Fordham Law Review

Indeterminacy, Justification and Truth in Constitutional Theory

Robert Justin Lipkin

Indeterminacy, Justification and Truth in Constitutional Theory

Cover Page Footnote

I wish to thank Edward Sankowski, Anne Shapiro, and Rodney Smith for commenting on an earlier draft of this article.

INDETERMINACY, JUSTIFICATION AND TRUTH IN CONSTITUTIONAL THEORY

*ROBERT JUSTIN LIPKIN**

In this Article, Professor Lipkin continues the debate over the nature of indeterminacy in constitutional theory, arguing that epistemic indeterminacy is most relevant to the law, because epistemic indeterminacy is more closely tied to practical reasoning than is metaphysical indeterminacy.

Professor Lipkin further argues that the controversy over metaphysical or epistemic indeterminacy is really a controversy over truth or justification as the primary form of validating constitutional rules. In Professor Lipkin's view, the search for constitutional truth should be abandoned or, at best, should be treated as a trivial result of the best justification.

Finally, Professor Lipkin proposes a new constitutional paradigm, integrating a revised version of Rawls's conception of wide reflective equilibrium with a modified account of Kuhn's theory of scientific change that takes into account the distinction between normal and revolutionary adjudication. Such a paradigm, Professor Lipkin argues, provides an interesting and complete account of constitutional adjudication and change, and therefore is an especially appropriate vehicle to transport constitutional theory into the twenty-first century.

CONTENTS

INTRODUCTION

MORE than any other single factor, the specter of indeterminacy is responsible for the current crisis[1] afflicting constitutional theory.[2] The traditional controversy over indeterminacy assumes that if constitutional language is indeterminate, constitutional law is illegitimate, arbitrary, or radically manipulable in the hands of power-hungry judges and other constitutional actors. Mainstream constitutional theorists attempt to defend against the charge of indeterminacy;[3] while deconstructionists,[4] skeptics,[5] nihilists,[6] and others keep the heat on by insisting that, despite traditional apologetics, constitutional doctrine does not provide determinate answers to controversial constitutional questions.

I want to cast the problem of indeterminacy in a new light. In my

---

1. Generally, the crisis consists of the failure of mainstream constitutional theorists to describe convincingly plausible paradigms and procedures for discovering and validating constitutional decisions. In particular, this crisis results from a loss of faith in the formalist and neo-formalist paradigms that dominate mainstream legal reasoning. Because they promise political neutrality, formalist paradigms are very attractive. *See* Schauer, *Formalism*, 97 Yale L.J. 509, 510 (1988) (contending that laws derive from politically neutral rules embedded in legal language). Judicial reasoning, in turn, employs these rules to generate "true" legal judgments. Formalist paradigms thus insist that judicial reasoning can uncover the immanent rationality in the law. *See* Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949, 953-54 (1988). According to neo-formalist paradigms, constitutional and legal problems, though not politically neutral, follow from the best interpretation of the legal system as a whole. *See generally* R. Dworkin, Law's Empire (1986). Both formalist and neo-formalist theorists insist that law significantly *constrains* judicial decisions, and believe that formalist or neo-formalist paradigms are the law's best hope.

2. The crisis I speak of is not restricted to constitutional law; it affects legal theory generally. *See, e.g.*, Chemerinsky, *Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43, 99 (1989) (stating that "the future of constitutional law and scholarship hinges on repudiating the foundation of the Rehnquist Court's approach to constitutional law—the majoritarian paradigm"); Winter, *Bull Durham and the Uses of Theory*, 42 Stan. L. Rev. 639, 679 (1990) (contending that "the legal academy is experiencing a state of epistemological crisis"); Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 Tul. L. Rev. 69, 71 n.5, 72-73 (1991) (describing the crisis in legal theory as continuous with the crisis in academic philosophy, both crises being implications of post-modernity) [hereinafter Lipkin, *Kibitzers*]; *see also* H. Berman, Law and Revolution: The Formation of the Western Legal Tradition 39 (1983) (arguing that the Western legal "tradition itself is threatened with collapse"); G. Gilmore, The Death of Contract 81, 85 (1974) (contending that the general theory of contract has died and what remains in its wake has been absorbed by tort law); P. Atiyah, The Rise and Fall of Freedom of Contract 778 (1979) (calling for a new theoretical structure for the law of contract).

   The impact of this crisis is greater in constitutional theory because constitutional law affects critical rights and liberties, as well as the very structure of American government. Moreover, in common law and commercial law, no one document defines the law, as does the United States Constitution in constitutional law.

3. *See* Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 Cornell L. Rev. 811, 833-41 (1990) (characterizing mainstream theorists) [hereinafter Lipkin, *Beyond Skepticism*].

4. *See generally* D'Amato, *Pragmatic Indeterminacy*, 85 Nw. U.L. Rev. 148 (1990).

5. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 816-26.

6. *See* Singer, *The Player and the Cards: Nihilism in Legal Theory*, 94 Yale L.J. 1, 47-51 (1984).

view, the question of law's determinacy is more complex than the standard controversy suggests. The problem of law's determinacy is not merely a problem about the nature of constitutional doctrine or language.[7] Instead, it is a problem about the appropriate paradigm for validating constitutional propositions.[8] Understood in this fashion, defenders of determinacy owe their allegiance to a paradigm of truth.[9] For these theorists, truth is the central philosophical concept explaining why we adhere to particular constitutional values. To validate a particular constitutional conclusion concerning free speech, for example, that conclusion must follow from a constitutional principle truly contained in the Constitution or in the values underlying the Constitution.[10]

In contrast, defenders of indeterminacy[11] owe their allegiance to justification, leaving truth to metaphysicians and logicians. In their view, truth is an uninteresting, and even perhaps a deceptive, jurisprudential

---

7. According to the standard controversy, whether law is "determinate" depends upon whether constitutional language constrains judicial decision-making—that is, whether constitutional language admits of only one meaning. *Cf.* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685, 708-13 (1985) (arguing that even the most simple language will always admit more than one meaning because words themselves do not have one particular meaning).

8. I do not mean that the parties to this debate consciously conceive of the issue in this way or would even welcome this characterization.

9. One immediate objection should be dispelled here. One could argue that no one believes in constitutional or legal truth, and that such a belief is naive, at least if we have satisfactorily learned our lessons from legal realism and critical legal studies. In one sense this objection is correct. Few constitutional scholars talk about constitutional or legal truth. Instead, they speak of good interpretations or what the framers meant by a constitutional provision. *See* R. Bork, The Tempting of America 143-60 (1990). Nevertheless, we should not forget that *some* distinguished legal theorists still insist that truth is a useful legal notion. *See* R. Dworkin, *supra* note 1, at 225; Moore, *Do We Have an Unwritten Constitution?*, 63 S. Cal. L. Rev. 107, 138 (1989). More importantly, despite the way constitutional theorists speak, some theorists insist that there exist uniquely correct answers to most legal questions. *See* R. Dworkin, *supra* note 1, at 226. Others believe that there are principled and perhaps correct answers to questions over the degree of generality associated with rights. *See* Tribe & Dorf, *Levels of Generality in the Definition of Rights*, 57 U. Chi. L. Rev. 1057, 1098-1106 (1990). Further, some theorists contend that the distinction between truth and justification is vital, and that conflating the two engenders confusion. *See* J. Coleman, *Negative and Positive Positivism*, in Markets, Morals and the Law 3, 4-7 (1988); *see also infra* notes 72-76 and accompanying text (discussing Coleman's thesis). Finally, others insist that legal scholarship seeks truth, even if advocacy does not. *See* Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 Yale L.J. 955, 968 (1981). Consequently, truth still has a hold on legal imagination.

10. Constitutional theorists wedded to truth assume that any given power, liberty, or right is either in the Constitution or it is not. This does not mean that defenders of determinacy must adhere to some crude form of textualism or intentionalism. Ronald Dworkin adheres to neither, and yet still believes, as does Robert Bork, that only certain rights are truly in the Constitution. *See generally* R. Dworkin, *supra* note 1, at 363-73; R. Bork, *supra* 9, at 161-70, 178-85. Both Dworkin and Bork, therefore, share the same fundamental presupposition about constitutional truth, with their difference arising out of how to explicate this presupposition.

11. *See* Boyle, *supra* note 7; D'Amato, *supra* note 4; Lipkin, *Beyond Skepticism, supra* note 3; Singer, *supra* note 6.

concept. Instead, constitutional theorists should describe and unify the diverse forms of constitutional justification. Justifying constitutional conclusions is a meaningful and necessary activity even if no one ever comes up with a philosophically or jurisprudentially respectable theory of truth. Indeed, worrying about truth is just as pointless as worrying about whether some activity is *really* constitutionally protected, once we have concluded that the best justification says it is constitutionally protected. If the notion of truth needs to be retained at all, according to this view, then one should say that a constitutional conclusion is true because it follows from a principle whose justification is superior to the justifications of alternative principles. In other words, no independent conception of truth is needed.

In this Article, I defend the indeterminacy thesis against the important objection[12] that proponents of indeterminacy often confuse metaphysical indeterminacy with epistemic indeterminacy.[13] I conclude that whether we endorse this distinction for other purposes, it is especially inappropriate in constitutional theory because *epistemic* indeterminacy is the central form of indeterminacy associated with constitutional reasoning. I then discuss the issue of truth and justification in constitutional theory, concluding that constitutional theorists, judges, and practitioners should abandon truth in favor of justification. The central feature of my thesis is that truth does not have the explanatory force it is typically thought to have. Consequently, whether constitutional statements are true is irrelevant to the process of constitutional litigation and adjudication. What is relevant is the refinement and unification of the various forms of constitutional justification—such as originalism, non-originalism, passivism, and structuralism—as well as the determination of whether a more general justificatory paradigm underlies constitutional reasoning.[14]

Finally, I want to sound a cautionary note concerning the perilous period in which constitutional theory now finds itself. Constitutional and legal theorists are desperately seeking novel and unifying paradigms around which to rally. For at least the past two decades, there have been a proliferation of different theoretical movements, each sporting a novel paradigm around which to consolidate and normalize constitutional adjudication.[15] No one paradigm has prevailed, nor has any paradigm pro-

---

12. *See* Kress, *A Preface to Epistemological Indeterminacy*, 85 Nw. U.L. Rev. 134, 134-38 (1990) [hereinafter Kress, *Epistemological Indeterminacy*].

13. *See id.* at 138. Kress succinctly explains the distinction between metaphysical and epistemic indeterminacy. According to Kress, "[m]etaphysical indeterminacy speaks to whether *there is* law; epistemic indeterminacy to whether law *can be known.*" *Id.* (emphasis in original). More generally, however, the metaphysical or semantic dimension of a statement "X is law" asks whether that statement has truth conditions, whereas the epistemic dimension asks whether those truth conditions can be known. According to this distinction, it makes perfect sense to say that " 'X is law' is true," despite our inability in principle to know whether it is true.

14. *See infra* notes 167-89 and accompanying text (discussing such a paradigm).

15. Critical legal studies, feminism, and law and economics are just some of the more prominent examples. *See, e.g.*, C. MacKinnon, Feminism Unmodified 103-16 (1987) (ar-

vided the stability required for conducting traditional or normal constitutional litigation, adjudication, and research.[16] Moreover, it is not clear that constitutional law and scholarship will ever again be dominated by one central paradigm, as perhaps was the case during the age of formalism or when legal realism reigned over law's empire.[17] Nonetheless, trying to fashion a synoptic vision of constitutional adjudication and theory is beneficial, even if doing so merely shows us that such attempts are quixotic. Thus, in this Article, I continue the search for such a paradigm.

My candidate for the correct justificatory paradigm in constitutional theory relies on two familiar methodologies, one in ethical and legal theory, and the other in the philosophy of science. I intend to deploy a revised version of Rawls's conception of wide reflective equilibrium[18] and integrate it with a modified account of Kuhn's notion of scientific change.[19] One salient feature of this revised paradigm is its anti-foundational, anti-formalist, pragmatic dimension, which renders it an especially appropriate vehicle to transport constitutional theory into the twenty-first century.

I. CONSTITUTIONAL INDETERMINACY: METAPHYSICAL OR EPISTEMIC?

Constitutional determinacy requires that constitutional concepts and principles of inference have a univocal meaning. Partial determinacy occurs when constitutional reasoning generates coherent, univocal answers from the perspective of an individual practical reasoner. In contrast, full determinacy exists when constitutional reasoning generates the same conclusions for other qualified constitutional practitioners. If such important constitutional provisions as "due process" or "equal protection" admit of different meanings, or permit different rules of reasoning, then a

---

guing for the transformation of masculine jurisprudence); R. Unger, The Critical Studies Movement 1-14 (1986) (criticizing traditional liberal legal theory); R. Posner, An Economic Analysis of Law 19-26 (3d ed. 1986) (formulating an economic approach to law); *see also* Minda, *The Jurisprudential Movements of the 1980s*, 50 Ohio St. L.J. 599, 602-32 (1989) (discussing alternative jurisprudential paradigms).

16. *See infra* notes 186-94 and accompanying text (discussing normal and revolutionary litigation).

17. This remark is, of course, hyperbolic. No single paradigm has ever dominated constitutional law and scholarship. Still, the structure of constitutional theory and practice never seemed more fragmented then it does now. Nor has it ever appeared less likely that constitutional theory and practice will be unified by a central paradigmatic vision.

18. *See* J. Rawls, A Theory of Justice 48-51 (1971); *see also* Nielsen, *In Defense of Wide Reflective Equilibrium*, in Ethics and Justification 19-35 (D. Odegard ed. 1988) (explaining and defending wide reflective equilibrium). In brief, wide reflective equilibrium maintains that acceptable legal and ethical judgments are those that follow from a plausible theory of our practical lives. *See infra* notes 182-89 and accompanying text.

19. *See generally* T. Kuhn, The Structure of Scientific Revolutions (1970). A Kuhnian notion of scientific change depicts two kinds of inquiry—normal and revolutionary inquiry—which structure the evolution of conceptual change. *See infra* notes 167-71 and accompanying text.

qualified, constitutional actor—namely, a judge or lawyer—will not be able to generate coherent, univocal constitutional conclusions for herself. More importantly, even if determinate constitutional conclusions are possible from the individual perspective, full determinacy requires that these conclusions constrain other qualified, constitutional actors in relatively similar situations.[20] If such constraints fail, constitutional actors will interpret these provisions in different, even incompatible, ways. In this event, constitutional reasoning fails as a form of practical reasoning,[21] and therefore cannot settle practical conflicts.[22] The fact that equally competent constitutional actors systematically disagree over the meaning of due process or equal protection strongly suggests that these terms are indeterminate.[23]

A. *Intersubjective Agreement and Rationality*

The indeterminacy debate implicates the notion of rationality. Specifically, it questions the relationship between intersubjective agreement and rationality. Can two practical reasoners interpret constitutional and legal provisions incompatibly and still both be rational? My hunch is that rationality is exhausted within the context of a coherent perspective, tradition, or language-game. In other words, rationality requires intersubjective agreement.

This neither praises nor denigrates rationality. It merely reveals the place of rationality in human inquiry. What lies outside rationality is sometimes irrational and absurd. At other times, what lies beyond rationality is visionary insight into new forms of description, which ultimately captures the imagination of the age. Consequently, rationality, or the forms of inquiry to which it applies, is sometimes very important, but it is also often mundane and pedestrian. Thus, while it is correct to say that rationality requires intersubjective agreement, this should not be construed as capturing everything of interest about human intellectual inquiry.

---

20. Of course, this is too strong. A judge is not completely free to do anything she likes. But neither is she compelled to choose a uniquely right answer. She must, instead, choose from a range of different, even incompatible, solutions.

21. Practical reasoning involves reasons for acting or deciding to act, while theoretical reasoning involves reasons for believing. *See* R. Audi, Practical Reasoning 2 (1991).

22. Constitutional provisions and values can be indeterminate in additional ways. For instance, constitutional provisions might be indeterminate because their scope or degree of generality cannot be fixed once and for all. Similarly, constitutional provisions might be indeterminate because they involve more than one value and these values can be ranked differently. Each form of indeterminacy has the potential to yield a skeptical result—namely, that constitutional reasoning does not constrain choice.

23. Mere disagreement does not entail indeterminacy. Nevertheless, when disagreement occurs in epistemically favorable circumstances—that is, in circumstances where qualified individuals ordinarily have the best chance for getting the right answer—the inability to resolve conflicts needs to be explained. One such explanation is that the issue is indeterminate.

In an earlier article,[24] I must not have been clear on this point, because Professors Kress and D'Amato both take me to task for insisting, incorrectly in their view, that intersubjective agreement is a necessary condition of rationality. In Kress's view, an argument for indeterminacy based on dissensus is unpersuasive.[25] In responding to my criticism of his important work on indeterminacy, Kress points out that two individuals can both be rational, though endorsing different conclusions, if each individual's evidentiary base is different or if their evidentiary bases overlap.[26] Kress asserts that my mistake is in assuming that "if A has evidence which is rational warrant for X, and B has evidence which is rational warrant for Y (inconsistent with X), then it follows that there is indeterminacy."[27] His argument continues:

> Yet A and B might have different evidence, and it would therefore not be surprising if they reach opposing conclusions. Put precisely, if A's evidence is C, D, and E, while B's evidence is E, F, and G, then there may well be both a metaphysically and epistemically right answer (quite possibly different than either X or Y). This is because A and B do not have all the evidence. Only if A and B had precisely the same evidence, or if all the relevant evidence were available to each [and] A and B rationally came to different conclusions would it follow that there is indeterminacy, epistemic or metaphysical.[28]

Two points are in order here. First, it is not at all obvious that indeterminacy is limited to circumstances in which both parties base their conclusions on all the relevant evidence. The fourteenth amendment's equal protection clause, for example, is indeterminate if it can be interpreted according to both my radically egalitarian views and your meritocratic views, despite one or both of our conclusions being based on only part of the relevant evidence. Thus, indeterminacy occurs when a constitutional provision yields different interpretations despite the reasons for these differences.

Moreover, even if we concede Kress's point that indeterminacy occurs only when parties to a dispute base their positions on all the relevant evidence, his argument against indeterminacy is still unpersuasive. Most controversial constitutional decisions in cases such as abortion, affirmative action, the right to die, consensual homosexuality, flag burning, capital punishment, and so forth are, or easily could be, based on all the evidence. In fact, in controversial cases, typically all the relevant evidence is available to any qualified party.[29] What explains the indetermi-

---

24. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 833-41.

25. *See* Kress, *Epistemological Indeterminacy, supra* note 12, at 140. Professor Kress argues that the objections to legal determinacy raised by critical legal scholars can be answered. *See* Kress, *Legal Indeterminacy,* 77 Calif. L. Rev. 283, 320-36 (1989) [hereinafter, Kress, *Legal Indeterminacy*].

26. *See* Kress, *Epistemological Indeterminacy, supra* note 12, at 140-41.

27. *Id.* at 140.

28. *Id.* at 140-41.

29. I am not using the term "evidence" in the standard legal way, pertaining to infor-

nacy in these cases is *how* each party assesses the evidence.[30] In some cases, the evidence is weighed or ranked differently. In other cases, certain pieces of evidence are rejected out of hand. Thus, in order for constitutional conclusions to be determinate, the evidentiary base must have the same character for each party. In other words, each party must identify, weigh, and rank the relevant values in the same fashion. Because that is seldom the case, it follows that indeterminacy exists at least in these *controversial* cases.

Even if all the relevant evidence is available to everyone, which evidentiary premise one should choose is itself indeterminate, even in relatively uncontroversial cases. Because equally qualified practitioners often view the evidence differently, different conclusions will follow. The problem is that constitutional justification, like any justification, involves arguing from premises to a conclusion, and your conclusion will differ from mine if your premises differ. What is thus needed is a meta-theory to tell us how to evaluate evidence and which premises to adopt. The process of generating conclusions is epistemically indeterminate—at least, if pushed far enough—because no one has yet figured out how to guarantee that one's opponent will adopt one's own premises unmodified.[31] Consequently, even if we concede Kress's point concerning indeterminacy and having the same evidentiary base, this simply removes the question of indeterminacy from conclusions to premises.[32]

Kress's argument for metaphysical indeterminacy is vulnerable to a further objection. In any system of justification having more than one value or applying the same value in different ways, determinate meta-principles are needed to determine how to rank these different values, or how to apply a singular value to different circumstances. Without meta-principles, constitutional conclusions will be metaphysically indeterminate, because any such system having multiple values or multiple applications of the same value can in principle generate multiple conclusions.[33] Even if most of these conclusions are unlikely, their possibility means that the system is conceptually or metaphysically indeterminate.

Kress's reply here is that indeterminacy is not established by showing

---

mation used by the trier of fact to decide a case. My use is broader, referring to all the evidentiary considerations upon which, for example, an anti-abortion position depends, including constitutional provisions, statutes, natural law, social psychology and so forth.

30. It would be useful here if Kress explained just what relevant evidence is, and how legal conclusions are derived from this evidence.

31. Kress needs to explain why two equally qualified practitioners differ over the relevant evidentiary bases for their judgments of P and not-P respectively. Such an explanation will, I believe, reveal the indeterminate justificatory structure of legal reasoning.

32. Furthermore, Kress's argument risks the problem of incommensurability. If Jones and Smith differ over abortion because of radically different evidentiary bases, then their views on abortion are unresolvable because they have incommensurable evidentiary bases.

33. Any comprehensive system of law will have multiple values or at least multiple applications of the same value.

that the legal system *can* generate different conclusions.[34] Instead, "[m]etaphysical determinacy may be said to exist if there is a best argument for one side, no matter by how little. Moreover, metaphysical determinacy may exist even where we are currently unable to determine which argument is best."[35] Kress here appears to be following Dworkin, who insists 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."[36]

Both Kress and Dworkin implicitly share the view that there is a sharp distinction between truth and proof. According to this view, it makes perfect sense to say that a particular sentence is true, despite our inability in principle to prove it true.[37] Thus, a particular constitutional conclusion—for instance, that affirmative action is consistent with equal protection—might be true, although its truth may never be established, even in principle. Although this position may have relevance in formal symbolic systems, this is precisely the sort of pointless theorizing that should be excised from constitutional theory. While certainly the best argument or best constructive interpretation might temporarily elude practitioners, we must nevertheless set limits concerning how long and in what way a statement's truth is compatible with our inability to prove it true.[38]

Truth is a trivial epistemic concept that the best argument gets by default. One cannot say that we are unable to determine which argument is best without attempting to explain this inability to prove truth. In other words, the notion of a "best argument" only makes sense in the context of proof.[39] While it is perfectly reasonable to believe that at any given time the best argument has not yet been formulated, this becomes idle, wishful thinking when adequate time, energy, and talent have been devoted to resolving a particular controversy.[40]

---

34. *See* Kress, *Epistemological Indeterminacy, supra* note 12, at 145.

35. *Id.*

36. R. Dworkin, *supra* note 1, at 225.

37. *See* R. Dworkin, A Matter of Principle 137-38 (1985) (denying that truth requires demonstration).

38. Anyone sensitive to law's purpose as a system of practical (normative and motivational) reasons should be reluctant to accept any conception of truth that sharply distinguishes between the truth and proof.

39. To deny this, as Dworkin does, is to permit the possibility of true answers to constitutional conflicts that are totally irrelevant to practical reasoning because they are unknowable. The pragmatic turn in constitutional theory rightly scoffs at this notion.

40. Andrew Altman argues that disagreement does not entail indeterminacy, because "[s]ome judges are likely to be much better than others at grasping the logical connections among the elements of a large body of propositions and seeing which (principle of) decision coheres best with the settled law." A. Altman, Critical Legal Studies 49 (1990). But this begs the question of whether, in controversial cases, one decision logically coheres best with the settled law. Does anyone really believe that logic or reason will settle the abortion controversy? Similarly, will logic or reason resolve the conflicts over affirmative action, gender equality, the right to die, or capital punishment? Disagreement may not *entail* indeterminacy, but unresolvable disagreement among comparably talented

B. *Constitutional Doctrine and Judicial Reasoning*

Constitutional indeterminacy challenges the widespread belief that constitutional doctrine constrains or significantly guides choice in cases of conflicting fundamental values. If the meaning of constitutional reasoning is determinate, then it should constrain a judge's decision. If it is indeterminate, it cannot. Moreover, the problem of indeterminacy implicates the independence of constitutional law as an autonomous discipline possessing its own concepts and principles of inference. If constitutional reasoning is autonomous and generates determinate conclusions, then it represents a form of reasoning distinguishable from ethics or politics, and can therefore independently generate solutions to constitutional conflicts. But, if constitutional reasoning generates both X and Y, and X is incompatible with Y, then the choice between X and Y must be made according to extra-constitutional factors or not be made at all. In this event, there is no difference between constitutional reasoning and ordinary practical (moral or political) reasoning. Moreover, unless ethical and political conclusions exist that constrain any reasonable person, constitutional reasoning cannot constrain or significantly guide choice in settling constitutional controversies.[41]

To counter this objection, a defender of determinacy must show how constitutional doctrine constrains or significantly guides choice. The primary problem with Kress's distinction between metaphysical and epistemic indeterminacy is its irrelevance to this question. Metaphysical determinacy is irrelevant to choice unless it includes epistemic determinacy. In other words, if the meaning of constitutional propositions is metaphysically determinate, but not epistemically determinate, it has no effect on constitutional reasoning, and consequently cannot show the legitimacy or competence of constitutional law.[42] Thus, any defense of

---

judges and other legal actors provides *evidence*, sometimes conclusive, that a belief in a uniquely correct decision is quixotic.

41. If constitutional reasoning depends upon moral reasoning, then constitutional reasoning constrains choice only if moral reasoning constrains choice. Accordingly, the equal protection clause constrains judicial choice only if it contains a moral conception of equality that all rational, moral agents must endorse. If an individual is free to adopt an alternative moral conception of equality, however, then doing so will give a meaning to the equal protection clause that others need not endorse. Because choice is constrained or significantly guided across persons only when they share the same paradigms, the equal protection clause constrains choice across persons only when individuals agree on the appropriate moral conception of equality. Should they disagree, they may interpret the equal protection clause as they please.

42. In an earlier article, I made the following point against Kress's defense of determinacy.

> Kress insists that "[l]ike classical mathematics, law may be ontologically determinate, even if there is no explicit meta-theory that 'tells us' precisely what the law is." But even if law is ontologically determinate, what good is this for constitutional practitioners? And how does it refute epistemic skepticism? Even if it makes conceptual sense to speak of law as ontologically determinate, unless this determinacy makes its presence felt in recognizable legal arguments, then its existence is useless.

legal determinacy must start out with a defense of epistemic determinacy.

Accordingly, Kress's disclaimer that he was primarily concerned with metaphysical indeterminacy—and not epistemic determinacy—is a non-starter.[43] If he was primarily concerned with metaphysical determinacy, then he was wrong from the outset.[44] Because metaphysical determinacy does not save a constitutional system from being incompetent or illegitimate if the system is epistemically indeterminate, epistemic indeterminacy has the same implications for constitutional theory as metaphysical indeterminacy. Thus, the first job in defending legal determinacy must be to dispel epistemic indeterminacy. Thus, the question of constitutional indeterminacy is ultimately a question of *epistemic* indeterminacy. Without *knowing* the univocal meaning of a constitutional proposition, even if such meaning exists, constitutional practitioners cannot be constrained or significantly guided by the law of the case.

Kress's mistake is to view metaphysical indeterminacy and epistemic indeterminacy as independent values.[45] The independency thesis main-

---

Lipkin, *Beyond Skepticism*, supra note 3, at 841.

I renew this challenge here. Even if a constitutional provision has a determinate metaphysical or ontological meaning, and even if we *know* that it has a determinate meaning, if no epistemically determinate method exists for ascertaining exactly what this meaning is, we are in the same position we would be in if the provision were metaphysically indeterminate.

43. Consider Kress's remark that "Lipkin claims that *Legal Indeterminacy* fails to adequately address epistemic indeterminacy. This understates the case. Indeed, he would be more accurate if he claimed that I ignored the issue. This is not surprising, however, since my topic was metaphysical, or ontological, as opposed to epistemic indeterminacy." Kress, *Epistemological Indeterminacy, supra* note 12, at 140. But, isn't epistemic indeterminacy the death-knell of legal determinacy? How, then, can one simply "ignore" the question of epistemic indeterminacy in a defense of legal determinacy?

Kress might respond that conceptually there exist two questions concerning indeterminacy in law. First, are there determinate legal truths? And second, how do we know them? Accordingly, Kress's argument might continue, in *Legal Indeterminacy* he was concerned with the first question because it is logically prior to the second question. Determinate legal truths must exist before we can come to know them. While I would agree that there are two questions involved in this controversy, they are not independent questions. Nor can we answer one independently of the other. *See infra* notes 46-47 and accompanying text. For there to be determinate legal truths, we must be able, at least in principle, to know them.

44. Kress's position is unpersuasive for yet another reason. Kress contends that "law may be ontologically determinate, even if there is no explicit metatheory that 'tells us precisely' what the law is." Kress, *Legal Indeterminacy, supra* note 25, at 332 (footnote omitted). But, if there is no *explicit* meta-theory, is there an *implicit* one? And, if there is no meta-theory at all for determining what the law is, then how can law be ontologically determinate?

45. Kress states that my views on indeterminacy overlap with Bentham's. *See* Kress, *Epistemological Indeterminacy, supra* note 12, at 140. Let me take this opportunity to mention three differences.

Bentham uses the charge of indeterminacy not as a skeptical weapon, but instead as a problem of unwritten common law rules—a problem that can be overcome by expressing the common law in written statutes that are thereby accessible to everyone. *See* J. Bentham, *A Fragment on Government*, in A Comment on the Commentaries and A Fragment on Government 402 n.e (J. Burns and H.L.A. Hart eds. 1977). In contrast, the contemporary charge of indeterminacy is a skeptical challenge attempting to show that (i) law

tains that a law can be either metaphysically indeterminate or epistemi-cally indeterminate, or both.[46] Abandoning the notion of truth, however, also means rejecting the independency doctrine. A law cannot be meta-physically determinate without also being epistemically determinate. While knowing the meaning of a constitutional provision necessarily means that it has a meaning, it does not follow that we can separate the metaphysical meaning from the epistemic meaning of a provision. Yet, such a separation is exactly what is involved in suggesting that a consti-tutional provision might have meaning that is in principle unknowable.[47] Once we abandon the notion of truth, unknowable meanings are tanta-mount to no meanings at all.

C. *The Seduction of Truth*

The seduction of the concept of truth is sometimes so pronounced that it affects even defenders of indeterminacy. Consider, for instance, Profes-sor D'Amato's ingenious example designed to show that rationality does not involve intersubjective agreement. He writes:

> I think our minds *are* wired to notice similarities and differences in the environment; this wiring has enabled us to survive as a species. Sup-pose nine primitive hunters noticed a similarity between a new animal they encountered and a friendly animal of their previous acquaintance, but the tenth hunter noticed what was to him a critical difference that suggested that the newly encountered animal was vicious. If the nine hunters perished and the tenth ran safely away, his gene that passed on to future generations might well be characterized as "don't let people talk you out of a dangerous situation." Intersubjective agreement, or rule by consensus, would have been fatal in the hunter situation.[48]

Professor D'Amato appears to interpret the claim that intersubjectiv-ity is required for rationality as equating the *meaning* of the "right an-swer" with consensus. His lone practical reasoner's choice was, evolutionarily speaking, appropriate despite being unpopular. Either he was right or his comrades were right. If he was right, no consensus is needed. If they were right, consensus is the only thing that is needed, and that is counter-intuitive in the extreme.

For this example to work, however, D'Amato needs a conception of truth as opposed to justification. As D'Amato's story goes, the judgment

---

(language) does not constrain judges, and (ii) if judges are constrained at all, we must look elsewhere for the source. Similarly, Bentham contends that indeterminacy must be overcome, *see id.*, whereas, in my view, indeterminacy can never be entirely overcome. Finally, and most importantly, constitutional indeterminacy shows that it is quixotic to think that one right answer exists to many of the constitutional controversies which de-fine contemporary society.

46. The "independency thesis" is my name for regarding metaphysical and epistemic features of rules as conceptually distinct values.

47. This suggests a constraint on what can count as law. To reject the independency thesis entails that legal meanings must be knowable in principle.

48. D'Amato, *supra* note 4, at 184 n.125 (emphasis in original).

of the pre-historic survivor was true, while the judgment of his comrades was false. This is curious, because D'Amato's powerful deconstructionist arguments seem to avoid truth. D'Amato is correct in asserting that truth ought not to be equated with justification,[49] but surely for a deconstructionist like D'Amato, the concept of truth must be suspect.

Should D'Amato appeal to justification instead of truth, his example fails. No real dichotomy exists between consensus and justification. Consensus alone, brought about by intimidation, drugs, or inattention, is not the basis of justification. Yet, getting the right answer without consensual validation is truth, not justification. To resist this dichotomy, we must determine what sort of consensus is relevant to justification. The answer is simple: justification is consensus by "qualified" individuals.[50] This does not mean that a consensus of such qualified individuals guarantees truth, or that consensus renders a conclusion certain. Nor does it mean that we should equate justification with consensus. Nevertheless, a consensus of qualified individuals is the best *evidence*—until we have better evidence—that the judgment in question is justified.

D'Amato's example does not confute this point. If his example works at all, it is only because a consensus of socio-biologically sophisticated individuals—us—now believe that his lone practical reasoner's choice was rational and the consensus's choice was irrational.[51] Consequently, for D'Amato's example to be effective, he must be wrong about the connection between rationality and intersubjectivity.

D'Amato fails to distinguish between the context of *discovery* and the context of *validation*. In important conflicts, we need not have intersub-

---

49. *See id.* at 188 n.141; D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 Va. L. Rev. 561, 594-95 (1989).

50. Different qualifications might be required in different circumstances. We can, however, list some features which any "qualified" individual should possess—namely, intelligence, experience, empathy, sensitivity, intuitiveness, and so forth.

51. D'Amato might insist that consensus on the resolution of a practical conflict is irrelevant to the rationality of the resolution, even after being considered in the appropriate circumstances by the qualified practical reasoners. If so, it is difficult to understand in what sense the resolution is rational. Rational argument, especially in law, seeks consensus through free and open argument. Indeed, it is only by agreement on legal paradigms that normal litigation and normal constitutional problem-solving can occur.

This notion of rationality as consensus need not entail applying antecedently-existing criteria through which people discover the right answer. Nor does it imply a uniquely right answer to constitutional conflicts. Instead, rationality as consensus suggests the notion of coming together, negotiating, or compromising after considering the various alternative resolutions to a particular constitutional problem.

The notion of rationality as achieving consensus is one Rorty approvingly attributes to Dewey:

> Dewey wanted to get rid of the idea that new ideas or practices could be judged by antecedently existing criteria. He wanted everything to be as much up for grabs as feasible as much of the time as feasible. He suggested that we think of rationality not as the application of criteria (as in a tribunal) but as the achievement of consensus (as in a town meeting, or a bazaar).

R. Rorty, *Cosmopolitanism Without Emancipation: A Response to Jean-Francois Lyotard*, in Objectivity, Relativism, and Truth: Philosophical Papers Volume I at 217 (1991).

jective agreement when discovering, devising, or formulating a judgment. When we validate that judgment, however, intersubjective agreement must be necessary in principle for confirming our individual results. If not, we have retreated to a radical form of subjectivism about justification, or what's worse, we have embraced justificatory solipsism. Thus, D'Amato's lone practical reasoner must achieve consensus with some intersubjective group—at the very least, us—for his judgment to be validated ultimately.

D. *Consensus and the Role of Normal and Abnormal Meaning*

Constitutional rationality, as the consensus of qualified practitioners, constitutes normal constitutional reasoning.[52] Constitutional practitioners need not always endorse the same conclusions. But, they must share the same paradigms as to what counts as a good argument, what is probative evidence, and what is an appropriate source of law. Furthermore, they ought to share many of the same conclusions and principles of inference upon which these conclusions depend.

The problem with appealing to normal constitutional reasoning as the basis of law, however, is the existence of controversial cases that are beyond the reach of normal adjudication. For instance, proponents and opponents of affirmative action do not share the same constitutional paradigm for equality or for remedying past discriminatory practices. Nor do those for and against abortion share the same paradigm of privacy and liberty. Capital punishment, federalism, free speech, privacy, the right to die, and so forth all exist at the periphery of normal adjudication. Until these questions are normalized,[53] if ever, they will admit only indeterminate answers.

Once we rid ourselves of the unfortunate dichotomy between metaphysical and epistemic indeterminacy, we realize that constitutional provisions have a univocal meaning if, and only if, qualified constitutional

---

52. *See infra* text accompanying notes 58-60 (explaining normal and abnormal meaning).

53. Constitutional controversies are normalized when the constitutional community agrees on the appropriate paradigms and methods for solving problems in that area of constitutional law. The present framework for analyzing due process and equal protection issues pertaining to social and economic matters illustrates this point. Prior to 1937, economic regulations were strictly scrutinized. After the 1937 revolution, *see infra* notes 190-194 and accompanying text, consensus was finally achieved. Unless a regulation burdened a fundamental right or suspect class, the Court should deferentially determine whether the regulation is reasonably related to a legitimate state interest. *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-42 (1985); Plyer v. Doe, 457 U.S. 202, 216-18 (1982); *see, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 682-91 (1973) (suspect class); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 29-44 (1973) (suspect class and fundamental right); Shapiro v. Thompson, 394 U.S. 618, 627, 631-33 (1969) (suspect class and fundamental right); Loving v. Virginia, 388 U.S. 1, 7-12 (1967) (fundamental right); Brown v. Board of Educ., 347 U.S. 483, 490-96 (1954) (suspect class); Skinner v. Oklahoma *ex rel* Williamson, 316 U.S. 535, 541-43 (1942) (fundamental right).

practitioners agree on what the provision means, and on the type of reasoning appropriate for resolving controversies pursuant to that meaning. This agreement explains why so-called "easy" cases are easy. In easy cases, qualified constitutional practitioners agree on the meaning of the constitutional provisions and on the type of reasoning relevant to resolving these cases.[54] This pervasive agreement, however, establishes neither metaphysical determinacy nor epistemic determinacy. Easy cases, such as the age requirement for the presidency, are easy so long as no circumstances exist in which a compelling political or moral argument can be asserted for interpreting the relevant constitutional provision in an atypical way. In fact, because it is not difficult to conjure up such atypical interpretations, a case's status as easy or difficult depends *not* on the *normal* meaning of the term alone, but on the reasons for restricting oneself to the normal meaning.

When the price is right, we will quickly substitute an abnormal meaning of the term for its normal meaning. For example, if we were unable to elect a president unless she were younger than thirty-five, we would no longer need or desire to restrict ourselves to the normal meaning of that constitutional provision.[55] Instead, we would begin to talk about sufficient maturity and so forth. This shifting from normal to abnormal meaning can be done systematically, and making such a shift is entirely a political, rather than a semantic, decision.[56]

The shifting from normal to abnormal meaning contexts is related to Kress's final defense against my attack. He writes:

> Finally, Professor Lipkin claims that a form of modified skepticism is demonstrated by the existence of controversial appellate cases such as abortion and racial issues. If he wishes to call modified skepticism what I have called moderate epistemic indeterminacy, that is fine with me. I do not wish to quarrel over terminology. The important issue is what such cases demonstrate. My contention is that a modest number of such controversial, or, if you wish, indeterminate cases, is not sufficient to establish that a constitutional system is illegitimate.[57]

If Kress grants moderate indeterminacy, then he must explain why meaning is constant in easy cases and not constant in the controversial cases.[58] Indeed, taking the controversial cases seriously enables us to see

---

54. *See supra* note 53.

55. Several commentators have described circumstances in which this scenario would be plausible. *See* D'Amato, *Aspects of Deconstruction: The "Easy Case" of the Under-Aged President*, 84 Nw. U.L. Rev. 250, 250-51 (1989); Fish, *Still Wrong After All These Years*, 6 L. & Phil. 401, 404 (1987); Lipkin, *The Anatomy of Constitutional Revolutions*, 68 Neb. L. Rev. 701, 742-43 (1989) [hereinafter Lipkin, *Constitutional Revolutions*].

56. This does not mean that the normal meaning is the *real* meaning of the provision. On the contrary, both normal and abnormal meanings are equally real or valid. The notion of a provision's *real* meaning is exactly the sort of analytic construct that we abandon once we rid ourselves of the notion of truth.

57. Kress, *Epistemological Indeterminacy, supra* note 12, at 141.

58. Should Kress reply that easy cases are easy because their metaphysical or ontological meaning is determinate, then he still must provide us with a theory of meaning

that what decides cases is not constitutional meaning, reasoning, or argument. Rather, it is contestable moral and political values that decide a case. Consequently, even if Kress is correct that most cases involve determinate principles—but some controversial cases do not—he has conspicuously failed to explain this phenomenon. Put simply, why is the meaning of the constitutional age requirement for the presidency determinate, but not the meaning of the equal protection clause?

The answer is obvious. Normal meaning—the meaning the sentence has for a native speaker of the language in ordinary circumstances—prevails only when there are political and moral reasons for it to prevail. Or, to put it more precisely, normal meaning prevails only when no moral or political reasons exist for its failure. Consequently, moral and political reasons always ultimately determine how we are to understand a constitutional conclusion, rather than its allegedly unique constitutional or legal meaning. Moreover, if moral and political reasons are always necessary for a particular meaning, then words have constant meanings only if those moral and political values are constant, and this is seldom the situation in controversial cases. When neither meaning nor the moral and political values supporting a particular meaning are constant, a constitutional system does not have the capacity to guarantee the same conclusions in relevantly similar circumstances. Hence, it can not uphold the traditional conception of the rule of law.

The point of saying that the meaning of constitutional propositions is determinate is to support the notion that constitutional language alone constrains our understanding of the Constitution. In this way, constitutional propositions purportedly tell us what to do, and we should heed their admonitions if we are rational. If, however, it turns out that a constitutional proposition has a univocal meaning only when certain other, constitutionally extrinsic factors obtain,[59] then the ultimate source of this meaning lies in these factors and not in constitutional discourse.[60] The indeterminacy thesis thus insists that abnormal (*i.e.*, non-literal) meaning can always preempt normal meaning in appropriate circumstances.

Consequently, we must distinguish a stronger version of the indeterminacy thesis from a weaker version. The stronger version contends that

---

that shows us how constitutional meaning is determinate. Without such a theory, how else are we to judge whether to retain his notion of determinate meaning?

59. These conditions include a commonality of purpose, as well as the absence of any serious challenges to these purposes or to the normative values underlying the law.

60. As an illustration, if any law is determinate, it is the law requiring a maximum speed of 55 miles per hour. But this law has a univocal meaning only because we share the same purposes of car safety and energy conservation, as well as a need (in these circumstances) for quantitative precision in achieving these purposes. In these circumstances, no one will seriously argue that a 55 miles per hour speed limit means simply "don't drive too fast;" further, in cases of this kind, we agree on a rather straightforward method of justification—namely, look at the traffic sign. Suppose, contrary to fact and plausible imagination, that twenty-five percent of all male drivers suddenly suffered heart attacks when driving under sixty miles an hour. In this case, the speed limit law might develop an exception or a non-literal interpretation.

constitutional provisions are now and perpetually indeterminate.[61] In contrast, the weaker version contends that constitutional provisions are either indeterminate or, if not, can always become indeterminate in the appropriate circumstances.[62] The stronger version ties meaning to language, insisting that constitutional language is indeterminate as a fact about language, while the weaker ties meaning to context, insisting that some contexts permit a univocal answer and some do not. The weaker version is sufficient to show that a constitutional system is not competent to generate the same answer in similar cases. And, this incompetence is at the heart of both law's indeterminacy and law's illegitimacy.

Similarly, it is for this reason that Professor Greenawalt's interesting attempt to demonstrate law's determinacy misses the point.[63] Professor Greenawalt wants to defend the "modest claim about determinacy" that "many legal questions have determinate answers."[64] According to Greenawalt's concept of determinacy, a legal question has a determinate answer if (1) it "would be arrived at by virtually all those with an understanding of the legal system,"[65] and (2) it is "unopposed by powerful arguments, consonant with the premises of the system, for contrary results."[66]

Greenawalt successfully describes circumstances in which law *can* be determinate.[67] But the indeterminacy issue, as I understand it, challenges the *source*, not the fact, of one right answer existing in any given case. To be a proponent of determinacy, you must believe that a constitutional question has one right answer, *and* that the answer derives solely from the meaning of the law, independent of our purposes, needs, aspirations, and context. In other words, you must believe in the acontextual meaning of law.[68] If sometimes one right answer can be derived contextually, then it is *absurd* to deny that only one right answer exists in that

---

61. For theorists whom I consider to abide by a stronger version of indeterminacy, see Boyle, *supra* note 7; D'Amato, *supra* note 4; Singer, *supra* note 6.

62. In other words, constitutional provisions are always potentially indeterminate. For a work demonstrating a weaker version of indeterminacy, see Lipkin, *Beyond Skepticism, supra* note 3.

63. *See* Greenawalt, *How Law Can Be Determinate,* 38 UCLA L. Rev. 1 (1990).

64. *Id.* at 29.

65. *Id.*

66. *Id.*

67. Parts of Greenawalt's argument read like a phenomenology of the contextual meaning of imperatives. For example, Greenawalt describes in detail how we comply with such simple imperatives as "please shut the door." *See id.* at 6-7. In this regard, his argument is very instructive. But such a phenomenology, rather than doing away with contextual meaning, makes contextual meaning central to understanding imperatives. Where there is contextual meaning, in turn, there is always the possibility of indeterminacy.

68. No one should deny that we can describe a context, even systematically, where one right answer exists. For example, the 55 miles-per-hour speed limit means that no one is legally permitted to drive faster than 55 miles-per-hour in a vehicle on the highway in ordinary circumstances. Of course, the weasel words "in ordinary circumstances" trivialize the results, while nevertheless showing how contextually one right answer can exist. The problem is that the weasel words are often contestable.

particular context.[69] The indeterminacy controversy need not challenge the *fact* that sometimes constitutional questions have one right answer.[70] Rather, it needs only to address the traditional explanation of this fact. A defender of determinacy must rely on the meaning of constitutional discourse in explaining the one right answer, while defenders of indeterminacy appeal to discourse, purposes, political and moral factors, and so forth. In short, defenders of indeterminacy appeal to factors extrinsic to constitutional and legal discourse.[71]

E. *Legal Positivism and Practical Reasoning*

The source of Kress's distinction between metaphysical and epistemic features of law can be found in Jules Coleman's important and illuminating article on positivism.[72] In distinguishing between two ways of understanding the concept of a rule of recognition, Coleman writes:

> In one sense, the rule of recognition is a standard that one can use to identify, validate or discover a community's law. In another sense, the rule of recognition specifies the conditions a norm must satisfy to constitute part of a community's law. The same rule may or may not be a rule of recognition in both senses, since the rule one employs to determine the law need not be the same rule as the one that makes law determinate. This ambiguity between the epistemic and semantic interpretations of the rule of recognition pervades the literature and is responsible for a good deal of confusion about the essential claims of legal positivism. In my view, legal positivism is committed to the rule of recognition in the semantic sense at least . . . .[73]

In Coleman's view, a rule of recognition must be semantically ade-

---

69. Professor Greenawalt argues that "the answer to the question of whether certain actions and events carry *particular* legal consequences is often clearly negative," and that "any thesis which asserts that answers to legal questions are invariably indeterminate is incorrect." Greenawalt, *supra* note 63, at 5. I am unpersuaded by this argument. Greenawalt is quite right that "life is filled with acts, like scratching one's nose and putting one's socks on, that patently do not give rise to legal liability. The norms of any legal system are determinate in their nonapplicability to countless human activities." *Id.* at 32. This, however, is an unilluminating notion of determinacy. The problem of indeterminacy challenges us to show that there are uniquely correct answers to legal problems. Greenawalt comes no closer to this goal by attempting to show that legal norms are determinate in their *non*-applicability to many human activities.

70. In other words, there are lots of easy cases. For example, no one would presently take seriously an argument that the Constitution permits naturalized citizens to become president. But why is this case easy? Is it because the language of the Constitution precludes such presidential candidates once and forever? I doubt it. Rather, it is because the normal meaning of the Constitution precludes it, *and* there are no pressing political, moral, or constitutional reasons to shift from normal to abnormal meaning.

71. Indeterminacy can be established without endorsing this strong view. A system of rules is indeterminate when the meaning of its statements derive from the context of people's needs and purposes. Contexts, needs, and purposes may vary, and consequently, the possibility always exists that abnormal meaning will replace normal meaning. That is all that is needed to demonstrate indeterminacy.

72. *See* J. Coleman, *supra* note 9.

73. *Id.* at 5.

quate, though it might be epistemically inadequate. In other words, legal positivism is committed to the view that truth conditions exist for any statement of law, even when we do not know that they exist. Legal positivism contends that the sentence " 'X is law' is true" is a meaningful sentence, despite our inability to verify its truth in principle.

Given the aims of a legal system—namely, to inform the public and guide action—what possible reason could a positivist have for regarding semantic and epistemic senses of a rule of recognition as independent notions? In order to achieve these positivist aims, a rule of recognition must be epistemically adequate. It must, therefore, tell people how to recognize, identify, pick out, verify, or discover that a particular norm is a bona fide law. While some positivists might insist that an epistemically adequate rule of recognition must be semantically adequate, this is simply another way of saying that the epistemic and semantic senses of the rule of recognition are dependent notions, and that to know whether a norm is a law entails that it is a law.[74] Separating these dimensions so that a rule of recognition might be semantically adequate but epistemically inadequate, as Coleman suggests, is a position that no self-respecting positivist should adopt.[75]

Coleman invokes a sharp distinction between accepting the same rule

---

74. A rule of recognition, as an epistemic notion, tells you how to determine whether a particular norm is a law. Thus, if you want to know whether the speed limit is 55 m.p.h., you must look at the sign or look it up in the statute book. A semantic conception of a rule of recognition that merely describes the truth conditions of particular laws, without supplying a methodology for determining whether these truth conditions exist, is simply pointless. Positivism needs to tie truth conditions to practical reasoning, and therefore the truth conditions must be tied conceptually to the process of coming to know what the law is. Consequently, whereas positivism need not reject the distinction between the epistemic and semantic dimensions of a rule of recognition, it should deny that these dimensions exist independently. The truth conditions of a positivist rule of recognition must include epistemic conditions. The truth conditions for the sentence "X is a law" must include reference to the process by which the law becomes known, even if it is as trivial as saying that X is a law if and only if the relevant legal actors come to regard it as legally binding.

Positivism's *raison d'etre* is to answer the epistemic imperative that natural law and theological conceptions of law failed to answer—namely, how can I come to know what the law is? Positivism's resounding answer to this question is to provide the social facts—for example, the product of legislatures and courts that are available to everyone directly or through representation by experts—*that tell you what the law is.* Thus, only by insisting upon a legal system that is epistemically adequate does positivism guarantee that law is relevant to an individual's social and political life.

75. Positivists, such as Coleman, insist that a rule of recognition is a social rule, and "[s]ocial rules can have normative force in that they have a prescriptive or reason-giving dimension." Coleman, *Rules and Social Facts*, 14 Harv. J.L. & Pub. Pol'y 703, 705 (1991). Social rules provide reasons for action only when "citizens accept[ ] them from an internal point of view." *Id.* But, then, for citizens to accept a rule of recognition from the internal point of view, the rule must be epistemically adequate—that is, the citizens must be able in principle to know the meaning of the rule. A semantically adequate, but epistemically inadequate, rule of recognition cannot be accepted from the internal point of view, and consequently cannot provide reasons for action. Hence, positivism cannot countenance semantically adequate, but epistemically inadequate, rules of recognition.

of recognition and identifying the same standards as legal ones. He writes:

> Suppose the . . . rule of recognition states, "The law is whatever is morally correct." The controversy among judges does not arise over the content of the rule of recognition itself. It arises over which norms satisfy the standards set forth in it. The divergence in behavior among officials as exemplified in their identifying different standards as legal ones does not establish their failure to accept the same rule of recognition. On the contrary, judges accept the same truth conditions for propositions of law; that is, that law consists in moral truth. They disagree about which propositions satisfy those conditions. While there may be no agreement whatsoever regarding which standards are legal ones—since there is no agreed upon standard for determining the truth of a moral principle—there is complete agreement among judges concerning the standards of legality. That judges reach different conclusions regarding the law of a community does not mean that they are employing different standards of legality.[76]

Is it really plausible to insist that judges who *systematically* reach different conclusions might be employing the same standards of legality? Suppose, for instance, that three judges hold the following legal positions. Judge Jones maintains that law is whatever is morally correct and believes that moral correctness is what helps others. Judge Smith maintains that law is whatever is morally correct, and believes that moral correctness is what is in one's self-interest. And Judge Thomas maintains that law is whatever is *prudentially* correct where prudential correctness involves acting in one's self-interest.

In Coleman's view, Judge Jones and Judge Smith share the same legal standard of moral correctness, a standard that is different from Judge Thomas'. Yet, this is counter-intuitive in the extreme. In fact, because Judge Smith and Judge Thomas understand "self-interest" in the same fashion, they will share the same concrete judgments and are likely to decide cases the same way. The fact that Judge Jones and Judge Smith share the same legal standard, using Coleman's terminology, has no practical effect at all.

To insist, as Coleman does, that these judges share the same standard is to invoke a distinction between an abstract formulation of a standard and the concrete propositions which give the standard content. As an abstract matter, Judges Jones and Smith agree that law is whatever is morally correct; so, they both accept morality as the abstract standard of legality. Nevertheless, both judges fill in the content of this legal standard in radically different ways—so different that it is difficult to see how they hold the same actual standard. The more radically different the contents of two legal rules, the less plausible it is that these rules express the same standard of legality. In short, there simply is no such thing as a

---

76. J. Coleman, *supra* note 9, at 20.

standard of legality, or the same standard of legality, independent of the concrete propositions which give it content.

Consequently, the distinction Coleman seeks to establish here yields implausible results. In Coleman's view, Judge Smith and Judge Jones have the same standard of legality—moral correctness—despite the fact that they inevitably and predictably decide cases differently. Yet, Coleman would also claim that Judge Thomas has a different standard of legality from both Judge Jones and Judge Smith, despite the fact that her decisions will be similar to Judge Jones'. In other words, two judges sharing the "same standard of legality" decide cases differently, while two judges holding different standards of legality make the same judicial decisions. Clearly something has gone wrong.

Another example of misusing the distinction between the metaphysical and epistemic dimensions of law is illustrated in Charles Silver's criticism of Ronald Dworkin's treatment of *Elmer's Case*.[77] It is instructive to examine this controversy.

Dworkin criticizes positivism for being unable to explain decisions in hard cases, such as *Elmer's Case*.[78] In Dworkin's view, positivism tells judges to decide the case according to the decision sanctioned by the rule of recognition.[79] When the rule of recognition is silent, however, judges are permitted to use their discretion to legislate in resolving the conflict. Consequently, if positivism provides an accurate explanation of judicial reasoning, judges in hard cases should not probe the law for the right answer. Instead, once a judge sees that the rule of recognition is silent, she should decide the case with abandon. Judges, however, do probe the law in hard cases; thus, positivism fails to explain actual judicial practice.

Silver argues that *Elmer's Case* does not, as Dworkin insists, provide a counter-example to positivism.[80] Following Coleman's lead, Silver distinguishes between the epistemic and semantic purposes behind a rule of recognition. Epistemic purposes concern verifying the legality of a rule, while semantic purposes concern the truth conditions for propositions of law.[81] For Silver, a rule of recognition may serve one purpose and not the other.[82] In other words, a rule of recognition may be either epistemically adequate or semantically adequate.[83]

---

77. *See* Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889) ("Elmer's case").

78. In *Riggs v. Palmer*, Elmer murdered his uncle in order to inherit his uncle's fortune. *See* 115 N.Y. at 509, 22 N.E. at 189. Thus, the question before the New York Court was whether a murderer could take under his victim's will. *See id.*

79. *See* R. Dworkin, *supra* note 1, at 34.

80. *See* Silver, *Elmer's Case: A Legal Positivist Replies to Dworkin*, 6 L. & Phil. 381, 380-89 (1987).

81. *See id.* at 389.

82. *See id.*

83. Thus Silver writes:

   For example, the rule of recognition in use in the United States is epistemically adequate because it sets out a test in light of which legality can be verified: if Congress enacted a bill that contained a norm and the President signed the bill into law, the norm is law, and otherwise not. But the rule "God's will is law,"

Especially on positivist grounds,[84] it is curious that a rule of recognition may be semantically adequate though not epistemically adequate. Any self-respecting positivist should reject, as illegitimate, a permanently epistemically inadequate rule of recognition.[85] The purpose of a rule of recognition is not to identify the truth conditions of propositions of law from some neutral vantage point. Instead, its purpose is to tell actual agents how to determine, identify, or validate a norm as a bona fide law. Thus, the central function of a rule of recognition is tied to practical reasoning. A rule of recognition that is merely semantically adequate cannot identify genuine statements of law, and hence cannot provide legal reasons for action.[86]

I am not denying the validity of distinguishing between semantic and epistemic matters for every conceivable purpose (nor am I affirming this distinction).[87] Because law is tied to practical reasoning, it is necessary for a practical reasoner—a judge, an attorney, or a citizen—to possess the appropriate legal information in order to make a decision. This information, in turn, must be built into the conception of law, as positivism does. Semantic conceptions of law that are epistemically inadequate fail to provide this information.

---

which could also be a rule of recognition, would be only semantically adequate. It establishes truth conditions for propositions of the form "The law is X"—such propositions are true just when X is God's will—but it establishes no tests for determining which norms—which Xs—comport with God's will. In other words, the rule "God's will is law" provides no authoritative method of divining God's will, even though it provides an authoritative criterion for the truth of propositions of law.

Id.

84. *See supra* note 74 and accompanying text.

85. Postema makes a similar point in characterizing Bentham's conception of law. "Bentham," according to Postema,

combines both 'ontological' [metaphysical] and 'epistemic' functions of criteria of validity in a single set of criteria. In fact, the 'epistemic' function drives his positivist conception of validity, for the social problem which calls for law, on his view, is at bottom an epistemic one: the problem of making certain rules and standards of conduct a matter of public, common knowledge.

G. Postema, Bentham and the Common Law Tradition 317 (1986) (citation omitted). In my estimation, the social problem of making law public is a function of the law's pragmatic project—namely, to provide a system of norms that can be used in (judicial) practical reasoning to settle legal conflicts.

86. Consequently, a positivist cannot accept just any rule as a possible rule of recognition. Positivism must eschew rules that are epistemically inadequate—for example, a rule which says that law is what is morally correct—unless, of course, moral correctness is epistemically discernible. While a rule of recognition might start out as epistemically inadequate, it cannot remain so. Unless it is *made* epistemically adequate, it cannot be the legal system's rule of recognition. In the example of moral correctness, the rule of recognition is made epistemically adequate by providing an intelligible procedure for determining moral correctness. Positivism, then, imposes constraints on the form and content of a rule of recognition.

87. In other contexts, I have adopted similar distinctions. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 821-22; Lipkin, *Conventionalism, Pragmatism and Constitutional Revolutions*, 21 U. Cal. Davis L. Rev. 645, 695-96 n.165 (1988) [hereinafter Lipkin, *Conventionalism*].

Because positivism concerns itself in the first instance with the epistemic adequacy of a rule of recognition, it explicates the concept of law in terms of clearly identifiable *social* facts—facts that in principle are equally accessible to everyone. Consequently, positivists must eschew epistemically inadequate rules of recognition. Indeed, both Coleman's and Silver's examples of semantically adequate but epistemically inadequate conceptions of law—law is what is morally correct and law is God's will—are examples of conceptions of law that no one (certainly no positivist) has ever in fact held. Natural law and theological conceptions of law, in contrast, always include an epistemological way of determining what the law is.[88] In other words, such conceptions of law always *attempt* to be epistemologically adequate, although they might fail due to inadequate epistemologies. Thus, because actual historical conceptions of law are conceptually tied to procedures for determining what the law is, Coleman's conception of semantic adequacy without epistemic adequacy is a pure fiction.[89]

The above argument leaves us with one final question. If metaphysical conceptions of law are pragmatically pointless, and law is epistemically indeterminate, how do we explain the low rate of appellate dissents? Although I have sympathy for the ideological view—namely, that appellate decisions reflect the ideology of the rich and powerful—I do not believe it is the whole story. Instead, I believe that legal practitioners draw some of the same conclusions over a host of legal problems because these conclusions serve common purposes.[90]

This says nothing about how law or doctrine constrains judges. Indeed, if our circumstances or purposes change, then law changes. Moreover, because the same purposes are not always widely shared, law's meaning is often *actually* indeterminate, and is always *potentially* indeterminate. Nevertheless, when people have shared goals, they will often agree on the legal result. These circumstances describe normal litigation, and agreement over a conceptual paradigm is necessary for normal litigation to operate. Moreover, the agreement driving normal litigation is

---

88. *See* J. Finnis, Natural Law and Natural Rights 64-69, 85-90 (1980) (arguing that values such as knowledge, life, play, aesthetic experience, friendship, practical reasoning, and spirituality are self-evidently good). Nevertheless, without some conception of *how* we know that these values are good (or what it is to know that they are good), it is difficult to assess the claim that they are good. Moreover, simply asserting that these activities are self-evidently good, all things considered, tells us very little. Certainly, we can believe that some value is good without even beginning to understand how much of it is good, or how it should be ranked in a hierarchy of values. In short, we can make abstract pronouncements about values without the slightest idea of how to express those values in actual life.

89. A rule of recognition that is only semantically adequate is tantamount to a rule of recognition that is applicable only from a God's-eye view of the world. On positivist as well as pragmatic grounds, such notions should be excised from jurisprudence.

90. The situation is more complex than this suggests. Sometimes, the purposes are common only to a particularly powerful group of citizens. Ideally, however, these purposes are common to all citizens.

FORDHAM LAW REVIEW [Vol. 60

necessary even for raising the great controversial cases of the day. Consequently, because normal litigation is necessary for any legal system, even one that is seriously incomplete, the fact of a low dissent rate (if it is a fact) should not be surprising. Even with sufficient indeterminacy to warrant a modified form of legal skepticism,[91] there must be considerable agreement for the legal system to be a legal system in the first place.[92]

Because it has special relevance here, I will anticipate my argument from Part II. Constitutional theorists should jettison the notion of constitutional truth.[93] Once abandoning truth, the distinction between metaphysical determinacy and epistemic determinacy loses much of its force. No longer will a great divide exist between truth and justification, or between the real meaning of a constitutional provision and the meaning it derives from social practices. This does not suggest that no gap exists between what a constitutional provision—such as due process or equal protection—means and what judges say it means. Rather, this gap is a critical device used to encourage constitutional criticism and change.[94] The Constitution means what judges say it means, but actual judges should say that the Constitution means what judges in ideal circumstances would say it means.[95] The goal of constitutional interpretation makes reflective, thoughtful agreement the central feature of constitutional justification.[96] This agreement, in turn, is guided by agreement in

---

91. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 824-26.

92. There are also some rather mundane reasons for agreement in appellate decisions. The appellate caseload and the strain of hearing the same sort of cases—for example, social security cases and writs of habeas corpus—incline even the most maverick judge to seek agreement and conciliation whenever she can.

93. For a further discussion of this point, see *infra* Part II.

94. Consider Rorty's account of how pragmatists view the distinction between truth and justification.

> They see the gap between truth and justification not as something to be bridged by isolating a natural and transcultural sort of rationality which can be used to criticize certain cultures and praise others, but simply as the gap between the actual good and the possible better. From a pragmatist point of view, to say that what is rational for us now to believe may not be *true*, is simply to say that somebody may come up with a better idea. It is to say that there is always room for improved belief, since new evidence, or new hypotheses, or a whole new vocabulary, may come along.

R. Rorty, *Solidarity or Objectivity?*, in Objectivity, Relativism, and Truth: Philosophical Papers Volume I at 22-23 (1991) [hereinafter Rorty, *Solidarity or Objectivity?*].

For Rorty, seeking truth is a quixotic attempt to get out of our skins. Similarly, Rorty denies that we can understand the term "human conscience" as anything but a contingent product of history. *See* Rorty, *The Seer of Prague*, 205 New Republic 35, 39-40 (1991). Human conscience is not transcendental; it is contingent through and through. To say, however, that human conscience is not identifiable with any particular culture is not, *pace* Rorty, to go beyond history or attempt to get out of our skins. It merely is an attempt to retain what is good in each culture and to shed the bad. Of course, good and bad are here pragmatic notions that mean helping or impeding us to cope with our environment.

95. In my view, theories of judicial interpretation are theories of what judges in ideal circumstances say the Constitution means.

96. We never get beyond socially-confirmed, reflective judgment. Consequently, con-

ideal circumstances which, to paraphrase Rorty on a different issue, gives us everything we could possibly hope for from a theory of constitutional truth.[97]

II. A Pragmatic Conception of Constitutional Justification and Truth

Defenders of constitutional determinacy are wedded to truth as the paradigm of constitutional validity. Advocates of indeterminacy, in contrast, are wedded to a paradigm of justification. Their concern is with which proposition is more solidly justified, not with whether the proposition has truth conditions.[98] Proponents of indeterminacy[99] see justification rather than truth as the central normative concept in constitutional reasoning.[100] Justification is agent-relative, while truth is not. Thus, jus-

firmation of this sort is all we need for constitutional objectivity. Consider Rorty's words: "[T]he desire for objectivity is not the desire to escape the limitations of one's community, but simply the desire for as much intersubjective agreement as possible." R. Rorty, *Solidarity or Objectivity?, supra* note 94, at 23. In this view, the distinction between constitutional knowledge and constitutional opinion "is simply the distinction between topics on which such agreement is relatively easy to get and topics on which agreement is relatively hard to get." *Id.*

97. Justification must not be formally equated with either consensus or truth. Free and reflective consensus or intersubjective agreement is, however, *evidence* of justification in ideal circumstances.

98. In this view, the notions of truth and truth conditions are suspect and should be abandoned. *See* Field, *The Deflationary Conception of Truth*, in Fact, Science and Morality 55, 56 (G. MacDonald & C. Wright eds. 1986) ("A prevalent view in the early days of the Vienna Circle was that the notions of truth and of truth conditions are a piece of useless metaphysics that we ought to abandon.") [hereinafter Field, *The Deflationary Conception of Truth*].

99. Robert Benson nicely describes the foe of determinacy as "a person who inhabits an enormous cultural web, sees connections between all the threads, and mercurially imagines how they could be taken apart and reconnected in different ways." Benson, *Deconstruction's Critics, the TV Scramble Effect, and the Fajita Pita Syndrome*, 85 Nw. U.L. Rev. 119, 120 (1990) (specifically describing Professor D'Amato). An individual devoted to truth as an explanatory and constraining concept would never seek, nor could he tolerate, deliberately taking apart our cultural web and imagining better ways of putting it back together again. Instead, a devotee of truth seeks to understand how this web reflects the way the world is.

100. The distinction between truth and justification is reflected in Robert Brandon's view that the philosophy of language can be divided into two schools: representationalism and social practice theory. *See* Brandon, *Truth and Assertibility*, 73 J. Phil. 137, 137-39 (1976). Representationalism is concerned with truth and the way the world is, *see id.* at 137, while social practice theory is concerned with assertibility and social practice, *see id.* at 137-38.

Similarly, advocates of determinacy contend that a sentence's meaning is not exhausted by citing social practices, and hence sentences can have a univocal and unchanging meaning. Detractors believe that meaning is merely a function of social practices and therefore cannot produce univocal and unchanging meaning.

Imagine an objection to this classification on the ground that determinate meaning can also be based on social practice. In this case, one cannot distinguish between the two kinds of meaning on the basis of social practice. If you believe, however, that sentences have determinate meaning *and* that meaning is a function of social practice, you must show how social practices can produce a singular meaning. I suggest that social practices

tification permits indeterminacy, but truth does not.

A. *Theories of Truth*

How can this issue between truth and justification be resolved?[101] Truth appears to play a familiar role in reasoning and inquiry.[102] Thus, in order for a belief to constitute knowledge and thereby have the appropriate hold over us, the belief must be true. Although philosophers have offered many different conceptions of truth, the correspondence theory of truth,[103] more so than any other theory,[104] has become the dominant conception of truth in the Western world. According to this theory, a belief is true when it pictures, mirrors, or reflects the external world or

---

create layers of meaning. These layers of meaning, though sometimes compatible, are often contradictory or exist in tension with one another. In fact, just how to characterize the point of the social practice is itself contestable, perhaps even ineradicably so. *Cf.* Gallie, *Essentially Contested Concepts*, 56 Proc. Aristotelian Soc'y 167, 171-72 (1956) (noting that defining or characterizing any contested concept requires that "each party recognize[ ] the fact that its own use of [the concept] is contested by those [uses] of other parties, and that each party must at least have some appreciation of the different criteria in the light of which other parties claim to be applying the concept in question").

The social practices upon which constitutional conclusions ultimately depend usually include contestable and controversial layers of meaning. For example, the social practice upon which due process rests is an amorphous web of attitudes and values about liberty and privacy. A proponent of abortion identifies and emphasizes certain strands of this web, while the anti-abortion proponent emphasizes other strands. Unless the social practices upon which due process derives its meaning become simple and uniform, the term "due process" will continue to be indeterminate. The point here is best summarized by saying that truth typically considers meaning to be a determinate result of the way the world is, while justification sees meaning as the indeterminate result of social practices.

101. It should be added that some foes of determinacy argue against both truth and justification. *See* Singer, *supra* note 6, at 25-26. I am sympathetic to this perspective when speaking about justification that is designed to compel assent. Alternatively, justification might be designed to guide and encourage agreement, while acknowledging that agreement often is impossible.

102. One writer describes the familiar role of truth as follows:

> Our ordinary concept of truth is . . . an extremely important one; it occurs frequently, not only in everyday discourse, but in mathematical and scientific discourse as well. Further, it is clear that many uses of this concept cannot easily be avoided, perhaps cannot be avoided at all. . . . When we talk . . . about all statements of a given form being true, or about the truth of all the premises of some unspecified argument, it is hard to see how we might express similar thoughts without employing the notion of truth.

Etchemendy, *Tarski on Truth and Logical Consequence*, 53 J. Symbolic Logic 51, 53 (1988).

103. *See generally* L. Wittgenstein, Tractatus Logico—Philosophicus (D.F. Pears & B.F. McGuinness trans. 1963) (embracing correspondence theory).

104. Other important conceptions of truth are: the coherence theory, *see* Davidson, *A Coherence Theory of Truth and Knowledge*, in Truth & Interpretation: Perspectives on the Philosophy of Donald Davidson 307, 307-19 (E. LePore ed. 1986); the semantic conception of truth, *see* Tarski, *The Semantic Conception of Truth*, 4 Phil. & Phenomenological Res. 341, 358-59 (1944); the disquotational view of truth, *see* Field, *The Deflationary Conception of Truth*, *supra* note 98, at 55-118; and the pragmatic conception of truth, *see* generally W. James, The Meaning of Truth (1975).

external reality.[105] Moreover, the fact that the belief reflects reality provides both the explanation and the justification of the belief. According to correspondence theorists, as I understand them, there is a sharp distinction between truth and justification. Truth reflects what is real, while justification tells us the best way to discover truth. In this framework, it is possible for us to be justified in what we believe, although our beliefs might still be false.[106]

A correspondence theory, then, is usually tied to realism, although the two positions are not identical.[107] Nevertheless, for the purposes of this essay, I will call anyone holding a correspondence theory of truth a realist.[108] Realists contend that our statements and beliefs copy a reality that

---

105. *See* Singer, *supra* note 6, at 28-30. I do not consider the view that principles of reasoning exist which compel belief.

106. This framework permits the possibility of skepticism. Because there is a sharp divide between what is true and what is justified, our beliefs might be justified and yet not be true. In response, mainstream theorists argue that skepticism can either be refuted or ignored. *See* J. Finnis, *supra* note 88, at 70-75; R. Dworkin, *supra* note 1, at 15-86; *see generally* Moore, *Moral Reality*, 1982 Wisc. L. Rev. 1061, 1063, 1063-1156 (attempting to "rebut[ ] most of the skeptic's claims"). I think none of these positions is correct. *See* Lipkin, *Beyond Skepticism*, *supra* note 3, at 874-77 (arguing that a modified skepticism will remain a permanent element in practical reasoning). *But see* Williams, *The Elimination of Metaphysics*, in Fact, Science and Morality 9 (G. MacDonald & C. Wright eds. 1986) (arguing that skepticism is pointless).

The real trick is to imagine, if possible, what our culture would be like if no one ever took skepticism seriously—if no treatises were ever written to combat skeptical doubt; if no one ever held out skepticism as a pitfall to be avoided; if people thought that skepticism, though possible, was just not interesting; if skepticism simply failed to capture anyone's imagination. Such a future might produce more exciting and more visionary narratives describing possible experiments in social interactions, as well as novel ideals toward which individuals could strive. Of course, some theorists might believe that certain forms of skepticism drive inquiry in helpful ways.

The traditional realist framework creates the possibility of divisions in our intellectual landscape. Because scientific and common sense claims appear to correspond to external reality, some areas of inquiry—such as, ethics and value theory—are supposed to be illegitimate because their subject matter fails to correspond to anything in the external world. What does "goodness," "rightness," or "obligation" refer to? What does "beauty," "harmony," or "grace" picture? The realist framework thus sometimes distinguishes between science and ethics, treating the former as a subject of knowledge and the latter as a subject of some weaker, even illegitimate, form of inquiry. Not surprisingly, the fact/value distinction arises with special force in a realist framework that identifies truth with correspondence. Law lies on the value side of the dichotomy and so, if truth is correspondence, law is not subject to truth or falsity. For an interesting attempt to defeat the stepchild status of morality and law, see Moore, *supra*, at 1061 (arguing that moral realism is the best explanation of our experience); *see also* Boyd, *How to Be a Moral Realist*, in Essays on Moral Realism 181 (G. Sayre-McCord ed. 1988) (arguing for moral realism).

107. Davidson believes that an intimate connection exists between correspondence and realism. *See* Davidson, *The Structure and Content of Truth*, 87 J. Phil. 279, 304 (1990) ("[t]he realist view of truth . . . must be based on the idea of correspondence").

108. Philosophical or metaphysical realism is the view that statements in science, ethics, and everyday life are true and reflect an external reality that exists independently of minds or perceivers. *See* H. Putnam, Reason, Truth and History 49 (1981). This view should be distinguished from "legal realism," which seeks to discover the actual *causes* of judicial decisions in contradistinction to *reasons* for those decisions.

FORDHAM LAW REVIEW [Vol. 60

is independent of both mind and language.[109] The external facts that comprise reality *make* our beliefs true. Realism, in other words, looks to reality to explain and justify our beliefs and values, as well as the progress that humankind (especially science) has made in understanding the world.[110] In a realist's view, truth plays a strong explanatory and justificatory role in the etiology of our beliefs. Thus, I call realist theories of truth that play this strong explanatory and justificatory role "strong theories of truth."[111]

According to a strong theory of truth, the fact that a belief or sentence represents external facts or corresponds to reality is sufficient to explain why the sentence is true. Realism, as incorporating a strong theory of truth, appears to conform to the common sense notion that what makes the sentence "The cat is on the mat" true is the cat and his presence on the mat.[112]

Does a strong theory of truth really provide the appropriate sort of explanation and justification of beliefs and statements?[113] Given the

---

109. *See* H. Putnam, *supra* note 108, at 49. Realism, as I see it, maintains that truth is a certain type of relation between cognitive states or sentential attitudes and the external world.

110. In the traditional view of scientific progress, "the growth of science delivers ever closer approximations to fundamental truths about the physical world." Leplin, *Truth and Scientific Progress*, in Scientific Realism 193, 193 (J. Leplin ed. 1984) [hereinafter Leplin, Scientific Realism].

111. Strong theories of truth are contrasted with weak theories of truth. Theories of the latter type retain the use of the word "true," but jettison its explanatory and justificatory force. A weak theory of truth determines whether a belief is justified and then, if it is, calls it true. On a weak theory, truth does not provide an explanation or justification of the belief. In fact, in such theories, truth plays no epistemic role at all. *See generally* Davidson, *supra* note 107, at 307-19 (arguing for a weak theory of truth).

112. Some realist theories of truth are committed to the view that words refer to objects in the world. *See* H. Putnam, *supra* note 108, at 49. *But see* R. Barthes, Criticism & Truth 40 (1987) ("[i]n the last analysis, words no longer have any referential value, only an exchange value: their function is to communicate").

113. Recently, Richard Rorty has inveighed against the correspondence theory of truth. *See generally* R. Rorty, Objectivity, Relativism, and Truth: Philosophical Papers Volume I (1991); R. Rorty, Contingency, Irony and Solidarity (1989); R. Rorty, Philosophy and the Mirror of Nature (1980); R. Rorty, Consequence of Pragmatism (1980). Rorty's distaste for truth rests on his belief that it is a trivial notion, and that freedom is a much more important concern. *See* Rorty, *Truth and Freedom: A Reply to Thomas McCarthy*, 16 Critical Theory 633, 634 (1990) [hereinafter Rorty, *Truth and Freedom*]; R. Rorty, *The Priority of Democracy to Philosophy*, in Objectivity, Relativism, and Truth: Philosophical Papers Volume I at 175 (1991). Rorty wants to know what will encourage unforced agreement in free and open encounters. For Rorty, it is pointless to seek a "God's-eye" view from which to evaluate everything. *See* Rorty, *Truth and Freedom*, *supra*, at 633. All we need is the notion that we might be wrong in some of our beliefs and values. In other words, "fallibilism" is the only thing we need, not an Archimedean point of view. *See id.* at 635.

Rorty fails to realize that fallibilism itself is the beginning of a God's-eye view. The notions of correctness and criticism imply getting beyond oneself. If we can't *try* to get out of our skins, then we can't endorse fallibilism. Correcting one's present view means seeking a more general one. Only by comparing my beliefs with those of others can I learn that mine are mistaken. While such a view may not represent getting out of our skins, it nonetheless makes talk about doing so pragmatically fruitful as a regulative ideal.

number of questions the theory leaves unanswered, the answer to this question is certainly "no." For example, if such a theory explains and justifies the sentence "The cat is on the mat," how does it explain and justify its negation—namely, "The cat is *not* on the mat"? If the negation is true, what "negative" fact explains this? Additionally, how does a strong theory of truth explain the truth of the sentence "Four is divisible by two"?

Still other questions remain unanswered. For instance, what is the relationship between a true belief or sentence and the external world? And, even further, how do we know that true beliefs correspond to the external world? Do we compare the sentence with reality?[114] To what do true sentences correspond?[115] What is the relation of correspondence between the true belief and reality? Do we intuit this relation? What sense can we give to the locution that a true sentence corresponds to or pictures reality? How does reality "make" a sentence true? These questions seem to be insurmountable problems for the correspondence theory of truth.[116] Rather than attempting to answer these questions—an effort probably doomed in advance—we should query what better explanation of truth is possible beyond our using truth as a means of endorsing and commending certain results.[117]

Furthermore, we can use this regulative ideal without reinstating truth. *But see* Rorty, *Truth and Freedom, supra,* at 642-43 (denying that such an ideal is pragmatically fruitful).

114. Inevitably, this leads to comparing one set of beliefs with another set of beliefs. *See* Hempel, *On the Logical Positivists' Theory of Truth,* 2 Analysis 49, 58 (1935) (noting "that there is no essential difference left between protocol statements"—statements which provide a foundation for empirical statements and beliefs—"and other statements" and beliefs).

115. The obvious answer is that true sentences correspond to facts. But what is a fact? According to Davidson, "there is nothing interesting or instructive to which true sentences might correspond." Davidson, *supra* note 107, at 303. Take the relatively simple sentence "The cat is on the mat." Do you point to the cat? The relation of "on-ness"? The mat? Does "mat" refer to the mat? What do demonstratives and logical connectives correspond to? As Strawson observes:

It is evident that there is nothing else in the world for the statement itself to be related to either in some further way of its own or in either of the different ways in which the[ ] different parts of the statement are related to what the statement is about. And it is evident that the demand that there should be such a relatum is logically absurd . . . . But the demand for something in the world *which makes the statement true . . .,* or *to which the statement corresponds when it is true,* is just this demand.

Strawson, *Truth,* in Logico-Linguistic Papers 190, 194 (1971) (emphasis added). In other words, our saying that a statement corresponds to the facts is just "a variant on saying that it is true." *Id.* at 195.

116. I do not suggest that those endorsing strong theories of truth have no replies to these objections. I do suggest, however, that the continuing philosophical controversy over the nature of truth should give *constitutional* and *legal* theorists pause. They should entertain the possibility that, however the philosophical controversy is settled (if it ever is), constitutional and legal theorists should abandon the notion of truth or at least consider it no more than a trivial notion.

117. Similar problems abound in the context of constitutional adjudication. Constitutional scholars love to quarrel over whether the right to non-discriminatory governmental

In this anti-realist view, truth at best is a function of how well a sentence or belief coheres with other sentences and beliefs.[118] We inherit a system of beliefs and values from society. Once we begin to consciously criticize and correct our system of beliefs and values, the touchstone of whether to add or retain them is how well they conform to other attitudes we have about the world.[119] A coherence conception of truth thus *defines* truth as coherence. But clearly that is a crazy view, as all sorts of coherent sets of sentences are possible that are not even remotely true.

Distinguishing between *truth* as coherence and *justification* as coherence might assist us here. Coherence in the context of justification permits us to start out with those beliefs and values we can't imagine giving up. This does not mean we make any claim about the *truth* of these beliefs and values. Rather, they are intuitive starting points that correct newly-acquired beliefs and values and, in turn, are correctable by them.

Coherence need not be a definition of "truth."[120] Rather, coherence

---

practices is *in* the Constitution, as if this were the same sort of question as whether the cookies are *in* the jar or whether the cat is on the mat. The presumption of this kind of question is that a uniquely correct answer exists that is conceptually distinct from the process of justification. Once truth is abandoned, however, we see that justification cannot yield uniquely correct answers.

118. One objection to the coherence theory of truth can perhaps be dispelled here. Coherentism must be wrong, because there are some beliefs and values we just can't give up. For example, two such attitudes seem to be the notions that murder is wrong, and that pleasure is prima facie good. If these attitudes can't be given up, then something like the realist project must be true.

The coherentist might reply that my inability to give up the above moral judgments reflects linguistic usage rather than substantive moral views. I might not be able to give up the belief that murder is wrong, but I still might abandon the view that abortion is murder. In other words, how we describe a value often determines whether we can give it up, not whether it reflects an inner or outer reality.

119. But what do we do if it turns out that "a system is coherent but bad"? Radin, *The Pragmatist and the Feminist*, 63 S. Cal. L. Rev. 1699, 1710 (1990). I do not see how this is a problem. If we say that some of our beliefs and values are coherent but bad, it must mean that we have other beliefs and values according to which the former are bad. The problem here is not bad coherence as much as what happens if we have more than one set of coherent beliefs and values. In such a case, coherentism might lead to mutually incompatible perspectives that we have no way of evaluating further. *See* Lipkin, *Beyond Skepticism*, *supra* note 3, at 844. Of course, in identifying which beliefs and values are important, there is always the danger that "coherentism may turn into complacent or aggressive conventionality or traditionality." Radin and Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. Pa. L. Rev. 1019, 1047 (1991). Additionally, coherentism is designed to replace both a correspondence theory of truth and the quest for an Archimedean perspective external to our conceptual scheme. This doesn't mean, however, that we must accept each and every belief and desire that coheres with some part of our conceptual scheme. Each individual is entitled to weigh, rank, and interpret her beliefs and values as she thinks best. Consequently, feminists can plausibly argue that once we identify the role of liberty and equality in our conceptual scheme, we will see that gender inequality is morally and politically unacceptable.

120. For James, a belief is true if it works; "everything we know conspiring with the belief, and nothing interfering . . . ." W. James, Pragmatism 99 (1975); *accord* W. James, The Meaning of Truth 118-19 (1975). Because definitions of truth are subject to obvious objections, similar to the objections to defining good contained in the naturalistic fallacy, I do not offer a definition of truth. If I were to define truth, warranted assertibility would

focuses on the sort of justificatory strategies that come naturally to us. This view leaves truth undefined and suggests that truth is where we rest after employing the best justificatory strategies available. On this view, truth is a univocal, honorific notion that applies equally to all legitimate domains of human inquiry.[121] With regard to truth's role in the episte-mological structure of inquiry, the answer is simple: truth has no such role.[122]

A realist might respond that we have no coherent notion of justifica-tion if we abandon the concept of truth. According to this argument, a sentence is justified just in case it is true or when we have adequate rea-son for believing it true. In either case, the notion of truth plays a central role. In the first case, truth is what justifies a sentence, while in the sec-ond, the *concept* of truth is relied upon to explicate the concept of justification.

This criticism is important, but ultimately it can be defeated. The ob-jection assumes that by calling for the abandonment of truth, we are re-taining our traditional framework concerning truth, justification, and knowledge. Thus, a call to truncate this framework by excising truth and perhaps knowledge leaves a conceptually impoverished form of justifica-tion. Because this framework defines the interrelationships among truth, justification, and knowledge, none is possible without the others. My point, however, is to challenge this framework, or at least its utility in constitutional jurisprudence. Throw out the framework, and along with it, the conception of justification that makes this objection plausible. In-stead, I am offering an *alternative* conception of justification—a concep-tion of justification that is especially useful in constitutional theory. This conception assumes that justification is all we ever have or need.

Suppose someone objects that a coherence theory of law is also con-cerned with both justification *and* truth. In other words, a theory of law is justified only when it is intra-theoretically self-consistent, and it is true when no better intra-theoretically consistent system exists. Conse-quently, coherence theorists are also concerned with justification and truth. If correct, this argument applies only to a weak, trivialized con-ception of truth. A strong theory of truth says that we are justified in adopting a particular interpretation of a constitutional provision because that interpretation is true.[123] A person might argue, for example, that a

---

capture the pragmatic justificatory spirit. *See* Putnam, *What is Realism?*, in Scientific Realism 140, 150 (J. Leplin, ed. 1984) (speculating about a shift from truth to "warranted assertibility").

121. Legitimacy is here defined pragmatically, and not epistemically. An area of in-quiry is legitimate if it generally assists us in achieving our needs and desires. Coping with our physical environment is one such need. Coping with our value environment is another.

122. *See* Williams, *Do We (Epistemologists) Need A Theory of Truth?*, in 14 Phil. Top-ics 223, 225, 241 (Spring 1986) (casting doubt on the idea that epistemologists need truth).

123. *See supra* notes 107-16 and accompanying text.

constitutional proposition is justified if it follows from a correct constitutional theory. In turn, a theory is correct because it reflects or mirrors reality—that is, it reflects natural law or the basic structure of the Constitution.[124] In this event, one has a strong theory of truth. If, on the other hand, what explains the reliability or truth of a set of sentences is its coherence with other such sentences, and that the ultimate test for reliability is coherence, one has a weak theory of truth. It is a weak theory of truth because truth is conceptually dependent upon coherence. My call for abandoning the notion of truth should be understood as calling for the abandonment of strong theories of truth. If you think that truth explains justification, then you have a strong theory of truth and you should abandon it. If, on the other hand, you think justification explains truth, then you have a weak conception of truth, and whether you abandon or retain the word "true" has no practical implications for constitutional theory and therefore is entirely trivial. Indeed, to say that justification explains truth is just to say that we pragmatically dignify the best justification with the title of truth. In such a scheme, truth is a front. Justification does all the work.

One problem with the suggestion of abandoning truth is that doing so appears to side with the idealist concerning central disputes in metaphysics, epistemology and value theory.[125] The idealist denies that truth exists as a mind or language independent of relation.[126] Additionally, the idealist denies that scientific or ethical *facts* exist, or that there really is a scientific and ethical reality "out there."[127] Interestingly, in the weak sense of truth, both scientific and ethical propositions are equally true, and both reflect facts that constitute reality. It is just that saying so does not add anything of importance to arguments about controversial scientific, ethical, or legal matters.[128]

---

124. Saying that a constitutional proposition reflects reality is not necessarily to endorse a realist ontology. You do not have to say that constitutional propositions reflect constitutional facts, where such facts are metaphysical entities not accessible to common sense. Nor must you say that constitutional propositions reflect natural facts. It only means that we cannot ultimately be justified in asserting constitutional propositions without some interesting explanatory notion of that proposition's truth. No such notion exists.

125. *See* Moore, *The Interpretive Turn in Modern Theory: A Turn For the Worse?*, 41 Stan. L. Rev. 871, 903 (1989) (arguing that Rorty's rebuttal of the correspondence theory of truth, and specifically his attack on realism, "use[s] the exact same arguments as the idealist metaphysician"). *But see* Lipkin, *Beyond Skepticism, supra* note 3, at 856-60) (rebutting Moore's criticism of Rorty).

126. For a classical empiricist version of idealism, see generally G. Berkeley, *Of the Principles of Human Knowledge*, in Principles of Human Knowledge and Three Dialogues Between Hylas and Philonous 53-113 (R. Woolhouse, ed. 1988).

127. *See* Glymour, *Conceptual Scheming or Confessions of a Metaphysical Realist*, 51 Synthese 169, 179-80 (1982) (describing metaphysical realism).

128. Abandoning a strong notion of truth has special significance in constitutional law. Because constitutional actors are a diverse lot, it would do well to reject any conception of meaning that does not make meaning a function of diverse social practices. Of course, this doesn't preclude (nor does it entail) a limiting case—namely, making constitutional

For example, the ethical realist believes that murder is wrong, but so does the *ethical* anti-realist. This reflective aversion to murder is the central meaning of both realist and anti-realist statements.[129] The additional trappings of each position are *philosophical* trappings that do not add to, but instead detract from, getting on with settling important controversial constitutional and ethical issues. Consider again the murder example. The realist often insists that realism provides an explanatory basis for the claim that murder is wrong. Nevertheless, how does realism explain this? What more can realism add to the judgment that murder is wrong that is not already present? If the awareness of intentional, unjustifiable, and inexcusable homicide does not prompt your judgment that murder is wrong, how will realism do so? If you need realism to prompt this judgment, you simply will not get the judgment. And, if you already have the judgment, you do not need realism.

Nor does this argument side with the anti-realist. Instead, it suggests that we redirect the subject to resolving substantive controversies, and side-step the realism/anti-realism controversy entirely. Rather than exerting precious philosophical energy on the search for a realist conception of truth, let us instead concentrate on formulating plausible conceptions of justification—conceptions that unify, refine, and perfect actual methods of generating reliable beliefs and values.

B. *A Pragmatic Conception of Justification*

Justification can be understood in the following manner. A statement is justified if it is endorsed by qualified practitioners in a given domain of inquiry. What prompts agreement is pragmatic success.[130] All things being equal, agreement of qualified practitioners achieved in the appropriate circumstances is evidence of the pragmatic success of the statement. Consequently, constitutional justification can be characterized as intersubjective agreement prompted by pragmatic utility.[131]

Pragmatic success is just another way of saying that a justified consti-

---

meaning a function of the social practices that a qualified constitutional actor would endorse in ideal circumstances.

129. This central meaning is similar to the notion of "core meaning" discussed in Fine, *The Natural Ontological Attitude*, in Scientific Realism, 83, 96-102 (J. Leplin, ed. 1984).

130. We must distinguish between consensus over particular judgments and consensus over political perspectives. Law codifies those particular judgments that achieve consensus. This does not mean that the same sort of consensus is required for political perspectives. In fact, it is doubtful that such consensus is even possible. *See* Lipkin, *Beyond Skepticism*, *supra* note 3, at 825-26, 831.

131. Endorsing a sentence means that that sentence will play a certain role in our system of beliefs and values. We adopt such a system because its adoption is beneficial. Should the realist say that a system is beneficial only if reality makes it so, then let him. The result is entirely trivial. Because pragmatic utility, and not correspondence, is our goal, a realist of this sort follows the pragmatic strategy. We can therefore tolerate his nostalgia for realism when he says that reality makes pragmatically beneficial results beneficial. What we reject is the contention that realism provides a deeper explanation than pragmatic success.

tutional decision is prized because it helps us cope with our constitutional environment. It assists us in coping with those internal tensions that cause crises in our constitutional theory, as well as with those external crises brought about by the social and political circumstances in which we live. As an example, if the decision in *Brown v. Board of Education* [132] helps us to deal adequately with racial justice in education, under the auspices of the equal protection clause, then it has the sort of pragmatic efficacy endorsed in this Article.

A theory of pragmatic justification must allow for the probability of change. It must even encourage change and show how change sometimes leads to further agreement, or how it sometimes strains the fabric of agreement. Pragmatic justification stresses that "the quest for timeless political principles is perverse."[133] Further, pragmatic justification is committed to the view that "political and epistemic change are enduring features of human life."[134]

Pragmatic justification also has a contextual dimension. A particular position is justified when the reasons in support of it outnumber those of concrete alternatives. Few propositions are ever justified once and forever. Because justification occurs only in comparison to other possibilities, a statement is always more or less justified relative to other statements. Similarly, the contextual dimension of pragmatic justification does not countenance artificial dichotomies between fact and value. Instead, according to pragmatic justification, "is and ought, fact and value, are systemically interwoven."[135]

A philosophical conception of truth as correspondence, or any strong conception of truth purporting to explain why we hold the beliefs we do, is unlikely and unnecessary in constitutional theory. Such a strong conception of truth is unlikely because the best theorists have been unable to devise such a notion of truth. Moreover, it is unnecessary because constitutional theory has operated well without such a notion of truth. This last point needs some elaboration.

In my view, constitutional adjudication and theory have historically functioned with a weak conception of truth—that is, a conception of truth that perfunctorily follows from having the best justification—and not vice versa. Yet, there is no difference between urging the abandonment of the concept of truth, and trivializing truth by denying its explanatory efficacy. Constitutional theorists, whether aware of this or not, have constructed their theories and have argued for substantive conclusions without having a strong notion of truth.

One might argue that if constitutional theory had a strong conception

---

132. 347 U.S. 483 (1954).
133. D. Herzog, Without Foundations: Justification in Political Theory 236 (1985) [hereinafter Without Foundations].
134. *Id.* at 236.
135. *Id.* This is not to say that it is appropriate to deduce values from facts. *See id.* at 237.

of truth, interminable controversies in constitutional law might be avoided. If a strong explanatory notion of truth was possible, this argument might indeed be plausible, in which case it might be prudent to search for such a conception despite its historical failures. But the point of asking us to abandon the notion of truth is that no one knows how to make a strong conception of constitutional truth even remotely plausible. If constitutional truth explains our constitutional beliefs, then wherein does this truth reside? Is it in the Constitution? Natural law? Social convention? Where? To date, no one has provided any argument showing that any of these sources compel us to accept the notion of a strong conception of truth. Additionally, even if it were plausible to speak of constitutional truth as residing in natural law, the Constitution or social convention, no one has ever explained the precise nature of these sources or how we can derive non-controversial conclusions from them. Finally, even if we agreed on the precise nature of these sources, no one knows how to show that constitutional interpretations *correspond* to these sources.

Justification in constitutional law, as elsewhere, involves individuals in a particular community—in this case the constitutional community—agreeing on the utility of a particular interpretation of the Constitution.[136] The relevant community is "us"—American judges, lawyers, and citizens—and that usually involves local justification.[137] Nevertheless, a more global justification is required in principle whenever you are confronted by any individual whose interest is affected by your proposed justification and who can raise a challenge to your view.[138]

With pragmatic justification, an individual always directs his argument towards some audience.[139] I might first justify my anti-war stance to-

---

136. The conception of justification offered here makes it "unreasonable . . . to require that political questions always have one right answer." *Id.* at 236.

137. *See* A. Gibbard, Wise Choices, Apt Feelings: A Theory of Normative Judgment 233 (1990).

138. In order not to beg any questions against disadvantaged humans or non-human animals, the challenge can be raised by a person representing an individual whose interests are affected.

139. Thomas Scanlon argues that, according to contractualism, we are motivated by a "desire to be able to justify one's actions to others on grounds they could not reasonably reject." Scanlon, *Contractualism and Utilitarianism*, in Utilitarianism and Beyond 116 (A. Sen & B. Williams eds. 1982) (footnote omitted). Indeed, we can only make sense of justification if we understand it as a social process. *See generally* L. Wittgenstein, Philosophical Investigations (G.E.M. Anscombe trans. 1968).

This desire for justification will not result in a specious consensus. Consider:

> We all might like to be in actual agreement with the people around us, but the desire which contractualism identifies as basic to morality does not lead us simply to conform to the standards accepted by others whatever these may be. The desire to be able to justify one's actions to others on grounds they could not reasonably reject will be satisfied when we know that there is adequate justification for our action even though others in fact refuse to accept it . . . Similarly, a person moved by this desire will not be satisfied by the fact that others accept a justification for his action if he regards this justification as spurious.

Scanlon, *supra*, at 116.

ward my friends or colleagues. Next, I might direct it toward my neighbors or the citizens of my town, followed by my region and so forth.[140] It is helpful to think of the context of justification as a coliseum in which there are circular rows, each row representing different kinds of audiences toward which I direct my justifications. Ultimately, the "us" refers to every relatively informed member of this decade or of the century in which I live.[141] When I say everyone, I mean every individual who could or would choose to challenge my argument.[142]

What implications does this conception of justification have for constitutional theory? Generally, it asserts that theories implicitly or explicitly dependent on the notion of truth must be abandoned or reformulated as theories of justification. When a strong theory of truth is retained, constitutional jurisprudence, though pluralistic, appears as if it is in utter disarray. Thus, reformulating constitutional jurisprudence in terms of a theory of justification permits us to ascertain the pluralistic nature of constitutional theory.[143]

Interestingly, this constraint applies equally to both Robert Bork's and Ronald Dworkin's theories of interpretation. Although Bork does not explicitly use truth as a predicate, his theory depends upon truth or some similar notion. According to Bork, originalism should be adopted because it is the only legitimate way to interpret law.[144] But nowhere does Bork offer a political justification for his methodology. As a theory of justification, Bork's theory should be evaluated in terms of the pragmatic justification offered in this essay. Can Bork's methodology facilitate agreement on controversial constitutional issues? Moreover, can we reach agreement on the utility of Bork's methodology? Probably not, because, as a theory of justification, Bork's originalism fails to achieve pragmatic success. Nevertheless, that is where the argument should lie.

Dworkin explicitly uses the conception of truth. In his view, a legal proposition is true if it follows from the best constructive interpretation of the relevant legal practice.[145] Because he believes in the concept of

---

140. When seeking to validate our beliefs or desires, "[w]e try to justify ourselves, but we cannot justify ourselves by ourselves, and so morality takes shape as a conversation with particular other people, our relatives, friends, and neighbors; or it takes shape as a speculation on what arguments might, or should, persuade such people of our righteousness." M. Walzer, Interpretation and Social Criticism 47 (1987).

141. Pragmatic justification must proceed from the center of the coliseum but it must also filter to its outer limits. *See supra* notes 136-38 and accompanying text. Anyone who can make her argument understood must be taken seriously. If two views, A and B, both pass critical muster according to Western standards, but B also answers a Trobriand Islander objection and A does not, then B represents a pragmatically superior justification than A.

142. Of course, actual justification seldom involves the entire coliseum. *See* A. Gibbard, *supra* note 137, at 253.

143. The pluralistic dimension of constitutional theory reflects the essentially pluralistic nature of human society. *See* Berlin, *The Pursuit of the Ideal*, in The Crooked Timber of Humanity: Chapters in the History of Ideas 1-2, 13 (H. Hardy, ed. 1991).

144. *See* R. Bork, *supra* note 9, at 143.

145. *See* R. Dworkin, *supra* note 1, at 225.

truth, Dworkin believes there are uniquely right answers even in hard legal cases.[146] Although Dworkin's conception of truth is a weak conception because it follows from the best justification and not vice-versa, it still distorts his conclusion. Dworkin's use of the predicate "is true" precludes him from perceiving the relational or agent-relative character of law as integrity.[147] It makes no sense to say that a proposition is true for me and not true for you, and so Dworkin must insist on his one right answer thesis. Once Dworkin's theory is recognized as a theory of justification and not of truth, the fact that different justifications work for different people will become apparent, and his theory can be evaluated in those terms.

Ultimately, constitutional justification depends upon its audience's imagination and shared ideals. It is a weak notion of justification, because it can identify some common ground and persuade others to endorse the decision, but it cannot, and would not if it could, compel assent.[148]

III. The Structure of Constitutional Justification: Normal and Revolutionary Adjudication and Wide Reflective Equilibrium

The motivation for abandoning truth in constitutional theory and endorsing justification is pragmatic.[149] Pragmatic constitutionalism is the best strategy for weathering the storm of acute crisis currently raging in constitutional theory. Crisis can have both positive and negative dimensions. Positively, crisis can generate new and exciting paradigms for carrying constitutional discourse into its subsequent historical moment. On the down side, however, crisis can become chronic and, when it does, constitutional theory will continue to founder. This final section of the Article explores the possibility of combining two paradigms: a revised

---

146. *See id.* at 266.

147. In Dworkin's view, a legal decision is true if it follows from the best interpretation (explanation and justification) of the community's legal practice. *See id.* at 225. What counts as the "best interpretation," however, is in part subject to a particular judge's explanatory and justificatory judicial values. Because Dworkin provides few limits to the scope of these values, they will inevitably differ across judges. Consequently, there will be different right answers, rather than uniquely right ones. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 843-44.

148. This form of justification can be visionary and utopian. We must keep in mind, however, that visionary or utopian solutions work only in the appropriate historical circumstances, and cannot always be counted on to win the day. The conspicuously American predicament is that the founding generation, though flawed, fashioned a visionary and utopian experiment, the results of which were specifically left to the future to decide.

149. Contemporary pragmatism means all things to all people. I use the term to refer to an anti-foundationalist conception of constitutional inquiry. None of the big-picture conceptions of legal epistemology—namely, objectivity, reason, formalism, and so forth—can be part of this pragmatic stance. I retain the word theory, however, in its non-formalistic incarnation. Constructing a "theory," in my view, is simply telling a story about how best to proceed in a given domain. Additionally, the theoretical pragmatic stance taken in this article is not antithetical to certain forms of skepticism; indeed, it embraces them.

version of Rawls's methodology of wide reflective equilibrium with a modified conception of Kuhn's theory of scientific change, in such a manner as to provide a pragmatic strategy for transporting constitutional theory into the next century.

A. *The Theory of Constitutional Revolutions*

The chief obstacle to providing an acceptable paradigm for constitutional theory is "the unitaristic fallacy."[150] A theory commits the unitaristic fallacy when it includes only a unitary paradigm of constitutional change.[151] Only theories that recognize the non-unitaristic nature of constitutional reasoning can account for constitutional change.[152] Hence, some non-unitaristic theory is likely to provide the appropriate paradigm with which to carry on constitutional litigation.[153]

Bruce Ackerman offers an interesting dualistic theory of change by distinguishing between normal politics and "higher politics."[154] Normal politics consist of those ordinary political events based primarily on self--interested motives, while "higher politics" constitute those rare constitutional moments that set the moral and political tone of American constitutionalism.[155] According to Ackerman, the Founding, Reconstruction, and the Revolution of 1937 are examples of "higher politics."[156] He writes:

> [T]he Constitution establishes a two-track law-making system. If our elected politicians hope only to win *normal* democratic legitimacy for an initiative, they are directed down the normal lawmaking path and told to gain the assent of the House, Senate, and President in the normal ways. If, however, they hope for *higher* lawmaking authority, they are directed down a specially onerous lawmaking path . . .[157]

Ackerman's distinction is between two kinds of law-making, one that involves the majoritarian forces, while the other involves the judiciary. Ackerman's project seems specifically designed to avoid, if not resolve, the counter-majoritarian problem. Judicial review need not be crudely majoritarian because it has higher purposes in mind—namely, the rights and liberties of a trans-temporal majority.

---

150. Lipkin, *Constitutional Revolutions, supra* note 55, at 703.

151. Conventionalism, coherentism, pragmatism, and natural law are examples of unitaristic theories. Each theory permits only one conception of constitutional change. *See id.* at 703-08.

152. *See id.* at 706 & n.13.

153. *See id.*

154. *See* Ackerman, *Constitutional Politics/Constitutional Law,* 99 Yale L.J. 453, 461 (1989) [hereinafter Ackerman, *Constitutional Politics*].

155. *See id.*

156. *See id.* at 456; *see also,* Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 Yale L.J. 1013, 1051-52 (1984) (discussing "higher politics").

157. Ackerman, *Constitutional Politics, supra* note 154, at 464.

Steven Winter criticizes Ackerman's dualism for being too narrow.[158] In Winter's view, there is a third stage of constitutional law called the "trimorphic mode."[159] This stage involves the "sedimentation" of constitutional law, which directly shows how judicial review can be democratic. Winter's term "sedimentation" refers to those values and norms that structure an individual's understanding of social reality.[160] Thus, he argues:

> The trimorphic mode of constitutional change, in contrast, is democratically superior. In this mode, the relentless processes of social and cultural construction produce new sedimentations that are first institutionalized in social practice and then concretized as constitutional rules. In its highest form, trimorphic jurisgenesis is marked by a moment of conscious, situated reflection in which the Court probes the development of and experience with these social norms before transmuting them into constitutional commands.[161]

Through the process of jurisgenesis,[162] trimorphic change is thus "tested in practice before the Court articulate[s] it as a standard that carrie[s] with it the force of law and the force of the Constitution."[163] Moreover, Winter writes:

> From a trimorphic perspective, the mid-century obsession with the countermajoritarian difficulty seems a little quaint, if not peculiar. The ordinary course of constitutional jurisgenesis reflects the dynamic nature of the social and cultural processes upon which it depends and, in that very sense, *is* democratic. In contrast, most conventional theories of judicial review need some knowable, authoritative, foundational moment of democratic decisionmaking that validates subsequent judicial action.[164]

But what makes the process of jurisgenesis democratic? Winter, I think, persuasively stresses how sedimentation occurs as a social and cultural process. It is nevertheless difficult to see how that process is itself democratic in any sense of the term. Slavery, Jim Crow, homophobia, sexism, and injustices of other sorts expressed in Supreme Court decisions might well have come about in the way Winter describes. That does not, however, show them to be the results of a democratic process, or even show the process of sedimentation to be a morally acceptable form of social change. Sedimentation, as a social and cultural process, would be democratic only if it could be independently established that

---

158. *See* Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 Calif. L. Rev. 1441, 1515 (1990) [hereinafter Winter, *Indeterminacy*].

159. *See id.* at 1515, 1520.

160. *See id.* at 1520.

161. *Id.* (citations omitted).

162. *See* Cover, *The Supreme Court 1982 Term—Foreword:* Nomos *and Narrative*, 97 Harv. L. Rev. 4, 11 (1983) (jurisgenesis is the process described by Cover as "creat[ing] . . . legal meaning . . . through an essentially cultural medium").

163. Winter, *Indeterminacy*, *supra* note 158, at 1521.

164. *See id.* (citations omitted).

the dynamic sedimentary forces occurred democratically. In other words, if everyone were relatively equal and had equal access and opportunity to express their need for change, then perhaps the sedimentary processes could be described as democratic.[165] In a society like ours, however, having an unfortunate record on matters of race, sex, and class, democratic influences are not likely to be a central part of the sedimentary process.

Alternatively, in order to explain democracy, conventional theories of democracy appeal to some actual *historical moment* designed explicitly to garner the consent of the governed. For judicial review to be democratic, it must be defensible according to a defensible *theory* of democracy. Thus, the process of sedimentation cannot show how judicial review is democratic for the simple reason that sedimentation need not occur democratically. Instead, sedimentation may only express the interests of the rich and powerful. For this to happen, the rich and powerful need not consciously or deliberately manipulate sedimentary forces in order to express their interests. Rather, the social system in conjunction with the process of sedimentation may quite naturally express their interests. In Winter's view, therefore, when this occurs, the judiciary should look to this sedimentary process—favoring the rich and powerful—and fashion it into a rule of law.[166] But, this is a conclusion that we should resist.

The idea that constitutional litigation ultimately involves a non-unitary theory that unites Ackerman and Winter is, I believe, correct. Thomas Kuhn has provided the ingredients of a framework for this triadic conception of constitutional change.[167] In an earlier article, I deployed Kuhn's views on scientific change[168] as the basis of a theory of constitutional revolutions. The theory of constitutional revolutions is designed to show the appropriate role that conventionalism, pragmatism, and coherentism play in constitutional change.

---

165. It is not obvious that it would be completely democratic even in this way. American democracy is primarily based on a theory which prizes conspicuous moments—legislative or executive decisions, elections, ratifications, and so forth—in which individuals consciously and reflectively consent to be governed.

166. Any view seriously advocated by any political party or movement has its foundation in the sedimentary process. This includes both the good and the bad.

167. *See generally* T. Kuhn, The Structure of Scientific Revolutions (2d ed. 1970); *see also*, R. Rorty, Philosophy and the Mirror of Nature 320 (1979) (distinguishing between normal and revolutionary discourse). Several legal theorists have noticed the relevance of Kuhn's conception of scientific change to constitutional and legal change. *See* Winter, *Indeterminacy, supra* note 158, at 1507 n.336; Singer, *supra* note 6, at 34; Lipkin, *Conventionalism, supra* note 87, at 648 n.3; Lipkin, *Constitutional Revolutions, supra* note 55, at 730-34; Castro, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 Tul. L. Rev. 907, 910-11 (1988).

168. *See* Lipkin, *Constitutional Revolutions, supra* note 55, at 730-34. I do not believe that the use of the theory of revolutionary adjudication is limited to constitutional change. Indeed, it might play as important a role in the development of the common law as it does in constitutional law. I am not aware, however, of any substantial attempt to show how this theory works in other than constitutional law contexts, and so we must wait until the work is done before we can determine its plausibility.

In its present form, the theory of constitutional revolutions describes three stages of constitutional change: normal litigation, revolutionary litigation, and post-revolutionary litigation.[169] Normal litigation occurs when there is a stable paradigm—such as constitutional text, judicial precedent, statute, or administrative rule—that the constitutional community generally agrees is relevant to the case, although there might be some disagreement over the precise application of the paradigm.[170] Normal litigation involves problem-solving that fills in the details of the paradigm. Normal litigation thus applies to the many federal cases that never get published or, if published, never make any remarkable changes in the law.[171]

Sometimes normal litigation becomes more complex and controversial. The paradigm governing the particular area of law does not appear to resolve the questions *then* being litigated.[172] When this occurs, following the model of normal science, constitutional practitioners ordinarily attempt to quell and settle the problems facing the paradigm. One of two consequences will result. Either a new judicial decision will settle the problems then facing the paradigm, or no judicial solution will be possible within the context of that paradigm. At that point, the area of law in

---

169. *See* Lipkin, *Constitutional Revolutions, supra* note 55, at 736-43 & nn.148-50 & 172. More specifically, normal adjudication involves routine litigation that is relatively uncontroversial; revolutionary litigation is litigation that clearly results in new law; and post-revolutionary adjudication is that period in which a revolutionary paradigm is refined, perfected and stabilized. *See id.* at 739-42.

170. *See id.* at 742-43. Paul Feyerabend criticizes Kuhn's distinction on the grounds that normal and abnormal science exist at the same time. That is, at any given time, a scientific community engages in both kinds of scientific change. *See* Feyerabend, *Consolations for the Specialist*, in Criticism and the Growth of Knowledge 197, 211 (I. Lakatos & A. Musgrave eds. 1970). I do not think, for our purposes, that this defeats the distinction. As long as we can specify in which ways the litigation is normal, revolutionary, and post-revolutionary, the distinction is a useful one.

171. In common law contexts, especially in torts and contracts, normal litigation has a big job to do. In these areas there are an enormous number of details to fill in. Consider the concept of proximate cause. Establishing the meaning of "proximate cause" requires common law judges to define and redefine the notion across a multifarious range of fact situations. The job of explicating the meaning of proximate cause in a variety of cases illustrates *normal* common law adjudication.

172. For fifty-eight years, the equal protection paradigm found in Plessy v. Ferguson, 163 U.S. 537 (1896), of "separate but equal" governed constitutional adjudication in the area of equal protection. In the 1930s, however, the paradigm in *Plessy* began to erode, ultimately being overruled in fact, if not in theory, by Brown v. Board of Educ., 347 U.S. 483 (1954). *See also* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938) (validating the state's refusal on racial grounds to admit Blacks to the only state law school); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950) (holding that special restrictions on black students at an integrated university violated equal protection); Sweatt v. Painter, 339 U.S. 629 (1950) (invalidating the state's refusal to admit Blacks to a white law school despite the existence of a state law school for Blacks because the white law school was superior).

During this period, *Plessy* came under more and more criticism. The separate but equal paradigm was no longer adequate to settle civil rights issues. Finally, in 1954, the *Brown* decision (together with Korematsu v. United States, 323 U.S. 214 (1944)) normalized adjudication over the issue of, if not the remedy for, racial segregation.

question faces a crisis. In a period of constitutional crisis, a new paradigm must be forged if normal litigation is to occur again.[173]

When normal litigation faces trouble, precursors to revolutionary decisions may occur, ultimately leading to a revolutionary decision.[174] A revolutionary decision occurs when a new paradigm is forged that either resolves the difficulties faced by the old paradigm, or creates an entirely new set of questions and a new program for their resolution. Revolutionary litigation drives the evolution of the law. Without it, constitutional change (if existing at all) would be markedly different than actual constitutional practice suggests. Once a revolutionary decision is made, the law in that area enters into a post-revolutionary period in which the newly-minted paradigm is refined, perfected, and stabilized. Law tends towards stabilization because it is only through stabilization that normal litigation can again occur. Normal litigation is constitutional change's reward, because it permits constitutional actors to predict the answers to constitutional questions. Furthermore, normal litigation permits stability and the orderly extension of constitutional principles. Thus, if a paradigm cannot be stabilized it will ultimately be overturned.[175]

Constitutional paradigms vary. Some paradigms are procedural, while others substantive.[176] Further, some constitutional paradigms integrate procedural and substantive paradigms in a manner that appears unique to American constitutionalism. For example, both due process and equal protection analysis deploy a procedural paradigm such that, depending on which part of the paradigm the Court chooses to apply to a case, a particular substantive decision results. In this way, the 1937 Revolution created a paradigm that granted deference to majoritarian forces, except in cases involving individual rights or suspect classifications.

Constitutional evolution includes both internal and external crises. In-

---

173. Within the context of normal litigation, paradigms reign with little controversy until crisis occurs. The Civil War was the limiting case of such a crisis. In this crisis, war ultimately determined the nature of the federal union. The debate between states' rights and nationalism predated the Constitution. More importantly, the Constitution itself proved unable to resolve the debate, thereby showing the limits of the constitutional compromise embedded in the Constitution.

174. *See supra* note 172.

175. Roe v. Wade, 410 U.S. 113 (1973), aptly illustrates this point. Throughout *Roe*'s twenty year tenure, the Court has unsuccessfully tried to normalize adjudication in this area. Through a series of cases, however—including the abortion funding cases of Maher v. Roe, 432 U.S. 464 (1977); Harris v. McRae, 448 U.S. 297 (1980); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989); and Rust v. Sullivan, 111 S. Ct. 1759 (1991)—*Roe*'s instability has been thoroughly established. In fact, given the tenor of the controversy over *Roe* in late twentieth century America, abortion cases are incapable of normal adjudication under *Roe*'s paradigm. Doubtless, *Roe* will be directly overruled or overruled *sub silentio* in the near future.

176. For example, the law of federal jurisdiction involves a procedural paradigm— namely, the requirements for litigating a case before a federal court. The paradigm in *Brown v. Board of Education*, however, involves substantive rights that can be vindicated in federal courts. Needless to say, procedural paradigms can affect substantive paradigms.

ternal crises are inconsistencies and conflicts that occur in the law itself. One sort of internal crisis occurs when the Court interprets a constitutional provision with insufficient foresight concerning its legal ramifications.[177] Or, a crisis might occur because rules in one area conflict with rules in another area.[178] External crises, in contrast, are crises brought about by extra-constitutional forces. Social and political crises—such as economic depression, segregation, war, and gender inequality—all involve external crises. In addition, there are hybrid crises that are brought about as a result of extra-constitutional factors combining with internal conflicts over the rules or principles in a given area of the law.[179]

Presently, the United States faces a constitutional crisis over abortion. With the increasing whittling away of *Roe v. Wade*,[180] the Court is constitutionally permitting the states to pass different, even incompatible, abortion legislation. Congress can, if it chooses, pass uniform legislation concerning abortion, but that would take an enormous degree of political fortitude.[181]

One problem with the theory of constitutional revolutions is that, if correct, it appears to be only an external description of constitutional change. It tells us very little about how judges decide cases from the internal point of view.[182] Certainly, it will be helpful for judges to know when their case is an example of normal litigation or revolutionary litigation. But how are they to know this? Clearly, a supplementary pragmatic strategy must be developed.

This supplementary pragmatic strategy is wide reflective equilibrium. Wide reflective equilibrium is a pragmatic strategy for formulating an individual's or a society's beliefs and values. It begins with what we hold dear and, by criticizing these beliefs and values, thereby encourages change. This pragmatic strategy asks us to evaluate our fundamental

177. For example, in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Supreme Court reversed its decision in National League of Cities v. Usery, 426 U.S. 833 (1976), on the ground that the test for the "traditional governmental functions" paradigm was "unworkable." *See Garcia*, 469 U.S. at 546.

178. *See* Shelley v. Kraemer, 334 U.S. 1, 4-8 (1948) (illustrating a clash between and among property rights, contract rights, and equal protection).

179. *See* Brown v. Board of Educ., 347 U.S. 483 (1954) (representing a hybrid crisis consisting of the constitutional and social tensions created by segregation).

180. 410 U.S. 113 (1973).

181. Interestingly, one possible solution to this controversy might be through scientific technology. Were it possible for a fetus to be placed in an artificial womb at conception, much of the force of endorsing choice would be eviscerated. Because the *sui generis* relationship between a fetus and mother would no longer need to exist beyond conception, it would be difficult to see how pro-choice fervor could be sustained. Indeed, it would then be difficult to imagine why someone would choose to have an abortion. Some pro-choice advocates might still insist on the right to abortions, either on principle or because sometimes a woman will choose to have an abortion when a safe extraction is no longer possible. In the former case, the right in *Roe* is more than a right to terminate a pregnancy. It is the right not to be a parent. But what implications does this have for infanticide?

182. The internal point of view is that perspective from which a person acts, based upon the reasons and norms with which she identifies.

values against various theoretical proposals for carrying on. By adjusting our values as well as the proposed theory, we might find a theoretical perspective that is a good match. At that time, when we hold our values and a theoretical perspective in balance, our values are held in wide reflective equilibrium with our theory.[183]

B. *The Role of Wide Reflective Equilibrium in the Theory of Constitutional Revolutions*

Wide reflective equilibrium and the theory of constitutional revolutions are two sides of the same coin. Before explaining what this means, however, let us explore three different movements or tensions in the notion of wide reflective equilibrium: intuitionism, formalism, and coherentism.[184]

Each one of these movements answers the question of how one should choose when intuitions and principles or theories collide. Intuitionism and formalism give different *a priori* answers to this question. Intuitionism says that, in cases of conflict, we should always choose intuitions over theories. Formalism, on the other hand, counsels us to choose theory over intuitions. In this view, if one has an appropriately elegant theory that is heuristically derived from a set of considered intuitions, but also conflicts with some important intuitions, then we should abandon the intuitions. Coherentism, finally, best reflects the pragmatic dimension of wide reflective equilibrium by rejecting *a priori* solutions (of either type) to this problem. Coherentism tells us to fiddle with both our considered intuitions and our theory in order to achieve equilibrium.[185]

To say that wide reflective equilibrium and the theory of constitutional revolutions are two sides of the same coin is to say that the three move-

---

183. For a more detailed characterization of wide reflective equilibrium, see Lipkin, *Beyond Skepticism, supra* note 3, at 865-70; Lipkin, *Kibitzers, supra* note 2, at 111-30.

184. In an earlier piece, I contrasted wide reflective equilibrium with intuitionism and formalism. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 868-69. I should also point out that, within wide reflective equilibrium itself, there are intuitionist and formalist movements. *See, e.g.*, W.D. Ross, Foundations of Ethics 82-86 (1939) (describing the anti-theoretical dimension of intuitionism); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. Rev. 1103, 1201 (1983) (describing the role intuitions play in legal theory); *see generally* I. Kant, Groundwork of the Metaphysics of Morals (1964) (stating the classical formalist theory of ethics); R.M. Hare, Freedom and Reason (1963) (arguing for a contemporary formalist theory of ethics). As theories distinct from wide reflective equilibrium, intuitionism and formalism are unpersuasive. Intuitionism takes our intuitions too seriously, whereas formalism does not take them seriously enough. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 868-69. In contrast, wide reflective equilibrium captures the pragmatic insight that both intuitionism and formalism involve overly rigid methodological principles. *See* Lipkin, *Constitutional Revolutions, supra* note 55, at 723-27.

Let me qualify my use of the term "formalism." I do not mean what is ordinarily understood as "legal formalism." *See supra* note 1. Rather, I am describing a reformist view that theories, principles, and even utopian visions should not necessarily be sacrificed in order to preserve intuitions.

185. *See* J. Rawls, A Theory of Justice 20 (1971).

ments in wide reflective equilibrium have counterparts in the theory of constitutional revolutions. Put simply, the theory of constitutional revolutions describes constitutional reasoning when viewed from the external perspective, while wide reflective equilibrium describes constitutional reasoning when viewed from the internal perspective. When deciding a case, a judge—or, for that matter, any practical reasoner—looks first to her considered intuitions. In the case of judicial decision-making, a judge's intuitions must include a fairly uncontroversial reading of the law. This reading must respect what the Constitution, case law, statutes, or administrative rules initially mean to a qualified constitutional practitioner.[186] From this starting point, the judge then looks to see if there exist broader justificatory principles that prompt a reinterpretation of what the law is to a qualified constitutional practitioner. Wide reflective equilibrium determines these broader principles. If the judge determines that these principles dictate a reinterpretation of her initial judgment, her initial judgment should be changed according to the principle.[187] If not, she should apply the initial judgment as it stands.

When a large area of law is beset with internal and external problems in which judges continually reinterpret prior judicial decisions, a constitutional crisis exists, and it is appropriate to engage in revolutionary adjudication in order to transform that area of law. Such a transformation requires the existence of attractive justificatory principles that are extrinsic to the law.

Wide reflective equilibrium drives judicial reasoning from the internal point of view. When several judges or the Supreme Court decide a case formalistically from the internal point of view, revolutionary decisions are made.[188] By contrast, normal adjudication takes place when judges routinely support the initial judgment of a qualified constitutional practitioner. In normal litigation, there is overwhelming reason to opt for the intuition rather than a new justificatory principle. Ordinarily, the reason

---

186. Let me state two points at the outset. First, I believe that all legal judgments are the result of interpretation. I do not wish to contrast interpretation with textualism or other positions that insist that we understand a statute simply by reading it. I do believe, however, that certain interpretations at certain times and places are much more obvious than others. Thus, interpreting Article II, Section 5 of the Constitution as requiring the president to be a resident of the United States for fourteen years prior to assuming the presidency is a much better interpretation than, in contrast, an interpretation requiring that the president have sufficient familiarity with our culture and history. *See* U.S. Const. art. II, § 5. Consequently, there are readings of case law by ordinary legal interpreters that are more obvious and more likely than others.

187. For example, in Brown v. Board of Education, 347 U.S. 483 (1954), the Justices' initial intuition must reflect the principle of "separate but equal" set forth in Plessy v. Ferguson, 163 U.S. 537 (1896). The broader justificatory principle is the anti-segregation principle in *Brown*, with which the Justices effectively transformed the law.

188. For example, when in Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965), the Court sought a normatively compelling principle of privacy, they did so from the internal point of view. The importance of privacy or personal autonomy warranted setting aside the traditional (intuitive) interpretation of the due process clause. From the external point of view, this decision is seen as revolutionary.

for opting for the initial judgment—that is, the reason for normal adjudication—is to achieve stability and predictability. In revolutionary adjudication, judges choose a new justificatory principle over their initial judgments in order to quell a constitutional crisis. Consequently, in normal adjudication, wide reflective equilibrium operates in favor of the intuition. In revolutionary adjudication, wide reflective equilibrium operates in favor of theory.[189] And, in post-revolutionary litigation—where a paradigm is perfected, refined, and stabilized—there is a much greater interplay between intuition (initial judgments) and theory (normative constitutional principles). Sometimes we modify the intuition, and sometimes we modify the theory. In this stage of adjudication, there is simply no *a priori* way to determine whether intuition takes precedence over theory or vice versa.

The 1937 Revolution illustrates the operation of the above process.[190] During the *Lochner* period, a qualified constitutional practitioner would have intuitively judged that the Constitution protects individual economic rights against the majority, without any need for further theoretical reflection.[191] The *laissez-faire* principle in *Lochner* represents an explanation and justification of this intuition. The *Lochnerian* principle, then, was the prevailing constitutional paradigm in economic affairs in 1937.

External economic circumstances ultimately forced the Court to retreat from this paradigm. The *laissez-faire* paradigm supported by *Lochner* clashed with Roosevelt's economic policy. The Depression and Roosevelt's program for dealing with it represented an external constitutional crisis in the area of economic policy. As the Depression worsened, a new paradigm—namely, judicial deference to the legislature—acquired a definite appeal. Consequently, in order to deal with the crisis, the Court chose to fashion a new justificatory principle concerning its role in scrutinizing legislative economic policy. The worsening crisis and this important justificatory principle provided the impetus for the Court to engage in revolutionary adjudication. The initial *Lochner* intuitions gave way to a principle of deference that was considered a better justification

---

189. Consequently, in normal adjudication, wide reflective equilibrium favors intuitions, and, in revolutionary adjudication, wide reflective equilibrium favors theory. There is nothing mechanical about this, however, because a controversy often exists over whether a particular case should be considered an instance of normal or revolutionary adjudication. While the notion of a crisis is important here, that too is a controversial notion, and whether a constitutional crisis exists is often clear only after the area of law has been settled.

190. The Revolution of 1937 altered the Court's role in reviewing economic legislative policy. No longer would the Court strictly scrutinize legislation affecting economic affairs. *See* West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937).

191. *See* Lochner v. New York, 198 U.S. 45, 52-57 (1905). This is not entirely true. During this period, some economic regulations were sustained. *See, e.g.*, Bunting v. Oregon, 243 U.S. 426 (1917) (sustained regulation of maximum hours men could work in the manufacturing industry); Muller v. Oregon, 208 U.S. 412 (1908) (sustained regulation of maximum hours women could work).

than the paradigm in *Lochner*.[192] By way of contrast, if the Court had remained in the intuitionist mode, it would have retained the *Lochner* paradigm and precluded both the 1937 Revolution and its new paradigm of judicial deference.[193] The decision to engage in revolutionary reasoning—that is, to embrace a new paradigm rather than stick with well-entrenched intuitions—enabled Roosevelt's economic policy to win the day without packing the Court. It also allowed the Court to fashion a more complete paradigm, and to normalize constitutional litigation in this area.[194]

To summarize, normal adjudication corresponds to the intuitionist movement in wide reflective equilibrium. When there is no sufficiently attractive justificatory principle available, a judge will choose the intuitionist movement and opt for a conventionalist view of adjudication. When a crisis exists, however, and there is a sufficiently attractive justificatory principle which will resolve the crisis, a judge will choose a formalist strategy. Finally, when the law is in a post-revolutionary period and a newly-adopted paradigm is being refined, perfected, and stabilized, the judge will adopt a coherentist approach. All three movements exist at different times and circumstances in the context of wide reflective equilibrium.

The theories of constitutional revolutions and wide reflective equilibrium represent a syncretic conception of how post-foundationalist constitutional culture can conduct its affairs. This syncretic conception does not eradicate all the problems that post-foundationalist constitutional theory will face. In fact, several immediate problems arise. First, will wide reflective equilibrium be capable of reaching agreement across persons?[195] Certainly, once constitutional practitioners adopt this pragmatic strategy, they will be able to achieve agreement on many issues. Even so, the more controversial issues may still defy agreement.[196] Second, the syncretic conception must determine how constitutional practitioners are to identify crises. In other words, how can one know whether one faces normal or revolutionary adjudication? Third, is there any way to distinguish between stabilizing a paradigm or unfairly cutting off its reach?[197] Should we even be concerned with making such a distinction?

---

192. *See West Coast Hotel*, 300 U.S. at 392.

193. Some still argue that the Court should have defended the *Lochner* paradigm. *See* R. Epstein, Takings 277-82 (1985).

194. United States v. Carolene Prods. Co., 304 U.S. 144 (1938) is perhaps the best statement of the present paradigm governing normal litigation in this area. The *Carolene Products* paradigm defers to the legislature in economic matters, yet reserves a place for strict judicial scrutiny where fundamental rights or suspect classifications are involved. *See Carolene Products*, 304 U.S. at 153 n.4; *see also* Whalen v. Roe, 429 U.S. 589, 596-98 (1977) (extending judicial deference to social welfare regulations). For a more expansive treatment of how the theory of constitutional revolutions work, see Lipkin, *Constitutional Revolutions, supra* note 55, at 727-43.

195. *See* Lipkin, *Beyond Skepticism, supra* note 3, at 870.

196. *See id.* at 876.

197. For example, are the abortion funding cases, *see supra* note 175, correctly de-

Fourth, can this syncretic conception account for our intuitions about the rule of law?[198] Should we be concerned about retaining this conception? Fifth, how does this syncretic conception argue against philosophical realism, natural-law theory, and other alternative conceptions of constitutional practice? And finally, how does this syncretic conception accommodate middle-level theoretical devices such as textualism, originalism, and passivism?

These are all important queries. How we answer them will ultimately determine the overall utility of this syncretic conception of constitutional adjudication for taking us into our third century of constitutional change.

CONCLUSION

I have argued that epistemic indeterminacy is the primary form of indeterminacy relevant to the law. The central reason for this is that it is pragmatically pointless to separate metaphysical indeterminacy from epistemic indeterminacy. Epistemic indeterminacy, regardless of metaphysical determinacy, settles the question over law's competence. If there is epistemic indeterminacy, then law or a legal system is indeterminate and cannot generate univocal answers to controversial questions even if such answers exist metaphysically.

Additionally, I have argued that the controversy over metaphysical or epistemic indeterminacy is really a controversy over truth or justification as the primary form of validating constitutional rules. I have urged us either to abandon the notion of truth or to treat it as a trivial result of the best justification.

Lastly, I have emphasized the present crisis in constitutional theory and argued that we are in need of new constitutional paradigms. I have urged that wide reflective equilibrium can be wedded with the distinction between normal and revolutionary adjudication in such a manner as to provide an interesting and complete account of constitutional adjudication and change.[199]

---

scribed as stabilizing the privacy paradigm, or as unfairly restricting this paradigm's appropriate extension into government funding contexts?

198. *See* Lipkin, *Constitutional Revolutions, supra* note 55, at 786.

199. I offer one final speculative note. Constitutional and legal theory will inevitably come up with a new exciting paradigm or remain split between various contenders. In the latter case, the crisis will remain and theory will remain independent of practice.

Practice, however, will continue. In these circumstances, if you believe theory is necessary to inform practice, you will believe that practice will suffer—perhaps irreparably. If, on the other hand, you believe that practice fares independently and is not nourished by theory, you will remain sanguine about the practice of law. A third possibility, in the event that theory as traditionally understood appears to be superfluous, is that new forms of reflection, presently unspecifiable, will develop with no structural unity. The reflection thought to be the province of theory will be taken over by this new form of reflection—call it, for lack of a better term, meta-practice. The difference between theory and meta-practice will be that a meta-practical conception will be less abstract, more particularized, and concrete. Further, meta-practice will not be concerned with either a general account

of all practice, the resolution of controversial constitutional and legal issues, or the connections between practice now and practice in the future. Instead, meta-practice will be content to have a deeper understanding of a particular field or sub-field of law, or even merely a deeper understanding of a set of related questions in one sub-field.

One possible scenario of the evolution of meta-practice might be that those interested in devising meta-practical accounts might only do so in the context of their own practice as attorneys. In this hypothetical brave new world, no one will ever consider trying to devise a meta-practical account as a theorist or scholar. Theory and scholarship, as those terms are presently used, will no longer exist.