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Practice-Based Constitutional Theories

ABSTRACT. This Feature provides the first full-length treatment of practice-based constitutional theories, which include some of the most important theories advanced in modern scholarship. Practice-based constitutional theories come in originalist and nonoriginalist—as well as conservative and progressive—varieties, and they assert that a constitutional theory should generally conform to our social practices about law. If, for example, it is part of our social practices for courts to apply a robust theory of *stare decisis*, then a constitutional theory that would require a less deferential theory of *stare decisis* is a less persuasive theory. Practice-based constitutional theorists would usually see it as a defect if a theory required a significant change in our social practices, such as overruling large swathes of landmark precedents.

But why should we care whether a constitutional theory conforms to our social practices? That normative question requires a normative answer, yet there has been very little scholarship systematically analyzing the justifications often given by practice-based theorists for conforming constitutional theories to our social practices. This Feature identifies and examines the primary justifications offered for practice-based constitutional theories: legal positivism, reflective equilibrium, and the stability that comes from an overlapping consensus. In doing so, it also provides the most in-depth analysis of the nature of practice-based constitutional theories to date.

The justifications usually offered by practice-based theorists reflect the influence of H.L.A. Hart and John Rawls on American constitutional theory. Although each justification is sophisticated, none can bear the normative weight that would justify conforming constitutional theories to our social practices. A constitutional theory cannot ignore our social practices, but it is the theory that can justify those practices, not the other way around.

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INTRODUCTION

American constitutional theorists commonly assert that a viable constitutional theory must “describe[] and explain[]” the “actual process of constitutional interpretation.”¹ Theories are said to be deficient insofar as they contradict “what we actually do” in adjudicating constitutional disputes,² are “incompatible with the bulk of legal practice,”³ or cannot give a “plausible account of American constitutional practice.”⁴ The essence of this view is that a constitutional theory should generally conform to our social practices. If, for example, it is part of our social practices for courts to apply a robust theory of *stare decisis*, then a constitutional theory that would require a less deferential theory of *stare decisis* is a less persuasive theory.⁵ This kind of argument, which “[p]roceed[s] from th[e] assumption” that “the foundation of the constitutional order inheres in the facts of social practice,” is characteristic of what Richard H. Fallon, Jr. has called “practice-based constitutional theories.”⁶ These theories come in originalist⁷ and non-originalist⁸—as well as conservative⁹ and progressive¹⁰—varieties. Indeed, it is fair to say that the vast majority of the most influential constitutional theories are practice-based.¹¹

Insofar as practice-based constitutional theorists are simply trying to provide an accurate description of how our constitutional system works, there is nothing particularly controversial about their insistence that constitutional theories reflect our social practices. Philip Bobbitt’s famous description of the modalities of

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1. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1756 (1994); see Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1772 (1997).
 2. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 44 (2010).
 3. RONALD DWORKIN, *LAW’S EMPIRE* 245 (1986).
 4. RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* 91 (2018).
 5. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1126-46 (2008).
 6. Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 542 (1999).
 7. See, e.g., William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. U. L. REV. 1455, 1457-58 (2019).
 8. See, e.g., STRAUSS, *supra* note 2, at 43-46.
 9. See, e.g., Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 686-715 (1994).
 10. See, e.g., DWORKIN, *supra* note 3, at 393-97.
 11. For some of these theories, see generally FALLON, *supra* note 4; Baude & Sachs, *supra* note 7; STRAUSS, *supra* note 2; DWORKIN, *supra* note 3. Many others could be listed here, and I do not mean to diminish the importance of those practice-based theories not listed.

constitutional adjudication¹² could be understood as an example of this purely descriptive enterprise: an attempt to better understand how courts *in fact* resolve cases, irrespective of how they *should* resolve cases.¹³ But practice-based constitutional theorists often go beyond purely descriptive claims to make normative claims. They do not just argue that their constitutional theories accurately describe our existing social practices. They argue that a constitutional theory that does not accurately describe our existing social practices is a less *normatively sound* theory. Ronald Dworkin, for instance, argued that a constitutional theory that “provide[s] the best constructive interpretation of the community’s legal practice”¹⁴ gives the law greater “moral authority.”¹⁵

But from a normative perspective, why should we care whether a constitutional theory contradicts our current social practices? What if our current social practices are mistaken? For example, practice-based constitutional theorists often point to *Brown v. Board of Education*¹⁶ as being so embedded in our social practices that any theory contradicting *Brown* is illegitimate.¹⁷ But if we were having this conversation in the early twentieth century, we might very well regard *Plessy v. Ferguson*¹⁸ as deeply embedded in our social practices.¹⁹ What seems to matter is that *Brown* was emphatically right and *Plessy* was emphatically wrong, not the extent to which either case is or was part of our social practices.²⁰

Of course, this example oversimplifies the claims of practice-based constitutional theorists and elides all sorts of important questions. What counts as part of our “social practices”?²¹ By what standard are we assessing whether a practice

12. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7-8 (1982).
13. *Id.* at 243-49; Dorf, *supra* note 1, at 1788-90; Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869, 1869 (1994).
14. DWORKIN, *supra* note 3, at 225.
15. *Id.* at 188, 190.
16. 347 U.S. 483 (1954).
17. See, e.g., FALLON, *supra* note 4, at 144-47; STRAUSS, *supra* note 2, at 12-16; Dorf, *supra* note 1, at 1767.
18. 163 U.S. 537 (1896).
19. Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412-17 (2011); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 302-08 (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 169 (1999).
20. Cf. Stephen E. Sachs, *The “Constitution in Exile” as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2256, 2276-78 (2014) (arguing that *Brown v. Board of Education* rests on deeper social practices and is not *itself* an embedded social practice).
21. Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* 193, 198 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (noting disagreement about which social facts matter in constitutional theory).

is right or wrong, legitimate or illegitimate?²² But the point of the example remains: the reason we think *Brown* was rightly decided does not turn on whether *Plessy* was deeply embedded in our social practices. We are quite ready to say that *Brown* was right even if *Plessy* was an established part of our social practices. And if that is true of *Plessy*, why would it not also be true of other social practices? In short, why *should* we care — as a normative matter — about whether a constitutional theory conforms to our social practices?

That normative question demands a normative answer.²³ To say that constitutional theories *ought* to conform to a social practice because that practice *is* our existing way of doing things is to overlook the distinction between descriptive and normative claims,²⁴ a basic distinction that constitutional theorists generally recognize as valid.²⁵ Yet, despite the importance and pervasiveness of practice-based constitutional theories, scholars have paid very little attention to their ostensible normative justifications in a systematic way.²⁶ To be sure, practice-based constitutional theorists have offered reasons why we should care about social practices, but there has been almost no examination of whether the reasons usually offered actually support the weight that these theorists accord to social practices.

The time is ripe for such an examination, particularly as we appear to be entering a period of rapid and significant change in the practices surrounding constitutional adjudication. As numerous scholars have observed,²⁷ the Supreme Court's recent cases have generally indicated a shift toward "text, history, and

22. FALLON, *supra* note 4, at 20-46 (distinguishing among moral, sociological, and legal legitimacy).
23. Fallon, *supra* note 6, at 545-49.
24. DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (L.A. Selby-Bigge & P.H. Nidditch eds., Oxford Univ. Press 2d ed. 1978) (1738); *see also infra* note 85 (discussing the validity of the is/ought distinction when analyzing the relationship between descriptions of social practices and justifications for adhering to those practices).
25. *See, e.g.*, Andrew Jordan, *Constitutional Anti-Theory*, 107 GEO. L.J. 1515, 1521-23 (2019); Fallon, *supra* note 6, at 545-49.
26. The few exceptions are Andrew Coan, *The Foundations of Constitutional Theory*, 2017 WIS. L. REV. 833, 867-76; Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2926-46 (2007); and Fallon, *supra* note 6, at 554-57. All three offer valuable insights into the nature of practice-based constitutional theories and their normative justifications, but they do not examine those issues in the same depth as this Feature.
27. *See, e.g.*, Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. (forthcoming 2023) (manuscript at 3), <https://ssrn.com/abstract=4366019> [<https://perma.cc/B46M-MZSV>]; Randy E. Barnett & Lawrence B. Solum, *Originalism after Dobbs, Bruen, and Kennedy: The Role of History and Tradition*, 118 NW. U. L. REV. (forthcoming 2023) (manuscript at 21), <https://ssrn.com/abstract=4338811> [<https://perma.cc/RL4Q-4LRW>]; Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES (forthcoming 2023) (manuscript at 21), <https://ssrn.com/abstract=4205351> [<https://perma.cc/7DDR-WW8E>].

tradition” over other methods.²⁸ *Dobbs v. Jackson Women’s Health Organization* held that there was no constitutional right to an abortion “because such a right has no basis in the Constitution’s text or in our Nation’s history.”²⁹ *New York State Rifle & Pistol Ass’n v. Bruen* held that the test in Second Amendment cases is “whether modern firearms regulations are consistent with the Second Amendment’s text and historical understanding.”³⁰ And *Kennedy v. Bremerton School District* held that the Establishment Clause “must be interpreted by ‘reference to historical practices and understandings.’”³¹ These are just a few important examples from the October Term 2021, and the shift they represent has the potential to challenge the conventional view among many practice-based theorists that the Court “has never established a priority or ranking of . . . different methods of interpretation.”³²

The Court’s move toward more history-focused methodologies underscores that “[c]onstitutional practice changes.”³³ As Fallon has observed: “[S]hifts in the balance of power on the Court can have profound effects in unsettling and then sometimes resettling norms of interpretive practice. Transformation has happened before. It could happen again.”³⁴ Much like *Brown* signaled a change in our social practices, so too does *Dobbs*. But, again, should our assessment of such cases depend on whether our social practices have changed, and if not, what does that tell us about the relationship between the descriptive and normative claims of practice-based theories?

These are important questions that call for a thoroughgoing examination of the normative foundations of practice-based constitutional theories. That is the task of this Feature: to identify and examine the justifications that many of the leading practice-based constitutional theorists give for conforming their theories to our social practices. In doing so, the Feature provides the first full-length treatment of practice-based constitutional theories.³⁵ At the same time, the scope of the Feature is limited in at least one important respect: I focus on the

28. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring).

29. 142 S. Ct. 2228, 2283 (2022).

30. *Bruen*, 142 S. Ct. at 2131.

31. 142 S. Ct. 2407, 2428 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)).

32. Griffin, *supra* note 1, at 1757. That is not to say that the Court’s constitutional jurisprudence is fully consistent with an approach that elevates text, history, and tradition over other modalities. But the Court’s emphasis on text, history, and tradition in recent cases is, in my view, clearly different from the way the Court has long decided cases.

33. Sachs, *supra* note 20, at 2253.

34. FALLON, *supra* note 4, at 92.

35. I say this without in any way diminishing the importance of Andrew Coan’s, Abner S. Greene’s, and Richard Fallon’s contributions. See *supra* note 26.

justifications that practice-based theorists give for adopting a practice-based approach to constitutional theory *in principle*. I do not examine whether, assuming one has *already* adopted such an approach, there are good reasons for favoring any particular practice-based theory over *other* practice-based theories.³⁶

When we turn to reasons for adopting practice-based theories in principle, three justifications stand out from the literature: (1) the concept of law found in legal positivism, (2) the justification of beliefs achieved through reflective equilibrium, and (3) the stability that comes from an overlapping consensus. Each of these justifications is sophisticated, reflecting the influence of the jurisprudential and political theories of H.L.A. Hart³⁷ and John Rawls.³⁸ But as I will argue, none of them provides a compelling normative reason to conform constitutional theories to our social practices. That is true *even if one accepts* the Hartian and Rawlsian concepts that undergird these justifications. Nothing in my argument depends on rejecting legal positivism, the process of reflective equilibrium, or the importance of stability. My point, rather, is that these justifications for practice-based constitutional theories are insufficient *on their own terms*. They are transient justifications—justifications that, despite looking, at first glance, like answers to our normative question, only point us to *other* normative justifications that lie outside of themselves. It bears emphasizing that I will not be examining all possible justifications for practice-based theories, only the most common justifications that have in fact been offered. Nor will I be critiquing all justifications for practice-based theories, only those that fail on their own terms. For example, while I briefly discuss Burkean justifications for practice-based theories, I do not make them the focus of my critique, since they (unlike the other justifications examined below) could, if accepted, suffice to justify a practice-based theory.³⁹

Before we can dive into the justifications for practice-based constitutional theories, however, we need to understand what they are. Part I provides an overview of the nature of constitutional theories in general and of practice-based constitutional theories in particular. It offers a novel explanation of the relationship between the descriptive and normative components of constitutional theories,⁴⁰ which helps clarify what makes practice-based constitutional theories

36. It is conceivable, for instance, that if we had already accepted practice-based constitutional theories as the right approach in principle, one of the justifications discussed below would favor one type of practice-based theory over another.

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

38. JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999).

39. See *infra* Section I.B.2.

40. See *infra* Section I.A.

distinctive,⁴¹ and it lays the foundation for the most in-depth analysis of the nature of practice-based theories to date.

Parts II-IV, in turn, examine each of the three main justifications for practice-based constitutional theories. I begin in Part II with legal positivism, which is the most straightforward example of a transient justification. Legal positivism is a theory about what law is. It claims (in its most common manifestation) that law is fundamentally a matter of social fact.⁴² Practice-based theorists are often legal positivists;⁴³ yet, precisely because positivism offers itself as a purely descriptive account of what law is, it has no internal normative premises that can justify adherence to the social practices by which it defines law.⁴⁴ It necessarily relies on some normative argument *outside of* legal positivism to justify obeying our social practices.⁴⁵

Part III takes up reflective equilibrium, whose transient nature is less obvious than legal positivism's. Reflective equilibrium describes the state of coherence among our beliefs about everything from the ethical framework we adopt (e.g., utilitarianism) to the considered judgments we make about specific questions (e.g., racial discrimination is wrong).⁴⁶ The idea is that, insofar as a person achieves reflective equilibrium, they are justified in holding the beliefs that they have brought into coherence.⁴⁷ Using this concept at a society-wide rather than a personal level, practice-based constitutional theorists often treat our social practices like considered judgments that need to be brought into coherence with each other and with broader moral and theoretical considerations, and the resulting equilibrium purportedly proves that our practices are justified.⁴⁸ But the justificatory function of reflective equilibrium requires that *all* of a person's

41. See *infra* Section I.B.

42. Charles L. Barzun, *The Positive U-Turn*, 69 STAN. L. REV. 1323, 1361 (2017); Scott J. Shapiro, *What Is the Rule of Recognition (and Does It Exist)?*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 21, at 235, 238-39.

43. See, e.g., Baude & Sachs, *supra* note 7, at 1459.

44. See *infra* Part II.

45. *Id.*

46. RAWLS, *supra* note 38, at 17-18, 42-45.

47. Mitchell N. Berman, *Reflective Equilibrium and Constitutional Method: Lessons from John McCain and the Natural-Born Citizenship Clause*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 246, 259 (Grant Huscroft & Bradley W. Miller eds., 2011); T.M. Scanlon, *Rawls on Justification*, in THE CAMBRIDGE COMPANION TO RAWLS 139, 140-41 (Samuel Freeman ed., 2003); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. REV. 273, 276 (1992); Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 369 (1984).

48. See, e.g., FALLON, *supra* note 4, at 144-47; STRAUSS, *supra* note 2, at 12-16; Dorf, *supra* note 1, at 1767.

beliefs – and, in the case of practice-based constitutional theories, *all* of our social practices – be subject to revision.⁴⁹ This revisability is incompatible with the nature of practice-based theories, which assume that some of our social practices are fixed and unchangeable. Because practice-based theories cannot subject all practices to revision, they cannot achieve a true reflective equilibrium that would give us good reason to think that practice-based theories are justified.⁵⁰ When practice-based constitutional theorists seek coherence in the law, what they are *really* seeking is not a state of reflective equilibrium; it is a coherence that serves some freestanding normative goal. And it is *that normative goal* – not the coherence of the law – that they think ultimately justifies their theory.⁵¹ Despite invoking reflective equilibrium, practice-based constitutional theorists cannot actually rely on it. They rely on some other normative value that is served by coherence with our social practices.

This leaves Rawls’s notion of an overlapping consensus as a means of achieving stability, which is the subject of Part IV. I provide a detailed explanation of Rawls’s overlapping consensus and the role it plays in his overall theory below,⁵² but the basic concept is that each person should be able, for their own internal reasons, to agree on the principles of justice that Rawls advocates.⁵³ This “overlapping consensus” on the basic principles of justice, in turn, ensures the stability of these principles in a society otherwise deeply marked by reasonable disagreement.⁵⁴ But whereas Rawls employed an overlapping consensus on the principles of justice, practice-based constitutional theorists employ an overlapping consensus on our social practices, and whereas Rawls hoped to secure the stability of the principles of justice, practice-based constitutional theorists hope to secure the stability of our constitutional order.⁵⁵ This difference in the *object* of the overlapping consensus produces a difference in the *kind* of stability achieved. Because Rawls was concerned with the stability of principles that he had (in his view) demonstrated to be just, the stability he sought to achieve would be a normatively attractive stability – the stability of *just principles*.⁵⁶ By contrast, the stability of our constitutional system is only normatively attractive insofar as our system is *itself* normatively justified, and showing that our system is normatively

49. Scanlon, *supra* note 47, at 149–53; Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 778, 782–83 (1993).

50. See *infra* Part III.

51. *Id.*

52. See *infra* Section IV.A.

53. JOHN RAWLS, POLITICAL LIBERALISM, at xxi, 38–40, 134 (1993).

54. *Id.* at xix.

55. See *infra* Section IV.B.

56. See *infra* Section IV.C.

justified requires a separate argument.⁵⁷ In other words, mere agreement on various social practices that constitute our legal system does not, by itself, give us a good reason to think that our social practices are *justified*; they might very well be morally appalling. An overlapping consensus on our social practices might be conducive to the stability of our constitutional system, but that is not a good reason – by itself – to adhere to those practices.

At the same time, it would be wrong to say that the stability of our constitutional system is *irrelevant* to a sound theory of constitutional adjudication, and that stability depends (at least in part) on the extent to which a theory of constitutional adjudication reflects our social practices. Part V concludes with a sketch of some preliminary thoughts on the appropriate role of stability considerations in constitutional theory. The upshot is that social practices are relevant – but ultimately answerable – to the normative justifications that undergird a sound constitutional theory.

There is, in short, an is/ought problem with many of the most important practice-based constitutional theories. That is not to say that *all* practice-based theories suffer from this flaw; some do not.⁵⁸ Nor is it to say that the theories I examine are irremediable; it is conceivable that they could be supplemented with normative arguments that, if accepted, would justify them (though perhaps in altered form). Indeed, some of the theorists who rely on one or more of the three justifications discussed below offer *other* normative justifications, but those justifications are generally thin and underdeveloped.⁵⁹ Nonetheless, most of the leading practice-based theorists adopt one or more of the justifications examined below, and the weakness of these justifications calls such theories into question.

I. AN OVERVIEW OF PRACTICE-BASED CONSTITUTIONAL THEORIES

One challenge in analyzing practice-based constitutional theories is defining what we mean by a “constitutional theory” and identifying what makes practice-based theories distinctive from other types of theories. Some constitutional theories are purely descriptive: they seek only to provide an accurate description of what our law is or how our constitutional system works.⁶⁰ Legal positivists like

57. *Id.*

58. See *infra* Section I.B.2.

59. See, e.g., FALLON, *supra* note 4, at 28–35 (offering a “minimal” theory of constitutional legitimacy); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2392–95 (2015) (invoking oath theory); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 894–97 (1996) (advocating for a form of traditionalism).

60. See, e.g., Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL’Y 485, 490–91 (2008).

Mitchell N. Berman⁶¹ and Stephen E. Sachs,⁶² or theorists of judicial decision-making practices like Bobbitt,⁶³ could be considered purely descriptive theorists. Other constitutional theories make normative claims and prescribe a particular methodology for judges to follow in resolving constitutional disputes (what we might call a theory of “constitutional adjudication”).⁶⁴ These theories have been more common historically⁶⁵ and include the theories of figures like Randy E. Barnett,⁶⁶ Ronald Dworkin,⁶⁷ and David A. Strauss.⁶⁸

Although both types of theories could plausibly be considered “constitutional theories,”⁶⁹ my focus here is on those theories that make normative claims. For that reason, I do not address in detail practice-based theories like Berman’s or Bobbitt’s, even though they are of great importance in the field of constitutional theory. Thus, for simplicity and brevity, when I use the term “constitutional theory” below, I am referring to theories that make normative claims, unless I specify otherwise.

I will first analyze the nature of constitutional theories (as defined above), showing why they necessarily have both descriptive and normative components and how those components relate to each other. I will then explain what makes practice-based constitutional theories distinctive from other constitutional theories.

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61. Mitchell N. Berman & David Peters, *Kennedy’s Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 322–39 (2019).
62. Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL’Y 817, 823–27 (2015). I perceive Stephen E. Sachs to be less focused on normative constitutional theory than William Baude, and I am not the first to perceive this potential difference. See Evan D. Bernick, *Eliminating Constitutional Law*, 67 S.D. L. REV. 1, 4–5 (2022). Insofar as I am mistaken and Sachs seeks to advance a normative argument in favor of originalism, then my criticisms in Part II and Section IV.C would presumably apply just as much to Sachs’s arguments as to Baude’s.
63. BOBBITT, *supra* note 12, at 243–49. Whether Bobbitt intends to offer a normative argument has been a point of dispute. See Fallon, *supra* note 6, at 541 n.13.
64. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823–24 (1997).
65. Mitchell N. Berman, *Our Principled Constitution*, 166 U. PA. L. REV. 1325, 1337–41 (2018).
66. RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 91–119 (2d ed. 2014).
67. RONALD DWORIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 3–38 (1996).
68. STRAUSS, *supra* note 2, at 33–49.
69. *But see* J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1773–75 (2021) (arguing that purely descriptive theories are incomplete theories).

A. *Two Components of Constitutional Theories*

It is widely accepted among scholars that constitutional theories have both normative and descriptive components.⁷⁰ This dual nature of constitutional theories stems from their general objective: to propose a methodology of constitutional adjudication and to offer a justification for that methodology.⁷¹ Because constitutional theories argue that a particular approach to constitutional adjudication in the American system ought to be followed by judges (and perhaps by other constitutional actors),⁷² they are necessarily normative⁷³ since only a normative argument can justify telling judges that they *ought* to follow a particular theory of adjudication.⁷⁴

At the same time, constitutional theories are descriptive in that they acknowledge certain features of the constitutional order as social realities that exist apart from what *ought* to be the case. For example, irrespective of whether we *should* have a written constitution, constitutional theorists acknowledge that we *do*, and that means that any plausible constitutional theory has to account for the constitutional text in at least *some* fashion.⁷⁵ That account might be descriptive or normative, and it might emphasize the text's importance or diminish its relevance. It might, for instance, acknowledge that there is a constitutional text but argue that, as a descriptive matter, the text plays little or no role in the making of constitutional doctrine. Strauss advances this view when he concedes that "[e]veryone agrees that the text of the Constitution matters" in some sense,⁷⁶ yet "[i]n the modal Supreme Court constitutional decision, the text of the Constitution plays no real role at all."⁷⁷ Or a theory might acknowledge that there is a constitutional text but argue that, as a normative matter, the text *should* play little

70. See, e.g., Fallon, *supra* note 6, at 540-41, 545-49; Dorf, *supra* note 1, at 1772; Griffin, *supra* note 1, at 1756; Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 629-30 (1987).

71. Alicea, *supra* note 69, at 1718-22.

72. See, e.g., Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 5-9 (2016).

73. Alicea, *supra* note 69, at 1773-75; Adler, *supra* note 21, at 198; Fallon, *supra* note 6, at 545-49; David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 586-88 (1999); Michael J. Perry, *Why Constitutional Theory Matters to Constitutional Practice (and Vice Versa)*, 6 CONST. COMMENT. 231, 241 (1989).

74. J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 10-11 (2022); Jordan, *supra* note 25, at 1519-23; Fallon, *supra* note 6, at 541 n.13, 545-49.

75. Fallon, *supra* note 6, at 544.

76. Strauss, *supra* note 59, at 880.

77. See, e.g., David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 8 (2015).

or no role, as Louis Michael Seidman does when he urges treating the text “as a work of art, designed to evoke a mood or emotion, rather than as a legal document commanding specific outcomes.”⁷⁸ But a constitutional theory that simply *ignored* the constitutional text—as though it did not exist—would lose “contact with the concrete reality of the law.”⁷⁹ It would be a theory about something—just not a theory about *American* constitutional law.⁸⁰

I want to emphasize that, in saying that constitutional theorists must acknowledge some features of our constitutional order as universally or almost universally accepted parts of our constitutional system, I do not mean that they necessarily have to accept those features as binding or morally legitimate. Indeed, as I will argue below, it is an error for practice-based theorists to move from the *fact* that a practice is universally or almost universally accepted to the *obligation* to conform to that practice. Rather, a theorist could acknowledge that a feature exists and then argue that the feature should be changed or disregarded. For example, as noted above, Seidman acknowledges that we have a constitutional text but argues that the constitutional text is morally illegitimate in whole or in part and should generally be disregarded.⁸¹ He takes the existence of the constitutional text into account, but he does not allow it to constrain his theory in any meaningful way. Another example would be Michael Stokes Paulsen’s theory of *stare decisis*, which acknowledges how courts currently treat precedent but argues that this widespread social practice is illegitimate and should be changed.⁸² Even these constitutional theorists—by arguing that a widely accepted feature should no longer be widely accepted—have a descriptive component to their argument. They acknowledge that a feature *is* accepted and must be taken into account as part of a constitutional theory, even if the theorist takes it into account by denying that it should exist.⁸³

78. See, e.g., LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 8 (2013); Andrew B. Coan, *The Irrelevance of Writtenness in Constitutional Interpretation*, 158 U. PA. L. REV. 1025, 1028 (2010).

79. Raz, *supra* note 47, at 285.

80. Fallon, *supra* note 6, at 549.

81. SEIDMAN, *supra* note 78, at 16-17.

82. Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289-98 (2005).

83. This does not necessarily mean that the theorist is making a descriptive *claim* about our constitutional system; she could simply be making a descriptive *presupposition*. She might, for example, *assume* that *X* is true about our system as a descriptive matter because people generally think that *X* is true, but she could then go on to *assert* that *X* should, as a normative matter, be disregarded. This type of argument would still have a descriptive component—without making a descriptive claim—because it presupposes some descriptive fact as part of its normative argument. I thank Mitch Berman for this clarification.

Both the normative and the descriptive components are necessary if the goal of constitutional theory is to prescribe a particular methodology for resolving disputes under the Constitution. Analogous issues in ethics help us see why that is so. Consider, for example, the ethics of drunk driving. From the fact that driving while intoxicated increases the risk of an accident, it does not follow – absent some normative premise(s) – that driving while intoxicated is immoral. The normative conclusion that drunk driving is immoral cannot be derived from a factual premise.⁸⁴ One would need to insert normative premises such as: (1) increasing the risk to the health or lives of others without good reason is immoral, and (2) there is no good reason to drive drunk. Similarly, a constitutional theory that attempted to move directly from a description of the features of our constitutional system to a prescription for adjudicating constitutional disputes would be attempting to derive a normative conclusion from a factual premise, which is fallacious.⁸⁵

On the other hand, if human beings could drink unlimited quantities of alcohol without becoming intoxicated, the ethics of drunk driving would be different, since presumably this change in the factual premise would mean that the moral argument against drunk driving⁸⁶ would no longer hold. This example shows that we need to know *some* facts about the object of our moral reasoning if we are to reason correctly.⁸⁷ Similarly, a constitutional theory that attempted to move directly from a general moral proposition to a prescription for adjudicating constitutional disputes would be implicitly asserting that facts about the object of moral reasoning are irrelevant, which is an equally fallacious claim.⁸⁸ The normative argument supporting a constitutional theory might differ in a system without a constitutional text.

Just as, in ethics, moral reasoning about human actions requires antecedent knowledge about human beings, in constitutional theory, moral reasoning about

84. ROBERT P. GEORGE, *IN DEFENSE OF NATURAL LAW* 84-85 (1999).

85. Alicea, *supra* note 69, at 1773-75; Jordan, *supra* note 25, at 1519-23; Fallon, *supra* note 6, at 541 n.13, 545-49. Those who reject the is/ought distinction in ethics often do so because they see facts about human nature as carrying intrinsic normative significance. See, e.g., RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* 192 (1987). But the features of a constitutional order that I am describing are human creations that cannot, in any plausible sense, be said to carry intrinsic normative significance. So the is/ought distinction seems sound in this context, even if it is debatable in others.

86. If the moral argument against drunk driving relied on the two normative premises described above, the change in the factual premise (such that drinking alcohol never led to intoxication) would mean that drunk driving would not increase the risk to the health or lives of others.

87. GEORGE, *supra* note 84, at 85.

88. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* 97, 116 (2016); Fallon, *supra* note 6, at 549.

constitutional adjudication requires antecedent knowledge about constitutional features.

B. Defining Practice-Based Constitutional Theories

Practice-based constitutional theories adopt a more robust understanding of the descriptive component than the thin understanding outlined above. The term “practice-based constitutional theories” was coined by Fallon in his landmark article, *How to Choose a Constitutional Theory*.⁸⁹ Fallon described practice-based theories as “[p]roceeding from th[e] assumption” that “the foundation of the constitutional order inheres in the facts of social practice.”⁹⁰ They therefore “look to see what is treated in practice as the Constitution or as possessing the status of constitutional law.”⁹¹

Practice-based constitutional theories generally regard these social facts as having significant normative implications, so much so that they claim that we generally ought to conform our approach to constitutional adjudication to suit the facts of our social practices. For practice-based constitutional theorists, the fact that a proposed methodology would contradict or require significant revision of our social practices is a strong—and sometimes dispositive—reason for rejecting the methodology. Practice-based theories also tend to have a more expansive understanding of which social facts should be treated as given (though this is not always true). This perhaps explains why there is often debate about whether the features these theories embrace are, in fact, deep features of our constitutional system.⁹²

One well-known example of the kind of arguments made by practice-based constitutional theorists is the canonical-case argument referenced above. This argument exemplifies both characteristics of practice-based constitutional theories: the desire to conform methodologies to social practices and an expansive understanding of which practices are foundational. The canonical-case argument identifies one or more cases that the theorist regards as deeply imbedded in our social practices and seeks constitutional methodologies that would produce the results in those canonical cases.⁹³ To the extent that a constitutional methodology is unable to produce the results in those cases, the practice-based

89. Fallon, *supra* note 6, at 550.

90. *Id.* at 542.

91. *Id.*

92. See, e.g., Sachs, *supra* note 20, at 2256, 2276–78.

93. Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* 83–86 (Apr. 3, 2019) (unpublished manuscript), <https://ssrn.com/abstract=2940215> [<https://perma.cc/G9MS-N4PJ>].

constitutional theorist would reject or revise the methodology.⁹⁴ Strauss, for example, identifies the New Deal-era cases that produced a federal government “far beyond anything [the Founders] could have imagined”⁹⁵ as being among those “at the core of American constitutional law,”⁹⁶ and because “[o]riginalism is inconsistent with” the principles of those cases, originalism should be rejected.⁹⁷ Here we see a classic practice-based argument: (1) constitutional theories should conform to our social practices, (2) the decision in case *X* is part of our social practices, (3) originalism would not produce the decision in case *X*, and therefore, (4) originalism should be rejected. Note, too, that it is debatable whether the dramatic expansion of federal power to which Strauss refers truly has become as imbedded in our social practices as he asserts. There have, after all, been popular political movements since the New Deal that have promised to significantly cut back – if not overturn – that expansion of federal power.⁹⁸

Thus, practice-based constitutional theories do not simply account for given features of our constitutional system; they spurn theories that call for changing or abandoning those features in any important or large-scale fashion, often defining the relevant features expansively to include contested aspects of our current constitutional law. This contrasts with non-practice-based theories, whether originalist⁹⁹ or nonoriginalist,¹⁰⁰ which are willing to make significant revisions to our social practices in light of the methodology prescribed by their normative claims. So, for example, Barnett’s originalist theory proceeds from the normative claim that the Constitution, as originally understood, is morally legitimate because its provisions are “necessary to protect the rights of others” and “proper” because they “do not violate the preexisting rights of the [people].”¹⁰¹ It then proposes originalism as necessary to “lock in” this moral legitimacy,¹⁰² and it calls for wide-ranging changes to our social practices as an implication of

94. *Id.*; see, e.g., Jack M. Balkin, *The Distribution of Political Faith*, 71 MD. L. REV. 1144, 1157 (2012); Michael C. Dorf, *Create Your Own Constitutional Theory*, 87 CALIF. L. REV. 593, 594 (1999).

95. STRAUSS, *supra* note 2, at 16.

96. *Id.* at 17.

97. *Id.* at 17–18.

98. See, e.g., 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 50–53 (1991) (describing President Reagan’s political campaign to repudiate parts of the New Deal).

99. See, e.g., WHITTINGTON, *supra* note 19, at 110–59 (adopting a popular-sovereignty-based theory of originalism).

100. See, e.g., SEIDMAN, *supra* note 78, at 11–28 (arguing that the Constitution is not morally binding).

101. BARNETT, *supra* note 66, at 44 (emphases omitted).

102. See *id.* at 105–11.

the theory.¹⁰³ Our social practices might affect how a non-practice-based theorist's normative claims apply in the context of our society (e.g., the normative claim might look different in a society without a written constitution),¹⁰⁴ but the theorist is quite ready to call for significant changes to our social practices, even while acknowledging that the practices exist.

1. Examples

A few examples will make the contours of practice-based constitutional theories clearer.¹⁰⁵ I will only provide a brief description of the theories to give a sense of the role of social practices in their logical structure. I use these examples here because I will return to them throughout the Feature in analyzing the three main justifications for practice-based theories.

The first example is the originalist theory offered by William Baude and Stephen E. Sachs.¹⁰⁶ Baude and Sachs ground their theory in legal positivism, starting from the premises that “what counts as law in any society is fundamentally a matter of social fact”¹⁰⁷ and that theories of legal interpretation can *themselves* be “part of our law.”¹⁰⁸ Baude and Sachs then argue that our social practices treat originalism as the law.¹⁰⁹ That is not to say that the doctrines announced by the Supreme Court generally accord with originalism; they very well may not.¹¹⁰ Rather, “the content of the law depends crucially on the *reasons* [the members of the legal community] cite for [what they do]. So it's perfectly coherent to say . . . that while originalism is the official story of our legal system, many individual cases may turn out to be wrongly decided under that standard.”¹¹¹ That

103. See, e.g., *id.* at 255-71 (proposing a “presumption of liberty”); *id.* at 277-321 (calling into question New Deal-era Commerce Clause doctrine).

104. See, e.g., Alicea, *supra* note 74, at 48-52.

105. Fallon likewise used Ronald Dworkin and David A. Strauss as examples of practice-based theories. See Fallon, *supra* note 6, at 542-44.

106. As noted above, Sachs could be seen as adopting a purely descriptive approach, but I will often refer to him and Baude together at various points in this paper because they have jointly articulated many of the principal features of their theory.

107. Baude & Sachs, *supra* note 7, at 1459 (quoting Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 355, 356 (Jules Coleman ed., 2001)).

108. Sachs, *supra* note 62, at 835; Baude, *supra* note 59, at 2351-52.

109. See Sachs, *supra* note 62, at 844-64; Baude, *supra* note 59, at 2365-86.

110. See Sachs, *supra* note 20, at 2256, 2261-72.

111. Baude & Sachs, *supra* note 7, at 1468; see generally William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUD. 178 (2023) (arguing that the “official story” is relevant to what the law is, even if not followed in practice).

is, “[t]he cases make claims to legal authority that sound in originalism, which is what matters for the official story.”¹¹² Thus, “so long as we agree that government officials should obey the law,”¹¹³ they must be originalists. Constitutional theory should conform to our social practices because our social practices identify what the law is, and we generally agree that we should follow the law. It just so happens that the law in our community is originalist.

But practice-based constitutional theorists are not necessarily positivists, as Dworkin—one of modern positivism’s foremost critics¹¹⁴—demonstrates.¹¹⁵ Dworkin argued that “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.”¹¹⁶ Dworkin’s approach came to be known as fit and justification.¹¹⁷ We are to take the community’s existing legal practices (fit) and find the interpretation of those practices that portrays them in their best light (justification),¹¹⁸ by which Dworkin meant their most morally attractive light.¹¹⁹ 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 make the novel overall the best literary work it could be, legal interpreters must discern a moral principle that fits existing legal practices and choose the principle that casts the law in its best light.¹²⁰ The law should be “morally coherent,” devoid—as far as possible—of internal compromises and contradictions.¹²¹ Doing so ensures that the law has “integrity,” a free-standing moral value that Dworkin argued gave a legal system moral legitimacy.¹²² In Dworkin’s view, then, adhering to our social practices—as interpreted in their best light—is essential to the moral legitimacy of law.

112. Baude & Sachs, *supra* note 7, at 1468; see Sachs, *supra* note 20, at 2268-72; Baude, *supra* note 59, at 2370-86.

113. Baude, *supra* note 59, at 2352.

114. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 14-45 (1978).

115. See Fallon, *supra* note 5, at 1126 n.69.

116. DWORKIN, *supra* note 3, at 225.

117. I am describing Dworkin’s theory as articulated in *Law’s Empire*, without regard to later changes in his theory. See Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 553-58 (2010).

118. DWORKIN, *supra* note 3, at 285.

119. DWORKIN, *supra* note 67, at 10-12.

120. DWORKIN, *supra* note 3, at 228-32.

121. *Id.* at 176.

122. *Id.* at 191-92, 214.

Finally, there is the common-law constitutionalism proposed by Strauss. Strauss provides a descriptive account of our social practices that tries to show that we have a “mixed system, composed of both text and precedent,”¹²³ in which the text of the Constitution is used to resolve “relatively technical” issues but “when the most momentous issues are on the table, the text tends to disappear” in favor of precedent.¹²⁴ Both of these approaches—textual analysis and common-law evolution of doctrine—command respect within their domains because they serve as “bases of agreement that exist within the legal culture” that allow us to “extend those agreed-upon principles to decide the cases or issues on which people disagree.”¹²⁵ Thus, our social practices distinguish between textual analysis in a very limited part of constitutional adjudication and common-law adjudication in the rest, and Strauss argues we should conform to those practices to ensure that we have “ground from which to launch the effort to resolve controversial issues.”¹²⁶

These examples offer a sense of what practice-based constitutional theories are, but it is also important to say what they are *not*. Practice-based constitutional theories are not simply one *type* of constitutional argument. Rather, they are complete theories: they propose a methodology for adjudicating constitutional disputes and offer a justification for that methodology. A practice-based methodology can encompass many types of constitutional arguments. Indeed, several leading practice-based theories are self-consciously pluralist about the types of permissible arguments.¹²⁷ So while a practice-based constitutional theory will include practice-based arguments, it is not reducible to a single kind of practice-based argument.

For example, one form of practice-based argument that has arguably become increasingly important in recent Supreme Court jurisprudence is liquidation.¹²⁸ As Baude described it in his foundational article, liquidation is a form of constitutional argument holding that, where the constitutional text “do[es] not have a fully determined meaning,”¹²⁹ its meaning can be “settled by subsequent

123. Strauss, *supra* note 77, at 13.

124. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1741 (2003).

125. Strauss, *supra* note 73, at 582; see Strauss, *supra* note 124, at 1735-40.

126. Strauss, *supra* note 73, at 586.

127. See Griffin, *supra* note 1, at 1762-67 (describing pluralist theories).

128. See, e.g., *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2136-37 (2022). I cite *Bruen* because it cites the concept of liquidation, but I take no position on whether *Bruen* is, in fact, an example of liquidation properly understood. See DeGirolami, *supra* note 27 (manuscript at 21-22).

129. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 9 (2019).

practice”¹³⁰ to the extent that such practice is “deliberate” and enjoys acquiescence and public sanction.¹³¹ But as those limiting criteria show, liquidation is not a methodology for all or even most constitutional disputes. Rather, it only applies under specific conditions, as one form of argument incorporated into a broader constitutional theory. As Baude writes, liquidation “is not quite an alternative, but rather an adjunct, to more complete methods of constitutional interpretation.”¹³² It “presupposes that one has some other, preexisting theory of constitutional interpretation,” such as originalism.¹³³

Whether a specific practice-based argument is normatively justified would, presumably, depend in part on whether it can be reconciled with the normative justification for the complete theory to which it is an adjunct.¹³⁴ Thus, while one could probe the normative foundations of practice-based arguments like liquidation, that would be a distinct inquiry from examining the normative foundations of complete practice-based theories.

2. *The Traditionalist Subset*

The three examples of practice-based theories that I have chosen above will be part of my focus below because these theories rely on arguments that fail to provide a normative justification even if one accepts them on their own terms. The lack of sufficient justification creates an is/ought problem for these normative constitutional theories. But in defining practice-based theories, it is also helpful to see examples that, while generally arguing for conformity to our social practices, offer normative arguments that, if accepted, *could* suffice to justify such conformity. Traditionalist theories are good examples of this category of practice-based theories.

Traditionalist theories are practice-based theories because they see longstanding practices as constitutive or determinative of constitutional meaning, and they contend that we generally ought to conform constitutional law to the meaning embodied in those practices.¹³⁵ The emphasis on tradition differentiates these theories from originalist theories in at least two ways. First,

130. *Id.*

131. *Id.* at 17-19.

132. *Id.* at 47.

133. *Id.*

134. See *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2162-63 (2022) (Barrett, J., concurring) (noting that “the manner and circumstances in which postratification practice may bear on the original meaning of the Constitution” are “unsettled”).

135. DeGirolami, *supra* note 27 (manuscript at 6). For a description of how some traditionalist theories differ from originalism and living constitutionalism, see Girgis, *supra* note 27 (manuscript at 8-13).

because traditionalist theories focus on practices extended through time, they do not try to capture the meaning of the Constitution at a particular moment, such as 1791 (in the case of the Bill of Rights) or 1868 (in the case of the Fourteenth Amendment).¹³⁶ Rather, they look at a pattern of practice stretching across time, taking into account the “age, longevity, and density” of practices “before, during, and after enactment of a constitutional provision.”¹³⁷ Second, they do not regard practices as “merely *evidence* of meaning, as some originalists say,” but as “generally, presumptively, the determinants of meaning and of law.”¹³⁸ The most prominent traditionalist theories are offered by Marc O. DeGirolami¹³⁹ and Ernest Young,¹⁴⁰ but the two theories should not be equated. Young’s theory focuses on judicial precedents and legal reasoning as the relevant practice,¹⁴¹ whereas DeGirolami’s theory excludes judicial precedent and instead relies on “concrete practices” of “political organs of government” and citizens.¹⁴²

Scholars are paying renewed attention to traditionalist theories in light of the Supreme Court’s October 2021 Term because one could plausibly interpret some of the major cases from that Term as traditionalist.¹⁴³ In *Dobbs*, the Court held that there was no constitutional right to abortion because “an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973.”¹⁴⁴ In *Bruen*, it held that good-cause limitations on the right to carry arms outside the home are unconstitutional because there is no “historical tradition limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense.”¹⁴⁵ And in *Kennedy*, it held that the Establishment Clause allows a public-school football coach to “kne[el] midfield after games to offer a quiet prayer of thanks”¹⁴⁶ because the Clause “must be interpreted by reference to historical practices and

136. See DeGirolami, *supra* note 27 (manuscript at 19).

137. *Id.* (manuscript at 6).

138. *Id.* (manuscript at 15).

139. See *id.* (manuscript at 6); Marc O. DeGirolami, *First Amendment Traditionalism*, 97 WASH. U. L. REV. 1653, 1661-67 (2020); Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 NOTRE DAME L. REV. 1123, 1125 (2020).

140. See Young, *supra* note 9, at 686-89.

141. *Id.* at 691-94.

142. DeGirolami, *supra* note 27 (manuscript at 6-7).

143. See *supra* notes 27-31 and accompanying text.

144. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2253-54 (2022).

145. *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2138 (2022).

146. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2415 (2022).

understandings.”¹⁴⁷ Each of these decisions accounted for longstanding practices pre- and postdating ratification.

Despite their focus on practice, I do not address traditionalist theories below. Unlike the three practice-based theories described above, they have – at least in the case of Young’s theory¹⁴⁸ – offered normative arguments that, if accepted, could suffice to justify general adherence to our social practices. Like Burke, Young argues that traditions are both more trustworthy sources of knowledge than individual reason¹⁴⁹ and embody the intergenerational obligations rooted in our social nature as human beings.¹⁵⁰ Thus, tradition has a presumptive normative force to it: we ought to conform to our traditional practices because not doing so is likely to lead us into error and damage the duties binding the living, the dead, and those yet to be born.

One might disagree with these normative claims or with the conclusion that they result in traditionalism rather than some other theory of constitutional adjudication. For instance, I have argued that Burkean political theory leads to popular sovereignty as the basis for the Constitution’s moral legitimacy,¹⁵¹ and I have also argued that only originalism respects popular sovereignty in the American context.¹⁵² Thus, I have previously provided reasons why originalism, rather than traditionalism, is the logical conclusion of the moral premises from which some traditionalists proceed. Nonetheless, these normative claims, if true, could, in principle, support adhering to traditional practices. They are not the same as the justifications surveyed below that could not, even if accepted, provide a normative basis for the theories they purport to uphold.¹⁵³

147. *Id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)) (quotation marks omitted).

148. DeGirolami has acknowledged that he has only “beg[u]n to probe what moral reason one might have to be a traditionalist when confronted with the claim that tradition has no moral force.” DeGirolami, *supra* note 27 (manuscript at 32). His theory’s normative justifications are, therefore, too underdeveloped at this point to be subjected to the kind of analysis I offer below.

149. Young, *supra* note 9, at 644-50.

150. *Id.* at 650-53.

151. J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145, 1182-94 (2022).

152. Alicea, *supra* note 74, at 43-53.

153. Because Strauss relies on Burkean arguments, I should explain why I argue below that Strauss’s theory lacks a normative justification, even while contending that Young’s theory has a sufficient normative foundation. Both Strauss and Young rely on Burkean arguments about epistemological humility to justify common-law evolution of doctrine through precedent. See Alicea, *supra* note 69, at 1761. However, unlike Young, Strauss rejects Burkean arguments that the dead have the authority to bind the living. *Id.* at 1755-56. These Burkean arguments presumably form the basis for Young’s contention that we are bound by the text when it is

3. *Complications and Tensions*

This overview of practice-based constitutional theories elides many complications and internal tensions, of which I will mention only a few.

Practice-based constitutional theories regard our social practices as foundational to what the law is, but they disagree about *which* social practices matter.¹⁵⁴ Some look almost exclusively to Supreme Court precedent;¹⁵⁵ others to the entire body of positive law.¹⁵⁶ Some focus on the types of arguments invoked by lawyers and judges;¹⁵⁷ others on the arguments made by the general public through social and political movements.¹⁵⁸ As Matthew D. Adler has observed, one of the striking facts about constitutional theory discourse is “the *heterogeneity* of appeals to social facts.”¹⁵⁹

All of these different theories can be described as “practice-based” because the term “practice” is often understood by constitutional theorists as a broad concept that can encompass various phenomena. Fallon has defined the term as “an activity constituted by the normative understandings, behaviors, and expectations of its participants.”¹⁶⁰ Similar definitions have been proposed by Rawls¹⁶¹

“sufficiently clear,” even in the face of a contrary tradition. Young, *supra* note 9, at 689. Strauss is therefore forced to rely on some other justification for adhering to clear text. That is where his overlapping-consensus argument comes in, *see* Strauss, *supra* note 59, at 906-11, which fails on its own terms for the reasons discussed in Section IV.C. Thus, although Strauss and Young both offer common-law-based theories of adjudication, they are significantly different in their normative justifications. The result is that Young’s justifications could, if accepted, support his practice-based theory, while Strauss’s could not.

154. Adler, *supra* note 21, at 197.

155. *See, e.g.*, STRAUSS, *supra* note 2, at 12-16.

156. *See, e.g.*, DWORKIN, *supra* note 3, at 245.

157. *See, e.g.*, Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987) (providing a normative theory relying on the arguments of lawyers and judges); BOBBITT, *supra* note 12, at 3-119 (providing a descriptive theory relying on the arguments of lawyers and judges).

158. *See, e.g.*, 1 ACKERMAN, *supra* note 98, at 266-94.

159. Adler, *supra* note 21, at 197.

160. Fallon, *supra* note 5, at 1112 (first citing ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 187-88 (2d ed. 1984); and then citing Thomas Morawetz, *Commentary: The Rules of Law and the Point of Law*, 121 U. PA. L. REV. 859, 859-60 (1973)); *see also* FALLON, *supra* note 4, at 87-92 (describing the practice-based theory of law).

161. John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 3 n.1 (1955).

and Berman,¹⁶² though some have argued for different understandings of a “practice.”¹⁶³

The disagreement over which practices should be the focus of constitutional theory leads to disagreement about whether a theory – had it been faithfully applied by judges throughout our history – should be able to produce something roughly like the current state of our constitutional law and be able to anticipate and explain how the law will develop in the future. Some theorists, for example, would see it as a significant strike against a theory if it were inconsistent with major decisions of the New Deal Court or the Warren Court (most notably *Brown v. Board of Education*)¹⁶⁴ since that would mean that the theory could not “describ[e] and explain[] how the Court interprets the Constitution.”¹⁶⁵ Others define the relevant social practices at a higher level of generality than individual Supreme Court decisions and are not bothered by inconsistency between their theory and modern constitutional doctrine.¹⁶⁶

Finally, although many practice-based theories are progressive in political theory and nonoriginalist in methodology,¹⁶⁷ they do not all fall within those categories. Here, Fallon’s typology fares a little less well. He distinguished practice-based theories from “text-based” constitutional theories, which “rest their claim to acceptance on their fit with, or their capacity to explain, the written Constitution.”¹⁶⁸ He believed that “[a] clear example” of a text-based constitutional theory “is originalism, which calls for the Constitution to be interpreted in accordance with the ‘original understanding’ of those who wrote and ratified relevant language and the generation to which the Constitution was originally addressed.”¹⁶⁹ But as the work of Baude and Sachs demonstrates, there are

162. Mitchell N. Berman, *How Practices Make Principles, and How Principles Make Rules* 7 (U. Pa. L. Sch. Pub. L. & Legal Theory Rsch. Paper No. 22-03, 2022), <https://ssrn.com/abstract=4003631> [<https://perma.cc/3Q2X-72B7>].

163. See, e.g., ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 187 (3d ed. 2007) (defining practices in relation to virtue); Michael Sean Quinn, *Practice-Defining Rules*, 86 *ETHICS* 76, 77-83 (1975) (disagreeing with John Rawls’s definition and arguing that a person can be engaged in a practice even if they do not follow the rules of that practice).

164. See, e.g., STRAUSS, *supra* note 2, at 12-16; Dorf, *supra* note 1, at 1768-69; Fallon, *supra* note 157, at 1213.

165. Griffin, *supra* note 1, at 1756.

166. Sachs, *supra* note 20, at 2260-78; see also Baude & Sachs, *supra* note 7, at 1468 (“[I]t’s perfectly coherent to say (as we have) that while originalism is the official story of our legal system, many individual cases may turn out to be wrongly decided under that standard.”).

167. See Alicea, *supra* note 69, at 1750-63.

168. Fallon, *supra* note 6, at 541.

169. *Id.*

originalist versions of practice-based constitutional theories,¹⁷⁰ just as traditionalist theories are philosophically conservative practice-based constitutional theories.¹⁷¹

* * *

Fallon's typology focused on the thing or phenomenon that a constitutional theory sought to explain or to which the theory conformed. A practice-based theory seeks to explain or conform to our social practices, while a text-based theory seeks to explain or conform to the constitutional text.¹⁷² In this way, his typology turned on the descriptive component of constitutional theories;¹⁷³ he did not focus extensively on the normative reasons why practice-based constitutional theorists regard our social practices as important.¹⁷⁴ Fallon was not alone in this. Few scholars have systematically examined the normative justifications that practice-based constitutional theorists give for their methodologies.¹⁷⁵ A more extensive examination of the justifications for practice-based constitutional theories is needed, and it is to that examination that I now turn.

II. LEGAL POSITIVISM

One of the most striking features of practice-based constitutional theories is how often they rely on legal positivism. Legal positivism is a jurisprudential theory, a theory about what law is.¹⁷⁶ Its basic assertion—at least in its modern form¹⁷⁷—is that law is fundamentally a matter of social fact; social facts determine what propositions we can call “law.”¹⁷⁸

170. See *supra* Section I.B.1.

171. See DeGirolami, *supra* note 27 (manuscript at 32-43); Young, *supra* note 9, at 650-59, 688-91; Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509, 515-23 (1996).

172. Fallon, *supra* note 6, at 541-42.

173. See *id.* at 541 n.16.

174. Though he did analyze that question briefly. See *id.* at 554-57.

175. See *supra* note 26 (noting the few exceptions).

176. HART, *supra* note 37, at 6-13.

177. The dominant form of legal positivism prior to Hart's was John Austin's, which (essentially) defined law as the command of a superior to an inferior backed by the threat of sanctions. See JOHN AUSTIN, LECTURES ON JURISPRUDENCE: THE PHILOSOPHY OF POSITIVE LAW 11-17 (Robert Campbell ed., New York, Henry Holt & Co. 1875).

178. Baude & Sachs, *supra* note 7, at 1459; FALLON, *supra* note 4, at 89-90; Barzun, *supra* note 42, at 1361; Shapiro, *supra* note 42, at 238-39.

There are many varieties of positivism, but the most influential account among constitutional theorists is the one offered by Hart.¹⁷⁹ Hart argued that a legal system consists of two general categories of rules: primary and secondary.¹⁸⁰ Primary rules are rules governing conduct: rules under which “human beings are required to do or abstain from certain actions, whether they wish to or not.”¹⁸¹ Secondary rules are rules about making or altering primary rules: they specify how “human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.”¹⁸² “Rules of the first type impose duties; rules of the second type confer powers, public or private.”¹⁸³ Among the secondary rules is the “rule of recognition,” which provides criteria for the assessment of the validity of other rules.¹⁸⁴ There might be multiple rules of recognition in a legal system, though Hart presupposed that there would be a single, ultimate rule of recognition governing the validity of *all other* rules.¹⁸⁵

Hart also distinguished between two perspectives from which to view rules: internal and external. What defines the internal perspective is “that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified.”¹⁸⁶ Those adopting the internal point of view employ

179. Baude & Sachs, *supra* note 7, at 1459. As Baude and Sachs observe, despite the many varieties of positivism that have emerged since Hart, Hartian positivism remains “the focal point among American law professors (to the extent that they think about such theories at all).” *Id.* at 1463. It therefore makes sense to focus on Hart here. In any event, because *any* form of positivism lacks normative premises not already incorporated into positive law, see Barzun, *supra* note 42, at 1341; Shapiro, *supra* note 42, at 238-39; Greenawalt, *supra* note 70, at 626, all forms of positivism would presumably be subject to the same objection I offer below. That is why, for instance, John Finnis – despite generally abjuring labels like “positivism” – can argue that legal positivism “never coherently reaches beyond reporting attitudes and convergent behaviour (perhaps the sophisticated and articulate attitudes that constitute a set of rules of recognition, change, and adjudication).” John Finnis, *Propter Honoris Respectum: On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1611 (2000).

180. See HART, *supra* note 37, at 94. There are subcategories of rules within these categories. See *id.* at 94-97.

181. *Id.* at 81.

182. *Id.*

183. *Id.*

184. *Id.* at 105; *id.* at 94-95; Shapiro, *supra* note 42, at 238.

185. HART, *supra* note 37, at 107; Larry Alexander & Frederick Schauer, *Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION, *supra* note 21, at 175, 176-77; Shapiro, *supra* note 42, at 238.

186. HART, *supra* note 37, at 57; see *id.* at 98.

“the normative terminology of ‘ought’, ‘must’, and ‘should’, ‘right’ and ‘wrong’” when referring to the common standards at issue.¹⁸⁷ By contrast, the external point of view is that of an observer of the rules in question who does not regard herself as bound by them, as a historian or a sociologist might study a foreign legal culture and “state[] the fact that others accept” the rules.¹⁸⁸

Putting these distinctions to work, Hart argued that the “necessary and sufficient” conditions for a legal system were that “those rules of behaviour [that is, primary rules] which are valid according to the system’s ultimate criteria of validity [specified by secondary rules] must be generally obeyed,” and “its rules of recognition specifying the criteria of legal validity . . . must be effectively accepted as common public standards of official behaviour by its officials.”¹⁸⁹ This second criterion reflects the importance of the internal point of view:¹⁹⁰ “[O]fficials of the system” must “regard [the rules of recognition] as common standards of official behaviour and appraise critically their own and each other’s deviations as lapses.”¹⁹¹ Thus, to restate Hart’s criteria for a legal system: the rule of recognition (a secondary rule) must be accepted by officials as a common standard for determining the validity of other rules (i.e., they must adopt the internal point of view toward the rule of recognition), including the primary rules, and those primary rules must generally be obeyed. Under this framework, law ultimately rests on social facts: facts about what officials *treat* as law.¹⁹² If officials – adopting the internal point of view – treat a rule as a rule of recognition, then that rule supplies criteria for the validity of *other* rules. “[T]he key social facts for Hart are facts about what officials do and say.”¹⁹³

Practice-based constitutional theorists often explicitly rely on Hart’s concept of law. As noted above, Baude and Sachs’s theory argues that originalism is recognized as part of our law as a matter of social fact,¹⁹⁴ and they describe themselves as having “adopted the generally Hartian version of positivism” in constructing their argument.¹⁹⁵ According to Baude, because originalism is our law, judges must follow it if they believe that they should follow the law.¹⁹⁶ Fallon builds his account of the legal legitimacy of the Constitution on Hartian

187. *Id.* at 57.

188. *Id.* at 103.

189. *Id.* at 116.

190. Shapiro, *supra* note 42, at 238–39.

191. HART, *supra* note 37, at 117; *see id.* at 102–03.

192. Greenawalt, *supra* note 70, at 626.

193. Barzun, *supra* note 42, at 1345 (emphasis omitted).

194. *See supra* Section I.B.1.

195. Baude & Sachs, *supra* note 7, at 1463.

196. Baude, *supra* note 59, at 2352.

positivism (i.e., the Constitution is law because it is accepted as such as a matter of social fact),¹⁹⁷ and he expressly relies on Hartian positivism as the reason why he looks to social practices in constructing his constitutional theory.¹⁹⁸ Strauss links his Hartian positivism to his general belief (discussed in more detail in Section IV.B below) that constitutional theory should identify legal principles that are based on “widespread agreement in society” in order to serve as a common ground for making constitutional decisions.¹⁹⁹ Others, such as Berman, agree with Hart’s fundamental premise that law is grounded in social facts but modify Hart’s positivism to avoid substantial criticisms of it.²⁰⁰

It is not surprising that modern legal positivism plays such a prominent role in practice-based constitutional theories. Legal positivism locates the definition and grounding of law in social practices, and it therefore makes intuitive sense that a constitutional theory based on legal positivism would reflect this focus on social practices.²⁰¹ But our question is whether legal positivism can provide a *normative basis* for a constitutional theory that, as defined above, proposes a methodology for resolving legal disputes.

And on that score, the answer is “no.” A central – perhaps *the* central – tenet of legal positivism is that law is best defined apart from moral evaluation. “The label ‘positive’ implies that the facts [that identify what law is] are meant to be nonmoral facts or what Mark Greenberg calls ‘descriptive facts,’ to be contrasted with moral or ‘value facts.’”²⁰² Hart was quite clear about this in rejecting any necessary connection between law and morality.²⁰³ Indeed, legal positivism’s *lack* of normative premises is a major reason constitutional theorists like Baude and Sachs are drawn to it; they contend that it holds out the promise of being able to avoid resolving intractable normative questions.²⁰⁴ Rather, legal positivism is, in Hart’s words, a form of “descriptive sociology.”²⁰⁵

Yet, as Jeffrey A. Pojanowski and Kevin C. Walsh have observed, “[e]ven if descriptive legal sociology can identify a unanimous, objective ‘is’ about our legal practices, it offers no reason why legal officials ‘ought’ to maintain that

197. FALLON, *supra* note 4, at 83-87.

198. *Id.* at 87-92; Fallon, *supra* note 6, at 546-48.

199. Strauss, *supra* note 73, at 589; see Strauss, *supra* note 77, at 53.

200. Berman & Peters, *supra* note 61, at 330-35; Berman, *supra* note 65, at 1358-70.

201. There is obvious overlap between Hart’s definition of the internal point of view and Fallon’s description of “practices” described in Section I.B.3 above.

202. Barzun, *supra* note 42, at 1341; see Shapiro, *supra* note 42, at 238-39; Greenawalt, *supra* note 70, at 626.

203. HART, *supra* note 37, at 200-12.

204. Baude, *supra* note 59, at 2352; see Sachs, *supra* note 62, at 823-28; Barzun, *supra* note 42, at 1325.

205. HART, *supra* note 37, at vi.

practice.”²⁰⁶ Insofar as the law is, ultimately, identified solely by reference to social facts, the identification of the law can provide no reason for action. That is to say, even if we can identify what the law is according to a positivist definition of law, that would not give us any reason to *obey* the law or to *apply* it in a specific way to resolve legal disputes.²⁰⁷ Deciding to obey the law and selecting an adjudicative methodology are matters of practical reason, meaning they require normative arguments that legal positivism cannot supply.²⁰⁸ “Absent something more to get from ‘is’ to ‘ought,’” building a constitutional theory on legal positivism “is at best redundant and at worst depends on a non sequitur . . . [S]uch reportage does not give *any*, let alone ‘the *best* reason to be an originalist’ or the ‘*best* reason not to.’”²⁰⁹

The descriptive nature of positivism is not a problem if the constitutional theorist seeks only to present an accurate depiction of how our legal system works, without offering a theory of how one ought to adjudicate cases. Berman and Sachs, for instance, seem much more concerned with identifying *what* the law is (from a positivist viewpoint) than with providing a normative theory of adjudication.²¹⁰ The problem occurs if the theorist purports to offer a theory that judges *ought* to follow in adjudicating cases. As Baude recognizes, if “originalists and their critics are ultimately arguing about how judges *ought* to decide cases,” then “the question remains how this descriptive [positivist] account of our legal practice has normative implications.”²¹¹

Nor can a positivist theorist—insofar as they hope to offer a theory of adjudication—get around the need to offer a normative argument by proposing a division of labor between descriptions of what the law is and normative claims about whether and how to apply the law. One could interpret Baude and Sachs as making a version of this proposal: we take no position on whether you should

206. Pojanowski & Walsh, *supra* note 88, at 114; see Kenneth Einar Himma, *Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 21, at 95, 95.

207. RONALD DWORKIN, *The Model of Rules II*, in *TAKINGS RIGHTS SERIOUSLY* 46, 48–58 (1978); see also Andrew Jordan, *The (Ir)relevance of Positivist Arguments for Originalism*, 56 *LOY. L.A. L. REV.* 937, 947–54 (2023) (discussing normativity and positivist theories of law and concluding that “one cannot infer that there is reason to conform to the practice merely from the existence of the practice”); Shapiro, *supra* note 42, at 247–48, 258–59 (conceding the normative inertness of positivism while offering the concept of “legal” normativity to attempt to answer the objection).

208. See Alicea, *supra* note 69, at 1775; Jordan, *supra* note 25, at 1519–23; Pojanowski & Walsh, *supra* note 88, at 113–15.

209. Pojanowski & Walsh, *supra* note 88, at 114 (quoting Sachs, *supra* note 62, at 822).

210. See Sachs, *supra* note 62, at 823–27; Berman & Peters, *supra* note 61, at 323–30; Berman, *supra* note 65, at 1337–44.

211. Baude, *supra* note 59, at 2392.

feel bound by the Constitution, but insofar as you do (for whatever good or bad normative reasons), *it follows that you must adjudicate cases using originalism*, since the original meaning of the Constitution – as a purely descriptive matter – is recognized as what the Constitution *is* within the context of our society. But as I have argued elsewhere, the reasons for obeying the Constitution (i.e., a theory of constitutional legitimacy) can affect how one ought to adjudicate cases under the Constitution.²¹² A theorist cannot remain indifferent to the purported basis for the Constitution’s legitimacy while proposing a theory of adjudication, since the former can affect the latter.²¹³

None of this is to dispute the merits of legal positivism. My point is to show the limits of legal positivism’s ability to serve as a basis for a constitutional theory. Indeed, many positivist practice-based theorists who *do* offer theories of adjudication agree that positivism cannot supply a normative reason for adhering to social practices. They provide some normative reason *outside* of legal positivism to justify obeying the law. Baude, for instance, has pointed to oath theory,²¹⁴ and Fallon has developed a self-consciously thin theory of moral legitimacy to justify adhering to the Constitution.²¹⁵ These theorists confirm that legal positivism, while having a logical relationship to practice-based constitutional theories, cannot – by itself – justify adopting those theories.

But if most positivist constitutional theorists seem to agree that positivism does not supply a normative justification, why take the trouble to emphasize that it cannot supply such a justification? The reason is that there is something of a disconnect between positivists’ acknowledgement of the is/ought distinction and how positivists’ writings on this subject might be received by readers, a point surfaced by the work of Pojanowski and Walsh,²¹⁶ Evan D. Bernick,²¹⁷ and Andrew Jordan.²¹⁸ When practice-based theorists contend that positivism is “the best reason” to adopt their theory,²¹⁹ readers can “slip into a kind of naïve

212. Alicea, *supra* note 74, at 11-13.

213. *Id.*; see generally Andrew Coan, *Amending the Law of Constitutional Interpretation*, 13 DUKE J. CONST. L. & PUB. POL’Y 85 (2018) (arguing that normative theory can affect one’s theory of interpretation, even in the face of a contrary law of interpretation). *But see* Stephen E. Sachs, *The Law and Morals of Interpretation*, 13 DUKE J. CONST. L. & PUB. POL’Y 103, 107-10 (2018) (arguing that the positive law affects normative obligation). The relationship goes both ways: normative claims can affect how we regard positive law, and positive law can affect normative claims. See Alicea, *supra* note 74, at 11-13, 48-51.

214. Baude, *supra* note 59, at 2392-97.

215. FALLON, *supra* note 4, at 24-35.

216. Pojanowski & Walsh, *supra* note 88, at 103, 109, 114, 116.

217. Bernick, *supra* note 62, at 4-5.

218. Jordan, *supra* note 25, at 1520 n.13.

219. Sachs, *supra* note 62, at 822.

metaphysical mode of reasoning and thinking about constitutionality” in which they pay insufficient attention to the is/ought distinction, thereby confusing a *descriptive claim* about what law is for a *normative claim* about whether to obey the law.²²⁰ This mistake is easy enough to make as constitutional theorists give increased attention to legal positivism as a potential basis for their constitutional theories, as part of the so-called “positive turn” toward theories of what law is.²²¹ So it is important to be clear that, while legal positivism may, at first glance, look like a normative justification for practice-based constitutional theories, that justification must lie elsewhere.

III. REFLECTIVE EQUILIBRIUM

A potentially more plausible normative justification for practice-based constitutional theories can be derived from the concept of reflective equilibrium. Reflective equilibrium is a term associated with Rawls, who described it in *A Theory of Justice (ATJ)*.²²² Rawls sought to identify principles of justice that would “defin[e] the fundamental terms of the[] association” among people in society, “regulat[ing] all further agreements” and “specify[ing] . . . the forms of government that can be established.”²²³ He proposed that these principles could be best identified by imagining that “those who engage in social cooperation” find themselves in “the original position,” a situation whose “essential features” include “that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like.”²²⁴ Indeed, they do not even know “their conceptions of the good or their special psychological propensities.”²²⁵ Behind this “veil of ignorance,” the participants choose the principles of justice.²²⁶ Rawls argued that, because the principles would be chosen in this position of

220. Jordan, *supra* note 25, at 1520 n.13.

221. Barzun, *supra* note 42, at 1325-27; see also Mitchell N. Berman, *Keeping Our Distinctions Straight: A Response to Originalism: Standard and Procedure*, 135 HARV. L. REV. F. 133, 137-40 (2022) (discussing the distinction between theories of law and theories of adjudication); Coan, *supra* note 26, at 871-72 (discussing constitutional theorists’ historical focus on how the law should be decided, not how it is decided).

222. RAWLS, *supra* note 38, at 17-18, 42-45.

223. *Id.* at 10; Samuel Freeman, *Introduction: John Rawls – An Overview*, in THE CAMBRIDGE COMPANION TO RAWLS, *supra* note 47, at 1, 3.

224. RAWLS, *supra* note 38, at 10-11.

225. *Id.* at 11.

226. *Id.*; see JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 83 (Erin Kelly ed., 2001); Freeman, *supra* note 223, at 10-14.

fairness, we could have confidence that the principles would be just – hence his description of his thesis as “justice as fairness.”²²⁷

But how do we know if the artificial conditions that specify the original position, as well as the principles of justice chosen in the original position, are justified? Rawls’s answer was the process leading to reflective equilibrium. Reflective equilibrium describes a state in which our considered judgments about particular matters, the principles chosen in the original position, and the conditions of the original position cohere with each other,²²⁸ where “cohere” means “something like ‘mutually supporting’” and internally consistent.²²⁹ Considered judgments are “questions which we feel sure must be answered in a certain way,” such as that “religious intolerance and racial discrimination are unjust.”²³⁰ To have such confidence in these judgments, they must be “rendered under conditions favorable to the exercise of the sense of justice,” circumstances “in which our moral capacities are most likely to be displayed without distortion.”²³¹

Rawls posited that those in the original position would choose principles of justice under the constraints of the original position, see if those principles generated our considered judgments on various matters, and, if they did not, modify either the principles or the considered judgments to produce coherence between our principles and our considered judgments.²³² Insofar as we decide to revise the principles rather than the judgments, that might require revising the conditions of the original position so that the position can produce principles that cohere with our judgments.²³³ In this way, “we work from both ends” – the beginning of the chain of reasoning in the form of the conditions of the original position and the end of the chain of reasoning in the form of considered judgments – “going back and forth” between the conditions of the original position, our principles, and our considered judgments, “sometimes altering the conditions” and other times “withdrawing our judgments and conforming them to principle.”²³⁴ We continue this process until we reach a “state of affairs” in which “our principles and judgments coincide”: the state of reflective equilibrium.²³⁵

227. RAWLS, *supra* note 38, at 11; see John Mikhail, *Rawls’ Concept of Reflective Equilibrium and Its Original Function in A Theory of Justice*, 3 WASH. U. JURIS. REV. 1, 9-10 (2010).

228. RAWLS, *supra* note 38, at 17-18, 42-45; Mikhail, *supra* note 227, at 11-13.

229. Raz, *supra* note 47, at 277.

230. RAWLS, *supra* note 38, at 17.

231. *Id.* at 42.

232. *Id.* at 17-18, 42-43; Mikhail, *supra* note 227, at 11-13; Lawrence B. Solum, *Situating Political Liberalism*, 69 CHI.-KENT L. REV. 549, 553-54 (1994).

233. RAWLS, *supra* note 38, at 18; RAWLS, *supra* note 226, at 30.

234. RAWLS, *supra* note 38, at 18.

235. *Id.*; *id.* at 43; see Mikhail, *supra* note 227, at 14-15; Scanlon, *supra* note 47, at 140-41.

Two important clarifications. First, Rawls insisted that our considered judgments were “*provisional* fixed points” that were subject to change through the process culminating in reflective equilibrium.²³⁶ Second, Rawls observed that the kind of reflective equilibrium “that one is concerned with in moral philosophy” was one in which we are “presented with all possible descriptions to which one might plausibly conform one’s judgments together with all relevant philosophical arguments for them.”²³⁷ That is, Rawls urged what has since come to be called “wide reflective equilibrium,” a kind of reflective equilibrium in which we have considered “the leading conceptions of political justice found in our philosophical tradition (including views critical of the concept of justice itself . . .)” and “weighed the force of the different philosophical and other reasons for them.”²³⁸ Thus, Rawlsian reflective equilibrium requires taking into account all possible conceptions of justice, the arguments for those conceptions, our considered judgments about specific issues, and the conditions of the original position to ensure coherence among them.²³⁹

This form of reflective equilibrium—when deployed in moral and political philosophy—makes an epistemological claim: insofar as we attain reflective equilibrium, we are justified in holding our principles and considered judgments,²⁴⁰ where “justified” means “supported by good and sufficient reasons.”²⁴¹ Rawls made clear that he did not regard justified beliefs as necessarily being true; reflective equilibrium only shows that they are reasonable (and, therefore, justified to that extent).²⁴² Coherentist epistemological theories are usually contrasted with foundationalist theories, which have a linear quality and assert that certain conclusions “follow[] as a matter of course from some other belief[s] that [the person] take[s], even implicitly, as foundationally true.”²⁴³ Unlike coherentist theories, in which “we work from both ends” of a logical chain from premises to conclusions and modify each to ensure coherence with the other,²⁴⁴ foundationalist theories would start from one end of the logical chain with

236. RAWLS, *supra* note 38, at 18 (emphasis added).

237. *Id.* at 43.

238. RAWLS, *supra* note 226, at 31.

239. See Joseph Raz, *The Claims of Reflective Equilibrium*, 25 INQUIRY 307, 308 (1982).

240. See Berman, *supra* note 47, at 259; Scanlon, *supra* note 47, at 140; Raz, *supra* note 47, at 276; Kress, *supra* note 47, at 369.

241. Scanlon, *supra* note 47, at 140.

242. See RAWLS, *supra* note 53, at xxii, 48-54, 94, 394-95. Rawls’s attempt to construct a theory of justice apart from what is true is one of the reasons why his theory ultimately fails. See John Finnis, *Liberalism and Natural Law Theory*, 45 MERCER L. REV. 687, 699-700 (1994); Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFFS. 3, 4-15 (1990).

243. Berman, *supra* note 47, at 260; see Kress, *supra* note 47, at 370.

244. RAWLS, *supra* note 38, at 18.

foundationally true premises and reason to conclusions, “treat[ing] some judgments as ‘bedrock’” and “not revisable in light of others.”²⁴⁵ But the key point is that coherentist theories—like Rawls’s theory of reflective equilibrium—make claims about the conditions that allow us to assert that some proposition is justified.

Practice-based constitutional theorists often present their constitutional methodologies either as a *form* of reflective equilibrium or as justified by reflective equilibrium.²⁴⁶ Dworkin’s law-as-integrity theory could be seen as an example of the former: his methodology is ostensibly a form of reflective equilibrium insofar as he seeks to make the relevant legal materials and the results in legal disputes “morally coherent,” devoid as far as possible of internal compromises and contradictions.²⁴⁷ One could therefore see Dworkin as going back and forth between legal principles and the results in specific cases to bring them into coherence.²⁴⁸ Many theorists—including, arguably, Rawls himself²⁴⁹—have interpreted Dworkin in exactly this way,²⁵⁰ though it must be said that there is a decades-long debate about the relationship between Dworkin’s theory and Rawls’s.²⁵¹

By contrast, some theorists treat reflective equilibrium not as their methodology but as a way of *justifying* their methodology.²⁵² The canonical-case argument has this coherentist structure. It identifies the outcome in a canonical case—such as *Brown*—and takes it to be the legal equivalent of a Rawlsian considered judgment.²⁵³ Then, it seeks to identify constitutional methodologies that would produce the result in that canonical case. To the extent that a constitutional methodology is unable to produce the result in the canonical case, these

245. Berman, *supra* note 47, at 259. Non-practice-based theories have something akin to a foundationalist character: they are willing to significantly revise social practices in light of premises they take to be foundationally correct. See *supra* Section I.B; Berman, *supra* note 47, at 260.

246. See Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 *GEO. J.L. & PUB. POL’Y* 287, 328–29 (2020) (drawing this distinction and suggesting that Fallon might be employing reflective equilibrium in both ways).

247. DWORKIN, *supra* note 3, at 176.

248. See *id.* at 424 n.17.

249. RAWLS, *supra* note 53, at 236 n.23.

250. See, e.g., Solum, *supra* note 246, at 329; Ken Kress, *Coherence and Formalism*, 16 *HARV. J.L. & PUB. POL’Y* 639, 653 (1997); Michael P. Zuckert, *The New Rawls and Constitutional Theory: Does It Really Taste That Much Better?*, 11 *CONST. COMMENT.* 227, 228 (1994); Paul F. Campos, *Secular Fundamentalism*, 94 *COLUM. L. REV.* 1814, 1826–27 (1994).

251. See Solum, *supra* note 232, at 559–60.

252. See Solum, *supra* note 246, at 328.

253. See, e.g., FALLON, *supra* note 4, at 144–47; STRAUSS, *supra* note 2, at 12–16; Dorf, *supra* note 1, at 1767.

theorists would revise the methodology to ensure coherence with the canonical case.²⁵⁴ As noted above, Strauss employs this form of argument to justify his rejection of originalism since he argues that originalism cannot cohere with our considered judgments about important or canonical constitutional disputes.²⁵⁵ He contends that his common-law constitutionalist methodology is more justified than originalism because it can produce our considered judgments in canonical cases.²⁵⁶ Thus, while Strauss – unlike Dworkin – does not present his methodology as a *form* of reflective equilibrium,²⁵⁷ he uses something like reflective equilibrium to justify his methodology.²⁵⁸

In assessing the way practice-based constitutional theorists employ reflective equilibrium, I will assume that reflective equilibrium justifies the beliefs brought into coherence.²⁵⁹ I also concede that, insofar as reflective equilibrium can justify beliefs, it could, in principle, be used to identify and justify the correct constitutional methodology. If a theorist used reflective equilibrium to bring their beliefs into coherence (subjecting all their beliefs to potential revision in the process), and if those beliefs logically required adopting a particular methodology, and if the theorist was willing to revise any social practices inconsistent with that methodology, then the methodology would ostensibly be justified.²⁶⁰

The problem is not with employing reflective equilibrium *in general*; the problem is with employing reflective equilibrium to justify *practice-based* constitutional theories. The key mistake of practice-based constitutional theorists is in treating our social practices as the equivalent of considered judgments, thereby making them part of the raw material that needs to be brought into reflective equilibrium. Treating social practices like considered judgments leads down one of two paths, both of which are untenable. Either we will use reflective equilibrium in a way that will give us no reason to believe that the resulting constitutional theory is justified, or we will use it in a way that is incompatible with the nature of practice-based theories.

254. FALLON, *supra* note 4, at 144-47; Dorf, *supra* note 94, at 594. One might also characterize Frederick Schauer's "easy cases" argument along these lines. See Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407 (1985).

255. STRAUSS, *supra* note 2, at 12-16.

256. See *id.* at 44; Strauss, *supra* note 77, at 28-30.

257. Strauss, *supra* note 59, at 896 (rejecting the law-as-integrity theory).

258. *Id.* at 888-89 (explicitly invoking reflective equilibrium to justify his methodology).

259. For reasons to doubt that coherence justifies beliefs, see Raz, *supra* note 47, at 275-82.

260. Raz noted this possibility, see Raz, *supra* note 47, at 285-86, but he rejected it because "[n]obody has ever suggested a view of law which allows for it," *id.* at 286. As discussed below, some practice-based theorists could be interpreted as making precisely the argument that Raz said no one makes, but the argument is incompatible with the nature of practice-based theories. See *infra* text accompanying note 274.

The first situation obtains if we decide to accept certain social practices or other features of our law as fixed, as not subject to revision. The canonical-case argument is one way in which we could go down this path: “*Brown* ha[s] become a canonical case in American constitutional law – a fixed point whose validity ha[s] to be presumed by any viable account of constitutional theory.”²⁶¹ The idea that there are certain “fixed points” in American law is common in constitutional theory,²⁶² canonical cases being just one variant of this more general form of argument. Another example would be that “sometimes the text is decisive” in resolving constitutional disputes.²⁶³ Insofar as we start from the position that there are certain cases that cannot be considered wrong or certain types of arguments or principles that are out of bounds (e.g., that the text of the Constitution should never be considered binding), we are accepting that some features of our constitutional system are *fixed*, not provisional.

But as noted above, reflective equilibrium can only justify beliefs insofar as everything being brought into reflective equilibrium is *provisional*, not fixed, at least until we achieve a state of reflective equilibrium. It is essential to reflective equilibrium’s justification-proving function that “considered judgments are not fixed inputs but are open to constant modification.”²⁶⁴ Otherwise, the process leading to reflective equilibrium will produce a coherence in which we can have no confidence. If, for example, we started the process leading to reflective equilibrium with considered judgments “conceived in prejudice and superstition,” and we kept those judgments fixed, we could still produce a coherent set of beliefs – but they would be nonsensical.²⁶⁵ “The racist’s belief in the untrustworthiness of members of a certain race, bred of prejudice, is not justified even if it coheres best with all the racist’s other (mostly racist) beliefs.”²⁶⁶ We could find ourselves in the position of Chesterton’s Maniac: holding coherent beliefs that, due to some erroneous premises, are nonetheless insane.²⁶⁷ Coherence, by itself, gives us no reason to believe that particular beliefs are *justified*. The beliefs being

261. Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 782 (2004).

262. See, e.g., Cass R. Sunstein, “Fixed Points” in *Constitutional Theory* (Harv. Pub. L. Working Paper, Paper No. 22-23, 2022), <https://ssrn.com/abstract=4123343> [<https://perma.cc/AL76-ADMM>].

263. Strauss, *supra* note 59, at 881.

264. Scanlon, *supra* note 47, at 152.

265. Raz, *supra* note 47, at 280; see Raz, *supra* note 239, at 309.

266. Raz, *supra* note 47, at 280; see Scanlon, *supra* note 47, at 145-46.

267. G.K. CHESTERTON, ORTHODOXY (1908), reprinted in 1 THE COLLECTED WORKS OF G.K. CHESTERTON 216, 222-25 (2002).

brought into coherence must be subject to scrutiny and revision if their coherence is to have any epistemic value.²⁶⁸

Thus, when constitutional theorists treat social practices as the equivalent of fixed beliefs and then attempt to bring them into coherence with other beliefs, they give us no sound reason to believe that the resulting set of coherent beliefs is justified. Cass R. Sunstein has made precisely this point in contrasting the analogical-reasoning characteristic of the common law with reflective equilibrium: “Unlike morality, in which revisability is a key aspect of the search for reflective equilibrium, the law tends to fix many particular judgments.”²⁶⁹ This “produces principled consistency, at best, and not truth at all.”²⁷⁰ As noted above, if we were constitutional theorists living before *Brown*, we might very well take *Plessy* as a fixed point in constitutional law,²⁷¹ and the coherent set of beliefs we would produce using that fixed point would be morally (and legally) appalling.

To their credit, some practice-based constitutional theorists implicitly acknowledge this by insisting that their considered judgments about law—and any social practices treated as equivalent to considered judgments—are provisional and subject to revision.²⁷² But denying that any of our social practices are fixed runs into a different problem: it is contrary to the nature of practice-based theories. If the idea behind practice-based theories is to root our constitutional theories in our social practices, then it cannot be the case that all our social practices are subject to revision, since that leads to the logical possibility that the constitutional theory produced in a state of equilibrium will be one with little or no relation to our social practices. To take an extreme example: faced with a lack of coherence between various moral principles on the one hand and the Constitution and the common law on the other, it would be possible that we would produce a theory that called for discarding the Constitution and the entirety of the common law. But such a theory would have no connection to our legal or social reality, even though the purpose of the practice-based theory was to ground constitutional theory in our social practices. There would be nothing, in principle, to prevent a theorist from producing a theory that they could just as easily have produced without taking into consideration any American social practices. And that is contrary to the nature of *practice-based* constitutional

268. See Scanlon, *supra* note 47, at 149-53.

269. Sunstein, *supra* note 49, at 778; see also *id.* at 782-83 (explaining why analogical reasoning is preferable to reflective equilibrium for sustaining “the system of precedent”).

270. *Id.* at 777.

271. See Greene, *supra* note 19, at 412-17; KLARMAN, *supra* note 19, at 302-08; WHITTINGTON, *supra* note 19, at 169.

272. See, e.g., FALLON, *supra* note 4, at 142-44; Berman, *supra* note 47, at 261, 268; Strauss, *supra* note 59, at 894-97.

theories, which “cannot consider more than a certain percentage” of our practices to be mistaken.²⁷³

Indeed, the problem with treating our social practices like considered judgments runs even deeper, for there is little reason to have confidence that fixed points in our law are likely to have been made under the conditions of Rawlsian considered judgments²⁷⁴ or to believe that our law is or can be made coherent.²⁷⁵ The laws of a given society are *human creations* that are at least partly the result of contingent political, economic, and social factors.²⁷⁶ *United States v. Windsor*²⁷⁷ and *Obergefell v. Hodges*,²⁷⁸ for instance, might be thought by most theorists to have already become fixed points in our law or to be likely to achieve that status.²⁷⁹ But those 5-4 decisions were only possible due to Justice Anthony Kennedy’s nomination in 1988, which itself “came only after a spectacular combination of strategic blunders and humiliating revelations that led a White House in the final months of Ronald Reagan’s presidency to grab desperately on to the last confirmable man standing.”²⁸⁰ It required an extraordinary confluence of contingent factors – from the timing of Justice Lewis Powell’s retirement in 1987, rather than one or two years earlier, to Republicans’ loss of the Senate in 1986, to the revelation of the Iran-Contra scandal in November 1986 and the consequent collapse of President Reagan’s approval rating, to the inept political response of the

273. Larry Alexander & Ken Kress, *Against Legal Principles*, 82 IOWA L. REV. 739, 766 (1997); see Raz, *supra* note 47, at 285-97.

274. See Alexander & Kress, *supra* note 273, at 766.

275. See Raz, *supra* note 47, at 293-95.

276. For those readers approaching constitutional theory from a natural-law perspective, I should clarify that I am not denying that positive law – to approximate the focal meaning of law – must accord with the natural law, which is coherent. See THOMAS AQUINAS, *SUMMA THEOLOGIAE* pt. I-II, q. 90, art. 4 (Fathers of the Eng. Dominican Province trans., 2d & rev. ed. 1920); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9-11 (2d ed. 2011). My point is simply that positive law is human-made law, and that means both that (1) the positive law will – due to human fallibility – sometimes fail to accord with the natural law (and thus fail to reflect the coherence of the natural law), even in a just society, and (2) positive laws will often fail to cohere *with each other* even if those laws *do* accord with (in the sense of not contradicting) the natural law, since two laws can be consistent with the natural law without cohering with each other. Thus, even if one were to refuse to call laws in the first category “laws” and disregard them from the reflective-equilibrium analysis, see FINNIS, *supra*, at 9-11, the second category of laws (called “determinations” in the natural-law tradition) would still show that we have no reason to expect law to be coherent.

277. 570 U.S. 744 (2013).

278. 576 U.S. 644 (2015).

279. See, e.g., Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 143, 160 (2013).

280. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 37 (2007).

Reagan White House to the criticisms of Robert Bork's nomination, to the surprise scandal that engulfed the intended nomination of Douglas Ginsburg²⁸¹ — to produce *Windsor* and *Obergefell* almost three decades later. And that does not even account for the other, remarkable confluence of contingent factors that led to the nomination of Justice David Souter,²⁸² whose unexpected jurisprudential views presumably led him to step down during the Barack Obama presidency rather than during the George W. Bush or Donald Trump presidency, leading to the appointment of Justice Sonia Sotomayor, a member of the 5-4 *Windsor* and *Obergefell* majorities.

Given that human law is, in part, the result of such contingent factors, even relatively fixed points in our law may not have been “rendered under conditions favorable to the exercise of the sense of justice,” circumstances “in which our moral capacities are most likely to be displayed without distortion.”²⁸³ That is not to deny that these fixed points might be correct; it is only to deny that we can have confidence in their correctness simply by virtue of their relative fixity in our law.

Nor — in light of such contingent factors — is there good reason to expect the law of any given society to be coherent.²⁸⁴ As Joseph Raz once observed, “The reality of politics leaves the law untidy. Coherence is an attempt to prettify it and minimize the effect of politics.”²⁸⁵ Because the processes that produce human law resist the coherentist impulse, any attempt to make it appear coherent will result in a contrived coherence, one that *imposes* consistency on legal materials that have no *inherent* consistency. There is no reason to believe that such a manufactured coherence justifies the legal materials brought into reflective equilibrium. That is not to deny that we should try to make the law as coherent as possible; it is only to deny that making law coherent is a sufficient reason to think the resulting body of law is justified.

Again, a few practice-based constitutional theorists implicitly recognize this and appeal to some reason why bringing our social practices into coherence is valuable *other than* the justification-proving function of reflective equilibrium. Dworkin famously argued that coherence in the law serves the value of integrity,²⁸⁶ and he contended that integrity — as a freestanding political value — made

281. See *id.* at 37-63.

282. See *id.* at 87-107.

283. RAWLS, *supra* note 38, at 42.

284. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1748, 1750 & n.54 (1995); Raz, *supra* note 47, at 295 (“[G]iven the vagaries of politics . . . there is no reason to expect the law to be coherent.”).

285. Raz, *supra* note 47, at 310.

286. See DWORKIN, *supra* note 3, at 190-92, 216.

political authority more legitimate.²⁸⁷ Strauss argues that having a theory that reflects our social practices serves the value of overcoming political disagreements by giving us common ground,²⁸⁸ a point to which I will return in Section IV.B. Irrespective of whether these arguments are sound, the key point is that coherence is being used in the service of some end *other than* the one for which reflective equilibrium was used by Rawls: to demonstrate that some set of beliefs is justified. Instead, coherence is serving some other normative value, which means that *that value* requires justification apart from coherence. Dworkin²⁸⁹ and Strauss,²⁹⁰ as well as Fallon²⁹¹ and other theorists who invoke reflective equilibrium, offer such justifications. But the foregoing shows that it is *those justifications*, not reflective equilibrium, that is doing the normative work in their theories. It is not reflective equilibrium that (ostensibly) justifies Dworkin's practice-based theory; it is the value of integrity, a value that must, in turn, be justified apart from whether the law is or can be made coherent. We must therefore look somewhere other than the concept of reflective equilibrium for a normative justification for practice-based constitutional theories.

IV. STABILITY AND DISAGREEMENT

We arrive at the final justification invoked by some of the leading practice-based theorists: Rawls's concern with the fact of reasonable pluralism,²⁹² the problem that this poses for stability, and his proposed solution of an overlapping consensus. This is the most complex justification, and it accordingly requires more extensive discussion. I do not contend that all or even most practice-based constitutional theorists explicitly or implicitly rely on the idea of an overlapping consensus, but some of the most important practice-based constitutional theorists do.

I will first discuss the fact of reasonable pluralism, the problem of stability, and the concept of an overlapping consensus as understood in Rawls's work. Then, I will show how these ideas fit into the logical structure of two major practice-based constitutional theories. This will set up my argument that practice-based constitutional theorists conceive of stability and the role of an overlapping consensus in a subtly but significantly different way than Rawls did. Whereas Rawls employed an overlapping consensus on the *principles of justice*, practice-

287. See *id.* at 191-92.

288. See Strauss, *supra* note 73, at 582-86.

289. See DWORKIN, *supra* note 3, at 186-224.

290. See Strauss, *supra* note 73, at 582-86; Strauss, *supra* note 124, at 1720, 1726-27.

291. See FALLON, *supra* note 4, at 147-48.

292. I use "reasonable pluralism" and "reasonable disagreement" interchangeably below.

based constitutional theorists employ an overlapping consensus on our *social practices*. But unlike Rawls's principles of justice, we have no reason to believe—absent further argument—that our social practices are just. Therefore, the stability created by an overlapping consensus on our social practices is not one that we can confidently say is normatively justified. To show that their theories produce a *just stability*, practice-based theorists have to provide a normative argument in favor of our social practices which, as with positivism and reflective equilibrium, must come from *outside* of the arguments from stability and overlapping consensus. Thus, we again have a transient justification: one that requires some normative argument from outside of itself to justify practice-based constitutional theories. I will conclude by briefly sketching what role stability concerns should play in constitutional theory.

I emphasize that my argument assumes that Rawls's theory as modified by *Political Liberalism* is correct; one need not disagree with Rawls to agree with me. Only in Part V will I depart from Rawls in sketching my own view of how stability fits into constitutional theory.

A. *Rawls, the Problem of Stability, and the Overlapping Consensus*

As noted above, in *ATJ*, Rawls sought to identify and justify principles of justice that would “defin[e] the fundamental terms of the[] association” among people in society, “regulat[ing] all further agreements” and “specify[ing] . . . the forms of government that can be established.”²⁹³ He aimed to show that his conception of justice was “more *reasonable* than another.”²⁹⁴ The first two parts of *ATJ* were devoted to this justificatory task.²⁹⁵ But Rawls also thought that it was necessary to show that his conception of justice would be more *stable* than rival conceptions,²⁹⁶ where a conception of justice is more stable than its rivals if “the sense of justice that it tends to generate is stronger and more likely to override disruptive inclinations and if the institutions it allows foster weaker impulses and temptations to act unjustly.”²⁹⁷ This was the task of Part Three of *ATJ*,²⁹⁸ and understanding Rawls's concern about stability and his proposed solution is essential to understanding the practice-based constitutional theories discussed in Sections IV.B-C below.

293. RAWLS, *supra* note 38, at 11.

294. *Id.* at 17 (emphasis added).

295. RAWLS, *supra* note 53, at 140-41 n.7.

296. *See* RAWLS, *supra* note 38, at 454.

297. *Id.*

298. RAWLS, *supra* note 53, at 140-41 n.7; Scanlon, *supra* note 47, at 158.

Here, we enter into somewhat fraught territory, since scholars disagree about Rawls's understanding of the problem of stability and its relationship to the changes to his theory that he made in *Political Liberalism* (*PL*).²⁹⁹ I will present what I believe to be the most plausible understanding of Rawls's writings.³⁰⁰ However, even if the reader disagrees with my interpretation, that would not affect the substance of my argument about practice-based constitutional theories, since the defect in those theories that I identify exists apart from the proper interpretation of Rawls's work. Thus, while I argue in Section IV.C that practice-based theorists both (1) misapply Rawls's concepts and (2) in doing so, produce theories that have no persuasive normative justification, only the latter needs to be true for my argument to succeed. Nonetheless, demonstrating that practice-based theorists misapply Rawls's concepts is important because it shows that, even on their own terms, the Rawlsian arguments of practice-based theorists cannot support conforming constitutional theory to our social practices. My summary will, of necessity, leave out important parts of Rawls's argument that have less relevance to my purposes here, as Rawls's overall theory is enormously ambitious and complex. But I hope to convey the main points that are relevant to assessing practice-based constitutional theories.

Rawls's argument about stability begins with his concept of a "well-ordered society."³⁰¹ A well-ordered society is one "in which everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy these principles."³⁰² This type of society "is also regulated by its public conception of justice. This fact implies that its members have a strong and normally effective desire to act as the principles of justice require."³⁰³ Such a society is "an ideal social world," since "it is desirable that people know and freely accept the principles of justice regulating their basic social institutions."³⁰⁴ Thus, we should aim for a society in which people freely act justly, rather than being compelled to do so through force, and which requires

299. See Freeman, *supra* note 223, at 35-36 (describing disagreement about whether Rawls meant for the overlapping consensus to affect his argument in Part One of *A Theory of Justice* (*ATJ*)); PAUL WEITHMAN, WHY POLITICAL LIBERALISM? ON JOHN RAWLS'S POLITICAL TURN 17-41 (2010) (same); Heidi M. Hurd, *The Levitation of Liberalism*, 105 YALE L.J. 795, 805-24 (1995) (reviewing RAWLS, *supra* note 53) (same).

300. My interpretation of Rawls on these points is influenced by the works of Samuel Freeman and Paul Weithman. For some of these works, see Freeman, *supra* note 223; WEITHMAN, *supra* note 299; Samuel Freeman, *Political Liberalism and the Possibility of a Just Democratic Constitution*, 69 CHI.-KENT L. REV. 619 (1994).

301. RAWLS, *supra* note 38, at 397; see Freeman, *supra* note 223, at 21.

302. RAWLS, *supra* note 38, at 397; see RAWLS, *supra* note 53, at 35.

303. RAWLS, *supra* note 38, at 398; see RAWLS, *supra* note 53, at 35.

304. Freeman, *supra* note 223, at 21.

that they come to see acting justly as part of *their own good*, not merely the good of others.³⁰⁵

Here we might ask: did Rawls not already show that his principles of justice were part of each person's own good in Parts One and Two of *ATJ* since these principles were selected by the participants in the original position? No, he only showed (if he did) that his conception of justice was more reasonable and, therefore, more justified than its rival conceptions. He did not show that acting justly is better for each person in society (given their own unique situation that was abstracted away in the original position) than pursuing other goods that a person might be able to achieve by acting *unjustly*.³⁰⁶ That is, "[i]t must be shown why people have sufficient reason, from within their individual perspectives, to observe and act on requirements of justice when these requirements constrain or oppose other ends and commitments they have."³⁰⁷ One way in which this problem can manifest itself is a "generalized prisoner's dilemma"³⁰⁸: "if each person thinks others will act justly, then every person's balance of reasons seems to tilt against acting justly himself."³⁰⁹ This, fundamentally, is the problem of stability: a conception of justice "must normally win out against propensities toward injustice"³¹⁰ that result from a person viewing their situation from the perspective of their own self-interest.³¹¹ The conception of justice "must promote or affirm their *good*" if it is to be stable.³¹² Thus, "a political conception is *just* only if it is *reasonable*" from the perspective of the original position in reflective equilibrium, "[a]nd it is *stable* only so long as it is *rational* for the great majority of people to act on that conception's principles and incorporate it into their conceptions of the good."³¹³

In Part Three of *ATJ*, Rawls attempted to show that acting in accordance with the principles of justice is rational for each member of society by demonstrating that "justice is in [each individual's] interest, because by acting on and from principles of justice, they fully realize their own capacity for a sense of

305. See RAWLS, *supra* note 53, at 143-44; WEITHMAN, *supra* note 299, at 5-6; Freeman, *supra* note 223, at 21-22.

306. In explaining this interpretation of Rawls's argument, I take no position on whether the distinction he drew was sound or compatible with his larger theory. See Hurd, *supra* note 299, at 805-16.

307. Freeman, *supra* note 300, at 626; see RAWLS, *supra* note 53, at 48-54.

308. RAWLS, *supra* note 38, at 505.

309. WEITHMAN, *supra* note 299, at 47; see *id.* at 46-49.

310. RAWLS, *supra* note 38, at 398.

311. RAWLS, *supra* note 53, at 52-53; Freeman, *supra* note 223, at 24-25.

312. Freeman, *supra* note 300, at 626.

313. *Id.* at 627; see WEITHMAN, *supra* note 299, at 49-57, 61-62.

justice, and therewith the intrinsic good of moral autonomy.”³¹⁴ This “congruence” argument was rooted in a Kantian understanding of the good.³¹⁵ Explaining the congruence argument would require too much space here,³¹⁶ and in light of subsequent changes to Rawls’s stability argument in *PL* that are the focus of practice-based constitutional theories, it is not essential to describe the congruence theory. The important point, for our purposes, is that Rawls sought in Part Three of *ATJ* to show – based on Kantian moral philosophy – that acting justly is in each person’s interest because doing so affirms their own good.³¹⁷

But Rawls came to see this solution to the stability problem as “not consistent with [his] view as a whole.”³¹⁸ The source of the inconsistency was what Rawls called “the fact of reasonable pluralism,”³¹⁹ the reality that “[a] modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines.”³²⁰ Comprehensive doctrines are broad ethical frameworks like utilitarianism or natural-law theory; “[t]hey are comprehensive in that they relate typically to a very wide range of moral and political phenomena.”³²¹ In Rawls’s view, pluralism of reasonable comprehensive doctrines “is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.”³²² This pluralism “shows that, as used in [*ATJ*], the idea of a well-ordered society of justice as fairness is unrealistic,”³²³ since the stability of such a society in *ATJ* was based on all citizens accepting a Kantian comprehensive doctrine.³²⁴ No such uniformity of comprehensive doctrines can be presupposed in a free society like the one Rawls had in mind.³²⁵ The problem of stability had to be reframed to take into account the fact of reasonable pluralism: “How is it possible that deeply opposed

314. Freeman, *supra* note 300, at 632; see RAWLS, *supra* note 38, at 450-514.

315. See Freeman, *supra* note 223, at 25-28.

316. For in-depth explanations, see WEITHMAN, *supra* note 299, at 183-233; and Samuel Freeman, *Congruence and the Good of Justice*, in *THE CAMBRIDGE COMPANION TO RAWLS*, *supra* note 47, at 277, 283-303.

317. See WEITHMAN, *supra* note 299, at 7.

318. RAWLS, *supra* note 53, at xviii.

319. *Id.* at xix.

320. *Id.* at xviii.

321. Zuckert, *supra* note 250, at 232; see RAWLS, *supra* note 53, at 58-66.

322. RAWLS, *supra* note 53, at xviii; see *id.* at 36-38.

323. RAWLS, *supra* note 53, at xix.

324. See *id.* at xviii, 388 n.21; RAWLS, *supra* note 226, at 186-87; Freeman, *supra* note 223, at 30; Scanlon, *supra* note 47, at 158-59; Freeman, *supra* note 316, at 303-08.

325. See RAWLS, *supra* note 53, at xviii, 36-38, 146-47, 388 n.21; Freeman, *supra* note 223, at 30-31; Freeman, *supra* note 300, at 632.

though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime?”³²⁶ Thus, in *PL*, while leaving Parts One and Two of *ATJ* “substantially the same,”³²⁷ he significantly revised his proposed solution to the stability problem that he had developed in Part Three of *ATJ*.³²⁸

Rawls’s revised solution to the stability problem was his concept of an “overlapping consensus.”³²⁹ An overlapping consensus occurs when each citizen, viewing her situation from *within her own* comprehensive doctrine, can accept the principles of justice and see them as conducive to her own good.³³⁰ The principles of justice become the common ground among differing comprehensive doctrines, such that each one—for *its own internal reasons*—can agree that acting in accordance with the principles of justice is rational.³³¹ Thus, a Kantian, a utilitarian, and a Thomist can all agree on the principles of justice “as explained within [each of their] own framework.”³³² If this can be achieved—and Rawls argued that it can³³³—then the principles of justice will not only be the most *reasonable* principles because they are chosen in the original position and in reflective equilibrium *independent of* any comprehensive doctrine. They will also be the most *stable* principles because they can be affirmed from within the *internal* perspective of each citizen’s comprehensive doctrine.³³⁴ In this way, the fact of reasonable pluralism becomes not a hindrance to stability but an integral part of achieving it.

There is much that this brief summary elides or does not fully explain. Rawls’s distinction between the reasonable and the rational;³³⁵ his explanation

326. RAWLS, *supra* note 53, at xx; see Zuckert, *supra* note 250, at 232.

327. RAWLS, *supra* note 53, at xviii; see Freeman, *supra* note 300, at 630, 637.

328. Freeman, *supra* note 300, at 622, 627-33; see Freeman, *supra* note 223, at 3; Solum, *supra* note 232, at 555.

329. RAWLS, *supra* note 53, at 144; see Scanlon, *supra* note 47, at 159-60.

330. See RAWLS, *supra* note 53, at xxi, 38-40, 134.

331. *Id.*; Freeman, *supra* note 300, at 640. T.M. Scanlon provides an excellent, concise description of the relationship between comprehensive doctrines and the political conception of justice. See Scanlon, *supra* note 47, at 159-60.

332. RAWLS, *supra* note 53, at 143.

333. For a detailed explanation of the argument, see WEITHMAN, *supra* note 299, at 270-300.

334. RAWLS, *supra* note 53, at 24-26, 144-45; Freeman, *supra* note 223, at 36-37; Freeman, *supra* note 300, at 627, 636-37.

335. See RAWLS, *supra* note 53, at 48-54; RAWLS, *supra* note 226, at 6-7, 82; WEITHMAN, *supra* note 299, at 7, 60; Freeman, *supra* note 223, at 31-32; Burton Dreben, *On Rawls and Political Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS*, *supra* note 47, at 316, 321-22; Solum, *supra* note 232, at 564-65. The distinction between the reasonable and rational is implicit in what I have said above regarding the argument of Parts One and Two of *ATJ* (which concerns the reasonable) and the argument of Part Three (which concerns the rational).

of political liberalism as a freestanding conception of justice;³³⁶ the two distinct questions raised by the problem of stability;³³⁷ and the many implications of Rawls's overlapping consensus (e.g., the idea of public reason)³³⁸ are just a few of the important concepts that I have not explored in detail here. While essential to fully understanding Rawls's theory, these concepts are not essential to fully understanding the relationship between Rawls's theory and practice-based constitutional theories. As we will now see, the fact of reasonable pluralism, the problem of stability, and the idea of an overlapping consensus have had a profound effect on major practice-based constitutional theorists, even if they were not influenced by Rawls directly.

B. *The Overlapping Consensus in Practice-Based Constitutional Theories*

What is the goal—or at least a goal—of constitutional theory? For practice-based constitutional theorists explicitly or implicitly influenced by Rawls, the answer is some version of the following: a constitutional theory should allow us to resolve constitutional disputes while minimizing the need to resolve deep normative disagreements.³³⁹ These theorists observe the fact of reasonable pluralism, perceive the threat it poses to the stability of our constitutional order, and attempt to draw upon points of overlapping consensus to craft a constitutional theory that provides a stable, shared basis for resolving constitutional disputes.³⁴⁰

Strauss provides the most explicit example of this internal theoretical structure.³⁴¹ He points out that the breakdown of widely shared religious beliefs “in

336. RAWLS, *supra* note 53, at 11-15; see Freeman, *supra* note 223, at 33-35.

337. RAWLS, *supra* note 53, at 141-42; see also Freeman, *supra* note 223, at 24-25 (describing stages of the stability argument); Freeman, *supra* note 300, at 638 (same).

338. See RAWLS, *supra* note 53, at 212-54; Freeman, *supra* note 223, at 37-44.

339. This understanding of the purpose of constitutional theory can also be found in some theories that one might not consider practice based. See, e.g., Solum, *supra* note 246, at 323-24 (arguing that, because “[c]onstitutionalism aims to provide a framework for the resolution of disagreement in a pluralist society,” constitutional theories should use “[b]road reflective equilibrium” as “the basis for an overlapping consensus on the appropriate principles for the guidance of constitutional practice”).

340. Cass R. Sunstein's approach of judicial minimalism and incompletely theorized agreements shares many of these features, though it differs from Rawls's theory in important ways. See CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 46-48 (1998); see also CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 27-30 (2005) (describing minimalists' views). But it is more of an antitheory than a practice-based theory, so I do not discuss it below. See Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 9-10 (1998).

341. See Greene, *supra* note 26, at 2930.

a liberal society” deprives us of a common moral framework within which to analyze “ultimate questions about the bases of the authority of the state.”³⁴² Constitutional theories must, therefore, “justify a set of prescriptions about how certain controversial constitutional issues should be decided . . . by drawing on the bases of agreement that exist within the legal culture and trying to extend those agreed-upon principles to decide the cases or issues on which people disagree.”³⁴³ Constitutional theories do this by “track[ing] existing practices to a significant degree.”³⁴⁴ For Strauss, one of those existing practices is the widespread acceptance of specific provisions of the Constitution as definitive resolutions of otherwise contestable questions.³⁴⁵ Another is the widespread acceptance of certain Supreme Court decisions,³⁴⁶ such as *Brown*.³⁴⁷ These practices provide “common ground among people who otherwise disagree,”³⁴⁸ and they allow each citizen to “fully endorse the common ground arguments” from within their own normative perspectives.³⁴⁹ Thus, Strauss expressly states that his practice-based constitutional theory is an adaptation of Rawls’s overlapping consensus.³⁵⁰

Other practice-based constitutional theorists are less explicit about the Rawlsian nature of their justifications, but the influence of Rawls’s concepts is there. For instance, it is a striking fact that Baude and Sachs emphasize that their theory provides the purported benefit of being able to avoid resolving deep normative disagreements by substituting widely shared social practices and normative commitments drawn from our existing culture. Sachs articulates the concern about the fact of reasonable pluralism: “When the law deserves our obedience is a question of ethics and politics that’s been debated since long before the Constitution was written. If we can’t resolve our disagreements about the Commerce Clause without first solving the problem of political obligation, our situation hasn’t improved.”³⁵¹ We therefore need, in Baude’s words, a constitutional theory in which “neither the conceptual nor normative justifications need to bear as much weight.”³⁵² As Baude frames the argument: if originalism is the law (based on social practices), and if judges agree that they have an obligation to obey the

342. Strauss, *supra* note 73, at 589; see Strauss, *supra* note 124, at 1720.

343. Strauss, *supra* note 73, at 582; see Strauss, *supra* note 124, at 1738-40.

344. Strauss, *supra* note 73, at 586.

345. See STRAUSS, *supra* note 2, at 102-04; Strauss, *supra* note 124, at 1733-35.

346. See Strauss, *supra* note 124, at 1737-38.

347. STRAUSS, *supra* note 2, at 14-15; Strauss, *supra* note 73, at 584-85.

348. Strauss, *supra* note 124, at 1725.

349. *Id.* at 1739; see *id.* at 1720.

350. *Id.* at 1720, 1726, 1735-36.

351. Sachs, *supra* note 62, at 827 (footnote omitted).

352. Baude, *supra* note 59, at 2352.

law (i.e., if there is an overlapping consensus on obedience to the law, as a social practice, based on whatever internal, comprehensive doctrines judges might believe), then judges have an obligation to be originalist.³⁵³ Baude argues that his “much thinner and more broadly accepted” normative justification for originalism is superior to “first-order normative justifications” (i.e., justifications that depend on comprehensive doctrines) over which there is substantial disagreement.³⁵⁴ That is why, as Baude and Sachs describe it, their arguments proceed from a “positivist premise [that] fits within an overlapping consensus among American legal scholars,” a consensus “that appeals to the broadest possible audience without requiring too many controversial assumptions.”³⁵⁵

I am not claiming that all practice-based constitutional theorists are influenced by the concepts of stability and overlapping consensus. Fallon, for instance, could be understood as rejecting those elements of Rawls’s theory.³⁵⁶ Nor am I claiming that the theories of Strauss, Baude, and Sachs perfectly map onto Rawls’s concepts. Indeed, as I will now show, practice-based constitutional theorists tend to understand the concepts of stability and overlapping consensus in a significantly different way than Rawls did, with the result that their theories lack a compelling normative justification.

C. *The Misuse of the Overlapping Consensus*

The key mistake made by practice-based constitutional theorists is that they overlook the significance of the fact that the *object* of their overlapping consensus is different from Rawls’s. This has the effect of making the kind of stability they produce different from Rawls’s. Rawls employed an overlapping consensus on *principles of justice*, and because he had already (ostensibly) proven that those principles were just, the overlapping consensus would produce a *just stability*. Practice-based constitutional theorists attempt to employ an overlapping consensus on *social practices*, and absent some normative argument justifying those practices, they will produce a *morally indifferent stability*. The result is that we have no good reason for accepting these practice-based constitutional theories as normatively justified.

Put another way, practice-based constitutional theorists divorce Rawls’s justificatory argument in Parts One and Two of *ATJ* from his stability argument in

353. *Id.* at 2352-53. Baude makes clear that a judge can accept the obligation to obey the law based on different internal normative justifications. *See id.* at 2394-95.

354. *Id.* at 2392.

355. Baude & Sachs, *supra* note 7, at 1459.

356. *See* FALLON, *supra* note 4, at 25-28.

Part Three of *ATJ* as revised in *PL*. As outlined above,³⁵⁷ Rawls's argument in Parts One and Two of *ATJ* was intended to show that the principles of justice were justified – that they were “supported by good and sufficient reasons.”³⁵⁸ His overlapping-consensus argument in *PL* was intended to address the problem of stability identified in Part Three of *ATJ*: how can we have confidence that the (previously justified) principles of justice will be freely accepted and obeyed by members of a well-ordered society given the fact of reasonable pluralism?³⁵⁹ Rawls correctly saw that an overlapping consensus could not be divorced from the justification achieved by the original position and reflective equilibrium.³⁶⁰ Otherwise, we could end up with a consensus on principles that are *unjust*, which is *not* “the kind of stability” that Rawls sought to achieve (or that we should seek to achieve).³⁶¹

Rawls anticipated that the idea of an overlapping consensus could be “easily misunderstood given the idea of consensus used in everyday politics.”³⁶² He imagined that some readers might think that an overlapping consensus involved “look[ing] to the comprehensive doctrines that in fact exist and then draw[ing] up a political conception that strikes some kind of balance of forces between them,” creating “a kind of average” of comprehensive views that all members of society could accept.³⁶³ Rawls clarified: “This is not how justice as fairness proceeds; to do so would make it political *in the wrong way*.”³⁶⁴ Rather, the proper course was to first identify the principles of justice through the device of the

357. See *supra* notes 222–295 and accompanying text.

358. Scanlon, *supra* note 47, at 140.

359. See RAWLS, *supra* note 53, at 142–43.

360. *Id.* at 133–34, 140–41 (describing the two stages of his argument); see also Freeman, *supra* note 300, at 627 (“To summarize, a political conception is *just* only if it is *reasonable*. For Rawls this ultimately means it must match our considered moral judgments of justice in reflective equilibrium.”); WEITHMAN, *supra* note 299, at 47–57, 61–62 (discussing Rawls’s treatment of stability through an example drawn from game theory). I emphasize again that I am assuming, for the sake of the argument, that Rawls’s justification for the principles of justice in Parts One and Two of *ATJ* succeeded. In truth, I do not think it did. See *infra* notes 420–422 and accompanying text. But even if it did not, the point is that Rawls correctly saw the need to justify the object of the overlapping consensus.

361. RAWLS, *supra* note 53, at 142.

362. *Id.* at 39.

363. *Id.*

364. *Id.* at 39–40 (emphasis added); see also *id.* at 170–71 (“[T]he acceptance of the political conception is not a compromise between those holding different views, but rests on the totality of reasons specified within the comprehensive doctrine affirmed by each citizen.”); RAWLS, *supra* note 226, at 188 (“[W]e do not look to the comprehensive doctrines that in fact exist and then draw up a political conception that strikes some kind of balance of forces between them.”).

original position in which “we leave aside how people’s comprehensive doctrines connect with the content of the political conception of justice.”³⁶⁵ Only then can we “hope” that those principles “can be the focus of a reasonable overlapping consensus.”³⁶⁶

It is important to see why Rawls was correct in thinking that an overlapping consensus could not stand alone, apart from a justification for the object of the consensus. An overlapping consensus, by itself, provides us with no sound basis for believing that the object of the consensus is just. The citizens of a polity might all converge from within their comprehensive doctrines on certain principles that, from the perspective of the original position (for Rawls) or whatever moral framework we believe is correct, are *plainly unjust*.³⁶⁷ There are, after all, *unreasonable* comprehensive doctrines.³⁶⁸ The notion that an overlapping consensus – by itself – is a good reason to affirm the object of the consensus is the equivalent of saying that whatever a majority says is necessarily justified.

Here, one might respond that I have misunderstood Rawls’s conception of an overlapping consensus, which is a consensus of *reasonable* comprehensive doctrines.³⁶⁹ But Rawls insisted that his theory was realistic, not utopian,³⁷⁰ and so he speculated that an overlapping consensus of reasonable comprehensive doctrines would be the *end point* of a gradual evolution in social views.³⁷¹ To stipulate a society consisting of reasonable comprehensive doctrines that attain stability by converging on justifiable principles of justice would be to stipulate the answer to the very problem Rawls sought to solve. Put another way, it would be hopelessly naïve to begin one’s analysis by presupposing that any given society at any given point in history consisted of citizens holding reasonable comprehensive doctrines that would – fortuitously – overlap on the principles of justice

365. RAWLS, *supra* note 53, at 25 n.27; see RAWLS, *supra* note 226, at 15, 88.

366. RAWLS, *supra* note 53, at 40; see also *id.* at 389 (explaining the idea of the reasonable overlapping consensus).

367. See, e.g., Sunstein, *supra* note 284, at 1744 (“The fact that we can obtain an agreement of this sort – about the usefulness and meaning of a rule or the existence of a sound analogy – is no guarantee of a good outcome, whatever may be our criteria for deciding whether an outcome is good. The fact that there is agreement about a rule does not mean that the rule is desirable. Perhaps the rule is bad, or perhaps the judgments that go into its interpretation are bad.”); see also *id.* at 1769 (“[I]f an agreement is incompletely theorized, there is a risk that everyone who participates in the agreement is mistaken, and hence that the outcome is mistaken too.”).

368. See RAWLS, *supra* note 53, at 36, 163-64.

369. See *id.* at 36.

370. *Id.* at 168.

371. See *id.* at 164-68.

identified by Rawls through the device of the original position, rather than overlapping on principles that would justify, say, slavery or human sacrifice.³⁷²

For that reason, in describing how this overlapping consensus would emerge, Rawls assumed that the comprehensive doctrines initially held by a society would accept the principles of justice only “reluctantly” and as a “modus vivendi.”³⁷³ That is, the comprehensive doctrines with which Rawls began were not sufficiently reasonable that they would – from the start – overlap on the principles of justice. Rather, Rawls argued that, because there is “a certain looseness” or “slippage” in the relationship between a person’s comprehensive doctrine and how the person regards the principles of justice, it would be possible for the person to “affirm” the principles without necessarily realizing that the principles contradict the person’s comprehensive doctrine.³⁷⁴ Over time, as citizens came to see the benefits of the principles of justice, the principles would “tend to shift citizens’ comprehensive doctrines so that they at least accept the principles of a liberal constitution.”³⁷⁵ “To this extent citizens’ comprehensive views are reasonable if they were not so before: *simple pluralism moves toward reasonable pluralism . . .*”³⁷⁶

Thus, in Rawls’s view, it is the principles of justice that produce a society with reasonable comprehensive doctrines and create the basis for a reasonable overlapping consensus, rather than a reasonable overlapping consensus producing the principles of justice.³⁷⁷ This shows that, on Rawls’s view, the object of an overlapping consensus (understood here as a mere overlap of views) is not necessarily just, given the existence of unreasonable comprehensive doctrines. Rather, the principles of justice must be identified *independent of* the overlapping consensus to ensure that they are, in fact, just – and *only then* should we seek to forge an overlapping consensus of reasonable comprehensive doctrines (which is what Rawls understood the term “overlapping consensus” to mean).

Practice-based constitutional theorists have misunderstood this crucial point, relying on an overlapping consensus as a sufficient normative basis for their constitutional theories without independently justifying the object of the consensus. Because the object of their consensus (social practices) is different from Rawls’s (the principles of justice), and because there is no good reason to believe that social practices are inherently just, this misunderstanding matters a great deal.

372. See RAWLS, *supra* note 226, at 37.

373. RAWLS, *supra* note 53, at 159.

374. *Id.* at 159–60.

375. *Id.* at 163.

376. *Id.* at 163–64 (emphasis added).

377. Freeman, *supra* note 223, at 37.

The problem is best seen by focusing on Strauss's theory, which is the most explicitly Rawlsian of practice-based theories.³⁷⁸ Strauss is quite clear in saying that "[a] constitutional theory justifies its prescriptions about controversial issues by drawing on the bases of agreement that exist within the legal culture and trying to extend those agreed-upon principles to decide the cases or issues on which people disagree."³⁷⁹ For Strauss, it is the *fact of agreement* that "justifies [a constitutional theory's] prescriptions,"³⁸⁰ including agreement on "certain legal judgments" and "certain moral principles."³⁸¹ Strauss explicitly links this conception of constitutional theory to Rawls's overlapping consensus and argues that the justification for adhering to our practices is that they are a "common ground" from which to resolve legal disputes.³⁸² But absent some independent justification for our practices, why should we have any confidence that those practices are *just*? *Plessy* may at one time have been the object of an overlapping consensus.³⁸³ Or, to take a less fraught example, the constitutional text (which Strauss says is an object of overlapping consensus) might be thought to be gravely morally deficient in various ways, as scholars on the political left³⁸⁴ and the political right have argued or suggested.³⁸⁵ We need more than agreement to ground the normative force of our practices.

Strauss might respond in two ways. First, he might point out that Rawls himself considered the objection that his theory of justice "appeal[s] to the bare fact [of] agreement"³⁸⁶ and argued that "justification," by its nature, "proceeds from what all parties to the discussion hold in common."³⁸⁷ Strauss explains that "[t]he principal reason for appealing to existing bases of agreement is that—as

378. Greene's critique of Strauss's theory differs from mine in that, whereas I argue that Strauss misapplies Rawls's theory, Greene assumes that Strauss accurately applies Rawls's theory and then proceeds to criticize Strauss on the same grounds that he criticizes Rawls. See Greene, *supra* note 26, at 2933-34.

379. Strauss, *supra* note 73, at 582.

380. *Id.*

381. *Id.* at 587.

382. Strauss, *supra* note 124, at 1720; see *id.* at 1724-27.

383. See *supra* notes 272-273 and accompanying text.

384. See, e.g., SEIDMAN, *supra* note 78, at 16-17; Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 406-20, 448-52 (2010); see also Thurgood Marshall, Essay, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987) ("[T]he government [the Framers] devised was defective from the start . . .").

385. See, e.g., Adrian Vermeule, *On "Common-Good Originalism,"* MIRROR JUST. (May 9, 2020), <https://mirrorofjustice.blogspot.com/mirrorofjustice/2020/05/common-good-originalism.html> [<https://perma.cc/9XLA-WB5F>] (describing "a Constitution as morally compromised as our own").

386. Strauss, *supra* note 73, at 588.

387. *Id.* at 582-83 (quoting RAWLS, *supra* note 38, at 508).

the passage from Rawls suggests – it is not clear what else we could appeal to.”³⁸⁸ But the quoted passage from Rawls refers to the points of agreement that are the *initial* basis for the process culminating in wide reflective equilibrium through the justificatory device of the original position (with all the idealized constraints that it imposes on the parties in reaching their agreement), where *all* judgments (and points of agreement) are merely provisional and subject to revision.³⁸⁹ Rawls later made explicit that “[i]t is this last condition of reasoned reflection [in reflective equilibrium] that, among other things, distinguishes public justification *from mere agreement*.”³⁹⁰ And quite apart from the proper interpretation of Rawls’s work, it is simply true that the mere fact of agreement does not justify the object of agreement. Otherwise, we would have to concede that widespread agreement within a society committed to human sacrifice was justified.

Strauss’s second response might be that he *does*, in fact, offer an independent justification for our practices: what Strauss calls “rational traditionalism.”³⁹¹ Strauss argues that a common-law style of constitutional adjudication is normatively attractive because its gradual evolution of doctrine reflects “humility” and “a distrust of the capacity of people to make abstract judgments not grounded in experience.”³⁹² But that argument does not solve Strauss’s problem, since he concedes that his rational-traditionalist argument “would justify much sharper departures from the text than our current practices allow.”³⁹³ For that reason, “traditionalism must be supplemented by a conventionalist account,”³⁹⁴ and it is Strauss’s conventionalist account that relies on the idea of an overlapping consensus.³⁹⁵ Strauss’s theory therefore depends, for its normative justification, on a freestanding appeal to an overlapping consensus, but we have no good reason for believing that the object of that consensus is just.

Strauss might reply that he does not intend to invoke the notion of an overlapping consensus as that term is understood in Rawls’s work, a possibility that he floats at one point.³⁹⁶ The substance of his argument (rather than the proper

388. *Id.* at 588.

389. RAWLS, *supra* note 38, at 508–09; RAWLS, *supra* note 226, at 5 n.5, 27–28.

390. RAWLS, *supra* note 226, at 29 (emphasis added).

391. Strauss, *supra* note 59, at 891.

392. *Id.*

393. *Id.* at 899.

394. *Id.*; *see also id.* at 907 (explaining that conventionalism “takes care” of the deficiencies of traditionalism).

395. *Id.* at 907; Strauss, *supra* note 124, at 1720, 1724–27.

396. Strauss, *supra* note 59, at 907 n.72 (“It is unclear to what extent conventionalism, as I have defined it, should be seen as describing an overlapping consensus as opposed to a *modus vivendi*, but in any case the metaphor of an overlapping consensus seems useful in describing it.”).

interpretation of Rawls's work) is what really matters, and that argument – that “it is more important that some things be settled than that they be settled right” because of the costs to social stability³⁹⁷ – is markedly different from the Rawlsian notion of stability. Indeed, it is the type of stability that Rawls explicitly disclaims.³⁹⁸ But my argument is not simply that Strauss's view is incompatible with Rawls's; it is that *Rawls was right* in refusing to rest the normative force of his theory on the mere fact of agreement.

To be sure, Strauss is correct that upsetting settled points within our law can come at great cost, and sometimes those costs can justify retaining a particular practice. That is, after all, an essential justification for the doctrine of *stare decisis*.³⁹⁹ But notice two things about this argument. First, it is no longer relying on the mere fact of agreement. It is relying on a normative premise that prioritizes social and political stability over other moral considerations, such as justice or the legitimate authority of enacted text.⁴⁰⁰ We would have left behind Strauss's initial argument that constitutional theory must adhere to points of agreement in our social practices because that is the only basis from which to resolve contested issues. Here, Strauss would instead be making a quite contestable normative argument to justify adhering to our practices. Second, this argument from social and political stability (which, to repeat, is quite different from what Rawls means by stability) cannot be a blanket justification for adhering to settled social practices unless stability is *always* more important than justice or other normative considerations, an implausible claim that would justify all manner of social pathologies and tyrannical conduct.⁴⁰¹ Strauss agrees that this claim is implausible, since he rejects any sort of blanket endorsement of our social practices: “Traditionalism need not mean that all traditions are sacrosanct or that abstract argument is never to be accepted. If one has a great deal of confidence in an abstraction, it can override the presumption normally given to things that have worked well enough for a long time.”⁴⁰²

But that means that Strauss must make a case-by-case argument that the normative reasons for retaining a particular practice overcome the normative reasons for discarding it, which means appealing to normative arguments *outside of* the stability/overlapping-consensus framework. So, for example, his argument

397. *Id.* at 907.

398. RAWLS, *supra* note 53, at 142-43.

399. See *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”).

400. See Strauss, *supra* note 124, at 1741-44 (making a version of this argument in advancing a justification for the idea that the constitutional text tends to matter less in more important cases).

401. See Sunstein, *supra* note 284, at 1764, 1769.

402. Strauss, *supra* note 59, at 895.

that originalism is unacceptable insofar as it is incompatible with “points of agreement within the legal culture that are absolutely rock solid, such as . . . the legitimacy of *Brown*,”⁴⁰³ does not carry any weight without some additional normative argument that answers the normative reasons in favor of originalism. Consider, for instance, the argument that originalism is morally required because it is necessary to preserve the legitimate authority of the people, which in turn is necessary to achieve the common good of society.⁴⁰⁴ If this justification for originalism is right, then Strauss would have to make an argument for why retaining a practice that is incompatible with originalism does not undermine the people’s legitimate authority⁴⁰⁵ or show that such undermining is an acceptable moral cost in light of the normative reasons supporting a particular practice.⁴⁰⁶ Ultimately, Strauss’s theory requires meeting the normative arguments offered by non-practice-based theories by employing arguments *aside from* the overlapping consensus. Invoking the fact that a practice is well accepted does not suffice.

The same is true of the implicit overlapping-consensus argument found in Baude and Sachs’s work. Baude has been clearer about what he sees as the normative basis for judges obeying the Constitution,⁴⁰⁷ a constitution whose status as law and manner of interpretation are defined (in his positivist framework) by social practices.⁴⁰⁸ Baude relies on the fact that judges take an oath to obey the Constitution, and he argues (in effect) that this social practice of obligation serves as a point of overlapping consensus for judges operating from within their own comprehensive doctrines.⁴⁰⁹ But as I have argued elsewhere, this argument only delays – it does not evade – deeper normative questions.⁴¹⁰ To take an oath to the Constitution requires an antecedent moral evaluation of the Constitution’s content. It would be immoral to take an oath to obey a constitution that was itself gravely unjust.⁴¹¹ We must be assured that the Constitution is morally justified before agreeing to be bound by it,⁴¹² and that kind of moral evaluation requires a moral framework for conducting the evaluation. For Rawls, the original position and reflective equilibrium developed in Part One of *ATJ* provide the

403. Strauss, *supra* note 73, at 584.

404. Alicea, *supra* note 74, at 44-45.

405. See *id.* at 44-52 (anticipating and responding to this argument).

406. See *id.* at 52-59 (anticipating and responding to this argument).

407. See Baude, *supra* note 59, at 2392-97.

408. See *supra* Part II.

409. See Baude, *supra* note 59, at 2394.

410. Alicea, *supra* note 74, at 12-13.

411. *Id.*

412. *Id.*; Jordan, *supra* note 207, at 957-62.

framework for identifying and justifying principles of justice that can, in turn, be used to evaluate the justness of a constitution, as he shows in Part Two of *ATJ*.⁴¹³ An overlapping consensus on the oath cannot justify obedience to the Constitution absent some independent moral justification of the Constitution, and that means that Baude would have to invoke normative arguments outside of the overlapping-consensus and stability framework.

V. PRELIMINARY THOUGHTS ON THE RELEVANCE OF STABILITY FOR CONSTITUTIONAL THEORY

I have argued that practice-based theorists make our social practices – rather than the principles of justice – the object of an overlapping consensus. Because (unlike the principles of justice) there is no reason to regard those practices as justified, there is no reason to regard practice-based theories as justified. Re-stated: some practice-based constitutional theorists have mistakenly divorced the notion of an overlapping consensus from a justification for the object of that consensus, leading to the untenable situation of constitutional theories that rest on the bare fact of social agreement. None of what I have said, however, should be taken as arguing that practice-based constitutional theorists are *wrong* to focus on the fact of reasonable pluralism and its attendant implications for the problem of the stability of our constitutional order (as distinct from the stability of the principles of justice). To the contrary, any morally plausible constitutional theory must concern itself with the stability of our Constitution.⁴¹⁴ The key question is *how* the stability consideration fits into constitutional theory. While it is not possible to provide a full answer to that question in the limited space I have here, I will offer a sketch of what the answer might be, drawing on prior work in which I have set out some of the relevant considerations at greater length.

Constitutional theories require a normative argument to justify a proposed methodology for adjudicating constitutional disputes, and that normative argument must include an argument for why the Constitution binds us in conscience, for two reasons. First, to the extent the Constitution does not bind us in conscience, there is no point to figuring out the proper way to adjudicate cases under it.⁴¹⁵ If we lived in North Korea or Nazi Germany, we would not care much about proposed theories of constitutional adjudication, since the constitution under which we lived would be so deeply unjust that we would reject it wholesale. Second, as noted above, a theory of constitutional legitimacy has implications for

413. RAWLS, *supra* note 38, at 171.

414. See Alicea, *supra* note 151, at 1180-83.

415. Alicea, *supra* note 74, at 11-12.

constitutional methodology.⁴¹⁶ If, for instance, one believes that the Constitution is only legitimate insofar as it reflects the substantive values of those living today, that will require rejecting any methodology that significantly constrains judges to obey the views of those long-since dead.⁴¹⁷ By contrast, if one thinks that the Constitution is legitimate (at least in part) because of an act of popular sovereignty in the distant past, that will require a methodology that ties judicial decisions to the views of those who ratified the Constitution.⁴¹⁸ Constitutional methodology is bound up with constitutional legitimacy.

Constitutional legitimacy, in turn, is a normative question of political theory; indeed, it is the very question with which Rawls was centrally concerned.⁴¹⁹ Whether and why one thinks the Constitution is legitimate depends on how one answers questions relating to the nature of the human person, the relationship of the individual to society, the nature (if any) of intergenerational obligations, the limits of human reason, and other difficult questions.⁴²⁰ Rawls attempted to construct a theory that prescinded from answering these questions (or, at least, prescinded from doing so from within a comprehensive doctrine), but for reasons well covered by others,⁴²¹ that effort was doomed to failure. We cannot answer foundational questions of constitutional theory without answering foundational questions of political theory.⁴²² And because foundational questions of political theory can only be answered by an appeal to broader ethical considerations, we cannot answer foundational questions of political theory without adopting a framework for moral analysis – a comprehensive doctrine.⁴²³

The need for a moral framework means that constitutional theorists confront a version of Rawls's stability question: given the fact of reasonable pluralism about comprehensive doctrines, what justification can we give for the moral legitimacy of the Constitution that will provide citizens with reasons to obey it freely? In answering that question, we must resist two different temptations. On the one hand, we are tempted to offer a thin or nonnormative account of the Constitution's legitimacy, one "that appeals to the broadest possible audience

416. *Id.* at 12-13.

417. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 29-34, 41-49, 59-73, 282 (2011).

418. See, e.g., Alicea, *supra* note 74, at 43-52.

419. RAWLS, *supra* note 226, at 40-41.

420. See Alicea, *supra* note 69, at 1735-67.

421. See, e.g., GEORGE, *supra* note 84, at 196-221; Hurd, *supra* note 299, at 803-24; Michael J. Sandel, *Political Liberalism*, 107 *HARV. L. REV.* 1765, 1777-82 (1994) (reviewing RAWLS, *supra* note 53); Raz, *supra* note 242, at 4-31.

422. See Alicea, *supra* note 69, at 1767-71.

423. See GEORGE, *supra* note 84, at 196-221; see also Alicea, *supra* note 74, at 13-16 (emphasizing that constitutional theories are based on moral arguments and, therefore, require a comprehensive framework for evaluating moral legitimacy).

without requiring too many controversial assumptions.”⁴²⁴ But our answer to the stability question, as I have tried to show, cannot be that we ignore the need to offer a normative justification for the Constitution and simply point to the fact of an overlapping consensus on social practices, since that simultaneously proves too little (i.e., it gives us no good reason to believe that the Constitution is justified) and too much (i.e., it would require us to obey even a fundamentally unjust constitution if such a document were the object of an overlapping consensus). A thin theory that relies on social practices divorced from normative justification ultimately threatens stability because it supplies no reason for our obedience.

On the other hand, we are tempted to offer a thick theory of constitutional legitimacy from within our own comprehensive doctrines without caring about whether our theory clashes with social practices and could be broadly endorsed by our fellow citizens. But stability – and, therefore, the social practices on which stability rests – is a moral consideration that cannot be ignored, since the stability of a regime is necessary to achieve the common good.⁴²⁵ We should concern ourselves with whether our theory of legitimacy is one that others in our society could endorse.⁴²⁶ Although a negative answer to that question should not cause us to adopt a theory that we believe is incorrect (i.e., we should never allow stability concerns to cause us to endorse a Noble Lie⁴²⁷), it might affect the contours of our theory or, as a matter of prudence, our rhetorical strategy in articulating it.⁴²⁸

It is important to see how what I just said is fully consistent with my critique of practice-based theories. My argument for the relevance of practices in thinking about constitutional legitimacy neither requires general conformity to those practices nor grounds their relevance in transient justifications. Rather, I begin with the normative argument that law is only morally legitimate insofar as it is directed toward the common good,⁴²⁹ and I make the further argument that the common good depends, in part, on the stability of a regime.⁴³⁰ To construct a theory of constitutional legitimacy on a basis that clashes with our social practices, however, means that the theorist either seeks to convert our culture to a

424. Baude & Sachs, *supra* note 7, at 1459.

425. See AQUINAS, *supra* note 276, at pt. I-II, q. 96, art. 4; J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS’S TREATISE ON LAW 387-89 (2014).

426. See Alicea, *supra* note 151, at 1183-91.

427. PLATO, THE REPUBLIC (c. 380 B.C.E.), reprinted in PLATO: COMPLETE WORKS 971, 1050 (John M. Cooper ed., G.M.A. Grube & C.D.C. Reeve trans., Hackett Publ’g Co. 1997).

428. Alicea, *supra* note 151, at 1194-1202.

429. Alicea, *supra* note 74, at 16-24. Indeed, orientation toward the common good is part of the definition of “law” when properly understood. *Id.*

430. *Id.* at 28-29.

very different understanding of our Constitution or to impose such a change through various centers of cultural, political, and legal power.⁴³¹ Either path is fraught with risk, since changing our self-understanding of our Constitution's legitimacy requires an attack on the complex, cross-cutting, and almost indefinable network of reasons, relationships, and emotions that bind a people to their constitution.⁴³² There is no guarantee that, if such an attack were successful, the society that remained would have the necessary rational and affective ties to the Constitution to sustain it over time; indeed, there is very good reason to think it would not.⁴³³ Thus, we have a *moral reason* for caring about whether a theory of legitimacy accords with our social practices: the stability that is essential to securing the common good.⁴³⁴

But because the common good can sometimes *require* reforming or even overthrowing an unjust regime, conformity to our social practices can only be one important consideration in thinking about the normative case for a particular theory of legitimacy, since any given practice might be inconsistent with the common good.⁴³⁵ Practices, in other words, are facts that are relevant – but ultimately answerable – to the normative justification from which I began: the imperative to secure the common good. My argument, therefore, avoids the is/ought problems identified above and allows for potentially significant departures from social practices,⁴³⁶ though it looks upon such departures with caution.

As I have argued elsewhere, the theory of constitutional legitimacy that is deeply embedded in our constitutional culture and that shapes how American society understands its fundamental law is the theory of popular sovereignty. That tradition of practice has normative implications, since abandoning popular sovereignty as our theory of legitimacy could destabilize our regime and imperil the common good.⁴³⁷ Such destabilization might very well be required if adopting a theory of popular sovereignty was contrary to the common good. That would be the case if, for example, popular sovereignty was simply an incorrect

431. Alicea, *supra* note 151, at 1197-1202.

432. *Id.*

433. *Id.*

434. *Id.* at 1182-83.

435. *Id.* at 1183.

436. If, for instance, I were incorrect in asserting (as I do below) that popular sovereignty is the theory of constitutional legitimacy that is deeply embedded in our social practices, and some *other* theory that subverted popular sovereignty was instead deeply embedded, I would advocate for significant changes to our social practices to bring them in line with popular sovereignty, since – as I have argued elsewhere – popular sovereignty is the theory of constitutional legitimacy that results from the general obligation to secure the common good. Alicea, *supra* note 74, at 24-33.

437. Alicea, *supra* note 151, at 1182-83.

theory—one that did not accord with right reason—since the common good is not served by acting contrary to reason.⁴³⁸ This is, essentially, why many—perhaps most—constitutional theorists reject popular sovereignty from within their own comprehensive doctrines.⁴³⁹ For example, their comprehensive doctrine might assume that there can be no intergenerational political obligations, which stems from a view of human nature and human reason that is not shared by other comprehensive doctrines.⁴⁴⁰ Nonetheless, that popular sovereignty is deeply embedded in our social practices is a relevant moral consideration.

Ideally, then, a theory of constitutional legitimacy would accord with our social practices and give us reason to believe it is correct. If possible, we want both parts: a theory of constitutional legitimacy that our society already endorses and a compelling moral argument in favor of that theory that demonstrates its validity. But if such a theory were found, it would not be justified based on adherence to our practices; it would be justified based on a sound normative argument that *also* makes adherence to our practices a relevant moral consideration.

In my view, the way to satisfy both criteria is to ground the Constitution in a theory of popular sovereignty and to justify that theory with a systematic normative argument drawn from within a coherent moral framework rationally accessible—in principle—to all. I have previously attempted to offer just such an argument from within the natural-law tradition.⁴⁴¹ But while the theory of popular sovereignty I have advanced is consonant with our constitutional culture in the sense that it reflects our basic assumptions about why the Constitution is legitimate,⁴⁴² it would be unrealistic to deny that many Americans do not share the framework by which I justify that theory. What are we to do about *that* disagreement?

While my answer here is tentative, I do not think that this kind of disagreement poses a significant threat to stability. There is a consensus on popular sovereignty in our constitutional culture,⁴⁴³ and that consensus is justified.⁴⁴⁴ It is this latter requirement that the practice-based constitutional theories discussed above overlook. Popular sovereignty does not rest on the bare fact of agreement. There are compelling *reasons* (accessible, in principle, to all citizens) for endorsing popular sovereignty as our theory of constitutional legitimacy, *even though* there are disagreements about the precise contours of that justification and its

438. *Id.* at 1183.

439. *Id.* at 1183-91.

440. See Alicea, *supra* note 69, at 1738-45, 1752-58.

441. See Alicea, *supra* note 74, at 16-43.

442. See Alicea, *supra* note 151, at 1190-91.

443. *Id.* at 1189-91.

444. See Alicea, *supra* note 74, at 16-43.

implications for constitutional adjudication. This incompletely theorized agreement on midlevel principles is likely sufficient to ensure stable societal support for our Constitution.⁴⁴⁵

But what if that is not enough? What if our consensus on popular sovereignty and the authority of the Constitution is insufficiently robust to prevent our deep disagreements about more basic principles from rending our society? Rawls certainly seemed to think it was not sufficient, and it would indeed be preferable if our society agreed on basic principles of justice and political philosophy—provided that they were true. But such a consensus cannot be achieved through the artificial constricting of reasons and arguments that Rawls proposed.⁴⁴⁶ If it is to emerge, it must emerge through the unplanned, intergenerational process through which the complex union of reasons and affections binds a people to one another and to their constitution.⁴⁴⁷ If our society is so riven with disagreement that it cannot coalesce around valid, basic political principles, neither common-law constitutionalism nor positive-turn originalism will remedy that problem. If Rawls was right that a free society will inevitably produce reasonable disagreement, we must hope that it need not inevitably produce a society incapable of agreement on the moral principles undergirding a just constitution.

CONCLUSION

It is widely accepted that constitutional theories must account for features of our constitutional system, and stated at that level of generality, this conventional view is correct. But practice-based constitutional theories go further, seeking to conform our approach to constitutional adjudication to our social practices. That further step requires a normative justification, and the primary justifications offered by practice-based constitutional theorists do not provide it. A constitutional theory cannot ignore our social practices, but it is the theory that can justify those practices, not the other way around.

445. See Sunstein, *supra* note 284, at 1739, 1742, 1746.

446. GEORGE, *supra* note 84, at 205 (“Public reasoning should be directed to overcoming the relevant mistakes, not pre-emptively surrendering to them.” (quoting John Finnis, Rawls and Political Liberalism 8 (Feb. 24, 1996) (unpublished manuscript) (on file with author))).

447. See Alicea, *supra* note 151, at 1169–82.