and identify the two main problems with organizing the debate in constitutional theory around methodologies of constitutional adjudication rather than the justifications for those methodologies.

This sets up the argument of Part II, in which I will sketch a justifications-based approach to constitutional theory. Section II.A will provide a fuller account of individualism and rationalism, and Section II.B, in turn, will show that the premises of several major constitutional theories—both originalist and non-originalist—depend on the acceptance or rejection of these two liberal propositions. I will argue that individualism and rationalism are foundational to some constitutional theories, while anti-individualism and anti-rationalism are foundational to others, and the acceptance or rejection of these two liberal propositions, far from tracking the originalism/non-originalism dichotomy, transcends it. Section II.C will pull these strands of argument together and show that the benefit of a justifications-based approach to constitutional theory is that we can identify crucial areas of agreement and disagreement across the originalism/non-originalism divide, which makes it much more likely

[32] See infra Part I.
[33] See infra Part I.
[34] See infra Section II.C.

that theorists will be able to identify the best constitutional theory and better understand doctrinal disagreements.

Finally, Part III will address various objections and counterarguments that are best left for the end, such as the argument that a justifications-based approach would shift constitutional scholarship too far in the direction of political theory and away from doctrine.

American constitutional theory is too complex, and the stakes are too high, for any single idea to serve as a panacea, and I certainly do not claim to be offering one. But the Standard Approach makes progress in constitutional theory less likely, and after forty years, it is time to try a new approach.

I. METHODOLOGIES AND JUSTIFICATIONS IN AMERICAN CONSTITUTIONAL THEORY

My principal claim in this Article is that the debates in American constitutional theory are, ultimately, debates about liberalism, and recognizing this fact would allow us to better understand why theorists agree or disagree, which would help us better assess which constitutional theory is best and better understand disagreements over constitutional doctrine. But before I get to that, it is important to show why the *current* way of understanding the debate within constitutional theory—as a debate between originalists and non-originalists—is inadequate. I will begin by describing what the Standard Approach is.

A. Defining the Standard Approach

The principal goal of American constitutional theorists is to describe and justify the correct methodology of constitutional adjudication (about which I will have more to say in Subsection I.B.2 below).[35] There are more modest or instrumental conceptions of constitutional theory,[36] but,

[35] See David A. Strauss, What Is Constitutional Theory?, 87 Calif. L. Rev. 581, 582–83 (1999); Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 Calif. L. Rev. 535, 537 (1999); Richard A. Posner, Against Constitutional Theory, 73 N.Y.U. L. Rev. 1, 1–4 (1998). Although "adjudication" has a distinctively judicial connotation, I do not intend to exclude methodologies describing how the political branches should interpret the Constitution. See, e.g., Amy Coney Barrett & John Copeland Nagle, Congressional Originalism, 19 U. Pa. J. Const. L. 1, 9–13 (2016); see generally Joel Alicea, Stare Decisis in an Originalist Congress, 35 Harv. J.L. Pub. Pol'y 797 (2012).

[36] See, e.g., Lawrence Lessig, The Puzzling Persistence of Bellbottom Theory: What a Constitutional Theory Should Be, 85 Geo. L.J. 1837, 1838–39 (1997).

by and large, what scholars mean when they say that they are proposing a constitutional theory is that they are proposing a methodology for adjudicating constitutional cases and offering a justification for that methodology.[37]

By a "methodology," I mean a form of analysis (one might call it a decision procedure) governing *how* to adjudicate constitutional disputes, and by a "justification," I mean the reasons *why* a particular methodology should be adopted. This is very similar to the distinction that Andrew Coan has drawn between "approaches to constitutional decision-making" and "normative foundations or claims."[38] For example, James Bradley Thayer is associated with a methodology of constitutional adjudication that allows judges to set aside a federal statute that they believe conflicts with the Constitution only "when those who have the right to make laws have not merely made a mistake [in believing that the statute is constitutional], but have made a very clear one, —so clear that it is not open to rational question."[39] His justification for that methodology was multifaceted,[40] but his principal reason was rooted in the separation of powers and his concern that, unless Congress was given a wide margin for error in enacting legislation, the judiciary risked intruding upon the legitimate sphere of discretion reserved by the Constitution to Congress.[41] As noted above, since at least 1980, when Paul Brest coined the term "originalism," the Standard Approach among scholars has been to divide

[37] I use the phrase "constitutional adjudication" rather than "constitutional interpretation" because, as discussed below, see infra Subsection I.B.1, some scholars have proposed distinguishing between constitutional "interpretation" and constitutional "construction." By "adjudication," I mean to encompass both "interpretation" and "construction," as these theorists have used those terms.

[38] Andrew Coan, The Foundations of Constitutional Theory, 2017 Wis. L. Rev. 833, 835–36 (2017) (emphasis omitted). It is also consistent with how other theorists think about the elements of a constitutional theory. See Richard H. Fallon, Jr., Law and Legitimacy in the Supreme Court 132–33 (2018) (distinguishing between "methodological premises or commitments" that "seek to specify the criteria of decision that the Justices should, or at least legitimately can, apply" and "defense[s] on partly normative grounds" that "the embrace of an interpretive methodology requires"); Randy J. Kozel, Settled Versus Right: A Theory of Precedent 64 (2017) (similar). But see Stephen E. Sachs, Originalism: Standard and Procedure, 135 Harv. L. Rev. (forthcoming 2022) (arguing that originalism should not be understood as a decision procedure).

[39] James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893).

[40] Id.

[41] Id. at 134–35.

constitutional theory into originalist and non-originalist camps,[42] and this necessarily means seeing methodologies—rather than justifications—as the most salient dividing lines within American constitutional theory.[43]

That is because, at least insofar as originalism and non-originalism *are* distinct (a question to which I will return in a moment), the line of demarcation is based on a methodological disagreement. This might not be immediately obvious. After all, originalism and non-originalism are best described as *families* of theories, and each theory within each family proposes a different methodology.[44] For example, within originalism, there are original-intent originalists;[45] original public meaning originalists;[46] originalists who accept the principle of stare decisis, at least in some form;[47] originalists who reject the principle of stare decisis;[48] etc. On the non-originalist side, there are common law constitutionalists;[49] moral-reading theorists;[50] pluralists;[51] etc. Since each of these theories prescribes a different methodology, is it correct to say that the divide between originalists and non-originalists is a methodological one?

Properly understood, yes. Lawrence Solum has accurately described the dividing line between originalism and non-originalism as the "Constraint Principle," the idea that constitutional adjudication must be (at least) consistent with the original meaning of the Constitution, with

[42] See supra notes 1–2 and accompanying text.

[43] Coan, supra note 38, at 835 (noting that scholars have generally tended to focus on methodologies over justifications).

[44] Solum, supra note 4, at 1265–66.

[45] See, e.g., Larry Alexander, Simple-Minded Originalism, *in* The Challenge of Originalism, supra note 11, at 87; Larry Alexander & Saikrishna Prakash, "Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility, 41 San Diego L. Rev. 967, 972, 982 (2004).

[46] See, e.g., Vasan Kesavan & Michael Stokes Paulsen, The Interpretive Force of the Constitution's Secret Drafting History, 91 Geo. L.J. 1113, 1132 (2003); Scalia, supra note 1, at 38.

[47] See, e.g., John O. McGinnis & Michael B. Rappaport, Reconciling Originalism and Precedent, 103 Nw. U. L. Rev. 803, 829 (2009); Caleb Nelson, *Stare Decisis* and Demonstrably Erroneous Precedents, 87 Va. L. Rev. 1, 5–8 (2001).

[48] See, e.g., Gary Lawson, Mostly Unconstitutional: The Case Against Precedent Revisited, 5 Ave Maria L. Rev. 1, 5–8 (2007); Michael Stokes Paulsen, The Intrinsically Corrupting Influence of Precedent, 22 Const. Comment. 289, 289–98 (2005).

[49] See, e.g., Strauss, supra note 1, at 33–40; David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 884–91 (1996).

[50] See, e.g., Ronald Dworkin, Law's Empire 225–75 (1986).

[51] See, e.g., Stephen M. Griffin, Pluralism in Constitutional Interpretation, 72 Tex. L. Rev. 1753, 1758–62 (1994); Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1209–23, 1240–46 (1987).

stare decisis taken into consideration for those originalists who accept it.[52] Non-originalists reject the Constraint Principle because they do not believe that the original meaning always has priority over other ostensible modalities of constitutional adjudication, such as moral arguments,[53] even as many non-originalist theories allow the original meaning to play *some* role in adjudication.[54] Acceptance or rejection of the Constraint Principle dictates which modalities of adjudication are appropriate and their relative weight, and because the Constraint Principle tells us *how* to adjudicate a constitutional dispute, the disagreement over its acceptance is a disagreement over methodology.

To be sure, *why* theorists accept or reject the Constraint Principle is a question of justification,[55] and thus one could also say that disagreement over the Constraint Principle is ultimately a disagreement about justifications. But there is no justification for or against the Constraint Principle that unites all or even most originalists or non-originalists,[56] so justifications cannot be what separates originalism and non-originalism. Rather, regardless of what one's justification is, originalists generally accept the Constraint Principle and non-originalists do not, and because the principle determines the decision procedure used to adjudicate constitutional cases, methodologies, not justifications, are the basis for the originalism/non-originalism divide through which the Standard Approach views constitutional theory.

B. The Problems with the Standard Approach

This methodological focus of the Standard Approach has two significant drawbacks, either one of which should cause us to refocus the debate within American constitutional theory around justifications.

1. The Blurry Line Between Originalism and Non-Originalism

First, the difference between originalism and non-originalism has become less clear over the last forty years due to developments within originalism, and irrespective of whether that is seen as a good or bad

[52] Solum, supra note 2, at 460–61; see generally Solum, supra note 1, at 139. Solum also relies on the "Fixation Thesis" to define originalism, but as discussed below, that principle is not what primarily divides originalists from non-originalists. See infra Subsection I.B.1.

[53] See Griffin, supra note 51, at 1762–64.

[54] Solum, supra note 2, at 460–61; see also Solum, supra note 1, at 105–28.

[55] Solum, supra note 2, at 472–73; Solum, supra note 1, at 26–30.

[56] Coan, supra note 38, at 882–84.

development in constitutional theory, it has the effect of making the originalism/non-originalism dichotomy offered by the Standard Approach a less useful way of understanding the debate within constitutional theory than it might once have been. That is to say, even if the best way to understand debates within constitutional theory was by focusing on disagreements over methodologies (which I will dispute in Subsection I.B.2), it is increasingly difficult to characterize the debates as being between originalist and non-originalist methodologies, since the distinction between those two camps has become harder to discern.

One change, in particular, stands out as having opened the door to the development of originalist theories that look a great deal more like non-originalist theories than did their predecessors: the introduction into constitutional theory of the distinction between constitutional interpretation and constitutional construction.[57] As formulated by Solum, who has been the foremost expositor of the interpretation/construction distinction, constitutional interpretation "recognizes or discovers the linguistic meaning of" the Constitution.[58] This linguistic meaning, as later elaborated by Solum, includes the "conventional semantic meaning of the words and phrases, standard grammar and syntax, and additional contextual information provided by the publicly available context of constitutional communication."[59] Linguistic meaning is "a fact about the world," not a normative enterprise.[60]

Constitutional construction, by contrast, "gives legal effect to" the linguistic meaning of the Constitution.[61] Sometimes, as when the application of the linguistic meaning to a given set of facts is very clear under almost any methodology (e.g., there are two Senators per state), the linguistic meaning might fully determine the legal effect (that is,

[57] See generally Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (1999). For the history of the distinction generally and within originalism specifically, see Solum, supra note 2, at 467–69; Randy E. Barnett & Evan D. Bernick, The Letter and the Spirit: A Unified Theory of Originalism, 107 Geo. L.J. 1, 10–13 (2018).

[58] Lawrence B. Solum, The Interpretation-Construction Distinction, 27 Const. Comment. 95, 100 (2010). Although Solum has been the principal developer of the interpretation/construction distinction, it was introduced into constitutional theory by Professor Whittington, see Barnett & Bernick, supra note 57, at 10–11, whose understanding of the distinction was somewhat different from Solum's.

[59] Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 502 (2013).

[60] Solum, supra note 58, at 99.

[61] Id. at 103.

constitutional interpretation fully determines constitutional construction). But in other situations, as when the text is vague, giving legal effect to the text requires "go[ing] beyond linguistic meaning" and appealing to some theory for how such situations should be resolved, such as deferring to the political branches.[62] But regardless of the situation, because construction entails giving legal effect to the Constitution, every constitutional case involves construction, even if it is not obvious that construction is occurring because the linguistic meaning fully supplies the legal content.[63] And unlike interpretation, construction is an inherently normative enterprise: how to give a text legal effect is a normative question, not a question seeking a fact about the world.[64]

The interpretation/construction distinction is controversial among originalists,[65] but for our purposes, the important point is that it has served as the foundation of several prominent originalist theories.[66] Proponents of the interpretation/construction distinction generally assert that originalism is primarily a theory of constitutional *interpretation*, not a theory of constitutional *construction*, though the Constraint Principle requires that any theory of constitutional construction be limited by the original meaning derived through constitutional interpretation.[67] Under this view, originalism is primarily a theory about how to derive the linguistic meaning (or "semantic content") of the Constitution, and its essential thesis is that the meaning of the Constitution was fixed at the time of the Constitution's enactment (what Solum calls the "Fixation Thesis").[68]

The effect of defining originalism in this way is that, so long as a theorist is willing to agree that the linguistic meaning of constitutional

[62] Id. at 104–06.

[63] Id. at 103 n.19.

[64] Id. at 104–05.

[65] See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 13–15 (2012); Gary Lawson, Dead Document Walking, 92 B.U. L. Rev. 1225, 1231–36 (2012); John O. McGinnis & Michael B. Rappaport, Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction, 103 Nw. U. L. Rev. 751, 772–80 (2009); see also Smith, supra note 11, at 227–42 (increasingly abstract distinctions within originalism take away from the attractive simplicity of originalism).

[66] See generally Barnett & Bernick, supra note 57 (tracing the history of these concepts within originalism); Jack M. Balkin, Living Originalism (2011); Keith E. Whittington, Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review (1999); Whittington, supra note 57.

[67] Solum, supra note 58, at 116–17; see also Barnett & Bernick, supra note 57, at 14.

[68] Solum, supra note 58, at 116–17; see also Barnett & Bernick, supra note 57, at 14.

language was fixed at the time of enactment (the Fixation Thesis) and constrains constitutional construction (the Constraint Principle), the theorist may offer any normative theory to determine the content of constitutional doctrine and still call herself an originalist.[69] And as between the Fixation Thesis and the Constraint Principle, the Constraint Principle better describes the distinction between originalists and non-originalists, since "the Fixation Thesis is and should be relatively uncontroversial."[70] But the extent to which the Constraint Principle truly constrains theorists depends on how much linguistic content those theorists believe to be supplied by the Constitution. If the linguistic meaning of the Constitution leaves most major constitutional controversies underdetermined, then the Constraint Principle does not meaningfully distinguish between originalist and non-originalist theories in contested cases, since the outcomes in those cases are dictated by theories of construction to which originalism (under Solum's understanding of interpretation/construction) does not speak.[71]

Both originalists and non-originalists have acknowledged this implication of the interpretation/construction distinction (at least as that distinction has been described by Solum and others). Solum has argued that "[o]nce the interpretation-construction distinction is recognized, it becomes apparent that some (and perhaps even many) aspects of the debate between Originalists and Living Constitutionalists are the product of conceptual confusion. In fact, some forms of living constitutionalism may actually be compatible with some forms of originalism."[72] Peter Smith, making an argument similar to the one made here, contends that newer theories of originalism that adhere to the interpretation/construction distinction are "not very different from non-

[69] Solum, supra note 1, at 16; Solum, supra note 2, at 472–73. Barnett has recently argued that the range of permissible theories of constitutional construction is narrower than he had previously recognized. See Barnett & Bernick, supra note 57, at 14 & n.58. But Barnett's view has not been broadly accepted by other originalists (at least not yet), so as things now stand, my description of the upshot of the interpretation/construction distinction remains true.

[70] Solum, supra note 1, at 16; see also Sachs, supra note 10, at 831–32 ("Most everyone accepts that some kind of original meaning is legally relevant sometimes."); Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. Rev. 1, 32–33 (2009). But see Lawrence B. Solum, The Fixation Thesis: The Role of Historical Fact in Original Meaning, 91 Notre Dame L. Rev. 1, 62–70 (2015) (arguing that some non-originalist theories deny the Fixation Thesis).

[71] Barnett & Bernick, supra note 57, at 15–17; see Solum, supra note 2, at 499–523 (arguing that the construction zone is substantial).

[72] Solum, supra note 58, at 117. As noted above, Solum seems to have retreated from that view in later writings. See Solum, supra note 4, at 1284.

originalism in practice."[73] And while some originalists have lamented the increasingly blurry line between some originalist and non-originalist theories,[74] there is "no official gatekeeper" of originalism.[75]

Perhaps the best example of the increasingly hazy line between originalism and non-originalism is Jack Balkin's theory, which he calls "living originalism"[76] because he believes that, properly conceived, originalism and living constitutionalism are "two sides of the same coin."[77] Balkin affirms both the Fixation Thesis and the Constraint Principle.[78] Accepting the interpretation/construction distinction, Balkin sees interpretation as originalism's domain, while construction is living constitutionalism's domain.[79] And because Balkin has a minimalist view of the linguistic content of many important provisions of the Constitution,[80] the Constraint Principle does not constrain him much, and living constitutionalism's domain is vast.[81] As a result, Balkin argues that his self-described originalist theory justifies the Supreme Court's decisions in *Roe v. Wade*[82] and *Wickard v. Filburn*,[83] both of which have generally been viewed as paradigmatic non-originalist decisions.[84]

[73] Peter J. Smith, How Different Are Originalism and Non-Originalism?, 62 Hastings L.J. 707, 723 & n.94 (2011) (collecting sources making similar observations); see also Thomas B. Colby, The Sacrifice of the New Originalism, 99 Geo. L.J. 713, 750 (2011) (modern originalism mirrors non-originalism in practice).

[74] See, e.g., Joel Alicea, Originalism and the Rule of the Dead, Nat'l Affs., Spring 2015, at 149, https://www.nationalaffairs.com/publications/detail/originalism-and-the-rule-of-the-dead [https://perma.cc/9F5A-M77L]; Smith, supra note 11, at 230–33; Nelson Lund, Living Originalism: The Magical Mystery Tour, 3 Tex. A&M L. Rev. 31, 43 (2015).

[75] Colby & Smith, supra note 1, at 258 (2009).

[76] Balkin, supra note 66. I will describe Balkin's theory in more detail below. See infra Subsections II.B.1–2.

[77] Balkin, supra note 66, at 20.

[78] Id. at 35–39, 282.

[79] Id. at 21–34, 282.

[80] Balkin's thin view of constitutional interpretation is dictated by the justification he offers for his theory. See infra Section II.C.

[81] Balkin, supra note 66, at 12–49; Solum, supra note 4, at 1282–83; Lund, supra note 74, at 32–36.

[82] Roe v. Wade, 410 U.S. 113 (1973); see generally Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291 (2007) (arguing that the right to abortion is consistent with the original meaning of the Constitution).

[83] Wickard v. Filburn, 317 U.S. 111 (1942); see Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 34–35 (2010); Balkin, supra note 66, at 164–65.

[84] See United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (arguing that *Wickard* has no basis in the original meaning of the Constitution); Planned Parenthood v. Casey, 505 U.S. 833, 979–1002 (1992) (Scalia, J., concurring in the judgment

Indeed, Solum has acknowledged the problem that Balkin's theory poses to efforts to define originalism and non-originalism, which is why he is forced to say that there are "hybrid theories"—like Balkin's—that are neither originalist nor non-originalist.[85]

Defenders of the Standard Approach might argue that theories like Balkin's are outliers that are only swept into the originalist family because of the lowest-common-denominator approach to defining originalism employed by theorists like Solum,[86] and insofar as defining originalism according to the lowest common denominator collapses the distinction between originalism and non-originalism, we need to identify common features of originalist theories that, while capturing the vast majority of such theories, exclude those that blur the originalism/non-originalism distinction. After all, if we have defined originalism so broadly that it is often difficult to distinguish from non-originalism, the word "originalism" is no longer serving the same useful function in scholarly discourse—facilitating conceptual clarity and fruitful discussion.[87] That might mean that we should change how we define originalism by using the second- or third-lowest-common feature, rather than the *lowest* common feature. I suspect, though I cannot prove, that this is how most jurists and practitioners think about originalism.[88] They define it according to certain features common to many—but not all or even most—self-described originalist theories, and these features have the effect of excluding theories like Balkin's that threaten to make the originalism/non-originalism distinction incoherent.

This would indeed be a way to make the Standard Approach more useful, but insofar as such a salvage operation is required, it only proves that the Standard Approach is not *currently* as useful as it was when originalism was a more cohesive family of theories. It also runs into two difficulties. The practical difficulty is that it will be hard to obtain agreement among scholars about how to define originalism *apart from* the lowest common denominator, since the selection of other features to serve as the common denominator among originalist theories will

in part and dissenting in part) (arguing that *Roe* has no basis in the original meaning of the Constitution).

[85] Solum, supra note 4, at 1282–84.

[86] Solum, supra note 1, at 20 n.55.

[87] See Stephen E. Sachs, Originalism Without Text, 127 Yale L.J. 156, 165–66 (2017); Smith, supra note 11, at 230–33.

[88] Solum, supra note 4, at 1254.

inevitably be controversial.[89] The theoretical difficulty is that much of the incoherence within originalism is the result of the interpretation/construction distinction, and proving that that distinction should be rejected or (if accepted) need not permit theories like Balkin's would be no simple task.[90]

Alternatively, we might just abandon the effort to come up with some descriptive definition of originalism and argue for what originalism *ought* to mean based on which theories of originalism are *most* sound.[91] This, too, would have some value, but because any such argument would be the subject of vigorous disagreement,[92] it would not serve the ostensible purpose of the Standard Approach: to clarify the terms of the debate and facilitate fruitful discourse.[93]

Finally, one might argue that I have merely described a problem of labeling and that we could solve that problem by coming up with new, more accurate labels.[94] But because the Standard Approach understands the debate within constitutional theory as a battle between originalism and non-originalism, how "originalism" and "non-originalism" are defined *matters* so long as the Standard Approach reigns, since those labels affect how we understand where and why theorists agree and disagree. If "originalism" is defined to include Balkin's methodology, then the Standard Approach instructs us to see his methodology as having more in common with Justice Scalia's than with Justice Brennan's, even though Balkin might *actually* have more in common with Justice Brennan. Under the Standard Approach, confusion about the "originalism" and "non-originalism" labels will create confusion about the *substance* of the debate within constitutional theory. The only way to solve that problem through

[89] Lawrence B. Solum, What Is Originalism? The Evolution of Contemporary Originalist Theory, *in* The Challenge of Originalism, supra note 11, at 12, 32.

[90] Though some have tried. See supra note 65.

[91] See, e.g., Alicea, supra note 74, at 154–61.

[92] Compare Randy E. Barnett, Am I "Imperiling" Originalism? A Reply to Joel Alicea, Volokh Conspiracy (Mar. 30, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/am-i-imperiling-originalism/ [https://perma.cc/Q4BU-MJ5Z] (responding to Alicea's article which criticizes Barnett's view of originalism), with Joel Alicea, "Yes, You are Imperiling Originalism:" A Response to Professor Barnett, Volokh Conspiracy (Apr. 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/04/yes-you-are-imperiling-originalism-a-response-to-professor-barnett/ [https://perma.cc/25S6-RE75] (refuting perceived similarities between his view of originalism and Barnett's).

[93] See Solum, supra note 4, at 1244–48.

[94] See id. at 1247–48.

relabeling would be to develop labels that do not depend on the originalism/non-originalism distinction, but that would lead to the *opposite* problem of suggesting that there are no distinct families of theories we might call "originalist" and "non-originalist."

And, to be clear, I am *not* contending that there are no differences between originalist and non-originalist theories; there clearly *can* be, which is why the "originalism" and "non-originalism" labels remain helpful in some circumstances. The originalism of Justice Scalia was miles apart from the non-originalism of Justice Brennan, so while the distinction between originalism and non-originalism may be hazy when considered as families of theories, some specific originalist theories are readily distinguishable from some specific non-originalist theories. My point is that whether such a difference exists, and the extent of that difference, requires asking *which* originalist theory is under discussion,[95] and once we acknowledge that to be true, the usefulness of seeing American constitutional theory *as a whole* through the originalist/non-originalist lens of the Standard Approach diminishes significantly.

2. The Priority of Justifications for the Goals of Constitutional Theory

But the problem with the Standard Approach is not just that the specific methodological families on which it is based, originalism and non-originalism, are increasingly difficult to distinguish from each other; it is that a methodological focus—regardless of the specific methodologies at issue—is a less promising way of accomplishing the goals of American constitutional theory than a focus on justifications.

As noted above, the principal goal of American constitutional theorists is to describe and justify the correct methodology of constitutional adjudication.[96] Determining which theory is "correct" requires some standard for evaluation, and what that standard should be is contested. For example, Richard Fallon has argued that the correct methodology would "furnish[ ] the most promising path to legal and moral legitimacy in Supreme Court decision making,"[97] which he believes "no off-the-rack version of the leading constitutional theories"[98] can accomplish without being open to case-by-case change through a process of reflective

[95] See Smith, supra note 73, at 729–30.
[96] See supra note 35.
[97] Fallon, supra note 38, at 136–37.
[98] Id. at 137.

equilibrium.[99] Fallon would therefore make the standard for evaluation something like: "Which methodology of constitutional adjudication best secures the moral legitimacy of the Constitution?" Irrespective of whether Fallon is right in proposing that that is the proper question for assessing constitutional methodologies, the point is that constitutional theory aims to assess those methodologies by *some* standard and determine which one best meets that standard.

Constitutional theorists try to achieve this goal by offering justifications for their methodologies. True, not *all* scholarship within constitutional theory is written to demonstrate the soundness of a particular methodology. Some articles attack methodologies without defending an alternative,[100] and others are descriptive of the field or some aspect of the field, hoping to inform the reader without necessarily putting forward an argument about which methodology or justification is sound.[101] But even these counterexamples *further* the overall goal of constitutional theory: describing and justifying the correct methodology of constitutional adjudication.[102]

This might seem like an overly ambitious goal for a field of legal scholarship. Is there a single, correct methodology of constitutional adjudication?[103] And even if there is, how likely is it that theorists would ever agree on that methodology? The voluminous and strenuous arguments put forward by constitutional theorists in favor of their own methodologies is powerful evidence that most of them do, in fact, believe that there exists a methodology which *best* satisfies whatever the appropriate standard for assessing methodologies may be. If constitutional theory does not have, as its goal, the description and

[99] Id. at 142–48.

[100] See, e.g., Berman, supra note 70, at 4–8; Mark. S. Stein, Originalism and Original Exclusions, 98 Ky. L.J. 397, 397–406 (2009–2010).

[101] See, e.g., Whittington, supra note 9, at 599.

[102] Of course, as pluralist theories of constitutional adjudication like Fallon's demonstrate, the question of whether there is a correct methodology of constitutional adjudication is distinct from the question of whether there are correct (or at least privileged) modalities of constitutional adjudication, though one must answer the latter question to determine which methodology is correct. See Fallon, supra note 51, at 1209–17 (arguing, in the context of an article justifying a pluralist methodology, that originalism errs by privileging text and history over other modalities).

[103] Some theorists would answer "no." See, e.g., Richard A. Posner, Legal Pragmatism Defended, 71 U. Chi. L. Rev. 683, 683–84 (2004); see also Solum, supra note 1, at 122–26 (describing theories that reject a single methodology of adjudication).

justification of the correct methodology, it is hard to see what all the fuss is about.[104]

To be sure, it is a separate question, given the limits of human nature and reason, whether theorists would ever be able to *discern* what that methodology was, and it is a still further question whether they could ever *agree* on such a methodology even when presented with the arguments that should allow them to discern it. But these problems are not unique to constitutional theory. The same problems bedevil any field of study that makes contestable claims—which is to say, all fields of study. These problems ought not, therefore, defeat the ambition of constitutional theory, even as they appropriately temper expectations of ultimate success.

If the goal of constitutional theory is to identify the correct methodology, and if the way in which theorists try to demonstrate that they have identified the correct methodology is through justifications, then justifications—not methodologies—are the most important areas of agreement and disagreement within constitutional theory. True, the *object* of a justification is a methodology, but the methodology remains the *conclusion* of a justification. It is the justification, not the methodology, that leads the theorist's audience to embrace the proposed methodology as correct.[105]

But perhaps this way of conceiving constitutional theory is too neat. One might argue that the ultimate goal is *agreement* on a methodology, not the *reason* for the agreement. Under this view, it is possible that theorists could achieve agreement based on something analogous to what John Rawls called an "overlapping consensus," in which they arrive at the same conclusion for different reasons.[106] If that is possible, then justifications are *not* necessarily the most important area of agreement or disagreement in constitutional theory.

There are two problems with this objection. First, we are not looking merely for agreement on a methodology, since theorists might be *wrong* in thinking that a particular methodology is, in fact, correct. Rather, we

[104] Even if I am wrong about this, the principal goal of constitutional theorists is, at the very least, to describe and justify the best subset of methodologies of constitutional adjudication, even if there is no single correct theory. My argument in the rest of this Section would remain valid under this more modest description of constitutional theory's goal.

[105] Kozel, supra note 38, at 64 ("Normative commitments are the paths to interpretive methodology.").

[106] See John Rawls, Political Liberalism 133–72 (expanded ed. 1996). I thank John Ohlendorf for pointing out this important objection.

are trying to get at the truth of the matter, which might entail rejecting the current consensus. That does not mean, of course, that agreement is irrelevant. Justifying a methodology entails trying to persuade others that the methodology is indeed the best one, and in an ideal world, that would produce agreement on a methodology. But agreement is not guaranteed, and its presence does not necessarily indicate that the best methodology has been found.

Second, it is not, in fact, possible to set aside justifications and arrive at a *meaningful* overlapping consensus on a methodology of constitutional adjudication because the justification influences the contours of the methodology.[107] For example, as discussed in detail below, Balkin argues that the legitimacy of the Constitution depends on its ability to reflect the views of each generation through constitutional construction, and he correctly concludes that, given his justification, the correct methodology *must* allow for a very significant amount of construction limited by only a thin conception of interpretation.[108] Balkin's justification thus requires a particular methodology, and other justifications will require *different* methodologies. These methodologies might share a general name like "originalism" or "non-originalism," but as I have argued, they could be radically different in practice.[109] If this is what is meant by an "overlapping consensus," it is a superficial one.[110] On the other hand, if we insist on a more substantive methodological consensus, that would require some form of consensus on justifications, in which case we have left behind the idea of an overlapping consensus that disclaims the need for agreement on justifications.

Here, the skeptic of my argument might propose that the real problem is that I have conceived of constitutional theory too linearly as proceeding from premise (justification) to conclusion (methodology). Instead, the skeptic would say, theorists arrive (or should arrive) at their methodologies through something like what Rawls called "reflective equilibrium."[111] The theorist might, under this view, "work from both

[107] See Michael W. McConnell, Textualism and the Dead Hand of the Past, 66 Geo. Wash. L. Rev. 1127, 1128 (1998).

[108] See infra Subsection II.B.1.

[109] See supra Subsection I.B.1.

[110] See John D. Arras, Methods in Bioethics: The Way We Reason Now 192–96 (James Childress & Matthew Adams eds., 2017) (making a similar argument about the possibility of an overlapping consensus in bioethics).

[111] John Rawls, A Theory of Justice 17–18, 42–45 (rev. ed. 1999).

ends"[112] by simultaneously formulating a justification and a methodology, making adjustments to each along the way. For instance, one might have strongly held intuitions that certain constitutional cases *must* be decided a certain way under any plausible methodology, and insofar as a methodology yields implausible outcomes, the theorist might discard it. If doing so required changing the justification, the theorist would do so. The process would only end when there is an equilibrium or congruence among the justification, methodology, and outcomes. This is similar to the view espoused by Fallon[113] and, in a different context and with some important changes, by Solum.[114]

But the same two problems recur. First, reflective equilibrium is not necessarily a means of arriving at the *truth* about something; it is a means of arriving at *coherence* about something, which may or may not be true.[115] Second, it should be obvious that, given the tremendous divergence in beliefs and intuitions, reflective equilibrium *among a group* rather than *within an individual person* cannot achieve the kind of coherence between justifications and methodologies that might possible within an individual,[116] and insofar as it instead aims at equilibrium within each individual and an overlapping consensus on methodologies based on incompatible justifications,[117] it is a superficial and unhelpful consensus for the same reasons already stated.

I hasten to add, however, that my argument for the priority of justifications does not imply that the Standard Approach *ignores* justifications. American constitutional theory, although dominated by the Standard Approach, is full of debates about justifications.[118] But because

[112] Id. at 18.

[113] See Fallon, supra note 38, at 142–48; Richard H. Fallon, Jr., Arguing in Good Faith About the Constitution: Ideology, Methodology, and Reflective Equilibrium, 84 U. Chi. L. Rev. 123, 139–44 (2017); Fallon, supra note 35, at 576 n.224.

[114] See Solum, supra note 1, at 30–35. Solum, for instance, employs it only for justifying the Constraint Principle, and he does not use canonical cases as part of his equilibrium analysis. See id. at 83–86.

[115] Arras, supra note 110, at 197–200. This implicates deep questions about how we know whether something is true, which is beyond the scope of this Article.

[116] Id. at 192–96. I understand Solum to be making the same point. See Solum, supra note 1, at 33–35.

[117] This was Rawls's aim, Arras, supra note 110, at 194–95, and it appears to be Solum's as well. See Solum, supra note 1, at 34–35.

[118] See, e.g., John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution 1–115 (2013); Strauss, supra note 1, at 1–50; Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 1–88 (2004); Whittington, supra note 66, at 47–159.

these debates occur *within* the framework of the Standard Approach, they organize themselves into *originalist* justifications and *non-originalist* justifications, rather than assessing justifications *across* the originalism/non-originalism divide. Discussion of justifications in this less-constrained manner is rare—and notable for that reason when it does occur.[119]

Finally, one might reasonably ask whether, even if describing and justifying the correct methodology of constitutional adjudication is the *principal* goal of constitutional theory, there might be *other* goals as well. For instance, presumably constitutional theory is not concerned with determining the correct methodology so that we may all stand around admiring it. Rather, the goal is that the correct methodology actually be *used* by jurists and practitioners. And if this practical outcome is one of the goals of constitutional theory, then perhaps organizing theories according to methodology is the most sensible approach, since jurists and practitioners are more likely to be interested in *how* to resolve cases (methodology) than in the abstract question of *why* they should resolve the cases that way (justification).[120] In other words, a judge is more likely to ask whether she should be an originalist or non-originalist than whether she should rely on popular sovereignty or utilitarianism to justify her methodology.

That is fair enough, and I am certainly not suggesting that scholars cease categorizing theories as originalist or non-originalist. As I said, there are *some* originalist theories that remain miles apart from *some* non-originalist theories, and since methodologies are the ultimate result of a constitutional theory, it is important to produce scholarship contrasting theories according to their methodologies. My point, rather, is that the Standard Approach is neither the *only* nor the *most useful* way of understanding constitutional theory if our primary goal is to attempt to discern the best theory. That goal points toward a justifications-based approach instead of a methodology-based approach.

[119] See, e.g., Adrian Vermeule, Common Law Constitutionalism and the Limits of Reason, 107 Colum. L. Rev. 1482 (2007); Fallon, supra note 38, at 1–19; Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787 (2005).

[120] Smith, supra note 11, at 227–30 (warning of the dangers of increasing levels of abstraction in constitutional theory); see also Bork, supra note 1, at 133–35 (same).

II. LIBERALISM IN AMERICAN CONSTITUTIONAL THEORY

Thus far I have been arguing against viewing American constitutional theory primarily through the lens of the methodological dispute between originalists and non-originalists. My burden in this Part is to sketch the alternative, justifications-based approach and identify its main benefit. I will argue that, once we shift the focus to the justifications that constitutional theorists offer for their methodologies, it becomes clear that the debate within American constitutional theory is fundamentally a debate about liberalism as a political theory. It is a debate *among* liberals—and *between* liberals and their critics—about propositions that are closely associated with the liberal tradition: individualism and rationalism.

This debate cuts across the originalism/non-originalism divide, with some originalists lining up *against* individualism or rationalism and others operating *within* the confines of those propositions, and the same is true of non-originalists. The surprising truth is that many theorists who are often seen as opposed to one another because of the originalism/non-originalism distinction imposed by the Standard Approach are, in fact, allies in the foundational debates about liberalism, and other theorists who are often seen as allies because they share a methodology are, in fact, opponents in those same debates. The result of the justifications-based approach is to identify new and more productive avenues for the debate within American constitutional theory, which can also help us better understand doctrinal disagreements.

This Part will proceed in three steps. The first is to describe individualism and rationalism, two propositions that unite many of the most important liberal theories. The second is to show that justifications offered for some of the most prominent constitutional theories hinge on the acceptance or rejection of individualism and rationalism. My discussion of individualism, rationalism, and various constitutional theories is necessarily abbreviated, but I hope to convey what I see as their essential character, even while acknowledging that others might differ with my interpretations of the theories described below.[121] The last is to describe the benefits of a justifications-based approach.

[121] For example, although I describe Locke as an individualist, some would disagree with that description. See Ruth W. Grant, John Locke on Custom's Power and Reason's Authority, 74 Rev. Pol. 607, 608 n.2 (2012) (cataloguing contrasting views about whether Lockeanism is individualistic). And while I put forward an interpretation of Mill, "*what* the liberalism is

A. Liberalism's Propositions

The threshold problem in any discussion about liberalism is to define what we mean by "liberalism." As noted in the Introduction, I do *not* mean "liberalism" as that term is understood in contemporary American political discourse, where the term "liberal" is associated with the Democratic Party and its policy proposals. But while it is easy enough to say what I do *not* mean by "liberalism," it is harder to describe what I *do* mean by liberalism. As Alan Ryan has noted, there is a plausible argument that liberalism is an "essentially contested term[ ]," in the sense that its "meaning and reference are perennially open to debate."[122] A tradition that includes such different thinkers as Locke and Mill might cause us to ask "is liberalism one thing or many"?[123]

Fortunately for my purposes, it is not necessary to provide a single definition of what liberalism is. I need only identify propositions that are *associated with* liberalism and show that their acceptance or rejection is crucial to understanding American constitutional theory. If I do so, then I have shown that American constitutional theory is ultimately a debate *about* liberalism,[124] regardless of whether those debates are seen as occurring *within* liberalism (under a broad understanding of liberalism) or *between* liberals and their critics (under a narrower understanding of liberalism).

For example, one of the main challenges in any discussion of liberalism is determining whether the conservative philosophical tradition represented most prominently by Edmund Burke is a species of liberalism.[125] Many theorists consider Burke a liberal,[126] just as many

that [Mill] defends and *how* [he] defends it remain matters of controversy." Ryan, supra note 14, at 292.

[122] Ryan, supra note 14, at 23.

[123] Id. at 21; see also Jeremy Waldron, Theoretical Foundations of Liberalism, 37 Phil. Q. 127, 127–28 (1987) (the term "liberalism" includes a range of views without "any set of doctrines or principles that are held in common").

[124] Assuming, that is, that I have successfully shown that justifications, rather than methodologies, are the fundamental areas of disagreement in constitutional theory. See supra Subsection I.B.2.

[125] This is partly because conservatism is itself a contested concept. See, e.g., Samuel P. Huntington, Conservatism as an Ideology, 51 Am. Pol. Sci. Rev. 454, 454–61 (1957).

[126] See, e.g., Levin, supra note 19, at xvi; Pierre Manent, An Intellectual History of Liberalism 80 (Rebecca Balinski trans., 1994); Gray, supra note 13, at 20; Guido de Ruggiero, The History of European Liberalism 78–84 (R.G. Collingwood trans., Beacon Press 1959) (1927).

consider Alexis de Tocqueville[127] or Friedrich Hayek[128] to be liberals. Others, such as Roger Scruton, have argued that conservatism is distinct from—and critical of—liberalism.[129] Disagreement about the relationship between conservatism and liberalism has received new attention recently as part of a larger debate about the future of liberalism, especially in the United States.[130] This is an important debate, but because my argument would remain the same irrespective of whether conservatism is considered part of liberalism or not, there is no need for me to enter into it. My analysis will follow Scruton's lead and assume that conservatism is distinct from liberalism, but I do so *solely* because it makes presentation of the ideas discussed below clearer and eliminates the need for wordy modifiers (e.g., distinguishing between "progressive liberalism" and "conservative liberalism"). One could, with Yuval Levin, argue that conservatism is a strain of liberalism[131] and still agree with my thesis that American constitutional theory is a debate *about* liberalism.

Thus, my approach will be to identify propositions that are asserted by some of the most important theorists in the liberal tradition, even while acknowledging that other liberal theorists might not agree with those propositions. Accordingly, when I speak of "liberalism" without qualification below, I am stipulating a definition that does not include conservative thought, and even within that narrower understanding of liberalism, I do not intend thereby to convey the false impression of a monolithic liberal tradition or to assert that what I attribute to liberalism is true for *all* liberal theories.[132]

My approach of identifying a few key liberal propositions is possible because, "[f]or all the rich historical diversity which liberalism yields to historical investigation, it is none the less a mistake to suppose that the manifold varieties of liberalism cannot be understood as variations on a small set of distinctive themes."[133] Indeed, after acknowledging the

[127] See generally Sanford Lakoff, Tocqueville, Burke, and the Origins of Liberal Conservatism, 60 Rev. of Pol. 435, 442–46 (1998).

[128] Ryan, supra note 14, at 24.

[129] Roger Scruton, The Meaning of Conservatism 182–94 (3d ed. Palgrave 2001) (1980).

[130] See, e.g., Deneen, supra note 15, at 1–42; Yuval Levin, After Progressivism, First Things (May 2012), https://www.firstthings.com/article/2012/05/after-progressivism [https://perma.cc/U45J-Y2S7].

[131] Levin, supra note 130.

[132] Waldron, supra note 123, at 140 ("[L]iberalism is not a monolithic tradition.").

[133] Gray, supra note 13, at xiii; see also D.J. Manning, Liberalism 13 (1976) (noting persistent themes throughout the differing strains of liberalism).

contested nature of liberalism, Ryan proceeded to identify a few such themes.[134] "[L]iberalism is more than a set of values. . . . Its values do not stand on their own metaphysical two feet, as it were, but derive from a theory of human nature and society"[135]—or, at least, there are *some* propositions about human nature and society that unite *many* of the most important liberal theories.

There are several propositions that might fit this description, but I will limit myself to identifying and describing those that are most relevant to American constitutional theory: (1) the primacy of the individual over society, what we might call "individualism," and (2) the primacy of individual reason over all other sources of knowledge, what we might call "rationalism." While other liberal propositions are the subject of debate within American constitutional theory, these two are the most salient.

Finally, I should preface my argument by acknowledging that there may be other, compatible ways of organizing the debate over justifications in American constitutional theory, such as the one helpfully offered by Coan in what is, to my knowledge, the only attempt to organize justifications other than this Article.[136] Like me, Coan does not contend that his way of organizing the debate is exclusive,[137] and I believe that his analysis is compatible with mine.

1. Individualism

Although it might be going too far to say that "[t]he metaphysical and ontological core of liberalism is individualism,"[138] there can be no doubt that individualism is a core proposition of many important liberal theories.[139] Here, individualism means more than the idea that individuals

[134] Ryan, supra note 14, at 23–40. So did Waldron. See Waldron, supra note 123, at 129–40.

[135] Arblaster, supra note 13, at 13 (emphasis omitted).

[136] My analysis in this Article was developed independently of Coan's and differs from his important project in several ways. To take just two examples: (1) he does not argue against the Standard Approach, choosing instead to argue in favor of more attention to justifications; and (2) he organizes justifications based on types of arguments (e.g., whether a justification is procedural in nature) rather than on whether theorists agree or disagree about particular substantive claims, such as individualism or rationalism.

[137] See Coan, supra note 38, at 840.

[138] Arblaster, supra note 13, at 15.

[139] See id. at 15–54; Gray, supra note 13, at xii; see also Deneen, supra note 15, at 31–34, 43–63; Kenneth Minogue, The Liberal Mind 46–52 (Liberty Fund, Inc. 2000) (1963); Scruton, supra note 129, at 64–66; C.B. Macpherson, The Political Theory of Possessive Individualism: Hobbes to Locke 1 (1962).

have rights, which preliberal political and ethical theories also acknowledge.[140] Rather, liberalism tends to draw a sharp line between the individual and society, while asserting that the individual has primacy.

What does it mean to say that liberalism sees the individual as having primacy over society? It means that liberalism sees the individual as existing *prior to* society.[141] This is not (usually) a historical claim that there was, in fact, a time when individuals existed apart from, and before the advent of, society.[142] Instead, liberalism asserts that the obligation to obey political authority must be grounded in the individual's *choice* to submit to that authority.[143]

This assertion is captured by the thought experiment of the state of nature. The state of nature, as conceived by liberals such as Locke, is the natural state of human beings:[144] a condition in which individuals exist outside of any political order, answering to no human authority above themselves.[145] That does not mean that state-of-nature theorists necessarily deny that human beings have *some* form of natural social inclination. While Rousseau does seem to deny this,[146] Locke asserts that several basic social relations, such as the family, exist in the state of nature.[147] But within a state-of-nature framework, *political* relations are alien to human beings in their natural state: "[m]an is not naturally a political animal" in Locke's account.[148]

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[140] John Finnis, Natural Law & Natural Rights 198–210 (2d ed. 2011) (rights-talk, though modern, is simply a useful way of describing the demands of justice in the natural-law tradition); see also Russell Hittinger, The First Grace: Rediscovering the Natural Law in a Post-Christian World 115–16 (2002) (noting that classical lawyers saw justice as the giving of rights due); Gray, supra note 13, at 6.

[141] Arblaster, supra note 13, at 21–23.

[142] Id. at 40–41.

[143] Levin, supra note 19, at 91–125.

[144] John Locke, The Second Treatise of Government, *in* The Second Treatise of Government and a Letter Concerning Toleration 2–7 (Tom Crawford ed., Dover Publ'ns, Inc. 2002) (1946); see also Levin, supra note 19, at 44–52; Thomas Paine, Rights of Man, *in* Collected Writings 464–65 (Eric Foner ed., 1995).

[145] Locke, supra note 144, at 2–10; see also L.T. Hobhouse, Liberalism 20–21 (1911). Locke's description of the state of nature is complicated, see Macpherson, supra note 139, at 240–41, and I have oversimplified for present purposes.

[146] Jean-Jacques Rousseau, Discourse on the Origin and Foundation of Inequality Among Men, or Second Discourse, *in* Rousseau: The Discourses and Other Early Political Writings 115, 145–46, 149 (Victor Gourevitch ed. & trans., 1997).

[147] Locke, supra note 144, at 35–38; Manent, supra note 126, at 44; Manning, supra note 133, at 121. Nonetheless, Deneen has argued that Locke's conception of familial relations is individualistic and anti-social. See, e.g., Deneen, supra note 15, at 32–33.

[148] Manent, supra note 126, at 42.

That raises the question of why human beings would exit the state of nature and consent to political authority.[149] For Locke, the state of nature "tends naturally to become" a state of war because there is no neutral judge to resolve disputes,[150] and because this leaves our natural rights in an uncertain situation, human beings opt to submit to political authority.[151] Yet, any form of authority exercised by one adult person over another may exist only by consent,[152] and the consent of a group of individuals to such authority forms a social contract in which they surrender only so much political power as is necessary to protect themselves and their property.[153] The natural state of human beings, then, is one in which they do not live under political authority, and any such authority can be justified only by their consent.

Although state-of-nature theory may seem a little antiquated, it remains—in modern form—an important feature of liberalism. John Rawls, for example, expressly frames his *Theory of Justice* as "generaliz[ing] and carr[ying] to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant."[154] Rawls' Original Position and Veil of Ignorance are adaptations of the state of nature and social contract,[155] and like those concepts, Rawls' theory implicitly assumes that political obligations should be derived from a vision of human beings *apart from* a politically organized society.[156]

Of course, not *all*—or even most—liberal theorists make use of the state-of-nature paradigm. John Stuart Mill, "the watershed thinker in the development of liberalism,"[157] did not, and he could be said to represent a more "communitarian," less individualistic version of liberalism than the liberalism of Locke.[158] Mill "thought social philosophy should begin by contemplating human beings not in a state of nature or behind a veil of

[149] Id. at 48.
[150] Id.; Locke, supra note 144, at 8–10, 44.
[151] Locke, supra note 144, at 44–45; Gray, supra note 13, at 13–14.
[152] Locke, supra note 144, at 44.
[153] Id. at 57–59.
[154] Rawls, supra note 111, at 10.
[155] Id. at 10–19, 118–30; Ryan, supra note 14, at 509.
[156] On the individualism of Rawls's theory, see Michael J. Sandel, Liberalism and the Limits of Justice 59–65 (1982).
[157] Gray, supra note 13, at 30; Hobhouse, supra note 145, at 43.
[158] Ryan, supra note 14, at 318; Manning, supra note 133, at 13.

ignorance, but immersed in their social setting."[159] Part of the reason why Mill's theory is less individualistic is that it purports to be grounded in utilitarianism rather than natural rights.[160] This opens the door to greater state and social intervention insofar as individual interests may be subordinated to the interests of the whole.[161]

Nonetheless, Mill sees the relationship between the individual and society in an inherently individualistic way.[162] Like state-of-nature theorists, Mill examines "society, as distinguished from the individual"[163] and sets out to determine "the nature and limits of the power which can be legitimately exercised by society over the individual."[164] His account of freedom of thought, speech, and action—while ostensibly derived from utility—makes assertions of authority subject to the judgments and choices of individuals.[165] The result is Mill's Harm Principle,[166] which asserts a basis for political authority (protection of individuals) that echoes the social-contract rationale. Indeed, Mill could be said to carry the distinction between the individual and society even *further* than Locke, since he (unlike Locke) provides an account of limitations on "the moral coercion of public opinion,"[167] not just political authority. The upshot is that "even if societies are not founded on a contract, the scope of legitimate authority may be understood as if they were."[168] Like liberal state-of-nature theorists, Mill proclaims: "Over himself, over his own body and mind, the individual is sovereign."[169]

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[159] Ryan, supra note 14, at 318; John Stuart Mill, On Liberty, *in* On Liberty and Other Writings 1, 75 (Stefan Collini ed., 1989).

[160] See Mill, supra note 159, at 14 ("I regard utility as the ultimate appeal on all ethical questions."); Ryan, supra note 14, at 263–64.

[161] See Ryan, supra note 14, at 262 (observing that Mill "advanced a much enlarged role for government and public opinion alike" with respect to enforcing parental responsibilities); Gray, supra note 13, at 29–30; Hobhouse, supra note 145, at 25–26.

[162] Arblaster, supra note 13, at 41–43.

[163] Mill, supra note 159, at 15.

[164] Id. at 5; see also id. at 8–9 (describing the tyranny of public opinion).

[165] See infra Subsection II.A.2. There is, therefore, a close connection between Mill's individualism and rationalism.

[166] Mill, supra note 159, at 13.

[167] Id.

[168] Ryan, supra note 14, at 362.

[169] Id.; Mill, supra note 159, at 13. One might object that I have defined liberalism solely based on the English liberal tradition and that other liberal traditions, such as the French tradition, are not as individualistic. See Larry Siedentop, Two Liberal Traditions, *in* The Idea of Freedom: Essays in Honour of Isaiah Berlin 153, 153–56 (Alan Ryan ed., 1979). Such a clean division between English and French liberalism is contested. See Gray, supra note 13, at 22–23; Ruggiero, supra note 126, at 347. In any event, nothing important would change

Thus, while Mill might be viewed as *relatively* less individualistic than Locke, he is, nonetheless, properly described as an individualist.[170] Indeed, as Patrick Deneen has persuasively argued, although Lockean and Millian liberalism are sometimes seen as opposed to each other because they differ on the scope of state power, both "argu[e] ultimately for the central role of the state in the creation and expansion of individualism."[171]

One major implication of liberal individualism is a rejection of intergenerational authority.[172] Locke, while acknowledging that the mini-society of the family would exist in a state of nature, is led by his individual-as-sovereign understanding of authority to firmly reject any notion of parental authority once a child reaches adulthood.[173] Based largely on this rejection of parental authority, Locke likewise rejects the authority of one generation to bind another to the social contract: "'Tis true that whatever engagements or promises any one has made for himself, he is under the obligation of them, but cannot by any compact whatsoever bind his children or posterity."[174] Mill is similarly hostile to

about my argument if the reader chose to substitute "English liberalism" for "liberalism" throughout this text.

[170] Mill, supra note 159, at 56–74 (arguing for the primacy of individuality); see also Gray, supra note 13, at 29 (In *On Liberty*, "Mill's commitment to liberal individualism is much more prominent than his commitment to Utilitarian social reform."); Macpherson, supra note 139, at 2 (describing the utilitarian doctrine as a restatement of individualist principles); Hobhouse, supra note 145, at 112, 120.

[171] Deneen, supra note 15, at 46–47; see also id. at 16–18, 43–63 (arguing that individualism and statism reinforce each other). Others have made similar arguments or observations, with Macpherson's argument being among the most detailed. See Macpherson, supra note 139, at 255–57 (arguing that individualism and collectivism reinforce each other and that Locke's individualism requires the role of the state); see also Scruton, supra note 129, at 38–41; Manning, supra note 133, at 53. That being said, I do not mean to suggest that the transition from state-of-nature theories to Mill is seamless; they differ in important ways. See, e.g., Ryan, supra note 14, at 310–11; Gray, supra note 13, at 29–30. I am only arguing that they share a commitment to individualism.

[172] Jed Rubenfeld has noted this connection between individualism and the severing of intergenerational relations, though he seems to think that the breakdown in intergenerational relations precedes individualism rather than vice-versa. See Jed Rubenfeld, Freedom and Time: A Theory of Constitutional Self-Government 22–26, 68–70 (2001).

[173] Locke, supra note 144, at 23–35. Although he was writing about democracy, not liberalism per se, Tocqueville's description of the way in which individualism leads to a severing of relationships between generations is applicable here. See 2 Alexis de Tocqueville, Democracy in America 99 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf, Inc. 1945) ("Thus not only does democracy make every man forget his ancestors, but it hides his descendants and separates his contemporaries from him . . . .").

[174] Locke, supra note 144, at 54; see also Paine, supra note 144, at 438–41 (arguing against intergenerational authority).

the authority of previous generations, condemning in strong terms the customs and traditions by which previous generations purport to bind subsequent ones.[175]

The rejection of intergenerational authority is a major point of departure between liberalism and conservatism. Whereas liberalism sees the individual as *prior to* society and engaged in an arms-length relationship *with* society, conservatism "arises directly from the sense that one belongs to some continuing, and pre-existing social order," from the perspective of "a person stand[ing] in the current of some common life."[176] The result is an account of political obligation in which an individual may be bound to obey authority without having chosen to submit to it.[177]

This very different conception of the relationship between the individual and society was most famously described by Edmund Burke in *Reflections on the Revolution in France*.[178] As Levin has explained, "Burke argues that to learn about man's nature, we need to understand man as he is and, to our knowledge at least, has always been: a social creature, living together with others in an organized society with a government."[179] Rather than seeing the individual as standing apart from society and negotiating the terms of entry,[180] Burke sees the individual as necessarily embedded *in* society: "I have in my contemplation the civil social man, and no other."[181] In this, Burke is an extension of the preliberal natural law tradition, which asserts that "man is by nature a social and political animal, who lives in a community."[182] These unchosen

[175] Mill, supra note 159, at 56–74.

[176] Scruton, supra note 129, at 10; see also Gray, supra note 13, at 80 (conservatives "mostly repudiated the abstract individualism they found in liberal thought and rejected liberal ideas of civil society in favour of conceptions of moral community").

[177] See Levin, supra note 19, at 101–08 (arguing that Burke's account of political authority was not based on consent).

[178] Edmund Burke, Reflections on the Revolution in France 52 (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1789–1790).

[179] Levin, supra note 19, at 54.

[180] Scruton, supra note 129, at 19–21 (arguing that conservatism rejects social-contract theory).

[181] Burke, supra note 178, at 52; see also Levin, supra note 19, at 101–08 (describing Burke's objections to the liberal notion of a state of nature); Scruton, supra note 129, at 19–21 (arguing against the state of nature hypothetical).

[182] Thomas Aquinas, De Regno, *in* St Thomas Aquinas: Political Writings 5, 5–6 (R.W. Dyson ed. & trans., Cambridge Univ. Press 2002) (Bk. I, ch. 1); see also Aristotle, The Politics, *in* Aristotle: The Politics and the Constitution of Athens 13 (Stephen Everson ed., B. Jowett trans., 1996) (Bk. I.2) ("Hence it is evident that the state is a creation of nature, and that man

relationships give rise to unchosen obligations, including political obligations.[183]

Given this understanding of human beings as enmeshed in a broader social and political fabric that predates the individual and will long outlast the individual, conservatism sees the relationship between generations quite differently than does liberalism. Whereas liberalism rejects the authority of past generations to bind the present generation, conservatism asserts the authority of the dead to rule the living.[184] Indeed, to make this point, Burke repurposes the idea of a social contract and proposes that, while "[s]ociety is indeed a contract,"[185] it is "a partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."[186] And, in stark contrast with Locke's rejection of any analogy between political and parental authority,[187] Burke approvingly describes England as having "given to our frame of polity the image of a relation in blood, binding up the constitution of our country with our dearest domestic ties, adopting our fundamental laws into the bosom of our family affections. . . ."[188] For Burke, as for conservatism generally, just as the individual cannot be properly conceived without reference to the society of which the individual is a part, each generation cannot be properly conceived without reference to the generations past and future to which it is a link.[189]

Of course, these distinctions between liberalism and conservatism can be overstated. Locke tempers his requirement of individual consent to the

is by nature a political animal."); see also Deneen, supra note 15, at 34–35 (describing premodern political thought); Arblaster, supra note 13, at 22–23. For an insightful and somewhat revisionist discussion of Burke's importance to natural-law thinking, see Matthew D. Wright, A Vindication of Politics: On the Common Good and Human Flourishing 120–58 (2019). But see Huntington, supra note 125, at 459 n.6 (asserting that "any theory of natural law as a set of transcendent and universal moral principles is inherently nonconservative"); see also 1 F.A. Hayek, The Fatal Conceit: The Errors of Socialism 66–88 (W.W. Bartley III ed., Univ. of Chicago Press 1991) (1988).

[183] Levin, supra note 19, at 101–09.

[184] Scruton, supra note 129, at 45–48; 1 G.K. Chesterton, Orthodoxy, *in* The Collected Works of G.K. Chesterton 251 (David Dooley ed., 1986) (1908) ("We will have the dead at our councils. The ancient Greeks voted by stones; these shall vote by tombstones.").

[185] Burke, supra note 178, at 84.

[186] Id. at 85.

[187] Locke, supra note 144, at 23–35.

[188] Burke, supra note 178, at 30; see also id. at 27–33; Scruton, supra note 129, at 21–24, 129–31.

[189] Levin, supra note 19, at 214–19.

social contract with the idea of tacit consent;[190] Burke tempers the authority of the dead by emphasizing the authority of the living to change social and political arrangements over time.[191] But these important qualifications do not change the basic point: liberalism and conservatism propose vastly different understandings of the human person and society, with implications for intergenerational relationships and political authority. The chart below attempts to summarize "this fundamental difference of perspective," which "affects every aspect of liberalism."[192]

Individualism	**Anti-Individualism**
The obligation to obey political authority must be based on the individual's choice to submit to that authority.	The obligation to obey political authority arises from relationships that are not chosen by the individual.

2. Rationalism

A second proposition closely associated with liberalism is rationalism. As with individualism, liberal theories partake of rationalism to different degrees, and some may even be said to reject it.[193] But there is a distinctly rationalist strain running through the liberal tradition that differentiates it from non-liberal theories.

By "rationalism," I do not mean the school of epistemology most commonly associated with René Descartes,[194] though Cartesian rationalism is certainly consistent with the kind of rationalism I am invoking.[195] Rather, I mean a "rationalism" with the character and disposition described by Michael Oakeshott:

[190] Locke, supra note 144, at 54–57; see also Levin, supra note 19, at 95–96 (describing this feature of Paine's theory).

[191] Burke, supra note 178, at 29–31.

[192] Arblaster, supra note 13, at 23.

[193] See Minogue, supra note 139, at 56–59 (stating that there is no necessary connection between liberalism and rationalism (what he calls "libertarianism"), while noting that it is nonetheless a key component of the liberal tradition). Ryan, for instance, implies that the classical liberal tradition associated with Locke takes a more modest view of human reason, see Ryan, supra note 14, at 24–26, and Arblaster points out that liberalism has always contained more- and less-rationalist veins, see Arblaster, supra note 13, at 79–84.

[194] See Minogue, supra note 139, at 27 (drawing this distinction).

[195] See Peter Markie, Rationalism vs. Empiricism, Stan. Encyclopedia of Phil. (July 6, 2017), https://plato.stanford.edu/entries/rationalism-empiricism/#Bib [https://perma.cc/9R8K-YFPE]; see also Adam Adatto Sandel, The Place of Prejudice: A Case

> At bottom [the Rationalist] stands . . . for independence of mind on all occasions, for thought free from obligation to any authority save the authority of 'reason'. . . . [H]e is the *enemy* of authority, of prejudice, of the merely traditional, customary or habitual. His mental attitude is at once sceptical and optimistic: sceptical, because there is no opinion, no habit, no belief, nothing so firmly rooted or so widely held that he hesitates to question it and to judge it by what he calls his 'reason'; optimistic, because the Rationalist never doubts the power of his 'reason' (when properly applied) to determine the worth of a thing, the truth of an opinion or the propriety of an action.[196]

Rationalism thus places *individual reason* above all other sources of knowledge, like tradition or revelation.[197]

Mill stands near the maximalist end of the rationalist spectrum. His high estimation of human reason is foundational to his political theory. In praising the "quality of the human mind," Mill asserts that "the source of everything respectable in man either as an intellectual or as a moral being" is that "[h]e is capable of rectifying his mistakes" through reason.[198] "Wrong opinions and practices gradually yield to fact and argument," which is why Mill thinks it is essential that free speech and free inquiry be given expansive protection.[199] Mill acknowledges the role that experience plays in the acquisition of knowledge, and "[t]he traditions and customs of other people are, to a certain extent, evidence of what their experience has taught *them*."[200] But he is adamant that the individual must "use and interpret experience in his *own* way," according to the exercise of individual reason.[201] Reason, including individual experience, must be the judge of traditions and customs; otherwise, the individual "has no need of any other faculty than the ape-like one of imitation."[202]

for Reasoning Within the World 24–33 (2014) (describing Descartes as a rationalist in the sense that I invoke here).

[196] Oakeshott, supra note 22, at 5–6.

[197] Minogue, supra note 139, at 54–55; Hayek, supra note 182, at 48–52. A similar description of rationalism is found in then-Pope Benedict XVI's Regensburg Address. See generally Pope Benedict XVI, Faith, Reason, and the University, *in* A Reason Open to God 7, 7–19 (J. Steven Brown ed., 2013).

[198] Mill, supra note 159, at 23.

[199] Id.

[200] Id. at 58.

[201] Id. (emphasis added).

[202] Id. at 59.

Mill's rationalism is part of his understanding of "man as a progressive being,"[203] a being who, through the exercise of reason, will continually improve.[204] Mill "held that the central discovery of the social sciences was that history progressed in a certain direction and did so under the impact of changes in ideas."[205] Accordingly, he saw a clear conflict between reason and tradition: "The despotism of custom is everywhere the standing hindrance to human advancement, being in unceasing antagonism to that disposition to aim at something better than customary, which is called . . . the spirit of liberty, or that of progress or improvement."[206] Custom had to be subordinated to reason, the source of progress, and the "the contest between [custom and progress] constitutes the chief interest of the history of mankind."[207] We see here the connection between rationalism and an understanding of history-as-progress that was to become highly influential in the Progressive Era,[208] when liberal theorists like John Dewey would infuse it with an explicit appeal to Darwinian evolutionary theory.[209] If reason is the source of human progress, then tradition, custom, and other potential sources of knowledge are—to the extent that they assert equality with reason in the governance of human affairs—the enemy of human progress and, in this sense, of history itself.[210]

This strong form of rationalism is not present in all liberal theories.[211] State-of-nature theories, for instance, need not assert such a strong

[203] Id. at 14.

[204] Id. at 23, 45; see also Manning, supra note 133, at 53–55.

[205] Ryan, supra note 14, at 267.

[206] Mill, supra note 159, at 70.

[207] Id.; see also Deneen, supra note 15, at 143–48 (describing Mill's hostility toward custom and tradition).

[208] Minogue, supra note 139, at 54-55 (describing the union of rationalism—what he calls "libertarianism"—and a progressive view of history); Hobhouse, supra note 145, at 49–50, 53.

[209] See John Dewey, The Influence of Darwin on Philosophy, *in* The Influence of Darwin on Philosophy and Other Essays in Contemporary Thought 1, 9–19 (1910); see also Bradley C. S. Watson, Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence 55–109 (2009); Gray, supra note 13, at 88 (recognizing the connection between Mill's anthropology and theory of history). But see Ryan, supra note 14, at 318 (arguing that Mill had a less optimistic view of human nature than Dewey).

[210] A very similar dynamic can be seen in Paine's writings. See Levin, supra note 19, at 150–68 (describing the rationalism of Paine). For a discussion of this view of the relationship between history and progress, see generally Herbert Butterfield, The Whig Interpretation of History (photo. reprt. 1978) (1931).

[211] Arblaster, supra note 13, at 35–37 (describing two strands of liberal tradition regarding human reason, with one being more rationalist); see also Ryan, supra note 14, at 25–26 (same). Hayek, for example, argues that Locke does not subscribe to this strong form of rationalism.

antagonism to tradition and other potential sources of knowledge once human beings consent to government, even though some (such as Paine's theory) do.[212] Nonetheless, such theories undoubtedly have a rationalist foundation: they derive political obligations from a state of nature that *excludes* tradition, custom, and other possible sources of knowledge.[213] There is no evidence that traditions or customs exist in Locke's state of nature, except perhaps for traditions and customs within a family,[214] and it is hard to see how they could. Likewise, Rawls's Veil of Ignorance, at least initially, explicitly excludes the kind of society-specific knowledge of which traditions and customs are a part.[215] Thus, while there might be some liberal theories that have a less rationalistic strain, "a foundation of liberal thought" is that "intelligible justifications in social and political life must be available in principle for everyone, for society is to be understood by the individual mind, not by the tradition or sense of a community."[216]

Here again, liberalism stands in stark contrast with conservatism.[217] Conservatism rejects rationalism's elevation of individual reason above all other sources of knowledge, both because it views other sources as (at least) equally trustworthy and because it is skeptical that individuals will correctly discern and accept what reason requires. Perhaps the most important non-rationalist source of knowledge for a conservative is

See Hayek, supra note 182, at 49. But see Grant, supra note 121, at 616–21, 623 (describing Locke's rationalism). As noted above, one could argue that Burke, Hayek, and Tocqueville are part of the liberal tradition, in which case they would be examples of liberal theories that reject rationalism.

[212] See Levin, supra note 19, at 150–68 (describing Paine's rationalism).

[213] Grant, supra note 121, at 616–21, 623 (describing Locke's rationalism); see also John Dunn, The Political Thought of John Locke: An Historical Account of the Argument of the "Two Treatises of Government" 116 (1969) (describing Locke's move from the state of nature to political society as "rationalistic and abstract").

[214] See Deneen, supra note 15, at 72–77 (describing the state of nature as being divorced from tradition and custom); Grant, supra note 121, at 610–16 (describing Locke's view on the influence of custom, especially within a family).

[215] Rawls, supra note 111, at 118–19.

[216] Waldron, supra note 123, at 135; see also id. at 149–50 (explicitly distinguishing liberalism and conservatism on this basis); Deneen, supra note 15, at 25–27 (describing liberalism as a being defined in part by its disregard for culture and tradition).

[217] Arblaster, supra note 13, at 79–84.

tradition, which Scruton describes as "a form of social knowledge."[218] He continues:

> Such knowledge arises 'by an invisible hand' from the open-ended business of society, from problems which have been confronted and solved, from agreements which have been perpetuated by custom, from conventions which coordinate our otherwise conflicting passions, and from the unending process of negotiation and compromise whereby we quieten the dogs of war.[219]

Tradition, in this sense, is not a set of arbitrary social practices. It is, rather, the deposit of human reflection on social, economic, and political problems extended through time. But precisely because such reflection is extended through time, tradition is "not formed by [those living today] drawing reasoned conclusions from certain facts or from an awareness that things behaved in a particular way."[220] Instead, as Hayek observed, "custom and tradition stand *between* instinct and reason."[221] It is the result of the rational reflection of generations of individuals, but because it is often inarticulate and diffuse, it bears more of the character of an instinct than a syllogism.

The need for such intergenerational reflection presumes skepticism of both individual human reason and Mill's idea of "man as a progressive being." As Burke said in one of his most famous passages:

> We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations and of ages.[222]

It was this skepticism of rationalism that led Burke to foresee the disastrous consequences of the French Revolution. Surveying "the list of the persons and descriptions elected into the *Tiers Etat*," he saw that "not one" was a man "of any practical experience in the state"; "[t]he best were only men of theory."[223] A group so taken with abstract reason would come

[218] Scruton, supra note 129, at 31. See also Minogue, supra note 139, at 53. Hayek articulates a similar idea in his landmark essay on the problem of knowledge. See generally F.A. Hayek, The Use of Knowledge in Society, 35 Am. Econ. Rev. 519 (1945).

[219] Scruton, supra note 129, at 31–32.

[220] Hayek, supra note 182, at 23.

[221] Id.

[222] Burke, supra note 178, at 76.

[223] Id. at 35.

to teach themselves "to despise all their predecessors,"[224] and by doing so, they would be led into grievous errors.[225]

Again, it is possible to overstate these differences. As pointed out above, liberals need not completely reject other sources of knowledge, and conservatives certainly use individual reason as part of their assessment of truth. The key point is the *relative weight* that each camp accords to various sources of knowledge. The distinction between rationalism and anti-rationalism could be summarized in this way:

Rationalism	**Anti-Rationalism**
Individual reason has primacy over all other sources of knowledge.	Tradition, custom, and other sources of knowledge are *at least* as reliable as individual reason.

Levin observes that, in Burke's view, there is a connection between individualism and rationalism: "This modern ideal of reason, Burke fears, partakes far too much in the modern myth of individualism, suggesting that every truth must be demonstrable to the rational individual."[226] The link between individualism and rationalism is a disposition—if not an intellectual commitment—of indifference (and sometimes hostility) to the propositions endorsed by generations past.[227] That is not to say that all individualists are rationalists, or vice-versa.[228] But it should come as no surprise that liberal theories tend to incorporate elements of *both* individualism and rationalism.

B. The Debate Within American Constitutional Theory

What I have said might seem distant from the adjudication of cases or controversies under the U.S. Constitution, but the truth is that the debates within American constitutional theory are, fundamentally, debates about liberalism. Specifically, the debates are about individualism and rationalism.

[224] Id. at 33.

[225] Id. at 31–36; see also Levin, supra note 19, at 128–50. Deneen argues that Burkean conservatism is properly viewed as the antithesis of Millian liberalism. See Deneen, supra note 15, at 143–48.

[226] Levin, supra note 19, at 134.

[227] Minogue, supra note 139, at 30, 35–38.

[228] As we will see, David Strauss's constitutional theory is individualistic but purports to reject rationalism. See infra Section II.B.

And, intuitively, it makes sense that they would be. Constitutionalism necessarily entails an assertion by one generation of the authority to bind subsequent generations in at least *some* respect,[229] and thus, as Michael McConnell has said, "the first question for constitutional theory" is: why should those living today obey the dictates of those long-since dead?[230] The answer to that question will turn on how we think about the basis of political obligation and the deference due to the reasoning of prior generations—in other words, it will turn on what we think of individualism and rationalism.

The Standard Approach obscures this truth. By focusing on methodologies instead of justifications, the Standard Approach causes us to miss crucial commonalities among theorists while imputing superficial commonalities to others. Theorists who are individualists are seen as opponents because they end up on different sides of the originalism/non-originalism divide—when in fact they agree on something far deeper. Framed in this way, many of the disagreements within American constitutional theory are disagreements about the implications of *shared* politico-theoretical premises and, conversely, other disagreements that seem like friendly intramural disputes among allied theorists are actually based on fundamentally *opposed* politico-theoretical premises.

To illustrate these points, I will examine some of the most important constitutional theories from both sides of the originalism/non-originalism divide. My examination cannot be comprehensive, but I have chosen theories that I believe best demonstrate the ways in which liberalism drives debates within American constitutional theory.

This will lead some readers to wonder if I have cherry-picked constitutional theories that support my thesis even though many others would contradict it. There are two responses to this concern. First, I do not claim that *every single* complete constitutional theory can be explained by the debates about individualism and rationalism. It is possible that some theories do not depend on how one views individualism and rationalism.

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[229] Alicea, supra note 74, at 151–54; see also Rubenfeld, supra note 172, at 45–73. That is why rejecting any form of intergenerational authority necessarily requires rejecting the authority of the American Constitution, no matter how interpreted. See Louis Michael Seidman, On Constitutional Disobedience 11–28 (2012); McConnell, supra note 107, at 1127. For a discussion of the role of rationalism in British constitutional culture, see generally Graham Gee & Grégoire Webber, Rationalism in Public Law, 76 Modern L. Rev. 708 (2013).

[230] McConnell, supra note 107, at 1128.

Second, as I will discuss in Section III.D, some theories that could be offered as counterexamples are simply *not* fully developed constitutional theories, and it is precisely because they are missing the theoretical structure necessary to complete their justifications that they appear not to implicate debates about liberalism. That is a deficiency of those theories, not of my argument.

1. Individualism in American Constitutional Theory

Just as individualism is the foundation of liberal theories as different as those of Locke and Mill, individualism is the foundation of American constitutional theories across the originalism/non-originalism divide.[231] For some constitutional theories, the role of individualism is not difficult to see. Lockean political theory is individualistic, so it stands to reason that constitutional theories in the Lockean tradition—such as Randy Barnett's originalism—would be as well.

Barnett's justification begins, appropriately, by asking: why should those living today regard the Constitution as binding?[232] Why, in other words, should the living obey the dead? Barnett's answer starts from the strongly Lockean premise that each person is an "individual sovereign."[233] From that premise, he argues that each person may consent to be ruled by another,[234] but the kind of consent necessary would have to be *actual* and *unanimous* consent.[235] He therefore rejects notions of implicit consent often relied on by popular sovereignty theorists,[236] and like Locke, he rejects the authority of prior generations to consent to a regime on behalf of those living today.[237]

Instead, Barnett proposes an alternative means of legitimating the Constitution:[238] "in the absence of such express consent, we must ask

[231] Rubenfeld, supra note 172, at 43 ("[T]o an extraordinary extent, the Jeffersonian thesis [that the earth belongs to the living] remains the dominant starting point for modern democratic and constitutional theory.").

[232] Barnett, supra note 118, at 9–10.

[233] Randy E. Barnett, Our Republican Constitution: Securing the Liberty and Sovereignty of We the People 69–73 (2016).

[234] Barnett, supra note 118, at 11.

[235] Id. at 14–25.

[236] Id. at 14–19, 22–25.

[237] Id. at 19–22.

[238] By legitimacy, Barnett means legitimacy as a moral concept. See Fallon, supra note 119, at 1796–1801.

what each person could be *presumed* to have consented to."[239] Barnett proposes that "if a law has not violated a person's rights (whatever these rights may be), then that person need not consent to it."[240] But only a regime whose laws are "(1) *necessary* to protect the rights of others and (2) *proper* insofar as they do not violate the preexisting rights of the persons on whom they are imposed" satisfies this alternative ground for legitimacy.[241] Because Barnett believes that the Constitution, as originally understood, meets his two criteria for legitimacy, originalism becomes essential to maintaining the legitimacy of the Constitution.[242] To allow the meaning of the Constitution to change would be to imperil the features undergirding its legitimacy.[243]

Notice that Barnett's answer to his own question—why should the living obey the dead—is not that they have an obligation to obey the dead by virtue of the dead's authority; he expressly rejects that idea.[244] Rather, Barnett believes that the living should evaluate the *substantive goodness* of the Constitution according to the two criteria he outlines, and because the living should conclude that the original meaning of the Constitution satisfies those criteria, they should—as individual sovereigns—view it as binding even in the absence of their consent. The legitimacy of the Constitution, in Barnett's view, is rooted in the judgment of those living *today*, not in any judgment of prior generations.[245] From start to finish, Barnett's theory is individualistic: it begins with the notion of people as individual sovereigns outside of political society, rejects the authority of prior generations to bind those living today, and ends with the legitimacy of the Constitution resting on the judgment of those living today.

But if Barnett's individualism is Lockean, Balkin's is Millian, rooted in a form of liberalism that presupposes "man as a progressive being."[246] For Balkin, the legitimacy of the Constitution hinges on its ability to serve

[239] Barnett, supra note 233, at 74. Rawls offered a similar principle of legitimacy. See Rawls, supra note 106, at 217.

[240] Barnett, supra note 118, at 44.

[241] Id.

[242] Id. at 100–13.

[243] Barnett's justification has undergone refinement over the years and now stretches across three books. My description of his theory is an attempt to synthesize his refinements in his later works with his earlier writings.

[244] Barnett, supra note 118, at 19–22.

[245] Id. at 114 ("[W]e are bound to respect the original meaning of a text, not by the dead hand of the past, but because we today—right here, right now—profess our commitment to this written Constitution.").

[246] Mill, supra note 159, at 14.

as both "higher law" and "our law."[247] By "higher law," Balkin means seeing the Constitution as "a repository of ideals morally superior to ordinary law and toward which ordinary law should strive," "an object of political and moral aspiration [that] offers a potential for redemption."[248] The Constitution serves as "our law" "when we feel that it reflects our values sufficiently well that we can identify with it as ours."[249] Because the Constitution must both "reflect our values" and be "a repository of" moral ideals that redeems our society, it "necessarily requires delegation to the future"[250] and "a steadfast belief that the evils of the present can and will be recognized and remedied, if not in our day then in the days to come."[251] "If people feel that the Constitution's values are not their values, but simply imposed on them as a straitjacket from an alien past, the Constitution is not theirs, and it offers them little hope that it will come to be theirs in the future."[252] Balkin's theory therefore imposes few unchangeable constitutional requirements while delegating the vast majority of the meaning of the Constitution to future generations through constitutional construction.[253]

Thus, while Balkin affirms that the Constitution is an intergenerational project,[254] he means that in a very different sense than Burke would. He sees the intergenerational nature of law *not* as a reflection of the metaphysical reality that human beings are constituted by their society, which necessarily extends backward and forward in time and creates obligations and authority across generations. Balkin rejects that conservative notion as "ancestor worship" that creates a "straitjacket" form of constitutionalism.[255] Rather, he sees the law as intergenerational because each generation may build on past generations to *improve*—or, in Balkin's word, *redeem*—the society.[256] In this sense, Balkin's theory is

[247] Balkin, supra note 66, at 59–61, 66–67, 76–77, 93, 114. Balkin also discusses "basic law," but I focus on the "higher law" and "our law" components of his theory because they are the most relevant to my point here.

[248] Id. at 62.

[249] Id. at 63.

[250] Id. at 62–63.

[251] Id. at 62, 78–79.

[252] Id. at 64.

[253] Id. at 29–34, 282, 300–19; see also Solum, supra note 4, at 1282–83; Lund, supra note 74, at 32–36.

[254] Balkin, supra note 66, at 56–57, 63. In this limited sense, Balkin disagrees with Strauss, see id. at 49–58, but both theories are ultimately grounded in individualism.

[255] Id. at 56–57, 64, 281–82; Jack M. Balkin, Constitutional Redemption 54 (2011).

[256] Balkin, supra note 66, at 75 (defining redemptive constitutionalism).

an applied form of the Millian tradition that came to encompass figures such as Dewey, with their strong belief in the gradual progress and evolution of history and society.[257]

Strauss does not set forth his understanding of the relationship between the individual and society as clearly as Barnett and Balkin do, but his treatment of intergenerational authority reflects his individualistic premises. Like Barnett and Balkin, Strauss expressly rejects the authority of prior generations. Invoking Thomas Jefferson's assertion that the "earth belongs to the living, and not to the dead,"[258] he regards intergenerational authority as "mystical and implausible,"[259] in part because he finds it "difficult to see why people who do not feel themselves part of" an intergenerational tradition "should be told that they have to identify with this particular American tradition."[260] Here, we see Strauss asserting the individual's right to determine whether she "identif[ies]" with tradition, a notion alien to the conservative belief that we are constituted by our traditions whether we agree with them or not.[261]

This is a crucial move for Strauss because, by rejecting the authority of the Founders to bind us today, he is forced to put forward a different basis for the authority of constitutional law. His answer is that the Constitution's text is not, in fact, strictly binding on us; it can be and has been treated more like the first judicial precedent[262] discussing an issue,

[257] It is important to note, however, that Balkin concedes that constitutional redemption is not guaranteed. Id. at 76; see also Jack M. Balkin, Constitutional Rot, *in* Can It Happen Here?: Authoritarianism in America 19, 19–35 (Cass R. Sunstein ed., 2018) (asserting that republics are susceptible to constitutional rot and patterns of success are not guaranteed to continue). Thus, while he has a Millian faith in human progress, he does not seem to carry that belief as far as some Progressives, who view social progress as inevitable. See Balkin, supra note 255, at 8.

[258] David A. Strauss, Common Law, Common Ground, and Jefferson's Principle, 112 Yale L.J. 1717, 1718 (2003).

[259] Strauss, supra note 49, at 928 & n.116; see also Strauss, supra note 1, at 18, 44, 100–01 (questioning why people from a different era should decide fundamental questions about our society today).

[260] Strauss, supra note 258, at 1724.

[261] Indeed, Strauss describes and rejects this conservative view. See Strauss, supra note 49, at 891 (asserting that the past is not "somehow constitutive of one's own or one's nation's 'identity'").

[262] Strauss emphasizes that the precedents that his common-law methodology takes into account are not limited to judicial precedents, see id. at 925, but I use the term "judicial precedent" here because it is easier to understand his point when thinking about the judicial context.

with subsequent cases modifying that first precedent.[263] To the extent the text binds us, rather, it is as a way of putting to rest issues that are more important to resolve than to resolve correctly.[264] Strauss justifies his common-law methodology based on its ability to best describe current constitutional practice,[265] its achievement of (from his perspective) normatively preferable outcomes in cases,[266] and the ostensible epistemological humility that it represents.[267] "Those justifications give a reason for deferring to the past that does not assume that the past has a right to rule us; we defer to the past because it makes sense to do so, *for our own purposes*."[268] Thus, while those justifications are not themselves based on individualism, they are only necessary *because* of individualism.

To be sure, I do not read any of these three constitutional theorists as arguing against the coercion of individuals who reject the legitimacy of the Constitution; they are not anarchists. But all three ground the legitimacy of the Constitution in the authority of those *living today*, not the authority of the past to bind the present.[269]

But just as conservatives reject the individualistic premises of liberalism, so do many originalists and non-originalists reject the individualism of Barnett, Balkin, and Strauss. McConnell "defend[s] the legitimacy of the dead hand" of the past by arguing that "there is nothing troubling or unusual about the idea that today's generation is constrained, for better or worse, by the decisions and actions of people who came before."[270] Human beings "are born into families, communities, and nations not of our making and not of our choosing."[271] That is to say, "[l]ong before we can conceive of the possibility of freedom, we have been given a language and a set of cultural assumptions; we have accepted benefits and incurred obligations. We are not alone in the present, but part

[263] See David A. Strauss, The Supreme Court 2014 Term—Foreword: Does the Constitution Mean What It Says?, 129 Harv. L. Rev. 2, 2–5, 28–52 (2015).

[264] Strauss, supra note 49, at 906–11.

[265] Strauss, supra note 1, at 51–97; Strauss, supra note 49, at 898–906, 916–24.

[266] Strauss, supra note 1, at 12–18.

[267] Id. at 40–42; Strauss, supra note 49, at 891–98.

[268] Strauss, supra note 1, at 100 (emphasis added).

[269] I will discuss Strauss's epistemological basis for his methodology in more detail below, see infra Subsection II.B.2, but he stresses that his epistemological argument is not based on the authority of the past. See Strauss, supra note 49, at 891–98.

[270] McConnell, supra note 107, at 1130–31. McConnell presents this as a possible response to the dead-hand argument, but he makes clear later in his article that it is, in fact, his own view. See id. at 1133–35, 1140.

[271] Id. at 1134.

of a historically continuous community."[272] McConnell argues that originalism embodies this intergenerational partnership because adhering to the original meaning of the text respects the authority of prior generations, while judicial restraint (defined as deferring to those living today "unless the text and history of the Constitution are tolerably clear") respects the authority of the present.[273]

Ernest Young agrees with McConnell's explicit embrace of Burkean anti-individualism—Young's articulation of which I will omit to avoid unnecessary repetition[274]—but he argues that it leads to non-originalism. For Young, one of the problems with originalism is that it assumes that the people consented to the Constitution and imbued it with meaning at a single point in time, rather than seeing the people as an intergenerational body whose consent "occurs in a continuing fashion," with the meaning of the text changing accordingly.[275] Instead, Young proposes a common-law method of constitutional adjudication similar to (though, as I will argue in Section II.C, meaningfully different from) Strauss's, which he believes better captures the intergenerational authority undergirding the Constitution.[276] Thus, while McConnell and Young disagree about which methodology follows from their justifications, their justifications proceed from anti-individualist premises.[277]

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[272] Id.

[273] See id. at 1136; see also Alicea, supra note 74, at 152–54 (asserting that recognizing the authority of predecessors' judgments is essential to preserving the legitimacy of present-day decisions).

[274] Ernest Young, Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation, 72 N.C. L. Rev. 619, 650–59 (1994).

[275] Id. at 672–73; see also Rubenfeld, supra note 172, at 62–65 (arguing that the meaning of a society's commitments evolves alongside that society).

[276] Young, supra note 274, at 688–91. For another Burkean approach to constitutional adjudication, see generally Anthony T. Kronman, Precedent and Tradition, 99 Yale L.J. 1029 (1990) (arguing that the common-law model is more descriptively accurate than other methods of constitutional adjudication).

[277] There is a good argument for including natural-law based theories in the anti-individualist camp, since (as noted above) conservatism and the national-law tradition tend to have a similar view of the relationship of the individual to society. Natural-law theories come in both originalist, see generally Lee J. Strang, Originalism's Promise (2019) (basing originalism on a natural-law account); Jeffrey A. Pojanowski & Kevin C. Walsh, Enduring Originalism, 105 Geo. L.J. 97 (2016) (same), and non-originalist varieties, see generally Adrian Vermeule, Common-Good Constitutionalism: A Model Opinion, Ius & Iustitium (June 17, 2020), https://iusetiustitium.com/common-good-constitutionalism-a-model-opinion/ [https://perma.cc/NUE4-UV3Q] (arguing for a framework for interpreting the U.S. Constitution that centers on its commitment to the general welfare); Adrian Vermeule, Beyond Originalism, Atlantic (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/

And that, ultimately, is the main point: at the foundation of each of the theories discussed above is an understanding of the relationship between the individual and society. Some—such as Barnett, Balkin, and Strauss—accept a form of liberal individualism, while others—such as McConnell and Young—reject it. But it is *that* disagreement that frames their justifications for their respective theories. Take away liberal individualism, and Barnett, Balkin, and Strauss's theories would be impossible to reconstruct.

The Standard Approach makes this reality difficult to see. Under the Standard Approach, we would organize the debate in this way:

Non-Originalists	**Originalists**
Strauss	Balkin
Young	Barnett
	McConnell

I have italicized the non-originalists to make it easier to see the effect of departing from the Standard Approach. Under a justifications-based approach, we would organize the debate, in part, in this way:

Anti-Individualists	**Individualists**
McConnell	Balkin
Young	Barnett
	Strauss

I say "in part" because I do not contend that the debate among theorists can be explained *solely* on the basis of their disagreement about individualism. In the next section, I will discuss how rationalism also plays a role in the American constitutional theory debate, and the disagreement over rationalism will organize the debate in a different way. And, as I have said, there might be other propositions of liberalism that divide constitutional theorists in other, interesting ways. Constitutional theory is complex, and no single principle is likely to explain why theorists agree or disagree. But their disagreement goes much deeper than methodology, "reach[ing] all the way down to the philosophical core" of "basic assumptions about human nature."[278]

common-good-constitutionalism/609037/ [https://perma.cc/84PE-L96V] (asserting the legitimacy of interpreting the Constitution in such a manner as to allow the government to promote the common good).

[278] Young, supra note 274, at 622.

2. Rationalism in American Constitutional Theory

Those basic assumptions include assumptions about human reason, and rationalism—or the rejection thereof—plays a key role in many American constitutional theories.

Given the Millian and individualistic premises of Balkin's theory, it is not surprising that his theory is also rationalistic. As described above, the concept of constitutional redemption is central to Balkin's theory of constitutional legitimacy.[279] Constitutional redemption begins by accepting that the Constitution falls short of our ideals and takes this as a "ground[ ] for redemption."[280] We redeem the Constitution as each generation acts through political and social movements—as confirmed by judicial constitutional construction—to change how the document is understood in our own time,[281] and while there is no guarantee that the document will eventually be redeemed,[282] Balkin insists that we must have "faith in its redemption through history,"[283] that "the system of constitutional government can and will become still better over time."[284] Balkin therefore rejects the assumption that there is a good chance that society will *deteriorate* over time and that the Constitution is meant to significantly constrain future generations.[285] Nor do tradition or custom play any significant role in Balkin's theory of redemption; individuals must judge for themselves, based on their own reason, how the Constitution should be redeemed. Balkin's meliorism is thus characteristically Millian, with its faith in human reason and "man as a progressive being."[286]

There is a similar "redemptive" theme in Ronald Dworkin's constitutional theory,[287] with its attendant confidence in human reason.

[279] See supra notes 246–57 and accompanying text.
[280] Balkin, supra note 66, at 76.
[281] Id. at 81–93, 277–319.
[282] Id. at 76.
[283] Id. at 74.
[284] Id. at 78.
[285] Id. at 28–29, 62.
[286] Mill, supra note 159, at 14. Indeed, Balkin acknowledges that his "focus on progress is characteristically modernist," with its "assumptions about the proper direction of history, which is a story of potential improvement." See Balkin, supra note 255, at 49–50; see also id. at 76 (describing redemption as a narrative of progress).
[287] James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms 130 (2015) ("[T]here are unmistakable affinities here between Balkin's commitment to interpret the Constitution so as to redeem citizens' faith in its promises and

Dworkin based his defense of the legitimacy of political and legal authority on the principle of integrity.[288] By "integrity," Dworkin meant that the law should be "morally coherent," devoid—as far as possible—of internal compromises and contradictions.[289] In Dworkin's view, "a state that accepts integrity as a political ideal has a better case for legitimacy than one that does not."[290] In the judicial realm, Dworkin's focus on integrity led him to propose a theory of adjudication in which "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[291] That is to say, a proper interpretation of the law must both "fit" the legal materials (e.g., applicable precedents, statutes, etc.) by being able to read them as a coherent whole and—because multiple interpretations might fit the materials—"justify" those materials by selecting the interpretation that depicts the law in its best light.[292] Dworkin illustrated his theory with the analogy of a chain novel: just as a series of authors writing a novel *seriatim* would have to fit their chapters with those that had been written by their predecessors and to make the novel overall the best literary work it could be, legal interpreters must discern a moral principle that fits the applicable legal materials and choose the principle that casts the law in its best light.[293] Dworkin's theory thus "brings political morality into the heart of constitutional law."[294]

Dworkin's principle of integrity makes tremendous demands on human reason.[295] Law-as-integrity can be fully realized only if the entire corpus of law is within the knowledge and understanding of the judge, and the judge must have the ability to discern a moral principle that fits the legal corpus, resolves the case, *and* is persuasive insofar as it presents the law

aspirations and Dworkin's and [Fleming's] commitment to interpret the Constitution in its best light.").

[288] Dworkin, supra note 50, at 190–92, 216.

[289] Id. at 176; see also id. at 184 (stating that integrity is flouted whenever a society enacts laws that express incoherent principles of justice).

[290] Id. at 191–92.

[291] Id. at 225.

[292] See id. at 228.

[293] Id. at 228–32; Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution 10–12 (1996).

[294] Dworkin, supra note 293, at 2.

[295] See Richard A. Posner, Conceptions of Legal Theory: A Response to Ronald Dworkin, 29 Ariz. St. L.J. 377, 383 (1997) (describing Dworkin as "a universalizing rationalist").

in its best light.[296] As Dworkin himself acknowledged, that is impossible,[297] which is why Dworkin invented a fictional, superhuman judge called "Hercules" to illustrate his theory.[298] The theory's impossibility in practice does not necessarily condemn it,[299] but it *does* demonstrate the extent to which Dworkin's theory assumes a highly optimistic view of human reason, as Cass Sunstein and Ernest Young have observed.[300] And although Dworkin's theory constrains the judge within the bounds of existing legal materials through the requirement of "fit," the requirement of "fit" does *not* entail according any authoritative status to tradition or other sources of knowledge.[301] Rather, fit is essential to achieving the integrity of the law, and the judge has only her individual reason to use in justifying the law.[302]

Against such rationalistic theories stand those that purport to advance a more modest conception of human reason. The most obvious are those that expressly cite Burke's skepticism of abstract reason as the foundation of their justifications. The non-originalist theories of Strauss and Young are examples.[303] It is not difficult to see the connection between their justifications and their common-law constitutionalist methodologies. If one thinks of judicial precedents as the practical, accumulated wisdom of generations of jurists and originalism as an abstract theory that would require revolutionary changes in constitutional law, a common-law approach seems more consonant with Burkean anti-rationalism.[304]

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[296] See Dworkin, supra note 50, at 245.

[297] Id.

[298] See id. at 239.

[299] Id. at 264–65.

[300] See Cass R. Sunstein, Second-Order Perfectionism, 75 Fordham L. Rev. 2867, 2879–81 (2007); Cass R. Sunstein, Burkean Minimalism, 105 Mich. L. Rev. 353, 394–96 (2006); Young, supra note 274, at 690–91 & n.356.

[301] See Fleming, supra note 287, at 102–05 (disclaiming the notion that "fit" entails obligations to the past).

[302] I could perhaps add Barnett to the list of rationalistic theories, since his premises track Locke's so closely, but Locke's writings make his rationalism more explicit than Barnett's do. Moreover, to the extent that pluralist constitutional theories are based on Dworkin's fit-and-justification approach, see Griffin, supra note 51, at 1756–57; Fallon, supra note 51, at 1233–34, one might consider them rationalist as well, but it is not clear whether all pluralist theorists understand "fit" in the same law-as-integrity way that Dworkin does, with its far-reaching requirements of coherence across the corpus of law.

[303] See Strauss, supra note 1, at 40–42; Strauss, supra note 49, at 891–94; Young, supra note 274, at 642–50. Thomas Merrill could also be added to that list. See Thomas W. Merrill, Bork v. Burke, 19 Harv. J.L. & Pub. Pol'y 509, 519–21 (1996).

[304] See, e.g., Strauss, supra note 1, at 40–44; Merrill, supra note 303, at 518–21; Young, supra note 274, at 667–69 & n.240.

More explanation is required, therefore, for why Bork's originalism should be viewed as anti-rationalist. In this regard, the most striking theme of Bork's theoretical writings is his skepticism of abstract theory. Bork acknowledged Dworkin's point that any constitutional theory—including originalism—is ultimately based on political theory,[305] but he rejected the idea that the choice of constitutional theory should be based on *his* political theory. Like Burke, Bork refused to build a constitutional theory from the ground up, deploring the "endless exploration of abstract philosophical principles" that presupposed the need to "settle the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the just society, and the like."[306] Dworkin once observed that there is a close connection between theories of legal obligation and theories of legal interpretation,[307] and that observation is borne out by the extent to which constitutional theorists see the need to justify the legitimacy of the Constitution as part of their justification for their methodology of constitutional adjudication.[308] Yet Bork refused to offer his own theory of legal obligation.[309] In a sense, Bork was skeptical of the entire enterprise of modern American constitutional theory.[310]

Rather, Bork started from Justice Story's premise that "[u]pon subjects of government, it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common-sense of the people, and never was designed for trials of logical skill or visionary speculation."[311] He saw our constitutional liberties as "ar[ising] out of historical experience and out of political, moral, and religious sentiment," rather than "rest[ing] upon any general theory."[312] Aligning himself even more closely with Burke's anti-rationalism, Bork explicitly analogized the abstract theories of his

[305] See Bork, supra note 1, at 177 (conceding, in response to Dworkin's assertion that "the choice of [originalism] is itself a political decision," that "[i]t certainly is"); see also Dworkin, supra note 50, at 259–60; Ronald Dworkin, A Matter of Principle 54–55, 162–65 (1985).

[306] See Robert H. Bork, Tradition and Morality in Constitutional Law, *in* A Time to Speak: Selected Writings and Arguments 397, 401–02 (2008).

[307] Dworkin, supra note 50, at 108–12, 190–92.

[308] See, e.g., Balkin, supra note 66, at 59–99; Barnett, supra note 118, at 1–86; Dworkin, supra note 50, at 176-224.

[309] Bork, supra note 1, at 173–74.

[310] See id. at 133–38.

[311] Bork, supra note 306, at 400.

[312] Id. at 401; see also Robert H. Bork, Styles in Constitutional Theory, *in* A Time to Speak: Selected Writings and Arguments, supra note 306, at 223, 235.

opponents to those of the French revolutionaries.[313] Rather than putting forward his own abstract theory to justify his methodology, Bork asked which theory of constitutional adjudication did *our constitutional tradition* select *for* us. Based on the Founders' understanding of the judicial role,[314] the dominance of originalism in constitutional adjudication until the Progressive Era,[315] and his argument (his most theoretical one) that only originalism was able to solve the "Madisonian dilemma" inherent in the structure of our Constitution,[316] Bork viewed originalism as the theory *of* our Constitution,[317] rather than a theory that he imposed *on* the Constitution. In his skepticism of abstract philosophy and desire to ground his theory in the history, tradition, and prescriptions of the Constitution, Bork was very much an anti-rationalist.[318]

Once again, the Standard Approach clouds our understanding of the relationship among these various theories. Under the Standard Approach, we would organize the debate in this way:

Non-Originalists	**Originalists**
Dworkin	Balkin
Strauss	Bork
Young	

Under a justifications-based approach, we would organize the debate, in part, in this way:

Anti-Rationalists	**Rationalists**
Bork	Balkin
Strauss	*Dworkin*
Young	

C. The Advantages of a Justifications-Based Approach

These charts highlight the main advantage of reorganizing the debate within American constitutional theory around justifications: clarifying

[313] Bork, supra note 312, at 223, 235.
[314] Bork, supra note 1, at 153–55.
[315] Bork, supra note 312, at 223–26.
[316] Bork, supra note 1, at 143–53.
[317] Id. at 155 ("The philosophy of original understanding is thus a necessary inference from the structure of government apparent on the face of the Constitution.").
[318] Bork, supra note 312, at 235.

what is at the root of the disagreement among theorists and making scholarly debate more fruitful.

What does it mean for the debate within American constitutional theory to become more "fruitful" or "productive"? If the principal goal of American constitutional theorists is to describe and justify the correct methodology of constitutional adjudication, it follows that the debate becomes more productive insofar as it is more likely to achieve that goal. This implies that understanding *why* we disagree becomes of central importance. We can only persuade each other of the truth of our arguments insofar as we correctly perceive areas of agreement and disagreement. Areas of agreement potentially allow theorists to reason with each other toward a common conclusion, and areas of disagreement allow theorists to identify flaws in their interlocutors' reasoning (or perceive the flaws in their own). To the extent that we can clarify the basis of disagreement, we have a better chance of arriving at the truth of the matter.

It might be said that the increasingly blurry line between originalism and non-originalism within constitutional theory is proof that the debates *have* been productive, as they have overcome what were previously believed to be irreconcilable differences among theories. But quite the opposite is true. As I have shown, the disagreement among theorists goes to the heart of political theory, and the ostensible reconciliation between originalism and non-originalism only proves the *inadequacy* of the Standard Approach, since it provides the illusion of agreement among irreconcilable theories.

A justifications-based approach promises a more fruitful way of structuring the debate.[319] By focusing on justifications, we can see that, although the Standard Approach would group Bork and Balkin together as allies because they are both originalists, they radically disagree about a question of human nature that forms the foundation of their respective theories.[320] They might agree, as a general matter, on the Fixation Thesis and the Constraint Principle, but given Balkin's theory of legitimacy and the importance of the Constitution's abstract provisions for constitutional redemption, they will never agree on how much the text constrains future interpreters—*the* key point on which originalism and non-originalism

[319] See Coan, supra note 38, at 876–84.

[320] Coan would call this an example of "hidden disagreements." See id. at 878–80.

differ.[321] Balkin *must* select a methodology that sees the text as minimally constraining because the logic of his justification *requires* that he do so.[322] A debate between followers of Bork and Balkin, therefore, should focus on the ideas of rationalism and "man as a progressive being"[323] that *undergird* their respective views of constitutional legitimacy. Debating the extent to which Balkin falls prey to the abstract-meaning fallacy[324]—while producing valuable insights about methodology in general—will do little to resolve the core of the disagreement between Bork and Balkin.

Conversely, a justifications-based approach helps us see that Bork and Strauss begin from similar anti-rationalist premises in constructing their constitutional theories.[325] A productive debate between followers of Bork and Strauss, therefore, would focus on the logical *implications* of their shared premises. For example, Strauss assumes that relying on judicial precedent is analogous to a Burkean relying on the wisdom of tradition, but as Adrian Vermeule has argued, there is good reason to think that "[a]rguments for the rationality or efficiency of the ordinary common law, or of societal traditions, do not translate successfully into arguments for the rationality or efficiency of the *constitutional* common law, especially as compared to statutes and other sources of law."[326] Indeed, there is a compelling argument that the wisdom of tradition is better embodied in the original meaning of the Constitution than in judicial precedents.[327] And Strauss's methodology yields results that are hard to reconcile with his Burkean premises. For instance, Strauss has argued that *Obergefell v. Hodges*[328] is consistent with his common-law approach.[329] Whatever the holding in *Obergefell* may be, it is quite difficult to argue that it is *intellectually humble* and consistent with Burkean *traditionalism*, given

[321] Balkin expressly links his theory of legitimacy with his thin view of original meaning. See Jack M. Balkin, Nine Perspectives on *Living Originalism*, 2012 U. Ill. L. Rev. 815, 828–29.

[322] Balkin, supra note 66, at 59–73.

[323] Mill, supra note 159, at 14.

[324] See generally John O. McGinnis & Michael B. Rappaport, The Abstract Meaning Fallacy, 2012 U. Ill. L. Rev. 737 (arguing that Balkin's theory erroneously assumes that abstract constitutional provisions are necessarily vague and underdetermined); see also Barnett & Bernick, supra note 57, at 33–36.

[325] Coan would call this an example of "hidden agreement." Coan, supra note 38, at 877–78.

[326] Vermeule, supra note 119, at 1484.

[327] Id. at 1502–06. Vermeule's purpose was not to defend originalism, but I believe his arguments at least undercut Strauss's Burkean arguments against originalism.

[328] 576 U.S. 644 (2015).

[329] See Strauss, supra note 263, at 6–7.

that same-sex marriage had not been recognized anywhere in the United States for the first 227 years of the nation's existence or, according to some, anywhere else *in the world* until the year 2000.[330] That is not, of course, to say that Strauss's methodology (or, for that matter, *Obergefell*) is wrong; only that it seems incompatible with the Burkean principles that Strauss uses to justify his methodology,[331] which might prompt Bork's followers to ask whether Strauss's methodology really does follow from the anti-rationalist premise that Bork and Strauss share.

But while Bork and Strauss's shared *anti*-rationalism branches out into very different methodologies, Balkin and Dworkin's shared *rationalism* further bolsters James Fleming's argument that Balkin and Dworkin's methodologies are close cousins.[332] Fleming focuses on the significant methodological similarities of the two theories,[333] and he notes that both theories adjudicate constitutional disputes in terms of redeeming the Constitution or seeing it in its best light.[334] But Balkin and Dworkin's faith in individual reason explains *why* they do so, and it therefore confirms that their methodological similarities are no accident. Rather, their methodological similarities presuppose their shared rationalistic premise. While they may disagree on other important philosophical questions,[335] it is realistic to think that their common starting point may allow them to reason toward shared conclusions.

Finally, a justifications-based approach shows that some theories have a complex relationship with each other that cannot be captured by the clean originalist/non-originalist or conservative/liberal divides. The Standard Approach would see Strauss and Young as allies given their similar common-law methodologies, and at first glance, a justifications-based approach confirms that alliance, since Strauss and Young both purport to reject rationalism.[336] But we now perceive that Strauss and Young strongly *disagree* about individualism,[337] with the consequence that tradition plays a very different role in their theories. For Strauss, tradition has no "independent value" beyond its check on individual

[330] See United States v. Windsor, 570 U.S. 744, 808 (2013) (Alito, J., dissenting).

[331] Indeed, one of the reasons why Bork rejected methodologies like Strauss's is that they allow judges to rely too much on their individual reason. See Bork, supra note 1, at 234–35.

[332] Fleming, supra note 287, at 125–41.

[333] Id. at 130–32.

[334] Id. at 130.

[335] Id. at 131–32.

[336] See supra Subsection II.B.2.

[337] See supra Subsection II.B.1.

reason, so if we are "quite confident that a practice is wrong," a traditional practice may be "discarded."[338] By contrast, Young understands tradition not merely in anti-rationalist terms, but also as embodying the intergenerational authority of the past, present, and future.[339] He is thus much less ready than Strauss to discard a tradition,[340] and what might therefore appear to be a *methodological* disagreement is ultimately shown to be a disagreement about *justifications*.

My point is not to resolve these debates; it is to show what *kinds* of debates a justifications-based approach would yield, including insights into doctrinal disagreements. Supporters of Bork and Strauss might not succeed in coming to a common conclusion about the implications of their anti-rationalism, but because the Standard Approach categorizes Bork and Strauss as opponents, it hides the possibility of this debate from us.[341]

III. OBJECTIONS AND COUNTERARGUMENTS

Although I have tried to address objections and counterarguments along the way, some were best deferred until now. What follows is not an exhaustive list of possible objections and counterarguments, but they are, to my mind, the most important.

A. Distinguishing Law from Political Theory

The first cluster of objections centers around the idea that constitutional theorists are usually lawyers, not political theorists, and a justifications-based approach goes too far in the direction of converting legal scholarship into political theory. The objection could be formulated in various ways.

First, it might be seen as one of scholarly competence, in line with Dworkin's description of the "division of labor" between political philosophers, who focus on questions of legal obligation and legitimacy, and academic lawyers, who focus on questions of adjudication.[342] But that division of labor is *already* ignored by legal scholars (including Dworkin) who put forward elaborate politico-theoretical justifications for their

[338] Strauss, supra note 49, at 895–96. Strauss's conception of tradition is arguably inconsistent with his Burkean anti-rationalism, which could explain why he and Bork disagree so strongly about methodology.

[339] Young, supra note 274, at 650–53, 673, 689.

[340] Id. at 652, 656, 689.

[341] As noted above, Vermeule's article is a rare example of a justifications-based argument.

[342] Dworkin, supra note 50, at 111.

methodologies,[343] and this interdisciplinary legal scholarship poses no more of an issue of competency than when legal scholars engage in economic or historical inquiry.

The second formulation of the objection would acknowledge that legal scholars already engage in politico-theoretical work but see that as part of a larger and lamentable trend in legal scholarship toward increasingly abstract, theoretical arguments divorced from legal doctrine.[344] As Bork mockingly described the situation: "The reader is supposed to be familiar with utilitarianism, contractarianism, Mill, Derrida, Habermas, positivism, formalism, Rawls, Nozick, and the literature of radical feminism."[345]

While Bork made this argument with humor, we should take his objection seriously, since legal scholarship becomes less valuable to the extent that it becomes more self-indulgent. But it is not true that the debates over individualism and rationalism are divorced from the resolution of concrete cases or controversies. To be sure, if one believes that, in resolving constitutional cases that are not directly controlled by precedent from a higher court, judges generally (1) decide cases based on factors that have little or nothing to do with their professed methodology and/or (2) select a methodology and then construct a justification post hoc without regard to whether the justification is correct, then my focus on justifications would have little to do with doctrine. But, then again, if either of those propositions were true, then much of the enormous literature of constitutional theory would *also* have little to do with doctrine and would seem rather pointless—or at least insular and parochial. That conclusion might seem plausible to some, but I do not accept it because I reject both antecedent propositions, though I of course cannot defend my rejection of them in this Article.

But if we instead assume (as I believe most constitutional theorists do) that judges select methodologies based *at least in part* on justifications and decide cases based *at least in part* on their methodologies, then the connection between my argument and constitutional doctrine is clear: whether a judge finds a justification persuasive likely depends on her

[343] See, e.g., Balkin, supra note 66, at 59–99; Barnett, supra note 118, at 1–86; Dworkin, supra note 50, at 176–224.

[344] Jacob Gershman, Study Casts Doubt on Kantian Link to Bulgarian Law, Wall St. J. L. Blog (Mar. 31, 2015, 4:20 PM), https://www.wsj.com/articles/BL-LB-50958 [https://perma.cc/4NEK-ZGE4]; Smith, supra note 11, at 227–30.

[345] Bork, supra note 1, at 134.

(perhaps unappreciated) view of individualism and rationalism, and the justification she finds persuasive will affect the methodology she chooses, which will affect her decisions in actual cases. There is, in short, a connection between (1) having a Lockean individualistic worldview, to (2) being persuaded by Barnett's justification, to (3) adopting originalism as a methodology, to (4) having a narrower understanding of Congress's authority under the Commerce Clause than exists under current doctrine.[346]

Indeed, although I do not have the space to develop the point here, I suspect that disagreements about individualism and/or rationalism would help explain why Justices who are often portrayed as methodological allies sometimes radically disagree on the outcomes of cases: their methodologies are shaped by justifications that are ultimately premised on different understandings of the human person. For example, as Balkin's theory demonstrates, sometimes one's justification will dictate the extent to which those living today should take into account how a text's enactors expected the text would be applied: a rationalist justification that requires expansive delegation of adjudicatory authority to future generations (like Balkin's) would be more likely to reject the relevance of expected applications (as Balkin's does).[347] Framed in this way, the debate between Justices Alito and Gorsuch—both methodological textualists—in *Bostock v. Clayton County* about the relevance of expected applications could be seen as a debate about the extent to which the individual reason of today's Justices in determining what constitutes "discriminat[ion] . . . because of such individual's . . . sex" should prevail over the reasoning of past generations who understood that phrase differently.[348] In fact, that is very close to how Justice Alito articulated his disagreement with the majority:

[346] See Barnett, supra note 118, at 279–80.

[347] See supra Subsection II.B.2; see also Balkin, supra note 66, at 104–08 (expressly linking the debate about expected applications with delegation of authority to future adjudicators); John O. McGinnis & Michael Rappaport, Original Interpretive Principles as the Core of Originalism, 24 Const. Comment. 371, 380–81 (2007) (observing that the relevance of expected applications is linked to how much faith the enactors had in the reasoning of future generations).

[348] Compare Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749–54 (2020), with 140 S. Ct. at 1766–73 (Alito, J., dissenting). But see Tara Grove, Which Textualism?, 134 Harv. L. Rev. 265, 291–96 (2020) (arguing that Justice Gorsuch's approach to textualism actually leads to less judicial discretion). Grove identifies Justices Alito and Gorsuch as proposing different kinds of textualism—that is, different variations of the same methodology—and I would

> The arrogance of this argument is breathtaking. . . . [T]here is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. But the Court apparently thinks that this was because the Members were not "smart enough to realize" what its language means.[349]

Much more would need to be said to show that the disagreement in *Bostock* traces back to a disagreement about rationalism, but I offer it as an example of the kind of real-world disagreements that might appear in a different light under a justifications-based approach.

Finally, the objection could be framed as skepticism that legal scholars will actually be able to *persuade* one another of any politico-theoretical argument of importance, given the absence of common assumptions about metaphysics and other philosophical premises.[350] For example, I said earlier that Bork and Balkin's followers would do well to focus their debate on rationalism, but is there any hope that that debate will prove productive in the sense of convincing one side of the debate that it is incorrect?

There are three responses to this objection. First, even if a justifications-based approach does not succeed in making it more likely that one set of theorists converts to their opponent's view, it *does* succeed in clarifying the points of agreement and disagreement, which is valuable in helping theorists understand *their own* theories better. Second, by clarifying the nature of the dispute, a justifications-based approach would make it more likely that *uncommitted* observers will be better able to determine which theory they find persuasive. Finally, to suggest that politico-theoretical debates are irresolvable and pointless is, I think, belied by the fact that there exists an entire field of political theory, in which such debates have played a central role, and presumably that entire field is not a waste of time.

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suggest that their differences might be based, at least in part, on their different politico-theoretical premises that shape their justifications for textualism.

[349] *Bostock*, 140 S. Ct. at 1757 (Alito, J., dissenting) (citation omitted). Although *Bostock* is a statutory interpretation case, the debate between the majority and dissents about expected applications is similar to the debate seen in the constitutional theory literature, see supra note 347, so it strikes me as a good example despite its non-constitutional context.

[350] Cf. Alasdair MacIntyre, After Virtue: A Study in Moral Theory 1–22 (3d ed. 2007) (making an even more radical version of this argument).

B. The Influence of Politics on Deciding Cases

The next objection comes from those who might be troubled by my argument because it could be seen as lending support to the notion that law is just politics carried on by other means,[351] which some theorists (especially originalists) would reject.

But my argument is not that judges must resort to political theory *in deciding cases*; my argument is that judges must resort to political theory *in choosing their methodology*.[352] It is a separate question whether a particular methodology will, in turn, require the judge to apply their political views in resolving cases.[353] In examining that separate question, some might argue that *any* methodology will require a judge to rely on their political views in deciding cases, but that is not my argument (and, indeed, I reject it). Alternatively, some methodologies (such as Dworkin's) *invite* reliance on a judge's own political theory in resolving cases,[354] but, again, nothing in my argument requires accepting such methodologies (and I, personally, reject them).

In short, one could accept my thesis, reject the notion that judging inevitably entails political decision-making, and adopt a methodology that left little or no room for the application of a judge's personal political views.[355] That would, incidentally, be the path I would take.

C. The Importance of Liberalism to the Debate

One might agree that the debate within American constitutional theory is ultimately a debate about political theory, yet object to my characterization of that debate as being about liberalism. What does "liberalism" really add to our understanding of the debate?

We could try to describe the debate within American constitutional theory without reference to liberalism—as Christopher Peters has done,[356]

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[351] See Joseph William Singer, Legal Realism Now, 76 Calif. L. Rev. 465, 467 (1988).

[352] McConnell, supra note 107, at 1128; see also Christopher J. Peters, What Lies Beneath: Interpretive Methodology, Constitutional Authority, and the Case of Originalism, 2013 BYU L. Rev. 1251, 1276.

[353] See Fallon, supra note 113, at 127, 129 (recognizing this distinction); see also Bork, supra note 1, at 177 (same).

[354] See, e.g., supra notes 298–313 and accompanying text (describing Dworkin's methodology).

[355] See generally John O. McGinnis & Michael B. Rappaport, The Power of Interpretation: Minimizing the Construction Zone, 96 Notre Dame L. Rev. 919 (2021) (arguing that various tools of interpretation can minimize—if not eliminate—the construction zone).

[356] Peters, supra note 352, at 1273–83.

by characterizing the debate as being about authority more generally—but such a description would overlook two important points. First, any debate about authority within the American legal system will *necessarily* become a debate about liberalism, since the authority of the Constitution was originally justified by liberal political theories like popular sovereignty, and any plausible account of its authority will have to engage with those liberal theories.[357] Second, and more importantly, the debate within American constitutional theory is not *solely* about authority. As I have tried to show, one of the key debates among constitutional theorists is about the limits of human reason. Although rationalism and notions of authority are related (as noted above, individualism and rationalism often go hand-in-hand), they are distinct, and both must be taken into account in describing the debate within American constitutional theory.

But perhaps the objection is that invoking liberalism does not actually *clarify* the terms of the debate within American constitutional theory. If one of the problems with the Standard Approach is that it relies on a distinction (i.e., the originalism/non-originalism distinction) that is increasingly hard to discern, how would a justifications-based approach improve the clarity of the debate if liberalism is *itself* a contested concept, much like originalism? Would we just be substituting one set of blurry categories for another?

This objection is superficially plausible, since both originalism and liberalism are contested concepts, but the objection is misplaced. Because the Standard Approach depicts American constitutional theory as a zero-sum debate between originalists and non-originalists, it becomes very important to draw a clear line between the two families of methodologies. By contrast, my approach does not require categorizing theories as liberal, conservative, pre-liberal, post-liberal, or something else—though I have done so for ease of presenting concepts here. Instead, my argument identifies theories according to the positions they take on key debates *having to do with* liberalism. The only way in which my invocation of liberalism would not be useful would be if it was difficult to identify whether a politico-theoretical debate was *about* liberalism in a broad sense, and I think that is unlikely, since the general contours of liberalism are generally understood.[358]

[357] Whittington, supra note 66, at 111–12; Gray, supra note 13, at 23–24.

[358] Gray, supra note 13, at xiii; see also Ryan, supra note 14, at 23–40; Waldron, supra note 123, at 129–40; Arblaster, supra note 13, at 13.

D. The Necessity of Normative Arguments

To say that American constitutional theory is fundamentally a debate about liberalism is to make a contestable assertion about the relationship between normative arguments and constitutional methodology. Some theorists might contend that normative arguments are not necessary to support a particular methodology.[359]

There are at least three possible versions of the counterargument I am describing here. The first is most commonly associated with originalists and argues, usually based on linguistic theory, that interpretation *just is* originalism.[360] Many (if not most) theorists disagree that interpretation is necessarily originalist,[361] but I will assume that it is for the sake of the discussion. Even under that assumption, however, we cannot escape the need for normative arguments because the *linguistic fact* that interpretation is originalist (assuming that it is) does not necessarily entail the further conclusion that judges (or any other persons applying the Constitution) *are bound by* that linguistic fact.[362] A judge might, for instance, believe that she is *not* bound by the original meaning and is free to disregard it in light of other considerations,[363] and convincing her otherwise would require a normative argument that she is doing something *wrong*.[364]

The most plausible arguments in favor of interpretation-just-is-originalism acknowledge something like this distinction between the linguistically correct interpretation of the text and the application of the text to cases and controversies.[365] Solum calls it the distinction between

[359] For a refutation of this position in general, see Fallon, supra note 35, at 545–49.

[360] Solum, supra note 70, at 20–30; Saikrishna B. Prakash, The Misunderstood Relationship Between Originalism and Popular Sovereignty, 31 Harv. J.L. & Pub. Pol'y 485, 486–89 (2008); Gary Lawson, On Reading Recipes . . . and Constitutions, 85 Geo. L.J. 1823, 1825–34 (1997). Michael Stokes Paulsen's argument is less about linguistic theory than it is about the Constitution's own prescribed methodology. See Michael Stokes Paulsen, Does the Constitution Prescribe Rules for Its Own Interpretation?, 103 Nw. U. L. Rev. 857, 858–64 (2009).

[361] See, e.g., Richard H. Fallon, Jr., The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation, 82 U. Chi. L. Rev. 1235, 1289–95 (2015); Cass R. Sunstein, There Is Nothing that Interpretation Just Is, 30 Const. Comment. 193, 194–98 (2015).

[362] See Sachs, supra note 10, at 829–35.

[363] See, e.g., Strauss, supra note 263, at 3–5.

[364] Peters, supra note 352, at 1278–84.

[365] Coan, supra note 38, at 839 (noting that the proposition that "approaches to constitutional decision-making require justification in the form of sound normative foundations" is "widely accepted but not entirely uncontroversial").

interpretation and construction;[366] Gary Lawson calls it the distinction between interpretation and adjudication;[367] and Michael Stokes Paulsen[368] and Saikrishna Prakash[369] separately call it the distinction between interpretation and application. But all of these theorists agree that, once we make the jump from interpreting the text to resolving cases, normative arguments are required to justify adherence to the original meaning. In this Article, I have defined constitutional theory as seeking to justify the best methodology of constitutional adjudication, and by constitutional adjudication, I mean the resolution of cases and controversies. Thus, properly understood, nothing that I have said here should trouble those theorists who insist that normative arguments have no bearing on the correct methodology of constitutional interpretation. They should agree with me that constitutional adjudication—as I have defined it—necessarily entails normative arguments.[370]

Another version of this objection would be that certain theories are qualified or disqualified as superior methodologies of constitutional adjudication depending on how well they describe our actual constitutional practice,[371] and this descriptive argument does not depend on normative considerations. But like arguments about what interpretation is, there still has to be an argument for why we should *care* about a methodology's ability to explain American constitutional practice,[372] and the only plausible way to do so is with a normative argument.[373] That is perhaps why it is difficult to think of a constitutional theory that is based *solely* on conformity with constitutional practice.[374]

[366] Solum, supra note 2, at 472–73.

[367] Lawson, supra note 360, at 1823–25, 1835–36.

[368] Paulsen, supra note 360, at 919.

[369] Prakash, supra note 360, at 489–91.

[370] Lawson, Paulsen, and Prakash would likely object to describing originalism as a theory of constitutional adjudication, rather than as a theory of constitutional interpretation, because they define originalism as concerned only with how to interpret texts, not with telling judges how to decide cases. See Paulsen, supra note 360, at 918–19; Prakash, supra note 360, at 491; Lawson, supra note 360, at 1823–25. I disagree with that conception of originalism, but even if those three theorists are right, it does not make a difference to my argument that constitutional theory more generally—which is concerned with adjudication—requires normative arguments.

[371] See, e.g., Strauss, supra note 49, at 898–906.

[372] Dworkin, for example, based the need for "fit" on the law-as-integrity principle, which is a normative argument. See Dworkin, supra note 50, at 176–224.

[373] Fallon, supra note 35, at 545–49.

[374] Id. at 540–41, 541 n.13.

Finally, one could challenge my thesis by employing arguments made by the "positive-turn" theorists, William Baude and Stephen Sachs, who contend that originalism can be justified based on originalism's status as "law" from a legal-positivist perspective.[375] But this suffers from a similar problem as attempts to justify a constitutional theory based solely on how well it explains current practice. As Jeffrey Pojanowski and Kevin Walsh have compellingly argued, any attempt "to separate description from evaluation in legal theory" will, "[a]t best," lead to "a normatively inert summary of how people happen to do things," while "offer[ing] no reason for why people do these things or should continue to do so."[376] Indeed, Baude himself acknowledges that "the positive turn can postpone and transform normative questions about interpretation, but it cannot wholly eliminate them. Obeying the law is still a normative choice."[377] That is not to say that the question Baude and Sachs are asking—*what*, exactly, does our society recognize as *the law*—is unimportant; it is only to say that the answer to that question does not provide a *complete* constitutional theory—i.e., a theory that *justifies* a particular methodology of constitutional adjudication. Such a justification requires knowing *why* we should adhere to the law—whatever "the law" is determined to be—and the answer to the *why* question is a quintessentially normative one based on political theory.[378]

CONCLUSION

What is at the root of our disagreements in American constitutional theory? The Standard Approach that has reigned for forty years has an answer: we disagree about methodologies of constitutional adjudication, with originalists on one side and non-originalists on the other. But while we differ about methodologies, the originalism/non-originalism dichotomy does not adequately capture the nature of disagreement in constitutional theory, and that is because the foundations of that disagreement are the justifications we offer for our methodologies, not the methodologies themselves. Once we refocus on justifications, it becomes clear that the debate within American constitutional theory cuts across the originalism/non-originalism divide. It is a debate about the relationship

[375] Sachs, supra note 10, at 822–38; Baude, supra note 8, at 2363–91.
[376] Pojanowski & Walsh, supra note 277, at 110.
[377] Baude, supra note 8, at 2395.
[378] Solum, supra note 1, at 79–80.

between the individual and society and the limits of human reason. It is a debate about the authority of the dead and the idea of human progress. It is, fundamentally, a debate about liberalism.