CONSTITUTIONAL POSITIVISM

Frederick Schauer*

Perhaps it was too much to hope for. When Justice Thomas's reference to "natural law" surfaced as an issue in the early days of the confirmation proceedings, there arose the possibility that the ensuing public controversy would demonstrate the contemporary importance of some of the traditional debates of analytic jurisprudence and would highlight the relationship between those debates and many of the pressing issues of constitutional law. But, alas, it was not to be. Even before Professor Hill's charges swamped these issues, it became clear that the public debate about natural law and its relationship to constitutional theory was likely to be as fruitful as a discussion of quantum physics on Larry King Live. Against the background noise of grinding axes, soundbites replaced analysis, inflammatory examples substituted for argument, and there was little concern about inconsistencies between the rhetoric deployed against Thomas and that deployed against Judge Bork only four years earlier.

It is unlikely that this lost opportunity will ever be presented again. Nevertheless, the hearings regarding Judge Bork's nomination, while hardly a model of the triumph of substance over form, hold out some hope that central questions of constitutional interpretation can still become part of American public discourse. In light of that hope, it may be useful to revisit the topic that might have been part of the Thomas hearings: the connection between issues of constitutional interpretation and the traditional debates concerning natural law. And even if there is no genuine likelihood that these issues will have any effect on public debate in the short or intermediate term, there still seems good reason to aim more immediately at academic controversies regarding constitutional interpretation, and to try to demonstrate that many of the issues of analytic jurisprudence are not just (as seems often sup-

* Frank Stanton Professor of the First Amendment and Professorial Fellow of the Joan Shorenstein Barone Center on the Press, Politics, and Public Policy, John F. Kennedy School of Government, Harvard University. This is the written version of the Day, Berry & Howard Lecture given at the University of Connecticut School of Law on September 15, 1992.
posed) the irrelevant meanderings of a bunch of dead Britons, but instead connect directly to some of the most important questions of constitutional theory.

I will take up three different debates that are about natural law, or about positivism, or about both. (Putting it this way should make it clear that not every issue concerning natural law also concerns legal positivism, and that not every attack on legal positivism necessarily embraces any recognizable version of natural law.) The first debate is about natural law and positivism as competing accounts of the nature of law. The second is about preconstitutional rights, and about the permissibility of judges locating and enforcing them. And the third debate is about whether a “limited domain” account of legal norms, an account also sometimes going by the name “positivism,” is descriptively accurate or normatively desirable.

With respect to each of these debates, my goal is more explanatory than prescriptive. The tenor of much that I say, however, will be somewhat sympathetic to positions that are frequently characterized as “positivist,” and frequently subject to criticism, in part for that very reason. This essay’s title reflects this normative tilt, for one of my goals is to offer for serious consideration a range of ideas that, until recently, have suffered the fate of being condemned as simultaneously irrelevant and pernicious.

I.

To most legal theorists, a reference to “natural law” connotes, perhaps among other things, a claim about the “nature” or “essence” of the very idea of law. More specifically, classical natural law theory maintains that the idea of law has a number of necessary conditions, and that at least some of those necessary conditions can properly be characterized as “moral.” According to classical natural law theory, therefore, there is at least one (and possibly more) morally grounded condition for the existence of legality in any normative system. Because the identification of a normative system as a legal system (and because the identification of a norm as a “genuine” law) requires satisfaction of this moral standard, the proponent of natural law believes it mistaken to think that legality is wholly distinct from morality.¹

¹ Among the leading works in the natural law tradition, all at least consistent with the brief characterization in the text, are THOMAS AQUINAS, SUMMA THEOLOGICA (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911); CICERO, DE RE PUBLICA DE LEGIBUS (Clinton W. Keyes trans., 1928); A.P. D’ENTREVES, NATURAL LAW: AN INTRODUCTION
Although it is possible to maintain that the natural law position is merely a claim about language and about the criteria for proper use of the word "law," the common form of the natural law claim is more substantial, maintaining that law itself, just like the content of many laws, is derived from fundamental conceptions of morality. As a result, legal systems (and perhaps even particular laws) unfaithful to those moral conceptions are exemplars of erroneous derivations from first moral principles and are therefore not genuinely legal at all.

Against this claim stands the tradition of legal positivism, according to which law is not derived necessarily from fundamental moral principles, but rather is simply "posited" by human beings and human institutions. The identification of law and legal systems, therefore, is a


2. This is the claim made, in a slightly different context, in Glanville Williams, The Controversy Concerning the Word 'Law,' in Philosophy, Politics and Society 134 (Peter Laslett ed., 1956).

matter of identification of some social fact, a process not necessarily entailing moral evaluation. To the positivist, therefore, laws and legal systems satisfying certain sociological criteria count as laws and legal systems, regardless of their moral content. Hence the central positivist


4. Except insofar as particular legal systems have contingently incorporated moral norms into their standards for legal identification. See infra note 6 and accompanying text.

5. It is important that I take off the table early on two linguistic siblings that are possible sources of confusion. First is logical positivism, a philosophical view that flourished from the 1920s through the 1950s, pursuant to which only verifiable propositions could be considered "meaningful." Examples of this perspective include the following: Alfred J. Ayer, Language, Truth and Logic (2d ed. 1946); Rudolf Carnap, The Logical Structure of the World (Rolf A. George trans., 1967); Logical Positivism (A.J. Ayer ed., 1959); J.A. Passmore, Logical Positivism, 21 Australasian J. Psychol. & Phil. 65 (1943). Because of their belief in the meaninglessness of the nonverifiable, logical positivists often maintained that moral propositions have no ontological status other than as assertions of the attitudes or emotions of the assenter. By espousing this noncognitive view of morality, logical positivism could properly be saddled with responsibility for its adherents' disbelief in the possibility of supralegal or prelegal morality, and consequent disbelief in the possibility of supralegal or prelegal moral standards for the evaluation of legality itself. No modern legal positivist, however, holds logical positivist views, and nothing about legal positivism as described in the text entails the moral skepticism or subjectivism that is one component of logical positivism. There thus appears no more than a homonymic relationship between logical positivism and legal positivism. To the extent that logical positivism has its jurisprudential arm, it is found not in legal positivism, but in the Scandinavian Realism of, for example, Axel Hagerstrom, Inquiries into the Nature of Law and Morals (Karl Olivecrona ed. & C.D. Broad trans., 1953); A. Vilhelm Lundstedt, Legal Thinking Revised (1956); Karl Olivecrona, Law as Fact (1939); Alf Ross, On Law and Justice (Univ. of Cal. Press 1974) (1958).

The relationship between legal positivism and the scientific positivisms of Auguste Comte, John Stuart Mill, Ernst Mach, and many others is somewhat closer. These theorists, in supposing that there can be universal principles of scientific observation, identification, and explanation, suppose as well that scientific observation can be (more or less) value-free. For a careful and insightful exposition, see Richard W. Miller, Fact and Method: Explanation, Confirmation and Reality in the Natural and Social Sciences (1987). Insofar as scientific positivism presupposes some distinction between fact and value, it is the philosophical compatriot of legal positivism, although neither in their contemporary versions adhere to the distinction in so crude a form. Still, insofar as scientific positivism is open to criticism for understating the contingency and value-ladenness of scientific observation, then legal positivism is similarly open to criticism for understating the valutational aspects of legal identification. But insofar as scientific positivism retains its core of soundness even in the face of modernist assaults at the margins, so too might the epistemological and ontological presuppositions of legal positivism, presuppositions that rely on at least some germ of truth in the claim that the act of law-identification requires only minimal
claim about the separation of law and morality is not a claim about the existence (or nonexistence) of moral values, nor a denial of the prefe-
rbility of moral laws and legal systems over immoral ones, but rather simply a claim that the existence of law is conceptually distinct from its moral worth.

Insofar as positivism represents a denial of the natural law claim that morality is a condition of legality in all possible legal systems, it need not, as a matter of formal logic, maintain that morality is not a condition of legality in all possible legal systems. Instead, positivism can rebut the natural law claim merely by demonstrating that morality is not a condition of legality in at least one possible legal system, a claim consistent with the (contingent) linking of morality and legality in many or even most legal systems, or even in all existing (although not all possible) legal systems. In this sense, positivism, as Jules Coleman most prominently has reminded us, is a conceptual claim about the idea of law, saying nothing about the standards for legality that are operative in particular cultures. To the positivist, law may very well be moral, and certainly should be moral, but it is not necessarily moral.

What, it might reasonably be asked, does all this have to do with constitutional interpretation? And the answer is quite straightforward. Nothing. As a debate about the criteria of legal identification, the traditional debate between positivists and adherents of natural law has virtually nothing to say to or about those who argue contested questions of constitutional theory or constitutional interpretation. This is especially true once one realizes that the conceptual claim made by the natural law tradition is a claim distinct from the actual moral standards embedded in any natural law argument. Although any particular natural law account presupposes a body of moral content that will serve the role that some moral content must serve in the natural law picture of the world, the very idea of a natural law theory is agnostic among moral values. If someone believed that only those laws and legal systems conforming to the moral theory generated by the best combined insights of numerology, phrenology, and astrology were to be considered “genuine” law, they could quite properly be said to have a natural

moral involvement.


law theory, although the actual content of the moral criteria they employed would of course be open to question.

Although the connections between natural law theory and issues of constitutional interpretation are strained at best, there is one intriguing complication. If one has a positivist view of legal identification, pursuant to which items of law can be "recognized" without satisfying a moral standard, and if the legal system of the United States is one of the legal systems in which that is possible, then one whose job partly involves law application could do that part of the job without having to engage in any moral reasoning whatsoever. But if one has a natural law view of legal identification, and accordingly believes that moral inspection is necessarily part of every act of law identification (and therefore of law application), then one whose job partly involves law application could not do that part without engaging in moral reasoning. As a result, positivist judges, were they so inclined, could in some systems get away with an amoral conception of their task, but natural law-inspired judges simply could not have such an amoral conception of the act of judging.

Despite this complication, the amoral conception of judging that positivism conceptually allows may not be allowed by the legal materials actually extant in this constitutional system. Insofar as judges must determine what counts as a deprivation of life, liberty, or property, or what deprivations of life, liberty, and property require due process of law, or what actions of the state deny the equal protection of the laws, or what punishments are cruel, or what searches and seizures are unreasonable, the contingent makeup of the American constitutional text, to say nothing of the legal culture surrounding it, is such as to make an amoral conception of interpreting and applying the Constitution of the United States virtually impossible (and the pretense of it therefore disingenuous). Thus, and still consistent with this conceptual understanding of the positivist claim, the act of constitutional interpretation in the


9. Remember, the positivist (in this sense, but see infra part III) could claim that although there are possibly legal systems in which moral inspection is not a part of legal identification, the United States is not one of them. Thus, the fact that the United States might (contingently) be a system in which moral evaluation was part of every act of law identification would not refute the positivist's conceptual claim.

10. I say "could" because positivism (as a conceptual claim) is agnostic on the question whether the official should have the morally sterile view of her job that positivism permits but certainly does not require. Moreover, positivism says nothing about the weight that the law should have when legal norms conflict with moral norms.
United States may require every bit as much moral inspection as would be required by the most morally thick of natural law theories. The difference would be only that the tradition of positivism would see this as a contingent feature of modern American constitutionalism, capable of being different at other times or in other systems, while the natural law tradition would see this as an instance of a conceptual truth equally applicable to all existing and possible legal systems.

Although the import of the foregoing has been to suggest the irrelevance of much of the traditional natural law/positivism debate to contemporary questions of constitutional interpretation in the American system, that conclusion was based on an implicit premise about the ontological status of an answer to the natural law/positivism question. In other words, it presupposes an answer to the question that asks just what it is that we are doing when we ask whether natural law or positivism is “true.”

Under one answer to this question, the one most compatible with the tenor of the foregoing pages, the answer to the question whether natural law or positivism is true is a matter of moral and conceptual epistemology, or moral metaphysics, pursuant to which there is a “there” out there that we are trying to discover.\(^\text{11}\) From this perspective, the task of the legal theorist trying to find out about the “nature” of law is essentially one of discovery, a task that need not and should not be clouded by considerations of which discovery would be more desirable.\(^\text{12}\)

A contrasting view, and one seemingly held by both Fuller and Hart in their famous debate,\(^\text{13}\) is that the choice between natural law and positivism is itself a moral choice, and not a matter of discovering which view is ontologically correct.\(^\text{14}\) This conclusion might flow from

\(^{11}\) This is not to say that all or even most people will agree on the answer. As Ronald Dworkin has repeatedly and correctly insisted, the idea of a single right answer is conceptually distinct from the fact of people’s agreement on what that answer is. See Ronald Dworkin, Law’s Empire (1986) [hereinafter Dworkin, Law’s Empire]: Ronald Dworkin, A Matter of Principle (1985) [hereinafter Dworkin, A Matter of Principle]. Just as it is possible for all to agree that the matter in the core of the planet Jupiter has a certain weight per cubic inch even though most have no idea what that weight per cubic inch actually is, so too might people have a similar view about moral epistemology, and believe that there is a real answer out there to be found even if it has not yet been found, or even if what has been found is the subject of great disagreement.

\(^{12}\) For an example of such a perspective, see Philip Soper, Choosing a Legal Theory on Moral Grounds, in Philosophy and Law 31 (Jules Coleman & Ellen Frankel Paul eds., 1987).

\(^{13}\) See Fuller, Positivism and Fidelity, supra note 1; Hart, Law and Morals, supra note 3.

\(^{14}\) See Nell MacCormick, A Moralistic Case for A-Moralistic Law?, 20 Val. U. L. Rev. 1
the view that there are simply no moral positions that are true for all possible worlds, or from the more plausible (to me) view that even if there are moral positions that are true for all possible worlds, that any proposition about the conceptual essence of the idea of law is not one of them. 15 Whatever the source, however, the consequence of this view is that we do not discover whether natural law or positivism is true, but rather we decide which ought to be true in light of deeper moral purposes, and in light of the way in which social conceptualization may be instrumental to political morality.

Here the specific terms of the Hart/Fuller debate become quite relevant to American constitutional law. Suppose we believe, with Fuller, Hart, and MacCormick, and against Soper, that we do choose legal theories on moral grounds, and that there are moral advantages and disadvantages to a society's having one or another picture of what a legal system is all about. If so, consider the existing terrain of American constitutional law. As that terrain now exists, it includes a written document called "The Constitution of the United States," most of more than 500 volumes of the United States Reports filled with cases commonly thought of as constitutional cases, courses called "Constitutional Law" in all American law schools, abundant books on "Constitutional Law," and numerous other organizations and institutions premised on the existence of something called "Constitutional Law."

If one held a natural law outlook, one could (but need not) treat constitutional law in just the same way that the natural law tradition treats law simpliciter. One could act as if the "constitutional" component of "constitutional law" were also "natural" in this morally antecedent sense, and that, just as the natural lawyer does not use the term "law" to refer to that which fails to comport with certain minimal moral criteria, so too might the natural constitutional lawyer refuse to use the word "constitutional" to refer to that which similarly does not satisfy certain moral criteria. In other words, the very idea of constitutional law might impose additional moral criteria even beyond those imposed by some version of natural law generally.

But whether under a thick version of constitutional natural law

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15. I have no views about whether the philosophical position known as "essentialism" is true or false. See generally Studies in Essentialism (Peter A. French et al. eds., 1986). And I have no views about the relationship between the essentialism debate in analytic philosophy and the debate of the same name in feminist theory. So my observation that classical natural law theory presupposes an "essential" nature of law is not eo ipso to condemn it.
that imposes higher moral standards for some norm to qualify as constitutional than for some norm to qualify as ordinary law, or under a thin version of constitutional natural law that imposes no greater moral standards on constitutional law than it imposes on nonconstitutional law, the fact that we now have so much "stuff" that is commonly described as constitutional law is intriguing. If one has a natural constitutional law perspective, then one must believe either that most of what this system has generated for the past 205 years has been found minimally morally sufficient, or that 205 years of history has been wrongly labelled. Since it may be difficult to change labels after this time, even if it would be appropriate to do so, there is a tendency from a natural constitutional law perspective to think that a good deal of the American constitutional tradition has been morally tested and found worthy.

Although I present this possibility as a dry conceptual claim, it appears to ring true to most American constitutionalists. Unlike the oncologist’s hostile relationship to cancer, and unlike the morally neutral relationship that some (many? most? all?) historians have towards historical events, the typical American constitutionalist thinks that the American constitutional tradition is generally worthy. It is of course true that the tone of much American constitutional commentary is critical, but this critique is commonly on the periphery rather than in the center, criticizing the details of execution while accepting the broad outlines of American constitutionalism as noble and enlightened. A fair reading of the tone of most academic and nonacademic writing and speaking about the American constitutional tradition is celebratory, and celebratory in a moral way—implicitly or explicitly praising the contributions of American constitutionalism to the pursuit of justice, equality, liberty, and other moral ideals. Rarely do we see the view that we would have had more justice, equality, or liberty had there been no constitutional tradition at all, or a constitutional tradition dramatically different to the core.

So it appears that the current attitude of American constitutionalists is compatible with (I make no causal claim) a natural law outlook, one that takes the designation "constitutional law" as some sort of moral imprimatur. Moreover, the typical American constitutionalist is already part of the constitutional law enterprise, rather than standing outside it, by virtue of a law degree, a position within a law school that is itself part of the legal system, and a scholarly voice that often sees judges as the objects of direct prescription. Being inside the enterprise, the constitutional scholar understandably inclines towards a jurispru-
dential perspective that legitimates that situation and that encourages her to make her own enterprise the best that it can be.\textsuperscript{16}

But now suppose instead that one rejects constitutional natural law and has a positivist outlook on American constitutional law. If so, then the fact that there has been 205 years of labelling a phenomenon as "constitutional law," and even the fact that one would herself label the phenomenon as "constitutional law," are morally neutral social facts, indicating nothing about the moral desirability of the phenomenon or its component parts. With a positivist perspective on the phenomenon of constitutional law, therefore, the constitutional positivist can study and identify constitutional law as such without approving of it morally, and without feeling any part of the enterprise. Just as many of the most prominent positivists throughout history have been progressive critics of the existing legal regime,\textsuperscript{17} a constitutional positivist could be one with no normative commitment to the enterprise, one who takes neither the constitutional tradition's existence nor its label as any evidence of its moral worth and who therefore may be comparatively free to offer the wholesale proposals for reform (or even for displacement) somewhat less available to those whose legal theories allow less distance. Contrary to the accepted wisdom,\textsuperscript{18} therefore, constitutional pos-

\textsuperscript{16} Although I customarily use the female pronoun, I am a bit uncomfortable with it in the previous sentence. Insofar as what I am about to say in the next several paragraphs is sound, there might be good reason to suppose that women are less likely to be normatively committed to the Constitution and its accompanying traditions than men. See Suzanna Sherry, The Ghost of Liberalism Past, 105 Harv. L. Rev. 918 (1992) (book review); Robin L. West, Constitutional Skepticism, 72 B.U. L. Rev. 765 (1992).

\textsuperscript{17} A few examples should suffice. Jeremy Bentham's whole commitment to positivism was a function of his disdain for judges and the legal system, and his desire for broad-based progressive law reform. See J.H. Burns, Utilitarianism and Reform: Social Theory and Social Change, 1750-1800, 1 Utilitas 211 (1989). Hans Kelsen was a socialist Jew who left Austria in 1930 and Germany in 1933, and who had earlier redrafted the Austrian Constitution in ways that promoted democratic decisionmaking and respect for human rights. Hart is another socialist, who promoted left-wing political ideas for many years and actively advocated privacy rights for homosexuals long before it was common or safe to do so. See H.L.A. Hart, Law, Liberty and Morality (1963); Neil MacCormick, H.L.A. Hart 1-19 (1981). Neil MacCormick is an active Scots Nationalist with little sympathy for the English legal regime that dominates his political landscape.

\textsuperscript{18} In addition to Fuller's work, the leading modern articulation of the view that legal positivism promotes amorality (and therefore potentially immorality) is found in the work of the late Robert Cover. See Robert M. Cover, Justice Accused 150-54 (1975); Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4 (1983). Unlike Fuller, however, who makes a causal claim (that I think mistaken) about the relationship between adopting legal positivism and obedience to immoral laws, Cover uses "positivism" as the label for the very act of amoral law-obedience. I believe the label is inappropriate, largely because nothing about legal positivism entails any attitude whatsoever about obedience to law. See Roger A. Shiner, Law and Authority, 2 Can. J.L. & Juris. 3 (1989). But the argument and its ramifica-
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positivism may be the posture towards constitutionalism most conducive to distance and therefore to external critique. Insofar as there is individual or social choice between a natural law and a positivist conceptualization of the institution of constitutional law, positivism is likely to be most appealing to those least inclined to sympathy with the existing constitutional order.

II.

To repeat, very little in the foregoing section has anything to do with the task of constitutional interpretation, and thus the appearance in public debate of the term “natural law” may have suggested the relevance of a range of arcane jurisprudential issues that in fact were unlikely to be of concern either to Justice Thomas or to his opponents. But although natural law as a theory of legal identification has had, and will undoubtedly continue to have, little relationship to the primary issues of American constitutional interpretation, inquiry does reveal a deeper and closer connection.

As I noted above, it is impossible to have a natural law view without believing in a prelegal and prepolitical human morality. Insofar as Justice Thomas indicated sympathy with natural law views,19 he certainly committed himself to the belief that there are moral values antecedent to particular legal and political cultures.20 Moreover, he probably committed himself as well to the view that his antecedent morality was not an unalloyed preference-utilitarianism, with preferences measured by use of the ballot box.21 This would hardly be cause for con-
cern, however, because the antecedent morality presupposed by a natural law view need be no different, as a matter of metaethics or moral epistemology, than the antecedent morality more often parading under the banners of "natural rights" or "human rights."

But if Justice Thomas was only indicating sympathy for the ideas of natural or human rights, and so placing himself in a tradition central to American constitutionalism, what was the cause of the concern? In part it appears as if Justice Thomas was suspected of having a two-part view (not unlike the two-part view that Judge Bork was defeated for not having) that, first, there are natural rights, and, second, it is the job of the judiciary to identify and to enforce those natural rights.

As to the first, it should be apparent that the actual charge against Justice Thomas was not that he believed in natural or human rights, but that he believed in the wrong ones. This itself is a legitimate complaint, for one who believes that part of the job of the judiciary is to

designed to stress, first, that utilitarianism is itself an antecedent moral position, and not merely a restatement of either relativism or subjectivism; second, that so-called "ideal" forms of utilitarianism, pursuant to which the welfare to be maximized is what is actually good for people rather than what they desire, would not go very far in generating even a presumption of majoritarianism; and, third, that even a preference-based utilitarianism generates a presumption in favor of majoritarianism only if it is assumed that the devices of majoritarian democracy are the best measures of citizen preferences.

One of the purposes of the foregoing was to make clear the distinction between a presumption against enforcement of moral rights that is based on a moral skepticism or subjectivism, see, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 3 (1971), and a similar presumption generated by preference utilitarianism, see, e.g., John Hart Ely, Democracy and Distrust (1980). On these and related questions, see Stephen Macedo, Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism (1990).


23. Judge Bork could have believed in the first but not the second, or the second but not the first, and still deny the conjunction of the first and the second, but he probably believed neither the first nor the second. That is, he likely believed that there are no antecedent human rights, but even if there were, it would not be the job of judges to locate and enforce them except insofar as they were restated in the Constitution's text.

24. It may have been a bit less legitimate insofar as it was tinged with a healthy dose of liberal academic anti-Catholicism. See Sanford Levinson, The Confrontation of Religious Faith
discover and to enforce nontextually explicit rights against majoritarian decisions is in no way committed to the view that one right is as good as any other, nor to the view that beliefs about the actual rights that some justice would enforce are irrelevant to the nomination or confirmation processes.

So if natural law is closely linked with or is just another term for natural rights or human rights, the "other side" of one debate is no longer legal positivism, but rather some version of moral skepticism, moral relativism, or moral subjectivism. There thus might be a debate between natural law in this "natural rights" sense and logical positivism, but natural rights and legal positivism simply are not contradictories.

That there are natural rights does not lead inexorably to the conclusion that it is the task of particular officials to identify and enforce them, however, and at this point the debate between natural law theory and legal positivism returns to the arena. Accepting the proposition that there are prelegal rights and prelegal moral values, while rejecting the proposition that it is the job of judges (and perhaps other officials) to identify and enforce them whether or not they are textually or preceptually explicit, requires that it be possible to identify legal items

and Civil Religion: Catholics Becoming Justices, 39 DePaul L. Rev. 1047 (1990). Because natural law legal theory is part of the Catholic tradition (as well as being part of other traditions), and because Aquinas is one of the leading exponents of natural law theory, it is sometimes assumed that one believing in natural law theory (or using the label "natural law") must adopt the Catholic view of the source and content of the antecedent morality that is a component of any natural law view. As I have tried to show, however, this assumed conjunction is simply false, and one can have a natural law legal theory premised on a wide variety of accounts of the source and substance of an antecedent morality. All that is necessary is that one believe in some antecedent morality, for without that a natural law view cannot get off the ground.

In Justice Thomas's case, the assumption that his sympathy for natural law implied a belief that the antecedent morality came from Rome was, I think, based on a combination of the fact that he had received a Catholic primary education and had attended the College of the Holy Cross, the fact that he opposed abortion rights, and the fact of anti-Catholicism within much of the academy.

25. See supra note 5.

26. There is perhaps a difference between enforcing antecedent moral rights when the text (or precedent, or other authoritative "legal" materials) is silent, and enforcing those rights even in the face of contrary text. Although a sizeable portion of the American legal tradition permits background values to trump inconsistent text, see, e.g., Dworkin, Law's Empire, supra note 11; Ronald Dworkin, Taking Rights Seriously (1977) [hereinafter Dworkin, Taking Rights Seriously]; Frederick Schauer, Rules and the Rule of Law, 14 Harv. J.L. & Pub. Pol'y 645 (1991) [hereinafter Schauer, Rules]; Frederick Schauer, Formalism, 97 Yale L.J. 509 (1988) [hereinafter Schauer, Formalism], it is even less controversial that background values must necessarily be used when the text (or similarly authoritative formal legal materials) is silent. See Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-
while avoiding an inquiry into the best moral theory. And that, in turn, presupposes legal positivism. The ability to divorce an inquiry into what is required by the law from an inquiry into what is required by morality presupposes the ability to engage, for the legal items at issue, in a morally sterile determination of what the law requires.

So it turns out that although legal positivism does not entail a morally sterile approach to adjudication or any other task within the legal system, starting from a morally sterile approach does presuppose legal positivism, i.e., the ability to determine what the law requires (in at least some cases) without opening the door to the full panoply of moral theory. Or, to put it differently, legal positivism is a necessary but not a sufficient condition for a conception of official responsibility that limits the moral compass of the law-applying, law-enforcing or law-determining official.

Legal positivism is thus a prerequisite to the contradiction of the view that there are antecedent moral (or natural) rights and that it is the job of all officials, including judges, to enforce them. But the contradiction itself, of which legal positivism is only a necessary but not a sufficient component, is thus not itself legal positivism, nor logical positivism, nor scientific positivism.27 Rather, it is the view, sometimes referred to as “role morality,”28 pursuant to which some official because of her role does not engage in some (or all) of the moral reasoning that would be engaged in by the best all-things-considered moral reasoner not constrained by the responsibilities of role.

In constitutional context, the question now is, given some conception of constitutional role morality pursuant to which a constitutional decisionmaker could separate the “is” from the “ought” of constitutional law, and could separate constitutional law (in a positivist sense) from political morality, whether she should proceed to decide only according to the “is” or the “ought” of each of the foregoing dichotomies.29 And it is exactly at this point that our inquiry confronts a huge

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27. In his recent book, Morton Horwitz maintains that there is a family relation between legal, logical, and ethical positivism, where the latter, a commitment to the fact/value distinction, seems similar to what I am calling scientific positivism. See MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960 (1992). Horwitz, however, does not explain the relationship, and much of what I say here can be taken both as an acceptance of Horwitz’s implicit offer to set out the nature of that relationship, and as a partial rejection of Horwitz’s belief that the similarities among the three are more important than the differences.


29. Because certain misconceptions are so firmly entrenched that it requires extra effort to try to unentrench them, and because one of those misconceptions is the view that a morally repugnant
portion of the domain of existing constitutional theory. For it turns out that many of those who have urged greater attention to text, or original intent, or precedent, or greater deference to political or majoritarian decisions, are (commonly) claiming not that antecedent morality is nonexistent, but rather that judges should see their role in a morally constricted way. When that is the case, there is a lack of congruence between moral and constitutional norms, the result of which is that a putative obeisance to constitutional norms will produce some morally suboptimal results.

The previous several sentences are of course a caricature. None of those who argue against strong constraint by text, precedent, and original intent argue that there is no space between the decisions of the ideal moral decisionmaker and the ideal constitutional decisionmaker. Some argue that the domain of morally thick constitutional decisionmaking is only a subset of all decisionmaking, and others stress the way in which the characteristic styles of constitutional argument are unlikely to track the styles of moral argument found in other domains. Conversely, those who rely heavily on text, or precedent, or original intent need not be committed to a morally sterile conception of the judicial role in constitutional cases, partly because the text, precedent, and original intent often compel a moral inquiry, and partly because they could believe that the indications of text, precedent, and original intent have presumptive rather than conclusive force for all legal ac-

form of official and judicial role morality is entailed by or is equivalent to legal positivism, let me repeat my primary theme once again, albeit in a slightly different way. One could accept a distinction between the “is” and the “ought” of constitutional law, and accept the ability to identify in a morally sterile fashion (some of) the commands of constitutional law, while still totally rejecting even the slightest hint of role morality. That is, one could say that the ability to identify the “is” of constitutional law would not suggest in any way what the judge or other official should do with or about it, and that the morally desirable thing for the official to do is to enforce the positive constitutional law only when doing so would not contravene any antecedent moral values. Moreover, and even more relevant to American constitutional law as it now exists, one could accept the ability to identify in positivist fashion some moderately clear constitutional indications while still believing (1) that some (or even many) constitutional indications are not clear at all, (2) that applying or interpreting unclear constitutional commands requires recourse to extralegal, including moral, norms and (3) that the operation of the selection effect is such that most constitutional cases winding up in the appellate courts, and especially in the Supreme Court, are of exactly this type.

30. For example, see Dworkin’s distinction between the domain of principle, in which both the courts and moral values play a large role, and the domain of policy, in which some form of consequentialist welfare maximization (itself a morally generated standard) is the ideal, and in which the role of the courts should be much smaller. DWORKIN, LAW’S EMPIRE, supra note 11; DWORKIN, TAKING RIGHTS SERIOUSLY, supra note 26.
tors, subject to override in situations of great moral moment.\textsuperscript{31}

Although my distinction between morally thick and morally thin conceptions of constitutional decisionmaking is thus a caricature, still the caricature may be useful in isolating the moral dimension in constitutional decisionmaking under an assumed metaethics in which morality is both real and important. That is, the question that my caricatures are designed to put on the table is whether, assuming a morally correct answer to the substantive question undergirding most constitutional decisions,\textsuperscript{32} it can ever be \textit{morally} right for a court or other constitutional decisionmaker to refrain from reaching it.\textsuperscript{33}

As with many questions of legal and constitutional theory, the answer to this question may vary with the standpoint, or voice, from which the question is answered. If the question is answered from the standpoint of the judge, or other constitutional decisionmaker, then the proposition that the official should have a morally suboptimizing conception of her role is one that might be quite difficult to maintain. We could say that the official should take into account the possibility of her own moral error and the extent to which certain morally optimal deci-

\textsuperscript{31} This last possibility is one I have called on occasion “presumptive positivism.” See Schauer, \textit{Playing by the Rules}, supra note 26, at 196-206; Schauer, \textit{Rules}, supra note 26, at 647; Schauer, \textit{Formalism}, supra note 26, at 548. It is possible that my use of the term “positivism” here is misguided, since it does not flow out of the conception of positivism I offered in part I. See Coleman, \textit{Rules and Social Facts}, supra note 7; Gerald J. Postema, \textit{Positivism, I Presume? \ldots Comments on Schauer’s ‘Rules and the Rule of Law’}, 14 Harv. J.L. & Pub. Pol’y 797 (1991). But if my use of the term is not misguided, it is not because of anything I have said in this Article up to this point, but rather because of the conception of positivism I sketch in the following section.

\textsuperscript{32} By “substantive question” I mean the kind of question that could be asked in an institution-ignoring way about the issues presented in many constitutional cases. Should women have the right to choose whether to have an abortion? Should the commands of one’s religion be respected by the majority even when those commands violate some aspect of the criminal law? Is it immoral to discriminate on the basis of sexual orientation? And so on. Thus the analysis here assumes that these are, in theory, answerable questions, and then goes on to explore the issue of whether, if at all, some institution should take the position that this answerable question should not be answered by \textit{it}, or that its institutional responsibilities lead it to give an answer it might not give had it had different institutional responsibilities.

\textsuperscript{33} I say “morally” right rather than “legally” right because the question of the shape of the legal (and constitutional) system cannot itself be a legal question, but must go outside of the law. To put it more formally, the determination of what is to count as law is a determination about just what the rule of constitutional recognition is in a given society, a question that necessarily transcends the question of what the law that the rule of recognition generates looks like. On the rule of recognition, see Hart, \textit{Concept of Law}, supra note 3, at 97-107. On the related idea of a Grundnorm, see Kelsen, \textit{Pure Theory}, supra note 3. On the relationship between the Grundnorm and the domain of constitutional inquiry, see Frederick Schauer, \textit{Deliberating About Deliberation}, 90 Mich. L. Rev. 1187, 1191-97 (1992) (book review).
Decisions might have a causal relation to some morally suboptimal decisions (by herself or others) in the future. But then it turns out that the decisionmaker is not making a morally suboptimal decision, but is rather making an optimal decision in light of numerous psychological factors that are part of a sophisticated optimization. In that sense, the decisionmaker is not deferring to the moral authority of another, but is making her own moral judgment. And if it is questionable whether anyone should ever defer to the moral authority of another, then criticisms of judges for making morally suboptimal decisions because of the perceived commands of the law are sound as well, since in the final analysis, according to this argument, the proper moral stance for any legal actor, including a judge, is one that does not abdicate moral judgment.

One response to this would be an argument for the desirability of a role-based morality, even from the perspective of the decisionmaker. Such an argument might be based on a strong communitarianism, pursuant to which the value in the search for values that an entire community could share and apply would be sufficiently important that individual decisionmakers would think it more important to participate deferentially in this search for shared values than to reach morally better decisions. Or it might be based on a related idea of separation of powers in a nontechnical sense, according to which the moral decisionmaker recognized both that the community would be better off if certain moral decisions were made by others, or that respect for the moral decisionmaking capacities of others required (at least partial) subjugation of her own moral judgment.

If a constitutional decisionmaker were to adopt some variety of

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36. For this argument to have any interest or any bite, it must be supposed that at least some values would serve the communitarian procedural goal more than they would serve the goal of moral optimization, communitarian goals aside. There is in the literature some attention to law as serving a coordination function, and in some respects the argument from community blends into the argument from coordination. See, e.g., John Finnis, The Authority of Law in the Predicament of Contemporary Social Theory, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 115 (1984); Gerald J. Postema, Coordination and Convention at the Foundations of Law, 11 J LEGAL STUD. 165 (1982).
this view, her mindset would commonly be one of moral deference for moral reasons. She might permit the Missouri legislature to decide who is to decide whether Nancy Cruzan should live or die. She would do so not because she thinks Missouri’s decision right, but either because she thinks that Missouri should have the moral right to make that decision or because she thinks that the Constitution’s makers should have the moral right to decide that Missouri, and not she, should decide who should decide whether Nancy Cruzan lives or dies.37 Similarly, even if she believes that there is a moral right to the use of one’s property that is violated by restrictions eliminating many possible uses of that property, she might still think that there are moral reasons why South Carolina’s different moral conclusion is entitled to respect, or that there are moral reasons why a constitutional decision to allocate the moral decision to South Carolina and not to the federal courts is entitled to moral respect.38 And even though she might think that legislatures for moral reasons should grant religion-based exemptions from many criminal laws, she might think that there is a moral component in the decision whether to allow the exemption question to be settled by a legislature or by the Supreme Court interpreting the Constitution.39

But let us suppose that the standard arguments against a strong sense of obedience or deference to legal authority are sound,40 and that as a result the moral argument for separation of moral powers cannot be maintained. If that is so, then there would be no good reason, from the standpoint of the decisionmaker, to defer to the morally suboptimal decisions of others, and good reason to criticize those who took the indications of positive law, or took the decisions of other individuals or institutions, as precluding their own moral decisionmaking.

Even with this assumption of the invalidity of the moral argument for obedience to moral authority, however, the question may look substantially different from a different standpoint. Let us therefore switch from the standpoint of the decisionmaker to the standpoint of the designer of a decisionmaking environment. In some contexts this might be a legislature designing the mechanisms of administrative procedure, in others a rules committee establishing the dispute resolution system for a nongovernmental organization. In the constitutional context, however, the rules committee is us. On most issues relating to how much power

40. See supra note 34 and accompanying text.
the courts (or other constitutional decisionmakers) should have to substitute what appear to them to be morally superior decisions for the morally inferior ones of other governmental decisionmakers, the Constitution is silent. And even were the Constitution not silent, the framework within which its prescriptions are to be taken is not and cannot itself be determined by the Constitution. The Constitution is necessarily silent about its own status,\(^41\) and thus a host of political decisions logically antecedent to constitutional law determine the shape of constitutional law and the effect that it shall have.

Thus the decision about whether the ordinary language indications of the constitutional text are to have none, some, or absolute effect is a political decision, where by "political" I do not mean to exclude that range of questions about constitutional theory and institutional design that have preoccupied constitutionalists for generations. Similarly, the weight of original intent, the force of precedent, the relevance of moral theory, the irrelevance of numerology, the use of the Preamble, and so on and on, are social and political decisions that determine the very contours of the domain that we consider constitutional law.

As we as a society sit as the rules committee for the practice of constitutional decisionmaking, we remake the rules continually. Although Bruce Ackerman would argue that we remake the rules only sporadically,\(^42\) the better account seems to me one of continuous rather than episodic reformulation,\(^43\) with events such as the Bork and Thomas hearings, as well as what presidential candidates say about the kinds of people they want for the Supreme Court, being recent central parts of this process. Indeed, the extent to which in this Article I focus on the early parts of the Thomas hearings is premised on the belief that the "natural law" discourse itself had some effect on just how this society sees its processes of constitutional decisionmaking, and thus had some effect on just what the phrase "constitutional law" is taken to stand for in the first instance.

One of the most important issues of constitutional political science

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41. Actually it is not, since both the Preamble and the Supremacy Clause of Article VI purport to establish the status of the Constitution. But this is of little moment for the argument I am making, since it just moves the question back one remove to the question about the status of the Preamble and the status of Article VI, the answer to which is not and cannot be found within the four corners of the document. As Kelsen and Hart have taught us, the status of law is at bedrock not a legal question.

42. 1 Bruce Ackerman, We the People: Foundations (1991).

is the issue of how these rules get enforced. These are not questions either of law or philosophy, but rather of psychology, sociology, and political behavior, so I do nothing more than offer the cruelest of intuitive generalizations. But among these crude intuitive generalizations would be that most people seek praise and dislike criticism, that for some people praise and criticism from their peers is most important (while for others praise and criticism in the widest possible arena is more important), that most people prefer to be promoted rather than fired, and that although people may differ on whether they would rather be right or President, 44 most people who have to confront that choice would certainly rather be both than neither.

As a result, we as a rules committee are constantly enforcing our constitutional rules when through our political system we nominate certain individuals to be judges or Justices and refrain from nominating others, when we confirm the nominations of some and refuse to confirm others, and when we contribute to the history that lauds some and condemns others. Reasonable people can differ about whether, in the short term, Supreme Court Justices with lifetime appointments are (or should be) immune from most of these kinds of considerations. 45 But it still seems counterintuitive to suppose that in the intermediate or long term the processes of constitutional decisionmaking are not substantially influenced by the prudential reasons that a society uses as its mechanism of enforcement of its constitutional metarules.

When I say "prudential reasons," I am unashamedly referring to the way in which all but the bravest (or most foolhardy) of us confront on a daily basis the conflict between what ideally we ought to do and what it is in our personal interest to do. 46 And so long as most constitu-

44. This phrase is attributed to Henry Clay in John Bartlett, Familiar Quotations 433 (13th ed. 1955).
45. This issue was explicitly debated by the Court in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).
46. An important question here, one that is superficially terminological, is what label we will give to the components and conclusion of the calculus I note in the text. When we have good moral reasons to do x, and good prudential reasons to do not-x, what we ought, all things considered, to do, is subject to alternative characterizations. Is the set of moral reasons merely a subset of the set of good reasons, such that what good reason (rationality) dictates need not be congruent with what morality dictates? Or are all good reasons, even seemingly prudential ones, actually moral reasons, such that there are good moral reasons for self-interest? In the latter case, what we ought to do, all things considered, is what we ought morally to do, recognizing that it may be moral to prefer our own interests to those of others. These issues have engaged moral philosophers for ages, and a particularly relevant example of the literature is John Cottingham, The Ethics of Self-Concern, 101 Ethics 798 (1991).
tional decisionmakers include the prudential as at least a partial component of their decisional calculus, then it is open to us as the constitutional rules committee to use our ability to supply such prudential reasons as a way of getting constitutional decisionmakers to reach decisions other than the ones that they think, for moral reasons, that they ought to reach.\(^{47}\) I leave the details of this to the social scientists, but it still seems plain that there are ways in which a society, in its role as creator of constitutional metarules,\(^ {48}\) can use the array of prudential

\(^{47}\) Although I think that this is literally true for many (or most) constitutional decisionmakers, let me repeat that in a slightly less literal sense it is also true insofar as a society uses the power of political prudential reasons to obtain the kinds of constitutional decisionmakers who will make the kinds of constitutional decisions that the "rules committee" wants made.

\(^{48}\) Here the sociology gets tricky, but in some sense the legal academy, particularly its constitutional branch, seems to have some role to play, as does the legal profession itself. To start with the latter, it is possible that professional glorification over time may make more of a difference for some people than public glorification, and insofar as that is true then those who have helped to create the reputations of Cardozo, see Richard A. Posner, Cardozo: A Study in Reputation (1990), Holmes and Traynor as great judges can possibly be said to have in their control some of the prudential reasons that would operate as reasons for action for those who would prefer the just-mentioned reputations to those of Duvall, Whittaker, and Wapner. And it may also be that what gets said about Supreme Court Justices on the pages of law reviews and in law school classrooms makes a difference to them, and to that extent those who produce the words on the pages and the reputations in the classroom also operate as the delegated applicators of society's prudential reasons.

There appears to me to be a bit of a norm against mentioning these factors in public, especially in the company of judges. That is, there appears to be some importance attaching to the myth that judges (and law professors) make decisions or reach conclusions totally unconstrained by prudential reasons. Part of this is likely due to the fact that an attitude of doing so is deemed socially important, and society creates special conditions, particularly life tenure with a quite decent salary in both cases, to make it as easy as possible. But that is not to say that life tenure or personal integrity produces for all or even most judges, let alone other constitutional decisionmakers, a total subjugation of prudential reasons for action and insofar as that is true, then control over the prudential can be used as a form of control over a constitutional decisionmaker's willingness to decide as she thinks ideally things ought to be decided.

I do not mean for any of the foregoing to be a reductionist account of what motivates judges or professors. I believe that most of us decide according to some mix of what is right and what is good for us, that what is right and what is good for us need not conflict, and that when they conflict, better people decide according to what they think is right more often than they decide according to what is good for them. But just as I want to avoid the view that decisionmaking is self-interest, so too do I want to avoid, at least on the failure of good evidence, the view that all or even most constitutional decisionmakers make their decisions totally without regard to their own careers or reputations. It is one of the lessons of much of modern legal scholarship that legal decisionmakers are situated, and although the immediate lesson of this has been to remind us of the way in which legal decisionmakers are situated by reason of race, class, gender, sexual orientation, religion, and numerous other factors, it may be useful to take from this scholarship the perhaps unintended lesson that legal decisionmakers are also situated in houses with mortgages, in families with members who often comment on their professional performance, in social structures with friends who read newspapers and watch television, in professions with institutional and
reasons as a way of getting constitutional decisionmakers to be more or less willing to reach what they perceive to be the morally best result in each case.49

From the standpoint of the rules committee, therefore, even a rules committee that has its own views of antecedent moral values and its own views about how it would decide constitutional cases according to those values, the question is now different. For now the issue is not whether Justice Thomas or any other constitutional decisionmaker should make, from their own standpoint and by their own lights, the morally best decision, but rather whether the rules committee, from its standpoint and by its own lights, should allow the array of Justice Thomases to make what they believe to be the morally best decision. And insofar as the rules committee thinks it best that the array of Justice Thomases subordinate their own judgment of what is morally best to some suboptimal but perhaps still better (from the rules committee’s perspective) array of moral judgments couched as constitutional judgments, then the rules committee can use its power to create prudential reasons as a way of calibrating the degree of moral attention it wishes its judges and other constitutional decisionmakers to pay.

This perspective is, of course, one way of understanding a generation of constitutional scholarship, weaned on the legacy of Lochner60 as constitutional, political, and moral disaster,61 that sought to discourage judges from seeking the morally best result as they saw it and to encourage judges to lower their moral sights such that much more of their field of vision was occupied with items of positive constitutional law than with larger questions of moral right.62 There are important reputational hierarchies, and in history with its enormous power to remember as well as to forget.

49. Remember, at this point in the argument we are assuming the soundness of the argument against authority, and thus assuming that without the application of prudential reasons the good constitutional decisionmaker will make the morally best decision, or, in more subtle versions, at least will avoid making constitutional decisions that fall below what to her is a minimal level of moral acceptability.


variations within this perspective, but a consistent theme was a considerable skepticism, strongly inspired by Lochner, about the likelihood that judges, empowered to search for the morally best results, would in fact reach the results the empowerer perceived as morally best. And although I have considerable disagreements with the empirical and decision theoretic basis for a perspective that assumes, without engaging in a more complex calculus, that decision procedures should be adopted that avoid the worst case rather than seek the best, for present purposes the importance of this perspective is that it appears to be looking at the issue not through the eyes of the judge, but through the eyes of a society deciding how it wants its judges to behave.

I do not mean to suggest that a society looking at judges or at constitutional decisionmaking from the standpoint of a systems designer would necessarily seek to have judges lower their moral sights. It is very possible that the best way to reach the largest number of morally desirable results is to encourage judges to look more rather than less to moral factors. And it is possible as well that encouraging judges to be morally sensitive will produce better moral results in the long run, and will even produce better moral results from those judges who will, pursuant to society’s instructions, see morality as a central part of their task. But now we see that at this level the question is more empirical than intrinsically moral, for now we are asking whether, given the systems designer’s moral views, including views about legally antecedent correct moral results, one or another judicial attitude, fostered in part by socially applied prudential reasons, will produce the highest number of morally correct results.

Once we see that this is an empirical question, we can understand that disagreement with the thesis that there are natural rights and that it is the job of the judiciary to locate and enforce them can (but need not) consist of the view that there are natural rights, but that empowering the judiciary to locate and enforce them will produce a morally worse state than declining to so empower the judiciary. This is itself a


54. Actually “highest number” is somewhat of an oversimplification, since the ideal calculation would be one of expected value, pursuant to which the morally best array of results would be a product of the number of morally correct results and the moral desirability (compared to the opposite result) of those results.
quite conventional point, albeit reached in a slightly different way, but the important question remains: What is the size of the field as to which these essentially jurisdictional determinations are to be made, assuming we are still within the standpoint of society as rules committee, or society as systems designer? Are we being opportunistically dishonest if we create one set of rules for those judges whose decisions we think likely to be morally misguided, and another for judges whose decisions we think likely to be morally correct, or one set of rules when we are morally comfortable with the judiciary and another for when we are not?

I want to assume, counterfactually, that the person offering the proposal is honest about its basis. So let us put aside morally difficult questions about candor and transparency, and assume that some participant in the process of making constitutional metarules openly proposes that the metarules in what I will call the “Thomas era” should be different from the metarules in force during some past or future “Brennan era.” Is this necessarily to be inconsistent in a repugnant way, or is there something that can be said for precisely this view?

Obviously, I would not have put it this way if I did not think that there is more to be said for this seeming inconsistency than is apparent at first glance. First, as a moral question, it is hardly the case that drawing a morally relevant distinction is immoral. And if, as we are assuming, there are moral differences between constitutional results, then drawing a distinction based on the likelihood of reaching those moral results cannot itself be immoral. With some frequency, we are bewitched by our categories, such that we think that the linguistic or political categories necessarily undergirding any determination of consistency and inconsistency have some moral priority over the underlying moral categories that they are designed to serve. But as a moral matter that is simply not true. Judges do not constitute a morally basic category, and thus there is no reason to suppose that a distinction differentiating among judges is necessarily morally open to question. If there are morally basic categories, and if the category “judges” (or “judging” or “Supreme Court decisionmaking” or “constitutional decisionmaking”) is not one of them, then subdividing the politically and lin-


56. This is a bald assertion, but I am not even sure what an argument to the contrary would look like.
guistically unitary category of judges in such a way that will serve a deeper moral division is neither unprincipled nor inconsistent.

If that is so, then the categorial question is not a moral one but an empirical one. Given that we are, by hypothesis, dealing with a world of disagreement about moral values (even as we are, by hypothesis, dealing with the fact that some of the disputants in that disagreement are wrong), the question is whether systems designers can empower an appropriate subset without also empowering a different subset who would reach quite different and less desirable results. In a world of moral disagreement, do systems designers have the linguistic, conceptual, and political tools to empower those who would reach good results while precluding those who would reach bad results from even making the effort?

In some respects the answer to this question is plainly yes. When remedies are available against police officers and municipal officials who take unconstitutional actions but not against legislators who vote for unconstitutional laws or judges whose unconstitutional decisions are reversed, or when the discourse of constitutional adjudication is quite different when addressed to the Supreme Court than when addressed to elected nonlawyer justices of the peace, we suppose that the category of constitutional decisionmakers can plausibly be subdivided. And if the universe of judges making constitutional decisions can be subdivided in this way, then there is no reason to suppose that it cannot be subdivided cross-temporally. In theory, at least, the category “Supreme Court Justices sitting from 1954 to 1973” can be distinguished from the category “Supreme Court Justices sitting now” and from the category “Supreme Court Justices likely to be sitting in 2010.”

The problem with the theory, however, is that the category “Supreme Court Justices” is, even if not for good moral reasons, socially and linguistically entrenched to a greater degree than the category “Supreme Court Justices and elected nonlawyer justices of the peace.” Because of this, it is easier to draw a socially durable distinction within the second category (at least if it is drawn at the “and”) than within the first, the result being that drawing a morally legitimate distinction within the former category may encounter far more slippage in application than drawing an equally morally legitimate distinction within the latter. And if that is so, then the empirical question gets more complex, for the desire to create a distinction that will maximize the expected moral value of the consequent decisions must take into account the expected moral disvalue that comes when morally optimal categories or
distinctions are misapplied in practice.

Taking the phenomenon of slippage into account, the empirical question is then whether a constitutional metarule disempowering the Justice Thomases from looking too deeply behind the positive constitutional law for natural or human rights, even if capable of "repeal" when the judiciary is differently constituted, will be so entrenched culturally and politically that its repeal would turn out to be difficult. And vice versa. Is the disempowerment of Justice Thomas more difficult than it might otherwise have been because of the discourse of judicial empowerment that took place for about ten or fifteen years preceding the Bork proceedings?

The traditions of American constitutional scholarship notwithstanding, I do not want anything to turn on my unsupported assertions of debatable empirical political fact. So I will not venture answers to some of the questions I have just posed. My point is not to decide, even given agreement about the existence of antecedent moral rights and the moral permissibility of using the institution of constitutional decisionmaking to further them, whether certain forms of public constitutional discourse at certain times will or will not help to achieve a morally better world. For once we are at this instrumental point in the argument, the relationship between arguments made (or institutions created) and results achieved, especially given the extraordinarily complex nature of the effect of prudential incentives, is political, empirical, and extremely intricate. There are, in theory, answers, but not ones as to which my skills or existing research are particularly helpful.

Despite that, however, I think I have demonstrated in this section that there is a philosophically coherent position that would admit the existence of legally antecedent natural rights but would under some circumstances attempt to deny to certain agents the power to locate and enforce them. This position sometimes (although I think misleadingly) goes by the name of positivism, but the relationship is actually more complex and more intriguing. In fact, the role morality position I have been describing may not be positivism in that it is distinct from and not entailed by any version of positivism, legal or otherwise. It


may, however, presuppose a particular version of legal positivism, and it is to this that I now turn.

III.

Contemporary debates about legal positivism are not dominated by a distinction between legal positivism and natural law, but rather by Ronald Dworkin's attack on a particular conception of law that Dworkin characterizes as "positivism." To Dworkin the positivist claim starts from Hart's arguments about the centrality of a rule of recognition to a positivist account of law. Thus Dworkin sees the positivist claim as primarily about the ability, by use of a rule of recognition or "pedigree,"\textsuperscript{59} to identify distinctly legal norms from among the entire universe of social (including moral) norms. Under this conception of positivism, law is a limited domain.

Against this, Dworkin offers a descriptive account and normative defense of a picture in which law does not exist as a limited domain of norms identifiable by their pedigree and not their content. Rather, to Dworkin, the domains of the moral, the political, and the legal are in many respects indistinguishable, and the practice of legal decisionmaking consists of the constant and necessary application of the full panoply of extant social norms. "Law" is the name for what judges do, rather than the name for what judges find.

Thus there is a debate that puts on one side a limited domain account of legal norms, and on the other a much more "seamless web" picture of the interplay of the full set of a society's public norms. And although I think, as a descriptive matter, that Dworkin is somewhat right but largely wrong,\textsuperscript{60} I need not rehearse my reasons for that belief here. Rather, I want to stress the way in which the role morality conception of decisionmaker responsibility presupposes that Dworkin is at least partially wrong.

In the previous section I sketched a picture of a judge who, whether because she thought it right or because society had given her strong prudential reasons for doing so, believed in the existence of antecedent natural (or moral, or human) rights, but believed as well that locating or enforcing them was "off her watch," at least presumptively,

\textsuperscript{59} Dworkin, Taking Rights Seriously, supra note 26, at 17.

unless those rights could also be found in the set of authoritative materials that together constituted constitutional law. This view, however, presupposes just what Dworkin denies, that there is a set of authoritative materials that can indicate (some) answers without the necessity of recourse to the full breadth of a society's political morality. If Dworkin is right, and there is no such limited domain or identifiable subset, then the role morality conception can never get off the ground. And in that case the only hope for those who would be morally disturbed by the results that Justice Thomas would reach is to try to get better judges, for the task of trying to get Justice Thomas to lower his moral sights by focusing only on some putatively narrower range of materials is, as a descriptive matter, a complete nonstarter.

Once we see Dworkin's attack on positivism as limited domain as descriptive and empirical, then it is possible that he is right about some aspects of the system and less so about others. More particularly, it is quite possible that, given the existing array of American Supreme Court precedents, given the existing indeterminacy and moral reference of so much of the constitutional text, and given the way in which the selection effect concentrates in the Supreme Court cases for which the narrowly legal materials do not generate an answer, the actual process of constitutional decisionmaking in the Supreme Court of the United States is one in which Dworkin is much more right than he is wrong. If for an array of cases the narrowly legal materials are either conflicting or silent, then even the strongest proponent of the limited domain thesis would admit that the decisionmaking process must then make recourse to a range of materials well outside the limited domain recognized by the rule of recognition.

Conversely, however, the limited domain thesis, if conceptually sound, is likely to be more true the further one moves away from the morally soaked subject of constitutional law, and the further one moves away from (even within constitutional law) the Supreme Court of the United States. So if we think of the limited domain notion of law as treating text, precedent, and perhaps other authoritative materials as

61. Dworkin seems not to address this point. That is, Dworkin's task is devoted largely to addressing what appellate decisionmaking looks like in many modern legal systems, and offering a normative justification for that practice. Nowhere does he deny that a quite different picture of legal decisionmaking, including a stronger role for rule of recognition-recognized legal rules, might exist in other legal systems, or in other parts of this one.

62. Some candidates would include original intent, statements in certain legal treatises, statements in privileged historical works such as The Federalist papers, statements in law journals, statements by certain legal scholars, practices of certain political bodies, and propositions of the
relatively distinct from other sources, then it is possible to imagine that the indications of those sources could be taken as at least presumptively controlling by some class of constitutional decisionmakers. And it is possible that these indications of law qua law would be more likely clearer for a larger percentage of decisions the further one gets from the Supreme Court.

All of this is only to state the possible. Whether it is desirable will involve the full range of considerations that I pointed to in the previous section. Still, the logical status of the limited domain thesis is worth spelling out. The truth of the limited domain thesis, either as a thesis about the domain of law or about the domain of constitutional law, is a necessary condition for the operation of a conception of judicial behavior pursuant to which judges make decisions not on the basis of all or most of what is within their moral field of vision, but rather on the basis of the more limited field circumscribed as "the law." But the truth of the limited domain thesis, although a necessary condition for this role morality conception of the judicial role, is not a sufficient condition. One could believe that there is a moderately identifiable domain of the law, or of constitutional law, while still denying to the norms indicated by that domain any force at all within the practice of judging. While highly unlikely, but this logical extreme is designed to point out, more plausibly, that the limited domain thesis is entirely consistent with the task of judging in general, or of appellate judging in particular, involving the application of far more than just "the law" in this narrow limited domain sense.

My sense is that many of the existing attacks on positivism in most of its forms are based on a misperception of this last point. If you start from the premise that law is the appropriate label for the full range of what judges do, or if you start from the premise that judges should only do law, then there is a strong temptation to define law capaciously, a temptation which if not resisted will make the limited domain thesis false by virtue of the premises that inspired the inquiry.

Conversely, if one starts from different premises, either that judging may very well (or necessarily)63 involve many tasks other than the

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63. This view was crucial to Kelsen, who maintained that no application of a legal norm, whether in the generation of another norm or in the generation of a specific legal result, was
application of pedigreed legal norms, or that it is perfectly appropriate for judges to take account of norms other than legal ones, then there is no reason to look for an expansive notion of what law is, and no reason to deny the seeming reality that the domain of legal materials, the domain of the kind of stuff found in books published by the West Publishing Company, is at least somewhat different from (in the overlapping, but not mutually exclusive sense) the domain of the full range of important moral and social norms.

It may turn out that there are strong political reasons for denying the limited domain thesis, inasmuch as denying the limited domain thesis may give lawyers (and here we have switched standpoints again) a morally and politically richer conception of their task.64 Alternatively, and perhaps more perniciously, an expansive definition of law helps to mislead society about just what it is that lawyers and judges are doing, and why it is necessary that lawyers and judges and not other folk are doing it. If the limited domain thesis is false, then why do we need a distinct label—"law"—for what is no longer a distinct realm?

Thus, if the limited domain thesis is true, it may very well follow, centuries of legal profession sociology aside,65 that judges should treat the products of that limited domain as relatively unimportant to their task. And it may well be the case that this is even more so with respect to constitutional decisionmaking, and most true of all for constitutional decisionmaking in the Supreme Court.

Constitutional positivism, therefore, may represent an intricate conjunction of various different positions and various different positivisms. At bottom, it starts with some version of scientific positivism, the plausibility of some fact/value distinction, for without the fact/value distinction there can be no distinction between what the law is and what the law ought to be. One could believe in the fact/value distinction and still not believe that it accurately describes the law, so legal

64. See Lon L. Fuller, THE LAW IN QUEST OF ITSELF (1966). That an expansive notion of what law is will produce a more expansive notion of what lawyers should do seems possibly right to me, but it is hardly logically compelled. Indeed, this causal connection starts from the premise that what lawyers do is only law. If we discard the notion that judges or lawyers do only law, then we have less need to use a phenomenologically misleading definition of law as a corrective.

65. Although I have hinted at it in the previous several paragraphs, the phrase in the text suggests a much wider range of issues than I can deal with here. Suffice it to say that I think that expansive definitions of law, and the accompanying critique of a limited domain conception of positivism, are somehow related to an internal and self-justifying perspective on legal theory, and that an external perspective, unconcerned with making law, lawyers, or judges all that they can be, will produce somewhat different conclusions.
positivism can be seen as a position that presupposes but is not entailed by scientific positivism.

At the next level, as we have just seen, is a position, call it the role morality position, that in turn presupposes but is not entailed, or even suggested, by legal positivism. If one starts from the premise, therefore, that the role morality position, pursuant to which judges have a morally constricted conception of their job, is morally troublesome, then there is an advantage to denying the truth of scientific positivism, for without scientific positivism there can be no legal positivism, and without legal positivism there can be no role morality (in this context).

But advantages commonly bring disadvantages. If one takes this route (assuming that there is a choice), and denies scientific positivism, then it is necessary that one deny legal positivism, and if one denies legal positivism, then one must deny role morality. The denial of role morality may thus be the necessary entailment of a denial of scientific positivism, but the consequences are problematic. If role morality is not a plausible position for society’s rulemakers to enforce, then the only solution to an array of decisionmakers we distrust is to try to get better ones. But if role morality is a plausible position, then another solution to an array of distrusted decisionmakers is to disable them as we try to get better ones. But if we disable them for reasons of distrust, then there may be spillover effects when we get the decisionmakers we desire, for we may then discover that re-enabling them is harder than it otherwise would have been.

There is no answer here. Whether in the legal context generally or in the constitutional context in particular, the choices I have tried to sketch are difficult. But they are choices nevertheless, and if there is something I can be taken to be arguing against in this Article, it is not natural law, or natural rights, or certainly not individual moral responsibility. Rather, it is the notion that there is a necessarily correct answer to even the seemingly abstract questions of legal and constitutional theory. The alleged evils of formalism, positivism, and a host of other widely castigated -isms are evils, if evils they be, not acontextually, but because of relatively time-specific, place-specific, and role-specific patterns of social and political behavior imposed on the moral landscape. As social and political behavior changes, then perhaps so should our view of the theoretical constructs within which we manage it.

66. See supra note 5.
IV.

My goals here have been multiple. I will not recapitulate all of them, but two are worth mentioning in closing. At its narrowest, my goal has been to pierce some of the linguistic confusion that surrounds the many uses of the word "positivism," 67 and in doing so to reconnect many of the most pressing issues of constitutional law to many of the most enduring questions of analytic jurisprudence. Whether this goal is too narrow or too irrelevant is not for me to decide, and may be a function of the extent to which clarity is seen as a facilitator of truth.

At its broadest, this has been an exercise in trying to deal with one of the largest issues of legal theory, the question whether styles of legal argument, and forms of legal structure, have some necessary and temporally indifferent normative political incidence. This Article has been one piece of a larger project to show that they do not, but there remains much more to be done.