This article suggests that we may construct an account of constitutional doctrine in which courts implement a handful of abstract norms—such as, "states may not undermine the constitutional structure"—with different doctrinal structures that vary with the practical problems attending implementation in different contexts. The central insight is that we can identify patterns in the mass of convoluted constitutional rules, tests, and standards that courts use to decide cases. These patterns suggest deep consensuses on fundamental constitutional requirements. We can explain a great deal of constitutional doctrine with these basic norms and jettison standard justifications that make many of these doctrines seem controversial. This runs against the conventional scholarly account of constitutional practice as dominated by debates between incommensurable theories of interpretation or value. This simpler account is preferable according to well-accepted criteria for assessing competing theories developed in the philosophy of science: It is consistent with our best general theory of law; it can advance constitutional theory beyond the interpretive debates in which the research program is presently mired; and it is simpler, more capacious, and more fruitful for future research than conventional accounts. It seems as if we are fundamentally divided on nearly every constitutional question, but this approach can provide an alternative to constitutional theory's traditional focus on interpretive and value controversies and counter the increasing politicization of constitutional questions with proof that we actually agree on a number of important constitutional matters.

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INTRODUCTION

Constitutional theory is primarily normative. The research program accordingly lines up well with public views that constitutional issues are grist for deep disagreements about even the most basic constitutional questions. What gets lost in all this arguing about what should be done or how things should change is the basic truth that, despite all our disagreements, we have a stable and durable constitutional system. We need an account of our constitutionalism that reconciles the existence of deep and wide-ranging division over basic political and moral matters that bear on constitutional decision-making with our system's undeniable stability. I explore the conceptual foundations for such an account here. Broadly formulated, my main claim is that, despite the overwhelming emphasis of scholarly and public debates on constitutional controversies and disagreements, there is evidence of broad and durable consensus among legal officials about important structural constitutional norms that transcend differences of party, interpretive discipline, and views on political morality. And the existence of broad constitutional support may provide a foundation for normative constitutional theory, whose goal is to improve the functioning of our constitutional law and provides a realistic picture of the system as it stands. Highlighting matters of constitutional consensus is a welcome corrective in what sometimes seems like a deeply divided polity engaged in disputes about even our most basic constitutional organizing principles.

1 See generally LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM (1996) (giving an
intellectual history of constitutional theory); Daniel B. Rodriguez,
Perhaps most important among the oversights resulting from constitutional scholarship's overwhelmingly normative and interpretive focus is that, so far, we have not thoroughly grappled with the following question: How can we best identify the constitutional norms we actually have, given the practices we observe and regardless of the competing views about what our norms or practices should be? I do not mean that we cannot write a treatise synthesizing from judicial decisions what the constitutional law is; I mean that we still fundamentally disagree about the basic propositions of constitutional meaning that explain and justify the rules applied in those judicial decisions.

One manifestation of this division is the debate between competing theories of constitutional interpretation, which increasingly dominates constitutional scholarship. This conflict has taken on the cast of a fundamental disagreement between competing visions of the system that differ all the way down to the basic content of the law.
debate is important, but it may be insoluble and as it becomes more contentious it increasingly stalls progress.

One cannot engage an issue of constitutional law or theory without copping to interpretive priors; and any progress on such an issue is bracketed by the specter of counterarguments from competing interpretive theories. Interpretive disagreement is if anything magnified in the structural context—federalism and separation-of-powers doctrines are conventionally explained by a series of contestable interpretive inferences from scattered constitutional provisions and organizational characteristics of the text; unsurprisingly, this generates significant interpretive disagreement in structural cases. We need a way around this controversy—not to ignore it, but to make progress on other fronts possible. We should accordingly want to attend to the positive constitutional question—what norms do we have?—and showing that there is value in doing so is the task of this Article, which contributes to a perennial and fundamental debate about the kinds of theories that are worth pursuing—a debate that... extends far beyond Dworkin and Posner and has a venerable and ancient history that runs through Plato and Thucydides, Kant and Nietzsche, Hegel and Marx, as well as Rawls and Geuss... a dispute between Moralists and Realists, between those whose starting point is a theory of how things (morally) ought to be versus those who begin with a theory of how things really are.

I argue that work identifying what constitutional norms we actually have in our system is, in fact, worth pursuing for a variety of reasons. My thesis is that we can explain structural constitutional doctrines applied in constitutional cases as the products of pragmatic reasoning about how to implement a handful of abstract and uncontroversial constitutional norms—we might call them skeletal norms because they are both thin and fundamental to the structure of the overall system. If theorists have begun arguing that the content of the law is determined by their favored methodologies),

7 The preoccupation with interpretation has grown: A search of Westlaw's Law Review & Journals database in December 2013 for articles featuring the keywords "originalism" or "living constitution" published in the last decade yields 6,088 results; the same search for the decade ending 12/12/2003 yields 3,118 results; and for the decade ending 12/12/1993, it yields 1,016 results.

8 Brian Leiter, In Praise of Realism (and Against "Nonsense" Jurisprudence), 100 Geo. L.J. 865, 867 (2012).
In Part I, I illustrate this idea's plausibility with a capacious example. Assume arguendo that one of our structural norms is that "states may not take actions that undermine the constitutional structure of which they are parts." Call this the State Preclusion Thesis (SPT).

I argue that a number of structural doctrines that are conventionally characterized as implementing distinct and more particularized norms—including, for example, the dormant Commerce Clause doctrine, dormant admiralty doctrine, dormant foreign affairs doctrines, doctrines of dormancy and preemption in immigration, and the obstacle preemption doctrine—all may be explained as mechanisms for implementing SPT in different contexts. Decisions developing and applying these doctrines form a pattern that suggests SPT is one of our constitutional norms. On this account—which draws on the recent move in constitutional theory to distinguish constitutional norms from the doctrinal rules with which courts implement those norms in concrete disputes—I argue that the specifics of the doctrinal rules, tests, or standards we observe in these areas are attributable to pragmatic considerations that relate to the process of judicial implementation of SPT and that vary from one context to another. We can debate the specifics of the doctrinal rules, tests, or standards we observe in these areas; we can debate the pragmatic rationales for their various implementing doctrines; and so forth. SN recommends that we first acknowledge evidence of official consensus that certain basic structural norms are part of our constitutional system. SN is preferable to conventional views about how we should identify the constitutional norms that we have, not least because it recognizes that we must acknowledge evidence of official consensus that these norms are part of our constitutional system. Without such evidence, the controversy over the meaning and legal effect of SPT and the rival views that surround it would be meaningless. We can debate the meaning and legal effect of SPT and the rival views that surround it; we can debate the consequent constitutional doctrine that is built on the meaning and legal effect of SPT; and so forth. But if we do so, we can define the meaning and legal effect of SPT as the meaning and legal effect of the constitutional doctrine that is built on the meaning and legal effect of SPT.

I then proceed to look at the implications of building an account in which most of the structural doctrines we observe in these areas are attributable to pragmatic considerations that relate to the process of judicial implementation of SPT and that vary from one context to another. On this account, SPT is one of our constitutional norms. SN recommends that we first acknowledge evidence of official consensus that certain basic structural norms are part of our constitutional system. Without such evidence, the controversy over the meaning and legal effect of SPT and the rival views that surround it would be meaningless. We can debate the meaning and legal effect of SPT and the rival views that surround it; we can debate the consequent constitutional doctrine that is built on the meaning and legal effect of SPT; and so forth. But if we do so, we can define the meaning and legal effect of SPT as the meaning and legal effect of the constitutional doctrine that is built on the meaning and legal effect of SPT.

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simpler, eliminating the need to infer a wide variety of norms from our sparse constitutional text to explain the structural doctrines judges apply. It is also more consistent with our best general theory of law—legal positivism—and may even provide the beginning of a way to answer Judge Richard Posner’s challenge that constitutional theory should either provide some empirically falsifiable claims or close up shop.

Expanding our methods for determining which constitutional norms we actually have immediately raises two related conceptual issues: First, because complex constitutional practices may have more than one plausible explanation, we need criteria for assessing competing explanations. Presently, we lack criteria even for assessing competing normative constitutional theory claims, at least if valid criteria should be independent of the normative commitments of the competing claims. To demonstrate the SN’s comparative merit, I begin filling this gap by exploring criteria for assessing competing constitutional norms—claims about what the law is, according to the constitutional text. These criteria are drawn from the philosophy of science, which has long focused on issues of theory competition and assessment.

Of course, laws and legal phenomena are artifacts of human practices, and explanations of those artifacts differ from scientific explanations of natural phenomena. But my conceptual and normative claim is that it is nevertheless useful to assess claims about the content of constitutional norms—claims about what the law is, according to the constitutional text. These criteria are drawn from the philosophy of science, which has long focused on issues of theory competition and assessment.

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Dec. 2015

SKELETAL NORMS

This page contains the text of the document. It discusses the concept of constitutional norms and the importance of developing a way to determine whether a norm proposed to explain a set of constitutional doctrines is, in fact, a valid norm of constitutional law. The text introduces legal positivism as a general theory of law that can be used to support this approach. It also cites specific legal theories and scholars to support these ideas.

15 See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 YALE L.J. 541, 552 (1994) (suggesting that the content of constitutional law just depends on how the texts "were objectively understood by the people who enacted or ratified them.


17 HART, supra note 16, at 94–110.

Part III then returns to disagreements about the proper theory of constitutional interpretation, which some characterize as theoretical disagreements among legal officials about our system’s criteria of legal validity. If it’s correct, that observation may undermine either the positivist claim that laws are valid in virtue of consensus or, if positivism’s general account is right, disproving the existence of consensus validity criteria for most constitutional law.

To bracket these interpretive debates and develop claims about constitutional practice independent of contestable interpretive assumptions, I argue that we should assume that structural norms are simple propositions on which interpreters of every view could agree. This allows us to set aside the interpretive theory debate—judges may have different reasons for accepting those skeletal norms, but evidence that they are accepted by learn general decision over the long term has independent value. If judges do not accept an outcome, then judges are either influenced, and other dynamics under judicial decision otherwise reinforce communal norms. The ST interpretation defines communal constitutional norms as significant agreements on basic structural commitments that remain stable over time. If judges are influenced, then evidence matters. Judges may provide different reasons for particular structural case outcomes; the reasons were fundamentally different and dispositive; the facts are contradictory, or the dissenters—but agreed by other members of the court. But consensus norms require that judges agree on which structural case outcomes count. Consensus norms can be fundamentally different and dispositive; the reasons are consistent with new conceptual tools. In the midst of widespread interpretive disagreement, in which constitutional norms might be adjudicated by consensus even when it seems impossible to adjudicate them, several approaches suggest the importance of structural norms. STT assumes that structural norms are significant agreements on basic structural commitments—and takes up, for example, questions about the norms’ implementation. STT defers to judges who accept the structural norms and the reasons they give for particular structural case outcomes are consistent with the structural norms even when it seems impossible to adjudicate them. STT defers to judges who accept the structural norms and the reasons they give for particular structural case outcomes are consistent with the structural norms. STT defers to judges who accept the structural norms and the reasons they give for particular structural case outcomes are consistent with the structural norms.
I have argued at length elsewhere that the State Preclusion Thesis ("SPT") is supported by the constitutional text, history, straightforward constitutional purposes, and the pragmatic necessities of modern constitutional practice. Perhaps the clearest and simplest reason to accept it is that SPT is the kind of norm you would adopt if you were trying to structure a durable federalist constitutional system. Generally speaking, the fewer specifications you make about the structure, the lower the risk of major pushes to abandon the Constitution in order to restructure the government. It is SPT's appeal to common sense that I rely upon here. The point is to hypothesize that SPT is a valid norm in our system and then see how much of the decisional phenomena it can explain. In this Part, I offer a new account of the constitutional foundation of immigration and obstacle preemption doctrines, arguing that they may be viewed as implementing SPT in different ways depending on instrumental (pragmatic) adjudicatory concerns that differ with the context. In the process, I explain how this kind of account can help resolve several curiosities and controversies surrounding these doctrines to set the stage for the more general case for this kind of re-theorizing that I make in Parts II and III. Throughout this Part, I draw heavily on the "two-output thesis," viz. "[T]here exist a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of judges: 'judge-interpreted constitutional meaning' and 'judge-crafted constitutional meaning,' "21 and II (hereinafter cited as "SPT").

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The judge-crafted rules, tests, and standards are the "decision rules" by which courts determine whether conduct falls within the scope of a constitutional prohibition or permission and are separate from the constitutional operative propositions themselves. The instrumental relationship between the operative propositions and the decision rules is that the latter implement the former—they facilitate the application of broad propositions of constitutional meaning to resolve disputes in concrete cases.

Decision rules are shaped both by the operative propositions that they implement and by instrumental or pragmatic considerations relevant to implementing the operative proposition in concrete contexts. Relevant pragmatic considerations include things like comparative institutional capacities; adjudicatory efficiency; the risk, likely rate, and costs of adjudicatory errors; risks of creating interbranch friction; repeat-player considerations attendant to adopting formalistic rather than flexible decision rules, and the like.

These considerations vary by context; accordingly, the decision rules implementing a single norm like SPT in the interstate commerce, admiralty, foreign affairs, immigration, and general preemption contexts—subject matter areas that are themselves vast and differ from each other in substantial ways—will diverge.

The dormant Commerce Clause, dormant admiralty, and dormant foreign affairs doctrines

A. Standard Dormancy Doctrines

The dormant Commerce Clause doctrine has been described by Berman as an "implementation" of constitutional norms by constitutional rules; see also Richard H. Fallon, Jr., Implementing the Constitution 37-44 (2001) (similar). Pursley, supra note 9, at 504-08 (discussing the relationship between the operative propositions and the decision rules).

See id. at 506-12; Roosevelt, supra note 10, at 1658-60.


subjects state actions that discriminate against out-of-state commercial activity—for example, by favoring local over out-of-state entities—to strict scrutiny that amounts in practice to a "virtually per se rule of invalidity;"


30 Jensen, 244 U.S. at 216.

31 Zschernig, 389 U.S. at 436.


33 See Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin., 505 U.S. 71, 81 (1992) (“Absent a compelling justification, however, a State may not advance its legitimate goals by means that facially discriminate against foreign commerce.”).


35 See Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 401, 423–24 (2003) (holding that a California statute was invalid because it “undercut[] the President's diplomatic discretion and the choice he ... made exercising it”); see also Pursley, supra note 9, at 553–54 (assessing readings of Garamendi’s holding).

36 See Pursley, supra note 9, at 537–61 (identifying three subject matter areas where constitutional dormancy operates and their importance).
the national economy (and thus, potentially, the stability of the entire system of government) are targeted; in admiralty, dormancy invalidates applications state law that undermine the uniformity of maritime law and, thus, the functioning of admiralty jurisdiction; and in foreign affairs, dormancy precludes state actions that interfere with federal control of international relations. These doctrines thus all may be viewed as implementing the simple structural proposition that states are constitutionally precluded from acting in a manner that undermines the larger constitutional structure of which they are a part.

Thus, if we assume arguendo that courts accept it, SPT provides a single constitutional grounding for all the standard dormancy doctrines. Of course, these rules differ substantially from SPT and, accordingly, enforce SPT in different ways. This is unsurprising—rules, tests, and standards of constitutional doctrine often differ in content from the underlying constitutional norms they implement; that variance may be explained, again, in terms of the pragmatic concerns about the process of constitutional adjudication in the relevant context.

The standard SPT doctrines' differences thus may be attributable to pragmatic reasons for courts to enforce SPT in different ways or with differing degrees of strictness in different contexts. The dormant Commerce Clause precludes relatively little state action and incorporates substantial deference to Congress because, in principle, Congress has greater capacity on economic questions and courts, accordingly, face significant risks of adjudicatory error.

The dormant admiralty and foreign affairs doctrines, by contrast, preclude a wider array of state actions and incorporate less deference because, among other things, in those contexts the potential negative consequences of state interference are more significant and the risk of adjudicatory error is reduced by the existence of decent proxies for state interference (the waterline or the relatively readily discernible indicia of international effect).

An explanatory account on which these standard dormancy doctrines all implement SPT is preferable to conventional accounts for
several reasons. First and most obviously, it explains several complex lines of doctrine with a single, simple normative predicate rather than by positing a distinct norm of contestable validity for each area. Second, the SPT account explains a number of exceptions and other features of these doctrines that are puzzles for conventional accounts. I have discussed these in detail elsewhere; here I will emphasize just a couple of examples. Conventional explanations of the dormant Commerce Clause doctrine ground the doctrine either on the text of the Commerce Clause or on some implied free-market or interstate-harmony promoting norm.

41 See generally infra Part II.B (arguing that simpler explanations of legal phenomena are preferable to more complex ones).


44 See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting) (calling the dormant Commerce Clause an artifact of “a grim sink-or-swim policy of laissez-faire economics”). See generally Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 WIS. L. REV. 125 (1979) (discussing various and sometimes competing tests that the Supreme Court has employed and/or should employ in its dormant Commerce Clause cases) (calling the dormant Commerce Clause an artifact of “a grim sink-or-swim policy of laissez-faire economics”). See generally infra Part II.B (arguing that simpler explanations of legal phenomena are preferable to more complex ones).
In the foreign affairs context, the conventional external sovereignty/plenary power rationale for preclusion doctrines is difficult to reconcile with the observable shift in judicial decisions away from applying the broad Zschernig dormancy rule to a greater reliance on the narrower dormant Foreign Commerce Clause, Garamendi, and preemption doctrines.

Why analyze state actions touching on foreign affairs for conflicts with positive federal enactments if the entire field is off limits to the states? A similar transition has occurred in the immigration context, as we will see below.

The SPT account more easily explains this shift: Courts could correctly conclude that it is difficult to enforce a general preclusion of state action touching on a subject like foreign affairs while also giving due attention to the federalism-based reasons to leave intact state actions that would otherwise clearly fall within the police power. Applying such a doctrine involves a complex balancing of potentially incommensurable constitutional values and a high risk of potentially costly adjudicatory errors. Federal enactments, however, crystallize broad grants of policy-making discretion—they demonstrate what the political branches think they can and should be doing in foreign affairs—and accordingly provide useful signals from more expert institutions to courts regarding which state actions should be precluded and which should be allowed to stand. Shifting to using preemption doctrine in these contexts is a reasonable doctrinal strategy for incorporating these signals into judicial decision-making, and, perhaps, reducing the potential for error.

A variety of additional benefits support the SPT account of the standard dormancy doctrines over conventional views. If SPT can explain still other categories of structural doctrine, then the case for thinking it and similar norms provide a better explanation for this segment of our constitutional practice is further strengthened.


See infra notes 113–14 and accompanying text.
B. Immigration Power Doctrine

The doctrine governing the constitutionality of state involvement in immigration regulation is complex and controversial. For nearly a century, courts have treated immigration as a matter for exclusively federal regulation. But state and local government involvement in immigration regulation has increased dramatically in recent years. Since the federal government, so far, has not responded to calls for immigration reform in a systematic way, state and local governments have moved in to fill the perceived vacuum.

This recent surge in state and local action—mostly aimed at deterring or punishing unauthorized immigration—has been controversial. Aside from political, practical, and moral debates, these state immigration laws raise difficult questions about the constitutional allocation of power between the federal and state governments.

If federal immigration power is supposed to be plenary and exclusive, how can states enact wide-bodied laws designed to force “attrition” of unauthorized immigrants?

I argue that refocusing debates about structural immigration law allows us to understand this recent state action as a normative reaction to perceived federal inaction. Since the federal government has not acted in an immigration context, states have been expected to fill the vacuum.

This argument is based on a recognition that the federal government’s inaction has been perceived as a significant normative development.

The doctrine governing the constitutionality of state involvement in immigration is complex and controversial. For nearly a century, courts have treated immigration as a matter for exclusively federal regulation. But state and local government involvement in immigration has increased dramatically in recent years. Since the federal government, so far, has not responded to calls for immigration reform in a systematic way, state and local governments have moved in to fill the perceived vacuum. This recent surge in state and local action—mostly aimed at deterring or punishing unauthorized immigration—has been controversial. Aside from political, practical, and moral debates, these state immigration laws raise difficult questions about the constitutional allocation of power between the federal and state governments.

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tion doctrine around SPT, rather than a constitutional provision for an exclusively federal immigration power, will clarify and advance these debates and, importantly, better explain immigration powers doctrine as it stands.

The Supreme Court has repeatedly held that the national government’s immigration power is both plenary and exclusive. The exclusivity holding means, as with the standard dormancy doctrines, that certain state actions touching on immigration are precluded by "the Constitution of its own force"—that is, ex ante—without regard to the existence of positive federal immigration law. Courts have made clear that this "dormant immigration doctrine" at least bars state enactment of so-called "pure" immigration law, viz.: Laws "determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." The conventional justification for this ex ante preclusion involves a complex combination of the Naturalization Clause, the Foreign Affairs Clauses, the Foreign Commerce Clause, and an extra-constitutional theory of [powers] inherent [in] national sovereignty.

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The doctrine draws support from the connection between immigration and foreign affairs. The latter context has broad doctrines including the Zschernig background rule that state involvement in "foreign affairs and international relations is . . . forbidden" and the dormant Foreign Commerce Clause rule precluding state actions that undermine the nation's ability to "speak[] with one voice" in foreign affairs.

These doctrines straightforwardly implement SPT: Foreign policy is crucial to national stability and is undermined when national and state governments send mixed or conflicting signals; thus state action affecting foreign affairs will frequently threaten the constitutional structure and is therefore properly presumed invalid.

The substantial connection between immigration and foreign relations means that state action on immigration will almost always have some effect on foreign affairs. Arizona's S.B. 1070, for example, sparked a diplomatic uproar and condemnation from foreign governments.

Despite strong reasons to favor a uniform federal immigration law, the dormant immigration doctrine is less than an absolute preclusion of state action in practice. There are two fairly well-established exceptions: First, while the Court has expressly held that states do not possess authority to directly regulate immigration, it has also acknowledged that the states' police powers encompass some actions that affect immigrants in the course of advancing "traditional" state interests like "education, crime control, and the regulation of health, safety and welfare." These decisions draw a rough distinction between immigrant "selection" and "regulation" rules.

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60 See Pursley, supra note 9, at 500.
63 See De Canas v. Bica, 424 U.S. 351, 355 (1976) ("But the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration as thus defined, especially where that deal is made in a general manner which in any way deals with aliens in a general manner as defined by the Court."); Graham v. Richardson, 403 U.S. 365, 372–73 (1971) (noting state laws directed at non-residents that were upheld over constitutional challenge).
64 See Toll v. Moreno, 458 U.S. 1, 11 (1982) ("[The states] can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization, and residence of aliens in the United States or the several states.").
65 Rodriguez, supra note 54, at 571. Rodriguez also argues that that "immigration regulation should be included in the list of quintessentially state interests." Id.
66 See, e.g., Truax v. Raich, 239 U.S. 33, 42 (1915) (stating that "they [aliens] cannot live where they cannot work").
areas and are considered the core of the federal immigration power. Accordingly, states are precluded from enacting their own immigrant-selection measures and from interfering with federal selection law.

Immigrant regulation rules, on the other hand, “have to do with the process of determining how immigrants residing in the United States live their lives;” and this category of immigration rules, while clearly within the federal immigration power, has received more confounding treatment in immigration-power doctrine.

In principle at least, state regulatory rules need not be categorically precluded because they only indirectly affect immigrant selection. A simple dormant immigration rule would dictate clear results in a vacuum—absent positive federal immigration law, state laws touching on immigration are wholly precluded. Things become more complicated when positive federal law enters the picture, both because federal immigration laws are complex and because they may contain signals of federal views about the permissibility of state action in the field. In its most recent immigration power case—the decision invalidating most of the challenged provisions of Arizona’s controversial S.B. 1070—the Supreme Court both reaffirmed the primacy of federal immigration power and demonstrated that the volume of existing positive immigration law makes preemption doctrine a useful substitute for the broader dormant immigration rule in contemporary cases. Congress may, for example, preempt state immigration regulatory actions even if they would be otherwise permissible, as in

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67 See Adam B. Cox, Immigration Law’s Organizing Principles, 157 U. PA. L. REV. 341, 345–46 (2008) (noting that “selection” is concerned with sorting, while regulation is concerned with the determination of how immigrants in the United States lead their lives).

68 Id. at 354; see also Huntington, supra note 52, at 807–20 (noting that “[a] self-definition view of immigration law does not allow a role for states and localities because self-definition is understood as a national process”).

69 Cox, supra note 67, at 345–46; see also id. at 353–55 (stating that “[c]ourts have been deeply divided over which sorts of rules states have the power to pass”).

70 See Cox, supra note 67, at 351–53 (explaining the difficulty in reviewing “alienage rules,” which only indirectly impact immigration); Huntington, supra note 52, at 807–17 (analyzing federal exclusivity over immigration and noting that recent state involvement “falls short of pure immigration law”); M. Isabel Medina, Symposium on Federalism at Work: State Criminal Law, Noncitizens, and Immigration-Related Activity—An Introduction, 12 LOY. J. PUB. INT. L. 265 (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843401 (discussing when federal preemption of state regulations affecting immigration may or may not be appropriate); Rodriguez, supra note 54, at 571–72 (arguing that there is a “structural need for federal, state, and local participation in immigration regulation”).


72 Id. at 2510 (holding that parts of the provisions of Arizona’s S.B. 1070 are invalid and remanding for further proceedings).

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the Immigration Reform and Control Act ("IRCA") provision expressly preempting state laws imposing penalties on employers who hire unauthorized immigrants. 74

Judicial recognition of congressional primacy on immigration also, however, gives rise to the second exception to the dormant immigration rule—just as state actions that would otherwise fall within the police power exception to the dormant immigration rule may be preempted by statute, so may actions that would otherwise be permitted can be authorized by statute.

States may exercise authority pursuant to express or implied delegations from the federal government to regulate immigration themselves or enforce federal immigration laws. 77

Federal statutes that expressly delegate immigration authority to state governments include, for example, an Immigration and Nationality Act ("INA") provision permitting states to decide whether to provide public benefits to unauthorized immigrants; an IRCA provision allowing states to sanction hiring of unauthorized immigrants "through licensing and similar laws;" and Section 287(g) of the INA, authorizing states to enter into agreements with the Justice Department for cooperative enforcement of federal immigration law. 78

Given the substantial deference courts accord the federal political branches on immigration issues, it is not surprising that courts treat congressional signals about state action’s permissibility as dispositive most of the time. But plumbing for these signals complicates judicial application of the dormant immigration rule. The search for congressional permission in federal immigration statutes requires a preemption-like inquiry into the existence of express or implied congressional permission, strikingly like the search for congressional permissions under the parallel exception to the dormant Foreign

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74 8 U.S.C. § 1324a(b)(2) (2008). This provision effectively overrules De Canas. See Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1974–75 (2011) (discussing IRCA and noting that after its passage, "state laws imposing civil fines for the employment of unauthorized workers like the one we upheld in De Canas are now expressly preempted").
75 See, e.g., United States v. Arizona, 641 F.3d 339, 365 (9th Cir. 2011).
76 Huntington, supra note 52, at 805–07.
77 See Toll v. Moreno, 458 U.S. 1, 12 (1982); Schuck, supra note 54, at 57.
78 Huntington, supra note 52, at 807.
 Commerce Clause doctrine. 83 A representative articulation is found in Toll v. Moreno. 84 The inquiry resembles preemption analysis insofar as the Court examines relevant federal enactments for signals regarding the permissibility of the challenged state law; but this is, in an important sense, the reverse of conventional preemption analysis. 85 The search is not for congressional intent to preempt state law against a default rule of state power in the absence of such intent as in a conventional preemption case; 86 instead, it is a search for congressional permission for state action against a default rule that states lack power without congressional permission.

Observing that much potential state interference does not clearly resemble the exercise of a power to directly regulate immigration that is dedicated exclusively to the federal government highlights the weakness of the conventional exclusive-federal-power explanation of the doctrine. Even if precluding these other forms of state interference is constitutionally necessary or otherwise desirable, judicial use of a formalistic distinction between exercises of immigration power and conventional state power makes it difficult to reach that result.

Decision immigration power questions according to the category of power under which state action is taken thus will allow a substantial volume of state interference to slip through the proverbial doctrinal cracks. This "power matching problem" inheres in most judicial attempts to fashion rules that preclude state encroachment on fields of exclusive federal authority. 87 Put differently, a power-focused doctrine magnifies the risk of adjudicatory error in a context in which the foreign relations implications of immigration law ratchet up the potential costs of adjudicatory errors that underenforce the constitutional preclusion of state action.

84 458 U.S. 1 (1982).
86 Toll, 458 U.S. at 11 n.16, 13 n.18.
87 Pursley, supra note 9, at 516–17 (discussing the power matching problem generally).
88 See id. at 557 (arguing that adjudicatory costs are heightened in foreign-affairs related doctrinal contexts); Spiro, supra note 54, at 144 (arguing that in immigration and foreign affairs "the stakes are of such magnitude as to readily defeat the interests of federalism; echoes of 'the Constitution is not a suicide pact' haunt any claim of state right" (footnote omitted) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963)).
The Court recognized this problem early on in the immigration context:

A law or rule emanating from any lawful authority, which prescribes terms or conditions on which alone a vessel can discharge its passengers, is a regulation of commerce and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations . . . . But assuming that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the States, and among those powers are those for the preservation of good order, of the health and comfort of the citizens, . . . and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the States. This power . . . has been . . . called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already . . . because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its exercise, can authorize a State to exercise it in regard to a subject-matter which has been exclusively committed to the Federal Government.

This suggests that doctrine might avoid the power matching problem by focusing on the subject of state action rather than the power under which it is taken. Determining state action’s true purpose is also difficult; but one way to begin is by assessing the action’s real effects. SPT is concerned, of course, precisely with the effects of state action on the stability of the constitutional system.

SPT grounds an alternative account of immigration power doctrine that reconciles the dormant immigration doctrine with its exceptions, with courts’ continuing use of the slippery distinction between selection and regulatory rules in the immigration field, and with the shift in recent decades from a dormancy analysis to a preemption-first approach.

Such an account dissolves the problem of textual foundation by anchoring the doctrine firmly to an uncontroversial implied structural norm.

The hypothesis that SPT grounds the doctrine immediately seems legitimate and worthy of exploration because the reasons conventionally cited by courts and commentators in support of the dormant immigration doctrine relate directly to the undesirable consequences of state interference with federal immigration policy. For example, some argue that allowing state immigration regulation might “erode the antidiscrimination and anticaste principles that are at the heart of our Constitution.”
The harder question is how the doctrinal exceptions permitting state actions affecting immigration also may fairly be characterized as implementing SPT. The first puzzle is the tension between judicial statements about the primacy of federal immigration power and the reality of widespread state action affecting immigration. The federal exclusivity, foreign affairs, and federal uniformity rationales for the dormant immigration doctrine apply in principle to every state action that affects immigrants, no matter how indirectly or insubstantially. But the cases demonstrate that a variety of state actions are not precluded even though they may interfere to some degree with federal immigration authority; thus, contrary to the conventional account, it is difficult to square the existing doctrine with the claim that federal immigration power is categorically exclusive.

On an exclusive-federal-power account, reconciling the normative predicate with the actual decision requires either a counterintuitive conception of the scope of federal exclusivity or the conclusion that federal exclusivity is significantly underenforced by courts. Some commentators argue, instead, that the exceptions exist because states possess some measure of concurrent authority to regulate immigration. That may mean of course, even in the absence of constitutional authority to regulate immigration, states may regulate in the interest in such a way the exceptions exist because states possess some measure of concurrent authority to regulate immigration. The actual decision, or course, even in the absence of constitutional authority to regulate immigration, states may regulate in the interest in such a way that the exceptions exist because states possess some measure of concurrent authority to regulate immigration. The actual decision, as well as the cases, demonstrates that a variety of state actions are not precluded even though they may interfere to some degree with federal immigration authority; thus, contrary to the conventional account, it is difficult to square the existing doctrine with the claim that federal immigration power is categorically exclusive.

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explain the doctrine, but it does not explain a century of judicial rhetoric emphasizing the primacy of federal power. The SPT account explains both.

The high cost of adjudicatory error in immigration cases flows from their connection to foreign affairs; the risk that any given state action affecting immigrants will interfere with federal authority on immigration is magnified by the pervasiveness of positive federal immigration law; and the history of minimal state involvement with immigration makes even small state forays into the field seem like large departures from standard practice.

Together, these instrumental considerations could make reasonable a default presumption that state action affecting immigration likely will interfere with the constitutional structure. A state action's visible connection to immigration, on this view, is a proxy for a likely violation of SPT.

There is little risk of adjudicatory error in applying this default rule, since most state actions' immigration effects, or lack thereof, will be fairly obvious for the reasons I have mentioned.

The distinction between selection and regulatory rules, however, bifurcates the general dormancy doctrine: State actions that amount to the imposition of selection rules are presumptively invalid, but state actions that function primarily as regulatory rules are evaluated more case by case. This is difficult to explain on the exclusive power view, but if the underlying constitutional norm is about assessing the magnitude of state interference, then an exception for state regulation of immigration pursuant to police power may be justifiable as a way to identify and preserve actions that are valuable to states and unlikely to undermine the system. Not every immigration issue has significant foreign affairs implications; nor does every state action affecting immigration actually risk destabilizing the system. And many state actions that are visible or easily identifiable as interfering with immigration are evaluated more case by case. This is why the exclusive power view is so problematic.

The distinction between section and regulation rules, however, explains both.
federal overreaching. Courts will need to weigh federalism concerns against the reasons for federal exclusivity. The question for doctrine makers is: What rule best accommodates these competing considerations?

One instrumentally justifiable approach is to use the selection/regulation distinction as a front-end filter to distinguish state actions that should be presumed to threaten significant interference from those that pose less systemic risk and may have greater federalism value. Courts can identify with relative ease state actions that are effectively selection rules, and it would be reasonable in the light of pragmatic considerations for courts to presume that those actions likely will be destabilizing in light of the comprehensive federal selection regime. It is more difficult to justify a categorical presumption that state actions with only indirect effects on immigration violate SPT: Whether the constitutional structure will be better served by invalidating such a measure or permitting it further federalism values is less clear and will vary from case to case. For these state actions as a group, STPLs may explain the constitutional prescription in a case-by-case fashion. Where the constitutional prescription will be better served by invalidating actions with only indirect effects on immigration, the Court has not identified an exception per se. However, in cases that present the difficult question of where federal immigration power ends and legitimate state police power begins—a question that the Court has not thoroughly answered.

STPL also explains the congressional permission exception to the dormant immigration doctrine—an exception that is, as I noted, very difficult to reconcile with the idea that federal immigration power is exclusive by constitutional mandate.

If there is a core of non-delegable federal immigration power, then any attempt to delegate it to states in a manner that allows federal power to override state policy choices would contravene STPL by contravening a mandatory structural provision. STPL, by designating a measure as a federalism exception, permits courts to decide whether federal immigration power is exclusive by constitutional mandate. It is more difficult to reconcile with the idea that federal immigration power is exclusive by constitutional mandate. SPTLs explain the constitutional prescription in the particular case. The distinction between STPL and federalism considerations in the particular case is less clear and will vary from case to case. For these state actions, a more practical approach may be better served by STPL: Where the constitutional prescription will be better served by invalidating actions with only indirect effects on immigration, the Court can identify a measure of STPL that the constitutional prescription will be better served by invalidating a measure of STPL that is more powerful. Where the constitutional prescription will be better served by invalidating actions with only indirect effects on immigration, the Court can identify a measure of STPL that the constitutional prescription will be better served by invalidating a measure of STPL that is more powerful.

One instrumentally justifiable approach is to use the selection/regulation distinction as a front-end filter to distinguish state actions that should be presumed to threaten significant interference from those that pose less systemic risk and may have greater federalism value. The question for doctrine makers is: What rule best accommodates these competing considerations? Courts will need to weigh federalism considerations.
requirement (the exclusive provision of power to Congress).

Even if federal immigration power includes the discretion to delegate it as Congress sees fit—as one might argue on a strong view of that power's unconditionality—unauthorized state exercises of it would still violate SPT. But our focus is on the instrumental determinants of doctrine, and regardless of the best answer to the delegability question, the power matching problem will make it difficult to distinguish the state actions that amount to impermissible exercises of the exclusive part of federal immigration power from those that do not. Thus it will be hard to design doctrinal rules that reliably invalidate impermissible delegations of non-delegable federal immigration power (or unauthorized state exercises of it, if it is delegable), and also validate permissible delegations of state authority to take other kinds of immigration-related actions. And in any case, even if we reject the exclusivity of federal power, the complexity of existing federal immigration law and the foreign relations concerns make it difficult for courts to determine whether state action will interfere sufficiently with the system to violate SPT.

The SPT account thus explains the congressional permission exception regardless of our underlying theory of the exclusivity or delegability of federal immigration power. In each formulation, the risk of adjudicatory error in deciding the permissibility of delegations is high in the marginal case. And, the political branches have long been regarded as having superior institutional capacity on immigration largely because of immigration's connection with foreign relations.

Accordingly, courts might reasonably conclude that the best way to implement SPT is with a rule that comports with the way in which SPT is applied. Accordingly, courts might reason that, consistent with the best forums, according to SPT's reasoning, the political branches receive deference because of immigration's connection with foreign relations. But there is a risk of judicial error in deciding the permissibility of delegations. Decision of the constitutional permissibility of delegation in federal immigration power, as each formulation of the constitutional permissibility of delegation in federal immigration power is subject to the constitutional permissibility of delegation in federal immigration power.


108 Scholars have increasingly noted that federal immigration power has been delegated to both private actors and the states. For an overview of this discussion, see generally Adam B. Cox & Eric A. Posner, Delegation in Immigration Law, 79 U. CHI. L. REV. 1285 (2012).

109 I have explored this argument—that state interference with exclusive federal powers constitutes interference with the constitutional structure—at length elsewhere. See Pursley, supra note 9, at 514–16; see also Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 447–49 (1827) (holding that state power may not be used so as to obstruct the free course of a federal power).

110 See supra notes 87–8 and accompanying text (noting the power matching problem).

111 See Spira, supra note 54, at 156.

Just as a statutory delegation provision can be viewed as a signal that a state action is no threat to structural stability from a better institution; a statutory preemption provision (or substantive provision that conflicts with the challenged state action) can be viewed as an expertise-backed signal that state action poses a structural threat. Federal immigration statutes and regulations, on this view, function as another kind of proxy for the more difficult underlying question of state action’s effect on the stability of the system. Positive federal immigration law crystallizes the scope and contours of federal immigration policymaking discretion. In the light of Congress’s institutional capacity advantage on immigration, courts using federal immigration statutes as a proxy for structural interference is a form of deference that may mitigate the risk that judicial deference to the political branches on whether any given delegation of authority to states will interfere with foreign affairs or the system of immigration law.

Positive federal immigration law crystallizes the scope and contours of federal immigration policymaking discretion. In the light of Congress’s institutional capacity advantage on immigration, courts using federal immigration statutes as a proxy for structural interference is a form of deference that may mitigate the risk that judicial deference to the political branches on whether any given delegation of authority to states will interfere with foreign affairs or the system of immigration law.

Judicial attention to these comparative institutional capacity considerations also may support an SPT-based explanation of the shift in recent decades from dormancy to preemption analysis in immigration power cases. Federal immigration statutes and regulations, on this view, function as another kind of proxy for the more difficult underlying question of state action’s effect on the stability of the system. Positive federal immigration law crystallizes the scope and contours of federal immigration policymaking discretion. In the light of Congress’s institutional capacity advantage on immigration, courts using federal immigration statutes as a proxy for structural interference is a form of deference that responds to relevant instrumental concerns. Congress has now legislated on so many immigration issues that preemption doctrine will be an available alternative to straightforward application of SPT in most cases, and preemption doctrine—detailed and predictable compared to the dormant immigration doctrine—provides a narrower, more determinate, and less controversial doctrinal mechanism for implementing SPT in this context. And, on the SPT account, the broader delegational mechanism, in the context of federal immigration policymaking discretion, is a form of deference that responds to relevant instrumental concerns. Congress’s institutional capacity advantage on immigration cases, when granted to Congress, is one of several proxy mechanisms that courts evaluate in determining whether federal action should be interpreted as an expression of congressional intent. Federal immigration statutes and regulations, on this view, function as another kind of proxy for the more difficult underlying question of state action’s effect on the stability of the system. Positive federal immigration law crystallizes the scope and contours of federal immigration policymaking discretion. In the light of Congress’s institutional capacity advantage on immigration, courts using federal immigration statutes as a proxy for structural interference is a form of deference that may mitigate the risk that judicial deference to the political branches on whether any given delegation of authority to states will interfere with foreign affairs or the system of immigration law.

If state interference is generally barred by SPT, then it might minimize adjudicatory errors to hold that it cannot survive just because no federal statutory signal on its invalidity can be found. However, courts might reasonably come to view the absence of preemptive federal law as a signal of implied permission from the better-situated institution. As federal immigration law becomes more comprehensive, state involvement with immigration more common, and calculations of delegation more difficult, the case for judicial deference to the political branches on whether any given delegation of authority to states will interfere with foreign affairs or the system of immigration law becomes more compelling, too.

Sections 113, 114

See infra notes 115–19 and accompanying text.

See supra notes 31–5 and accompanying text.
B. SPT

When immigration is a useful case study for illuminating more broadly the idea that in federalism, power is not a zero-sum game, one can use transplantation, and the governmental architecture it suggests, to try to model immigration. This approach is helpful because it avoids the need for the kind of complex courtly arguments that are required in the immigration preemption cases to show the preemption exception. One can use transplantation to make the model of preemption more comprehensible. In short, it is a simple tool for explaining the complex immigration preemption cases.

C. Obstacle Preemption

The SPT account does not require disregarding a century of judicial rhetoric about the exclusivity of federal immigration power. The SPT account does not require recognizing some constitutional immigration power—powers that states possess. The SPT account does not require recognizing the federal preemption doctrine in general. It requires only that we recognize the general preemption doctrine in the immigration context. The SPT account makes it difficult to distinguish legitimate state police power actions from illegitimate encroachments on federal immigration power.
proach beginning with the seminal 1941 decision in *Hines v. Davidowitz* and continuing through important decisions in *Graham v. Richardson*, *De Canas v. Bica*, and *Mathews v. Diaz* through the most recent encounter with an immigration power question in *Chamber of Commerce v. Whiting*.

The dormancy and preemption doctrines accomplish much the same thing—both buttress the stability of the constitutional system by precluding state interference with what is taken to be either an exclusively federal power or, if federal exclusivity is not a constitutional necessity, at least a regulatory subject in which the existence of comprehensive federal regulation means that state forays into the field raise the specter of interference with federal policymaking discretion in an area tightly bound up with international relations.

Keep in mind the conceptual distinction between preemption and dormancy that I explored at length elsewhere: dormancy rules identify state actions that are beyond the states' constitutional power ex ante; preemption rules, by contrast, identify state actions that, while otherwise within states' constitutional authority ex ante, are nevertheless contingent precluded in virtue of the enactment of a conflicting federal law.

It turns out that the controversial obstacle preemption doctrine may be characterized as implementing SPT, using state laws' conflicts with congressional purpose as a proxy for structural interference with federal statutes that either play a significant role in structuring the government, establish important and long-vested legal rights, or that have otherwise achieved what we might call quasi-constitutional status. Thus, obstacle preemption, like the immigration power doctrines, is deeply related to the standard dormancy doctrines. This new justificatory account resolves a prominent critique of obstacle preemption—that it cannot be properly grounded on the Supremacy Clause.

This account also gives us new leverage on two broader controversies:

First, courts have never made clear the constitutional foundation for characterizing federal laws as ex post checks on the states' ability to legislate in areas where the Supremacy Clause requires the states to yield. In *Wyeth v. Levine*, the Court embraced a broad view of structural preemption, construing the Supremacy Clause to apply not just to federal laws that directly conflict with state laws, but also to federal laws that, by their structure and purpose, have the effect of precluding state legislation in areas that Congress has chosen to regulate exclusively. This approach, which I have criticized elsewhere, *see supra* notes 57–62, 105–111 and accompanying text, is deeply problematic. It is not clear how courts can properly determine what Congress intended to preclude when the federal laws in question are not explicitly stated. Moreover, the approach taken in *Wyeth v. Levine* is at odds with the standard dormancy doctrine, which requires that state laws be beyond the states' constitutional power ex ante. Thus, courts must decide whether the Supremacy Clause applies when state laws are within the states' constitutional power, but are precluded by federal laws that are not explicitly stated to be preclusive. This is a difficult task, and courts have often struggled to make the necessary determinations.

Second, courts have not adequately addressed the implications of the Supremacy Clause for the doctrine of preemption. The doctrine of preemption is based on the idea that federal laws preclude state legislation in areas where the states have no constitutional authority. However, the doctrine of structural preemption, which I have criticized, suggests that federal laws preclude state legislation even when the states have constitutional authority. This is problematic because it undermines the presumption that state laws are constitutional and should be given the benefit of the doubt unless specifically precluded by federal laws. Moreover, the doctrine of structural preemption is inconsistent with the standard dormancy doctrine, which requires that state laws be beyond the states' constitutional power ex ante. Thus, courts must decide whether the Supremacy Clause applies when state laws are within the states' constitutional power, but are precluded by federal laws that are not explicitly stated to be preclusive. This is a difficult task, and courts have often struggled to make the necessary determinations.

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See *supra* notes 57–62, 105–111 and accompanying text.

See *Pursley*, *supra* note 9, at 561–65 (distinguishing dormancy and preemption while also discussing contingent unconstitutionality).

See, e.g., *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) (arguing that "this Court's [entire body of] 'purposes and objectives' pre-emption jurisprudence" is inherently flawed).
preemption holdings that have the effect of fully nullifying state law or, even more extreme, displacing state regulatory authority rather than simplyrendering the challenged state law inapplicable in a particular case—asper one might expect on an intuitive reading of the Supremacy Clause as a choice-of-law rule that would merely render the preempted state law inapplicable in the particular case—and that foundation is not obvious. Call this the “displacement” problem.

Second, commentators have been frustrated by the Court’s haphazard application of the presumption against preemption—a rule that, when applied, requires an especially salient manifestation of congressional preemptive intent before federal law may be construed to preempt state law. While the Court has stated that the presumption is grounded on constitutional federalism considerations and has hinted on occasion—consistent with the generality of its rationale—that it applies in every preemption case; it has not applied the presumption in every preemption case and the reasons for its non-application in some cases have not been explained.

We should begin with some background on preemption, its proposed constitutional grounding, and the nature of the controversies.


See Pursley, supra note 122, at 524–29 (canvassing formulations of this criticism).

Tom Merrill called this effect of preemption decisions “displacement,” as distinguished from cases in which the preemption holding is essentially a choice of law holding that does not invalidate the state law beyond the particular case. See Thomas W. Merrill, Preemption and Institutional Choice, 102 NW. U. L. REV. 727, 730–31 (2008).

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (describing examples of federal law preempting state law, concluding that “it is often a perplexing question whether Congress has precluded state action.”)

See Young, supra note 43, at 1834–35, 1849–50 (discussing how the “courts were not envisioned [by the Framers] as the primary line of defense” for enforcing federalism and separation of powers).


See, e.g., AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (ignoring the presumption in preemption analysis); Williams on v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011) (same); see also Merrill, supra note 124, at 728 (noting the Court’s varying methods of application regarding presumption); Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 253, 307–08 (2012) (noting the Court’s unreliable use of the presumption).
surrounding its development and application.

Preemption doctrines invalidate state actions that conflict with positive federal law in one of several ways. Express preemption occurs where federal law contains a provision expressly barring certain state laws or categories of state laws. Field preemption—rare but applicable in some narrow circumstances—occurs where federal law is clearly meant to be the sole source of regulation on a subject or category of activity.

Two forms of implied preemption may occur even absent express preemption language or evidence that the federal government sought to occupy the entire field of regulation. First, state laws may be impliedly preempted where they directly conflict with one or more provisions of positive federal law. The exact test for direct conflicts remains unclear; popular recently has been the formulation that state law directly conflicts with federal law where it is impossible for a regulated party to comply with both the state and federal requirements (hence, this has in recent cases been called "impossibility" preemption). But here, I focus on the other form of implied conflict preemption—the so-called "obstacle preemption" rule, which requires the invalidation of state laws that "stands as an obstacle to the . . . full purposes and objectives of Congress." Interestingly, this obstacle preemption doctrine was born in the immigration context—it was first articulated in *Hines*.

The immigration context—was the first articulated in *Hines*—is important here. In *Hines*, the obstacle preemption doctrine was employed to invalidate federal immigration laws under the Supremacy Clause. The Court held that a federal immigration statute preempts state laws that attempt to regulate the entry and exit of aliens into the United States. In *Hines*, the Court emphasized the need to balance interest in effective immigration enforcement with the importance of respecting states' interests in immigration. The Court noted that federal immigration laws are designed to achieve specific purposes and objectives, and that state laws that interfere with those purposes and objectives are preempted.

In subsequent cases, the Court has applied the obstacle preemption doctrine to a variety of state laws, including those that regulate the entry and exit of aliens, the employment of aliens, and the admission of aliens. The Court has also considered the question of whether the Supremacy Clause preempts state laws that conflict with the Immigration and Nationality Act (INA), the primary federal statute governing immigration. In *INS v.挫折*, the Court held that state laws that regulate the employment of aliens and that are not sufficiently related to the federal law are preempted.

In *INS v.挫折*, the Court held that state laws that regulate the employment of aliens and that are not sufficiently related to the federal law are preempted. The Court noted that the INA gives the federal government the exclusive authority to control the entry and exit of aliens, and that state laws that interfere with the federal scheme are preempted. The Court also noted that the Supremacy Clause preempts state laws that are not substantially related to the federal law, and that state laws that are not substantially related to the federal law are preempted.

The Court has applied the obstacle preemption doctrine to a variety of state laws, including those that regulate the entry and exit of aliens, the employment of aliens, and the admission of aliens. The Court has also considered the question of whether the Supremacy Clause preempts state laws that conflict with the INA. In *INS v.挫折*, the Court held that state laws that regulate the employment of aliens and that are not sufficiently related to the federal law are preempted.
One prominent objection is that the obstacle preemption doctrine is textual. In articulating preemption rules, the Supreme Court unerringly cites the Supremacy Clause as the relevant constitutional foundation. The Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made . . . under the Authority of the United States" are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding." There is a longstanding debate about whether the obstacle preemption doctrine can be justified by the Supremacy Clause—it is unclear at best that congressional "purposes and objectives" can render state law "contrary" to federal law and, for that matter, that "purposes and objectives" are "laws of the United States." We can place the more controversial preemption doctrines—especially the obstacle preemption rule—on firmer conceptual footing by characterizing them as implementing SPT rather than the Supremacy Clause; but to do so we must adopt a somewhat broader conception of the constitutional structure that SPT protects against state interference. First, we might argue that obstacle preemption is justified where a federal statute is enacted pursuant to arguably exclusive, or at least importantly discretionary, federal authority. Federal immigration statutes, for example, arguably crystallize federal immigration policymaking discretion—which, if the federal government enact a federal immigration statute, then, may be characterized as interference with the constitutional structure as far as it undermines the exercise of federal discretion. But this proves far too much. On this view, however,
nearly every positive federal law can be characterized as part of the constitutional structure—we need criteria for limiting what qualifies as part of the constitutional structure to prevent SPT from becoming a general prohibition on states doing anything at all. We might limit the range of positive federal laws that count by introducing some kind of significance criterion—assessing either the significance of state interference with a given law for the stability of federal policy or the significance of the head of federal authority under which the law was enacted. Another ready-to-hand criterion of significance is found in recent constitutional theory work suggesting that broad, comprehensive federal statutes may become part of the constitutional structure in some sense. Statutes that create rights and empower government institutions to elaborate and enforce those rights through legislative and adjudicatory processes discharge quintessentially constitutional functions. What’s more, long-lived constitutive or rights-bearing statutes of this sort also seem quasi-constitutional because they are entrenched in a sense, not by Article V, but by the pragmatic factors—including, for example, institutional settlement and incentives to maintain status quo allocations of administrative jurisdiction, anti-reform pressures from powerful status quo stakeholders, regulatory entrenchment effects, and so forth—that make altering significant federal statutes more difficult and costly.

The INA, for example, displays some of these features—it creates rights and remedies; it has been around for a long time and has generated a large body of institutions and implementing regulations, resulting in strong endowment effects, and so forth. Since SPT is supported in large part by the desire to avoid the practical consequences of destabilization, it is a natural next step to argue that SPT’s definition of interference with the constitutional structure should be capacious and flexible enough to include interference with statutes that display these characteristics. Preemption doctrine thus may be viewed as implementing SPT in some instances. State actions’ conflicts or interference with federal statutes can serve as proxies for interference with federal sensitive or exclusive federal authority—important features of the constitutional structure. Obstacle preemption in particular seems better explained on this account; while the doctrine’s focus on Congress’s policy objectives may seem odd because those objectives are not by law within constitutional structure, obstruction preemption in particular seems better explained by constitutional structure. Obstacle preemption captures some of the important entrenchments of the constitutional structure that are of constitutional significance with respect to the SPT doctrine. For example, because the INA is quintessentially constitutional in some sense, one might argue that the right to order aliens to leave the United States is quintessentially constitutional because they are entitled in a sense, not by Article V, but by the pragmatic factors that make altering significant federal statutes more difficult and costly.

We might think of the range of positive federal laws that can be characterized as part of the constitutional structure as part of the constitutional structure to prevent SPT from becoming a general prohibition on states doing anything at all. A general prohibition on state doing anything at all would necessarily make every positive federal law be characterized as part of the constitutional structure, which would be problematic. We need criteria for limiting what qualifies as part of the constitutional structure to prevent SPT from becoming a general prohibition on states doing anything at all.
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the meaning of the Supremacy Clause, that focus is consistent with an
SPT-based doctrine insofar as Congress objectives are directly rele-
vant to determining the extent to which state action threatens to de-
rail a federal policy process crucial for systemic stability. Or, if we
want to take the super-statutes idea more literally, we might say that
certain statutes become elements of the constitutional structure in a
functional sense in virtue of their constitutional characteristics. Doc-
trmine is (ideally) responsive to pragmatic concerns; thus it makes
sense for courts to select doctrines that treat certain federal statutes
as quasi-constitutional. On either view of federal statutes' role in the
analysis, SPT improves upon the conventional Supremacy Clause ex-
planation of preemption doctrine, which does not straightforwardly
suggest these considerations. The SPT account is thus preferable in
the sense that it provides a new solution—in the form of a new nor-
mative grounding—for the "atextuality" critique of obstacle preemp-
tion.

The SPT view also points out a new clarifying solution to the
common conflation of the "preemption" and "displacement" effects
of preemption holdings. Displacement finds at best contestable justi-
fication in the Supremacy Clause; but full displacement of destabiliz-
ing state action is exactly what you would expect from decision rules
implementing SPT. The potential for structural interference, after
all, will typically be a quality of the state law in all applications, not
just in applications to a particular set of facts. And even if it is a
questionable

...
effect to something closer to the choice-of-law model, the SPT account suggests that in those instances, the state law’s general application could be fairly clearly pronounced harmless. Or, those decisions might be explained as implementing the Supremacy Clause, which reads as a choice-of-law rule, provided that the federal law at issue falls relatively clearly within the Clause’s language. All preemption doctrines thus may implement SPT in a sense—that is, SPT can, if it forms part of the normative background for preemption doctrine, finally justify the displacement effects. It’s easy to view preemption as a decision rule that leverages a useful proxy—the content of positive federal law—to replace a harder inquiry into state laws’ effects on the constitutional structure. If all preemption doctrine is, in this sense, aimed at preventing state interference, then it’s a form of SPT.

The super-statute idea is simply another way of characterizing what appears to be a judicial inquiry into the importance of either the federal statute as a policy matter, the specificity of the federal interest in uniformity or in the statute’s particular subject relative to other regulatory subjects, or the significance of the obstacle posed by state law, balanced against the degree of state interest in the purportedly preempted law. A judicial finding that the statute implicates significant federal interests will in most cases confirm other explanatory frameworks, whose central feature is the threat to structural stability posed by federal law. In such cases, the federal statute is a policy matter, the specificity of the federal interest in uniformity or in the statute’s particular subject relative to other regulatory subjects, or the significance of the obstacle posed by state law, balanced against the degree of state interest in the purportedly preempted law. A judicial finding that the statute implicates significant federal interests will in most cases confirm other explanatory frameworks, whose central feature is the threat to structural stability posed by federal law. In such cases, the federal statute is a policy matter, the specificity of the federal interest in uniformity or in the statute’s particular subject relative to other regulatory subjects, or the significance of the obstacle posed by state law, balanced against the degree of state interest in the purportedly preempted law.

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These SPT examples demonstrate the potential fruitfulness of constructing explanatory accounts that characterize complex constitutional doctrine as predicated on normative propositions that are significantly more general and abstract than are those proposed in conventional accounts, and that are thus likely to be matters of substantial and durable consensus among legal officials and the public. Now suppose that such an account could be expanded, with the additional assumption that the constitutional doctrine is in the same sense, constitutional in structure. If all preemption doctrine is a decision rule that leverages a useful proxy—the constitutional structure, whose central feature is the threat to structural stability posed by federal law. In such cases, the federal statute is a policy matter, the specificity of the federal interest in uniformity or in the statute’s particular subject relative to other regulatory subjects, or the significance of the obstacle posed by state law, balanced against the degree of state interest in the purportedly preempted law. A judicial finding that the statute implicates significant federal interests will in most cases confirm other explanatory frameworks, whose central feature is the threat to structural stability posed by federal law. In such cases, the federal statute is a policy matter, the specificity of the federal interest in uniformity or in the statute’s particular subject relative to other regulatory subjects, or the significance of the obstacle posed by state law, balanced against the degree of state interest in the purportedly preempted law.
In Parts II and III, I assume that such an account—the SN account of structural constitutional doctrine—is possible and explore the implications; first developing a theoretical framework for assessing the merits of SN relative to conventional explanatory accounts and then arguing that pursuing accounts like SN may advance constitutional theory by reconciling it with legal positivism and moving it past the preoccupation with debates about constitutional interpretation.

Importantly, the claims that constitutional norms can be identified in this way, and (as I argue in the next Part) that the aptness of such identifications can be evaluated by normatively inert criteria, do not require the conclusion that other normative criteria are inapplicable to the norms. It is not, in other words, an argument in favor of the norms’ moral validity, their compatibility with democracy, or their compatibility with conventional rule-of-law values. Those debates can—and should!—still be had, they are just not the debates that I take up here.

Instead, my argument is in favor of legal norms’ legal validity—that is, their status as legal norms qua legal. So, too, my approach to identifying certain constitutional norms does not entail or imply any theory of adjudication. Indeed, the underlying distinction between constitutional operative propositions and constitutional decision rules, and to corollary observation that decision rules are influenced by instrumental as well as legal considerations,

147 See supra notes 10–24 and accompanying text.

148 See Pursley, supra note 9, at 504.

suggests that multiple categories of non-legal reasons might be legitimately relied on by courts in constitutional adjudication. One might respond to this view by adopting a theory that prioritizes or deprioritizes deep consensus norms, but any reason to do so—even if it is some reason directly related to the fact that they are matters of deep consensus (such as the influence of social acceptance)—is not incompatible with holding that it is some norm’s legal status that one takes into account as part of the legal reasoning process.

149 I am leaving the rights side of constitutional doctrine and practice aside for now. While I believe that similar reconceptualizations of constitutional rights doctrines are possible, they will be harder, more controversial, and perhaps less useful on the rights side. The structural focus seems preliminarily more fruitful, since there are very few specific structural prohibitions in the constitutional text.


151 John Gardner, Legal Positivism: 5 1/2 Myths, 46 AM. J. JURIS. 199, 209–10 (2001) (“Agreeing that a norm is legally valid is not incompatible with holding that it is entirely worthless...”).

152 See supra notes 10–24 and accompanying text.
validity) is analytically distinct from the reasons I offer for thinking that these norms are, in fact, valid constitutional norms of our system.

II. EVALUATING CONSTITUTIONAL THEORY CLAIMS

This kind of explanatory account of constitutional doctrine raises a number of second-order questions. In this Part I address questions of theory classification and evaluation. There are multiple competing constitutional theories and there is room for debate about how we should categorize their various theses. Two important questions that bear directly on this project are (1) how—by what criteria—should we assess competing constitutional theories and, relatedly, (2) are there categories of constitutional theories that should be subjected to different sets of evaluative criteria? Both questions arise from an even more basic one—"which theory is best?"

To address these questions, I first propose a rough taxonomy of constitutional theories—divided into theories of law and theories of adjudication, following the traditional distinction in jurisprudence; and into positive and normative theories following the convention of most disciplines. These distinctions illuminate the difficult question of how we should evaluate competing theories of various kinds. I argue that while the conventional way of assessing a constitutional theory, which involves normative criteria of political morality and the like, is apt for theories of adjudication, but problematic for positive theories of law. Theories of law should be evaluated according to criteria that help us choose between competing claims about what is the case. Accordingly, I propose a set of evaluative criteria for positive constitutional theories of law—divided into theories of law and theories of adjudication, which involves normative criteria of political morality and the like.

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149 See Gardner, supra note 146, at 211–12.

150 Fallon, supra note 14, at 540.

151 See, e.g., Berman & Toh, supra note 6, at 552 (noting the taxonomy’s commonality in jurisprudence); see also SCOTT J. SHAPIRO, LEGALITY 247–48 (2011) (same). No categorization is airtight. See Berman & Toh, supra, at 553–54 (arguing that “new originalism” advances claims belonging to both a theory of law and a theory of adjudication); Fallon, supra note 14, at 543–45 (noting that “originalism” advances claims that are part of both theories). Without categorizing claims so much as regions along a continuum, the task of conceptual distinction is not to define polar opposites so much as regions along a continuum. The test of a conceptual distinction is how useful it is. See, e.g., Berman & Toh, supra note 6, at 552 (rejecting arguments that could be made to deny utility).

152 See, e.g., Fallon, supra note 14, at 538 (arguing generally that the criteria for selecting among competing constitutional theories “must reflect a judgment about which theory would yield the best outcomes, as measured against relevant criteria”).
ory-of-law claims that tracks the dominant views about theory assessment and selection in jurisprudence and the philosophy of science. This taxonomy makes clear that the view I am defending here is a theory-of-law thesis whose compatibility with legal positivism is another of its theoretical virtues. I explore this in Part III.A. And in Part III.B, I argue that a constitutional theory of law of this kind can help us avoid the implications of the inescapably normative and seemingly unresolvable contest among proponents of competing theories of constitutional interpretation.

A. Constitutional Theory Taxonomy

Constitutional theories are many and varied. For our purposes, it is most useful to first distinguish theories of law from theories of adjudication. By a theory of law, I mean an account of the law—that is, an account that answers the question "what is the law" in jurisdiction X or why is it the case that is a legal norm and not some other kind of norm (a moral rule, a rule of etiquette, etc.).

Because law is a socially constructed artifact of human practice, not a natural kind with a "distinctive micro-constitution"—water or gold, for example, have distinctive molecular structures by which we can distinguish them from other natural phenomena— it is difficult to give an

English claim from other natural phenomena. — It is difficult to give an

A. Constitutional Theory Taxonomy

Constitutional theories are many and varied, and in Part III.B, I explore this in Part III.A. And in Part III.C, I develop a methodology for comparative analysis of constitutional theories that tracks the dominant views about theory assessment and selection in jurisprudence and the philosophy of science. This taxonomy makes clear that the view I am defending here is a theory-of-law thesis whose compatibility with legal positivism is another of its theoretical virtues.
account of the necessary or essential conditions that must be present in order to be a proposition of law.

Among other problems, the conditions under which the proposition will in fact be a proposition of law will vary by jurisdiction and, perhaps, by area of legal practice within a given jurisdiction. Accordingly, the focus of theories of law is on the criteria of legal validity—the conditions under which \( \Theta \) will be a proposition of law and not something else—that obtain within a jurisdiction \( Y \).

Or, more ambitiously, some theorists aim for a general theory of law that tells us something generally true about criteria of legal validity, and thus about the content of the law, in every jurisdiction. Claims belonging to theories of law tend to take the following form:

\[
\text{Propositions whose content satisfies conditions } \alpha \text{ and } \phi \text{ are propositions of law in jurisdiction } Y. \]

The primary contribution of theories of law is to describe, and thereby illuminate, the criteria of legal validity—conditions \( \chi \) and \( Z \).

Professor Mitchell Berman and Kevin Toh characterize some "new" originalist claims as belonging to a theory of law—such as Steven Calabresi and Sai Prakash's claim that "[o]riginalists do not give priority to the plain dictionary meaning of the Constitution's text because they like grammar more than history. They give priority to it because they believe that it and it alone is law." On this view, "insofar as judges should follow or enforce some fixed original aspect of the constitutional text, they should do so because that fixed aspect of the constitutional text, they should do so because that fixed aspect of the text is essentially tied to the interpretation inherent in the original understanding of the text by the original legislators."

Critically, some theorists focus on the conditions of legal validity—criteria that \( \Theta \) must meet in order to be a proposition of law. In this view, the distinction between law and non-law becomes irrelevant because all legal propositions meet the necessary conditions for being a proposition of law. Accordingly, the concept of law is reduced to a set of conditions that \( \Theta \) must satisfy in order to be a proposition of law. In order to be a proposition of law, \( \Theta \) must meet the necessary conditions of law, which are then described as the conditions under which \( \Theta \) will in fact be a proposition of law.
pect—'the plain dictionary meaning' in [Calabresi and Prakash's formulation]—is the law."

Perhaps the most famous general theory of law is the positivist account that H.L.A. Hart articulated in his seminal work *The Concept of Law*. I set out Hart's core claims in more detail in the next Part; for now, summarizing Hart's core thesis is enough to show that his is a theory of law—viz.: In any legal system, the legal validity of any given norm depends on whether it comports with criteria of legal validity that a consensus of the system's legal officials accept as obligatory.

Hart characterized his view as one of "descriptive" sociology—he sought to give a general account of law on which the concept of law is exhausted by facts about the practices of participants in municipal legal systems. Contrasting theories of law with theories of adjudication, which describe or prescribe how officials—usually judges—do or should resolve disputes under law. The American Legal Realists' theory of adjudication, developed in the first part of the Twentieth Century, was that judges respond primarily to the facts of the case such that legal reasons have less to do with causing judicial outcomes than was then thought under earlier theories of adjudication developed in the first part of the Twentieth Century.

Legal systems are described by facts about the practices of participants in municipal legal systems. However, it is fair to give a general account of law on which the concept of legal criterion that are accepted by broad consensus as obligatory may be identified by patterns of consecutive or consistent legal validity in any section, which can be called Hart's so-called "social facts" of legal validity. The principle that social facts are legal criteria is captured by the concept of consensus Hart's core thesis is captured in the next Part; for now, summarizing Hart's core thesis is enough to show that his is a theory of law—viz.: In any legal system, the legal validity of any given norm depends on whether it comports with criteria of legal validity that a consensus of the system's legal officials accept as obligatory. The American Legal Realists' theory of adjudication, developed in the first part of the Twentieth Century, was that judges respond primarily to the facts of the case such that legal reasons have less to do with causing judicial outcomes than was then thought under earlier theories of adjudication developed in the first part of the Twentieth Century.
Political and legal theorists involved in modern projects like the construction of the attitudinal model of judging that measures the extent to which judicial decisions can be predicted according to observable proxies for the judges’ political leanings.

Normative theories of adjudication are more common—two well-recognized examples are Ronald Dworkin’s view that judges should engage in “constructive interpretation,” rendering decisions that both fit existing legal materials and render them morally justifiable; and John Hart Ely’s view that constitutional adjudication should focus on shoring up failings of the political process so that the latter can do the lion’s share of the governing.

A theory of constitutional interpretation is a particular kind of theory of adjudication—a sort of “theory of legal or constitutional epistemology” that “aim[s] to give guidance regarding how to conduct a particular inquiry to discover the legally effective meaning of the constitutional law applicable to some dispute.”

Classical originalism, for example, instructs courts how to go about determining what the authors of constitutional provisions intended to say; their background assumption about the content of law being that the content of “the constitutional law in a case of first judicial impression is fully determined by what the authors of the constitutional text in question intended to say.”

More generally, the distinction between the semantic and legal meaning of a text, which is of some importance in internecine debates among originalists, is of some importance in internecine debates among originalists. Most acknowledge that legal meaning may not be identical with semantic meaning; see id. at 548–49 (discussing this distinction and “the tendency of legal theorists to conflate semantic facts with legal facts”).
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This is distinct from a theory of law—to instruct courts how to discover the proper legal meaning of the governing law presupposes "an account of what the law is or consists of"—as it must, in order to guide courts toward the proper legal meaning of the constitutional law and not some other set of norms.

Some theories of interpretation arguably now include, alongside their epistemological guidance, "theory of law" claims—as with New Originalism mentioned above—but while they may be loosely grouped under the same heading for hanging together as a more or less thematically related set of views, these kinds of claims are conceptually distinct.

The two-output thesis, for example, belongs to a theory of adjudication but not to a theory of constitutional interpretation; the process of generating constitutional operative propositions may but need not involve the application of a theory of constitutional interpretation, and the formulation of constitutional decision rules involves a distinct operation, which has come to be called constitutional "construction."
any guidance at all on what anyone should do about anything on any occasion.  

Moralistic theories of law—e.g., natural law theories like that of John Finnis—are normative—although there are some notable exceptions such as the positive claims of the American Legal Realists and, more recently, the attitudinal models—but not all normative constitutional theories are exclusively theories of adjudication. Some also make claims belonging to a theory of law, such as the originalist claim mentioned above.  

The State Preclusion Thesis account and Skeletal Norms depend on the two-output thesis as a positive claim about constitutional adjudication, but my central claim is that we should consider whether patterns of convergent official practice in constitutional matters are evidence of the norms that are valid constitutional norms in our system, and perhaps of part of the rule of law, thus in discussing criteria for evaluating constitutional claims, I will focus on developing evaluative criteria that will be useful for assessing claims of this sort.

185 Gardner, supra note 146, at 202 (characterizing legal positivism's core claim as "normatively inert").  

186 See JOHNN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011) (introducing ethics, political philosophy, and jurisprudence).  

187 On the Realists, see BRIAN LEITER, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, in NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 15, 23 (2007) (describing the American Legal Realists' "core claim"—that "judges respond primarily to the stimulus of the facts of the case" in deciding outcomes—as a positive, social scientific thesis about adjudication). For examples of modern positive theories of adjudication, see FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 3–4 (2007) (surveying modern empirical work on the real causes of judicial opinions); SEGAL & SPAETH, supra note 173, at 123 (evidencing the proposition that judges' political attitudes are better explained and predicted than analysis of the legal reasons in the cases).  

188 See supra notes 162–64 and accompanying text.  

189 See supra note 142, at 416.  

B. Criteria for Theory Evaluation

Constitutional theory does not have much of a literature on theory assessment, and what there is primarily proposes assessing competing theories according to values that are at stake in constitutional debates. Richard Fallon, for example, argues that “the choice among theories should be based on which theory will best advance shared, though vague and sometimes competing, goals of: (1) satisfying the requirements of the rule of law, (2) preserving fair opportunity for majority rule under a scheme of political democracy, and (3) promoting substantive justice by protecting a morally and politically acceptable set of individual rights.”

This is simply a different question to ask about constitutional theories, one with no necessary relationship to my question about explanatory accuracy. And applying normative criteria internal to constitutional practice to choose between positive theories of law is question-begging; after all, the goal of such theories is to provide an accurate picture of what the constitutional law is, and theorists tend to claim that something in our constitutional law is the source of the values that form the basis for these proposed normative assessments.

This kind of normative assessment may be unavoidable in constitutional theory (the discipline is, after all, dominated by normative work), but I doubt it. The relative paucity of positive constitutional theory in the legal literature might tell us something about the scholarly community’s implicit assessment of such work’s value; but more likely, I think, it tells us something about what constitutional scholars find interesting, and in any case it does not establish that positive theory is either impossible or undesirable.

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193 See id. at 551 (“Questions about appropriate evaluative criteria for constitutional theories arise within the same debates in which those criteria are invoked.”); see also Michael C. Dorf, Create Your Own Constitutional Theory, 87 CALIF. L. REV. 593, 598 (1999) (“Any claim that some set of [normative] priorities and [relative] weights [among such priorities] is best is itself a highly contestable claim of constitutional theory.”).

194 See Fallon, supra note 14, at 540–41 (arguing that choosing a constitutional theory “requires appeal to normative criteria”).

195 Cf. Gardner, supra note 146, at 203 (“When a philosopher of law asserts a proposition that neither endorses nor criticizes what they do, but only identifies some necessary feature of what they do, lawyers and law teachers are often frustrated. They automatically start to search for hidden notes of endorsement or criticism, secret norms that they are being asked to follow.”).
Normative constitutional theory is clearly distinct from scientific theory—the latter purports to explain what is the case while the former purports to demonstrate what should be made the case. Positive constitutional theory, which does purport to reveal what is the case, is also distinct from scientific theory. Law is not a natural kind, it is an artifact created by human practice. Among other things, human practices and their artifacts may change over time while physical phenomena (for the most part and excepting quantum mechanical phenomena) remain fixed regardless of human observation or action. Moreover, the object of positive constitutional theory—constitutional practice—is a notoriously difficult, moving target; for example, a number of interpretive paradigms can coexist peacefully in constitutional practice, and no one paradigm is likely to force the others out of business. Even if some of our constitutional norms can be clearly identified, then, it is very difficult to use that information to predict practical outcomes in the light of the widely varying approaches observable in constitutional practice under which constitutional norms may be given legal effect in constitutional disputes. For these reasons, among others, two typical scientific theory evaluation criteria—falsifiability and predictive power—seem inapt for choosing among positive constitutional theory claims.

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196 See supra notes 158–59 and accompanying text.
198 A scientific proposition is falsifiable if a statement about some occurrence is incompatible with the proposition. See Karl R. Popper, The Logic of Scientific Discovery, 41–87 (1968).
199 See, e.g., Milton Friedman, The Methodology of Positive Economics, in ESSAYS IN POSITIVE ECONOMICS 7–9 (1953) (arguing that the principal, perhaps only, proper test of a positive economic theory should be its predictive power).
200 Although they are routinely referenced in legal theory literature, see Jeanne L. Schroeder, Just So Stories: Posnerian Methodology, 22 CARDOZO L. REV. 351, 355 n.17 (2001), there is debate in the philosophy of science about the propriety of predictive power and falsification as criteria for evaluating scientific theories. Popper’s views have been largely abandoned by mainstream philosophers of science. See, e.g., Susan Haack, A Philosophy of Science: A Deconstruction—and a Reconstruction, 5 N.Y.U. J. L. & LIBERTY 394, 415–16 (2010). Thomas Kuhn, for example, does not include falsifiability on his list of five criteria for choosing among scientific theories. See KUHN, supra note 12, at 52–57. Assumptions about the rationality of the scientific method are not the same as assumptions about the rationality of legal theory claims. The following example illustrates the importance of choosing among constitutional theory claims. For the most part and excepting quantum mechanical phenomena, it is not obvious how—assuming that constitutional norms are meaningfully constituted (validated) by patterns of convergent official practice of acceptance; then for claims of the form “X is a constitutional norm in legal system Y,” potentially falsifying counterexamples (e.g., a judicial decision upholding some state action that poses a clear threat to structural stability) could be interpreted as either (1) evidence that X is not a norm of the system; or (2) evidence that X has changed or is changing. It is not immediately obvious how—
Thomas Kuhn argues that there is not an objectively correct set of scientific theory selection criteria—because there is debate about whether scientific theories actually disclose truths about the world; we say that they approximate truths about reality, and these theory selection criteria are meant to identify the likely more accurate approximation among competitors.

Accordingly, in science, theories are evaluated on criteria that are broadly considered appropriate in the light of the general characteristics and aims of science as a practice.

There is some debate about what distinguishes science from other forms of inquiry; but it seems uncontroversial to suggest that science as a practice "avoids appeals to final causes, vital forces, or general bunkum[, ... answers] to criteria of empirical adequacy[, ...] and makes claims that are genuine, empirical predictions of future events that can be falsified by observation and experiment."

Given these aims, it is unsurprising that criteria for theory selection that enjoy broad and long-lived consensus support among scientists include accuracy, simplicity, consilience (or explanatory power/capacity), conservatism (or consistency with other well-accepted views about the world), and potential fruitfulness for future research.

There appears to be no such consensus with respect to the propriety of the various normative criteria proposed for choosing among constitutional theory claims.

If robust consensus on theory selection is the best approximation of objectivity available, there is substantially more robust consensus with respect to the criteria I have mentioned for distinguishing scientific, social scientific, and positive constitutional theories—one that is not dependent on judicial specification, and which makes claims that are empirical predictions that can be falsified by observation and experiment. Even an unambiguous judicial statement that it has never been a valid norm would not decisively falsify the SPT claim; current judges cannot be certain about what earlier judges accepted as obligatory.
constitutional theory claims—enough consensus for Kuhn to suggest that scientific theory selection decisions on these criteria can, over time, approach objectivity. Theories may fare differently along different dimensions, and it there is no consensus as to the weight that should be accorded, say, simplicity relative to conservatism; but it seems reasonable at least to think that theories may compensate for failure on some dimensions with success on others.

Identifying what the law is may require the application of some moral, economic, historical, or other interpretive or evaluative criterion currently argued by some to be relevant to identifying the legal norms that we have; but whether such criteria must be so applied is one of the core disputes between competing theories of law. If we want to evaluate positive constitutional theory claims according to how well they discharge the aim of disclosing what is the case about law; then the general theory selecting criteria developed in the philosophy of science for application to other theories that aim to disclose what is the case are preferable.

This is not to deny that the
process of assessing competing theories is inherently normative—of course it is, but limiting normative claims to the second-order question of which theory selection criteria we should adopt (and not, therefore, extending it to the first-order question of which theory we should select) avoids conflating the question what makes a good theory of law with the question what values does law serve or reflect—after all, the latter is one question that theories of law seek to answer.

The choice here is between theories holding that the content of the law is only that which accords with some value proposition or interpretive methodology, on the one hand, and SN, on which we recognize both norms constituted by deep patterns of convergent official practice and norms validated according to value or interpretive criteria as parts of the Constitution, on the other.

First, simpler explanations are preferable to more complex ones, all else equal.

In arguing that legal positivism is preferable to alternative theories of law including natural law theory and Dworkin's "law as integrity" account, Brian Leiter highlights positivism's "ontological austerity," or its capacity to explain phenomena "in ways that do not involve unnecessary, controversial or incredible metaphysical commitments."

SN is simpler than conventional theories in two senses illustrated by the SPT account of the standard dormancy doctrines, immigration doctrine, and obstacle preemption doctrine. First, positing a single structural norm to explain all these doctrines is ontologically simpler than conventional accounts that posit multiple distinctive norms, perhaps one for each line of doctrine. In this same sense, SPT explains immigration doctrine more simply than, say, the external sovereignty rationale; and obstacle preemption...
doctrine more simply than the conventional Supremacy Clause explanation.

Second, positing a consensus based constitutional norm like SPT is more analytically austere than, say, a value-based account that posits additional, contestable rule-of-law or social justice principles to justify the norms that ground these doctrines, which would require a distinct normative case to be made for each line of decisions. Similarly, SN is in this sense simpler than interpretive theory alternatives—SN posits norms acceptable across interpretive views and explains the shape of doctrine according to pragmatic factors; it does not require the complex interpretive moves that, say, an originalist account would require.

A second generally accepted criterion is consilience, which is about how much of the relevant phenomena the competing theories are capable of explaining:

"We prefer more comprehensive explanations—explanations that make sense of more different kinds of phenomena—to explanations that seem too narrowly tailored to one kind of datum."

Everyone agrees that theory must fit the phenomena under consideration—it cannot have explanatory power if it does not explain anything. But among competing theories that roughly fit some aspects of the relevant phenomena, the consilience inquiry shifts to how many phenomena the theories explain, respectively.

So, for example, "Darwin's theory of natural selection was able to account for observations that initially seemed unrelated, such as those pertaining to anatomy (the presence of vestigial organs) and zoology (the observed differences in related species); and thus is more consilient than alternatives that cannot explain these phenomena."

The SPT view explains at once a variety of doctrines that alternative accounts typically characterize as based on several different constitutional norms (and thus in this sense unrelated). A pluralist theory account accounts for different characteristics as based on several different constitutional norms (and thus in this sense unrelated). A pluralist theory account accounts for different characteristics as based on several different constitutional norms (and thus in this sense unrelated). A pluralist theory account accounts for different characteristics as based on several different constitutional norms (and thus in this sense unrelated).
like SN would explain a great deal more, perhaps most
tinction insofar as they hold that the law is only that which is consistent with the very interpretive theory or value criterion that answers the "should" question.

Moreover, the thin-norms theory can explain, in a manner that competing theories cannot, an even larger and in some senses more obvious phenomenon: the stability and durability of the constitutional system despite various apparently deep disagreements of method and value.

Another accepted criterion, conservatism, suggests that desirable positive theory should leave intact our other well-accepted views about the world.

Leiter maintains that legal positivism is more desirable than alternatives on this dimension because, among other things, positivism is consistent with, supported by, and potentially generative of empirical research programs on related issues: A theory of law that makes explicit the tacit or inchoate concept at play in scientific research is probably to be preferred to its competitors. Positivism is that theory. If one surveys... the now vast empirical literature on adjudication, which aims to explore the relative contributions of legal versus non-legal norms to decision-making by courts, this literature always demarcates the distinction in positivist terms.

So, too, SN's capacity to distinguish what the law is from what one thinks the law should be facilitates empirical analysis of the relative influence of legal and non-legal reasons for decision. What matters on this view is that judges act as if they accept SPT and similar norms as valid norms of the constitutional system, not their reasons for that acceptance; thus SN is consistent with any account of the real causes of judicial decisions.

Value-driven and interpretive theory-of-law claims, however, are inconsistent with empirical work like that on the attitudinal model—they claim that judges should decide cases based on some set of values or interpretive commitments, but the empirical evidence suggests that such proposals are unrealistic in light of judges' actual behavior. As a result, one might claim that these theories are internally consistent, but...
well-established belief that the constitutional system is robust and stable despite observed disagreement.

A related criterion is fruitfulness—the extent to which a theory "enable[s] us to say significant things, generate[s] insights, and has implications for future research." It is not right to say that legal theory cannot generate predictive hypotheses. The literature on the attitudinal model of judicial decision-making, which tests the hypothesis that proxies for judges' political views (such as the party of the appointing president), is widely viewed as a robust and successful predictive research program.

This shows that legal theory can spur empirical research—the attitudinal model was prompted and supported by the theoretical claim of the American Legal Realists and others that legal reasons alone are insufficient to explain many judicial decisions.

The abstractness of norms like SPT means that positivizing them has little predictive power in itself—without more, the hypothesis that SPT is accepted predicts some constellation of judicial actions aimed at preventing state interference with the constitutional structure. That is what we see, but these observations are not terribly surprising and do not crisply distinguish the SPT view from other explanations. However, SN provides a framework for developing more determinate and testable hypotheses. For example, the argument that SPT is implemented by a variety of doctrines whose differences are attributable to non-legal considerations is more fruitful: We could, for example, design experiments to test the causal power of various instrumental or other non-legal factors in doctrinal formulation; we would just need reliable proxies for judges' concerns about institutional capital, interbranch conflicts, adjudicatory error rates, and so forth.

In the next Part, I explore two aspects of SN's theoretical desirability—its consistency with legal positivism and its capacity to advance constitutional theory past problems associated with interpretive debate.

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233 Wendel, supra note 191, at 1053; accord KUHN, supra note 12, at 321; PETER LIPTON, INFERENCE TO THE BEST EXPLANATION 34 (2004).

234 See Robinson, Does Prosecutorial Experience "Balance Out" a Judge's Liberal Tendencies?, 32 JUST. SYS. J. 143, 144 (2011) (arguing that "the 'attitudinal model' has proven remarkably robust in explaining much of the aggregate variance in appellate decisions" compared to other models measuring the influence of social background factors); cf. Pauline T. Kim, Lower Court Discretion, 82 N.Y.U. L. REV. 383, 395–407 (2007) (arguing that the attitudinal model is incomplete, and articulating various critiques and concluding that law's independent normative force explains many judicial decisions).

See generally SEGAL & SPAETH, supra note 173.
In this Part, I explore aspects of Skeletal Norm’s theoretical conservatism in detail. First, I argue that this kind of account is more consistent than alternatives with our best going general theory of law, the legal positivism developed by Hans Kelsen, given definitive formulation by H.L.A. Hart, and refined over the last half century by Joseph Raz, Leslie Green, John Gardner, and others. Explaining this consistency also makes clear that this account is consistent with current, ongoing empirical research programs in law. Second, I address interpretive controversy. The clash of rival theories of constitutional interpretation has two salient consequences. Interpretive controversy is the phenomenon that motivates Dworkin’s “theoretical disagreement” objection to legal positivism. If Supreme Court Justices disagreeing about the proper theory of constitutional interpretation constitutes disagreement about the criteria of legal validity, the argument goes, than either we have no settled rule of recognition for constitutional law or there is something wrong with Hart’s account of the rule of recognition as a social rule. SN generates a new refutation of the theoretical disagreement line as it relates to constitutional law. Additionally, interpretive controversy dominates constitutional theory. SN creates a path around interpretive debate so that theorists may proceed with other inquiries without so much interpretive throat clearing. Or so I shall argue.

From the taxonomy developed above we can group two clusters of views that dominate modern constitutional theory—value-laden theories and interpretive theories. Both are normative: Value-laden theories are those theories of law or adjudication in which the law-forming social institution is central. Interpretive theories are those theories of law or adjudication in which the context in which the law is legally valid depends on the context in which the law is legally valid.

For other responses, see Leiter, supra note 19, at 1215 (formulating “disingenuity” and “error theory” responses to the objection).
tutional norms that we have are said to be those that best promote some value (democracy, justice, etc.) or on which proper constitutional adjudication has courts working to maximize some value. Interpretive theories are normative theories of adjudication according to which courts should go about discovering what the constitutional law is through some particular series of steps. I argue that my view is superior to value-driven theories because it is more consistent with legal positivism and that my view is superior to interpretive theories because it diffuses the problem of theoretical disagreement in a manner that interpretive theories cannot.

Legal positivism is characterized by its two core claims—the "sources" thesis and the "social rule" or "conventionality" thesis. The sources thesis is that norms may be rendered legally valid solely in virtue of their sources, without reference to their merits. In other words, a legal system's ultimate criteria of legal validity, viz. the content of its laws, need not include merits-based criteria. The rule of recognition is thus a legal rule that need not itself be validated by satisfying criteria of legal validity. The social rule thesis is that a legal system's ultimate rule of recognition is a social rule that is established by empirical fact, namely, the existence of a pattern of convergent practice by legal officials demonstrating the existence of those criteria of legal validity that the law, in virtue of their sources, may be considered legal valid solely. If legal positivism is a theory of law—a view that explains the crucial question that arises about law: Namely, how do we determine which norms in any society are norms of the legal system, that is, norms that are "legally valid." It is our best go-

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I will argue, however, that SN is more consistent with legal positivism than competing theories of constitutional law, such as the value-laden theories, and that this is an important reason to prefer SN. So far, there is no account of constitutional norm identification that is wholly compatible with legal positivism.

NORMS THAT COMPORT WITH THE CRITERIA OF LEGAL VALIDITY CONTAINED IN A LEGAL SYSTEM'S RULE OF RECOGNITION ARE LAW IN THE SYSTEM. ACCORDINGLY, TO IDENTIFY THE CONSTITUTIONAL NORMS THAT WE HAVE, POSITIVISM SUGGESTS THAT WE LOOK FOR THE AMERICAN RULE OF RECOGNITION'S CRITERIA OF LEGAL VALIDITY FOR CONSTITUTIONAL NORMS. HOWEVER, THIS IS MORE CONSISTENT WITH LEGAL POSITIVISM THAN COMPETING THOUGHTS OF CONSTITUTIONAL NORM IDENTIFICATION, AS I WILL ARGUE, HOWEVER, THAT SN IS MORE CONSISTENT WITH LEGAL POSITIVISM BECAUSE THE DEGREES HAVE BEEN MADE AT ENOUGH LEVEL THAT IS RELEVANT TO THE POSITIVE THEORY OF LAW. ALTHOUGH I WOULDN'T DENY THAT CLAIM AT
validity for constitutional law, given the debates between constitutional theory claims belonging to theories of law.

How, then, should we approach the norm identification question? Without a complete account of our ultimate rule of recognition with respect to constitutional norms, we might do well to look for norms that appear to sit at the center of convergent official practice—as I have done above.

Norms supported by such a consensus are more likely to be legally valid insofar as they are surrounded by the indicia of official acceptance that are the hallmarks of a functioning rule of recognition—that is, norms broadly accepted as legally valid seem more likely to be consistent with consensus-supported criteria of legal validity than, say, norms advocated by originalist judges but disputed by living constitutionalist judges.

Indeed, there is no theoretical obstacle to our (or any) rule of recognition validating some norms as law just in virtue of their broad and durable acceptance as legally binding by legal officials; all this would require is a pattern of official acceptance recognizing that in some circumstances patterns of official acceptance are sufficient for legal validity.

Such norms are analogous to norms of customary law; that is, law that "in foro requires for its existence a temporally extended pattern of relatively convergent behavior by multiple law-applying officials" which pattern suggests that the officials accept the custom as legally binding.

Customary norms may become constitutional law norms upon a long-term pattern of legal officials' accepting that the norms have constitutional status.

Importantly, while the formation of a system's rule of recognition requires a pattern of convergent official practice recognizing a set of criteria, legally binding obligations themselves do not require such a pattern to be operative legal obligations.
The rule of recognition may recognize duly enacted legislation, judicial decisions, and so forth, as legally binding in virtue of their sources regardless of any official behavior or public attitudes about the specific legal norm embodied in the statute or decision. However, this does not rule out the possibility that some norms—like customary law norms—may be legally valid in virtue of patterns of convergent practice alone, or perhaps in combination with the satisfaction of other validity criteria if convergent practice alone is insufficient under the particular rule of recognition.

The State Preclusion Thesis-like norms I hypothesize here may be constitutional norms of the form of customary law; but where the custom arises among legal officials rather than some segment of the general public. The Supreme Court frequently makes statements of the form

See Leiter, supra note 236, at 171 (“Dworkin demonstrated quite persuasively that Hart was mistaken to claim that the existence of a duty always requires the existence of... a practice of convergent behavior in which those engaged in the behavior accept a rule describing their conduct as a standard to which they felt bound to adhere.”).


This is not to say either that consensus on individual norms’ legal validity is a general requirement of any rule of recognition or that the absence of consensus on norms’ legal validity always demonstrates a putative norm’s invalidity or the absence of consensus validity criteria in the area. Neither is necessarily true. A rule of recognition can in principle (1) validate consensus norms in virtue of the consensus alone; (2) validate legislated norms in virtue of their having been duly legislated alone; (3) validate constitutional norms in virtue of their derivability according to some particular interpretive method (or a set of approved interpretive methods). Indeed, a complex rule of recognition might contain all of these criteria and more.

Here, I am assuming that judges and Justices tacitly accept SPT-like norms ex ante, before they formulate implementing doctrines and render decisions consistent with the norms. I have elsewhere explored a slightly different account of how these norms might be accepted, see Garrick B. Pursley, Properties in Constitutional Systems, 92 N.C. L. REV. 547, 584–89 (2014) (reviewing Adrian Vermeule, The System of the Constitution (2011)), an account that diverges slightly from Hart’s view that acceptance from “the internal point of view” requires a conscious decision to abide by a norm viewed as legally obligatory. Hart, supra note 16, at 255. If, instead, norms simply emerge as durable patterns in constitutional decisions over time—as emergent properties of the constitutional system—we might extend Hart’s conception of how criteria of legal validity become part of a system’s rule of recognition to include something other than standard, conscious adoption.

See Pursley, supra, at 585–88.

My view is not a form of popular constitutionalism, although it is compatible with popular constitutionalist theories. See supra, note 190. On Hart’s view, the consensus of legal officials on the criteria of legal validity is a central feature of legal systems, Hart, supra note 16, at 94–95, even if there also may be a public consensus, the two are not necessarily connected and the latter is not necessarily required. Hart, supra note 16, at 60–61, 116. However, this view neither requires nor precludes the possibility that our rule of recognition might contain criteria that validate popularly accepted norms.

See Gardner, supra note 246, at 34 (discussing customary law); Abner S. Green, What is Constitutional Obligation, 93 B.U.L. REV. 1239, 1245–46 & n.37 (2013) (“Hart says only official acceptance is necessary, but he does not say rules of recognition may not include citizen participation in constitutional decisions, and so forth, as legal actors in the realm of decision.”).
we have long accepted," "it is well-established," or "courts accept," which suggest that our rule of recognition might well incorporate a criterion of legal validity for patterns of official consensus.

Now contrast, in terms of consistency with legal positivism, a value-based theory of law on which the constitutional law consists in those norms that best promote a substantive value like social justice. Though a rule of recognition on the "exclusive" legal positivist view may incorporate only source-based criteria of legal validity: "inclusive" legal positivism holds that any given rule of recognition may include evaluative criteria (although no rule of recognition need do so).

But on either positivist view, where a consensus of officials accepts criteria that validate the norm as binding, we need not be concerned with the reasons why they decide in a manner that suggests recognition.

See, e.g., Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2636 (2013) ("It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference."); Olim v. Wakinekona, 461 U.S. 238, 249 & n.12 (1983) ("[C]ourts agree that an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause.").

See, e.g., LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 71 (2004) (arguing that constitutional norms should be identified on an account of the Constitution as a "justice seeking" collection of norms); cf. DWORKIN, supra note 14, 178 (arguing that the law is that which best fits and morally justifies the other legal norms of the legal system).

Whether this is the best account of the general structure of rules of recognition remains open to debate. This view is characteristic of inclusive legal positivism, and seems to be the view that Hart himself accepted. HART, supra note 16, at 253, 269 (maintaining that "the existence and content of law can be identified by reference to the social sources of law"); see also Gardner, supra note 149, at 200–01 (discussing various formulations of the source thesis, which he states as "(LP*) In any legal system, whether a given norm is legally valid, and hence whether it forms part of the law of the system, depends on its sources, not its merits (where its merits, in the relevant sense, include the merits of its sources)").

A stronger statement of the sources thesis has it that a legal system's ultimate rule of recognition cannot incorporate merits-based criteria. See, e.g., RAZ, supra note 167, at 45–52 (discussing versions of the thesis and defending, in the end, a stronger version, i.e. that laws are valid solely in virtue of their sources and not their merits). Defenders of the first formulation are "soft" or "inclusive" positivists (because they include the possibility of some legal systems with merits-based validity criteria); defenders of the latter version are "hard" or "exclusive" positivists (because on their view merits-based criteria cannot be criteria of legal validity). Gardner, supra note 149, at 200–01. On inclusive legal positivism, see generally WILLIAM J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM (1994); Kenneth Einar Himma, Inclusive Legal Positivism, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 125 (Jules Coleman & Scott J. Shapiro eds., 2002).
acceptance of the relevant criteria. Thus a system's rule of recognition may validate norms based on their merits, validate customary norms based on a consensus that they are law, or validate norms that both enjoy consensus acceptance and comply with merits criteria.

Value-based theories of law are in tension with positivism's social fact thesis. There is substantial debate about the proper value criteria on which to assess competing claims about the content of constitutional norms. In addition to the various claims that Φ or Ψ is the principal value a norm must advance to be properly considered a valid norm of constitutional law; other accounts combine multiple values in various ways. This makes it difficult to square value-driven theories with legal positivism, since the debate about values would seem to forestall the possibility of official consensus on value-based criteria of legal validity.

In any case, my claim here is not that SPT-like norms exhaust the set of constitutional norms—that is, I am not claiming that our rule of recognition is occupied solely by criteria that validate customary norms as law. My modest claim is that SPT-like norms validated by cross-theoretical consensus may be some of our constitutional norms. In other words, I am speculating that while value-based requirements may be part of our rule of recognition, they are likely not the only criteria, or mandatory criteria (that is, necessary conditions) for the validity of constitutional norms. Norms might be validated by satisfying one of multiple subsets of criteria of legal validity, some of which might incorporate evaluative criteria and others not.

The point here is just that one validity criterion might be whether there is a durable consensus as to the legal and constitutional status of the relevant proposition. Where there is such a durable consensus, we could make sense of the idea of official acceptance constituting prima facie evidence of legal validity. On this view of our rule of recognition, we could categorize certain norms as part of the Constitution by observing the fact of their general acceptance as illustrated by patterns of convergent official behavior without regard to the officials’ reasons for accepting the norm. On a value-driven view, we could not make sense of the idea of official acceptance constituting prima facie evidence of legal validity—we would need to know the officials’ reasons for acceptance.

only if their reasons match our basic value proposition and the norm itself advances the value could we explain why they legitimately accept the norm as legally binding. Such a view will also frequently require us to characterize some norms that clearly are accepted by a consensus of legal officials as not legitimately part of the Constitution (that the officials' acceptance of the norms is in error) because it is in many instances the case for example that shared or predominant, perhaps false, belief amongst officials could account for their belief. Such constitutional legalism might deem SN's method and the cases where it has been applied to be incorrect. But both possibilities are inconsistent with the social fact thesis; but both are likely to arise frequently on a value-based constitutional theory of law because of the deep disagreement among officials on questions of political and moral value.

273 See supra notes 94–95 and accompanying text.

274 See supra Part II.A.1 (discussing competing value-based constitutional theories).

275 Even in consensus norm implementation, there can be room to account for constitutional officials' positions in the following way: if there is a genuine consensus among constitutional officials that a rule or practice is required by the Constitution, then even if there is no legitimate basis for that belief, it may still bind the court. But in most cases, constitutional officials' positions will be more complex and will involve deep disagreements about the nature of the Constitution itself.

276 See Pursley, supra note 9, at 514–528 (giving reasons why adherents of various interpretive theories could accept SPT). Strict constitutional textualists might deny SPT's validity just because it is an unwritten norm, see for example John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2013–20 (2009) (denying the legitimacy of unwritten structural norms in general). But inferring SPT requires only the modest assumption that the obvious intention to make the Constitution durable, which seems sufficiently fundamental to their purpose of a Constitution as to be relatively uncontroversial, is relevant to interpretation, an assumption that even strict textualists would be hard pressed to deny. Pursley, supra note 9, at 534–36.
The Constitution. This is a breakthrough in at least two senses: It can help advance constitutional theory past interpretive debate and it can provide a new answer to the "theoretical disagreement" objection to legal positivism.

But it is easy enough, if it appears that all constitutional questions hang in suspense until the interpretive theory debate is resolved, analysis of other forms of reasoning in constitutional cases will tend to take on secondary importance. Identifying certain basic consensus norms like SPT, acceptable on most theories of interpretation, that are implemented in a variety of contexts with a wide range of doctrinal mechanisms shifts the focus of our normative debates about structural doctrine from interpretive issues to the instrumental reasoning issues that shape doctrinal rules once the interpretive question is settled in an operative proposition.

This is not to say that interpretive debate is valueless. It is of course beneficial to think carefully through questions of interpretive method, develop coherent theories of interpretation, and engage in the broader normative debates that often lurk in the background of interpretive debates.

For example, one normative debate that frequently goes hand-in-hand with the originalism/non-originalism debate concerns judicial constraint: Originalism initially was offered as a palliative for the countermajoritarian difficulty in virtue of its capacity to constrain judges and, by its unyielding insistence on historically fixed meaning, prevent them from "making" law, engaging in "police-making," or reverting to "result-oriented judging.

Living constitutionalism, by contrast, is "juristocratic"—its proponents evince a wide-bodied trust in judges' capacity to fairly update constitutional meaning in the light of changing circumstances. This debate is, in other words, partly a debate about the actual bite of the countermajoritarian difficulty, a problem that has preoccupied constitutional jurisprudence differently.

Issue that shape doctrinal rules once the interpretive discussion is settled include the interpretive issues to the instrumental issues. And mechanisms where we focus our normative attention are influenced in a variety of contexts with a wide range of contexts. But it is easy enough to see that all constitutional questions can be approached in a variety of ways.

283 See Bartrum, supra note 278, at 122–23 (noting that the political theory debate is “a matter of political motives and a matter of constitutional theory”); see also Dorf, supra note 193, at 595 (“Because no two participants in the debates about constitutional law and constitutional theory will have identical views about questions of constitutional value, there will be as many constitutional theories as there are participants. And, as one might think about constitutional theory, there will be as many constitutional theories as there are participants. And, as one might think about constitutional theory, there will be as many constitutional theories as there are participants.”).


285 See Roosevelt, supra note 278, at 122–23 (“As a matter of constitutional theory, there will be as many constitutional theories as there are participants.”). Bickel coined the term “countermajoritarian difficulty” in 1962. B ICKEL, supra note 281, at 16–18. For an overview of the debate, see generally Barry Friedman, The Birth of an Academic Obsession, 112 YALE L.J. 153 (2002).

286 Dorf, supra note 193, at 595 (“Because no two participants in the debates about constitutional law and constitutional theory will have identical views about questions of constitutional value, there will be as many constitutional theories as there are participants. And, as one might think about constitutional theory, there will be as many constitutional theories as there are participants.”).
fort to reconcile originalism with living constitutionalism faces an uphill battle so long as inter-theoretical competition is driven by incompatible underlying normative agendas. Finally, one might conclude that both originalism and living constitutionalism "as they are conventionally understood," are "both obviously defective theories that no sensible person would hold." As Kermit Roosevelt explains:

Classic living constitutionalism is silly for all the reasons conservatives point out. The idea that judges must sometimes, somehow "update" the Constitution to keep it in step with the times is neither helpful to a judge trying to see himself as a participant in the ongoing project of constitutional self-governance. . . . Classic originalism is no better, however. It makes a profound error in supposing that fidelity to the original meaning of the Constitution requires that cases be decided, to the extent possible, as if they had been brought immediately after the ratification of the relevant constitutional provision. . . . This view is obviously mistaken because some constitutional provisions might be intended to fix outcomes in that way, others might not... but standards, such as the Fourth Amendment's prohibition on "unreasonable" searches, may dictate different results regardless of time and circumstance. . . .

On top of everything else, then, theorists engaged in interpretive debates might be chasing a truly elusive prize. These observations suggest a new refutation of the "theoretical disagreement" objection to legal positivism. The objection trades on the supposition that when judges disagree about interpretive method, they disagree about the criteria of legal validity. But see id. at 125–26 (criticizing Balkin's project on this ground).

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Law can arise despite having a settled rule of recognition; for example, officials operating under a consensus view of the criteria of legal validity may nevertheless have “empirical” disagreements about (1) whether there is sufficient consensus on some validity criterion (e.g., a dispute about whether judges generally accept customary international law as binding in the United States); or (2) whether settled criteria of legal validity are satisfied in a particular case (e.g., a dispute about whether Congress actually enacted a statute).

But if judges who say they disagree about the proper method of constitutional interpretation do, at least in some cases, truly believe that they are involved in a dispute about the criteria of legal validity, then this kind of disagreement is difficult to reconcile with the positivist claim that every legal system has a set of consensus-based criteria of legal validity. That is, “the positivist theory . . . fails to explain . . . what it appears the judges are disputing . . . . They write as if there is a fact of the matter about what the law is, even though they disagree about the criteria that fix what the law is.”

So, Dworkin argued, legal positivism is incomplete because it cannot explain this phenomenon of our legal system. We saw above that value-based theories of law are inconsistent with legal positivism’s source theory; interpretive theories run into trouble with legal positivism here—they invite theoretical disagreement and thus are inconsistent with positivism’s social fact thesis as to constitutional law. By way of general response to the theoretical disagreement objection, Leiter has correctly noted that legal positivism explains perfectly well the most important phenomenon of our legal system, the “massive and pervasive agreement about the law throughout our society.”

The vast majority of legal issues are resolved with theoretical disagreements Dworkin emphasizes, which arise only in a small subset of appellate cases while most judicial decisions are resolved without any theoretical disagreements. Legal positivism’s account of legal decisions explains perfectly well the most important phenomenon of our legal system. Legal positivism’s account of legal decisions explains perfectly well the most important phenomenon of our legal system. Legal positivism’s account of legal decisions explains perfectly well the most important phenomenon of our legal system.

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Thus, Dworkin's seeming insistence that theoretical disagreement is a central phenomenon of the legal system is misplaced. This problem of theoretical disagreement is, however, more pointed when we focus on cases involving substantial interpretive questions, where the "history of interpretive theory in American courts is, above all, a history of persistent and deep disagreement among judges and courts about the proper methods and sources of legal interpretation."

Questions of constitutional interpretation provoke the most theoretical disagreement; thus the objection has the heightened force with respect to constitutional adjudication and potentially undermines the existence of a settled rule of recognition for constitutional law. While this affects only a small fraction of legal disputes, and thus does not threaten legal positivism's superiorit y as a general account of most legal disputes, it is troubling because it might undermine positivism's capacity to account for the operation of a system's most fundamental law.

Leiter offers two straightforward positivist responses to the objection: Judges engaged in theoretical disagreement act as though there is a fact of the matter about what the law is, but they are either being disingenuous or they are in error insofar as the theoretical disagreement disproves the existence of consensus validity criteria on the issue.

He admits, however, that these responses only "explain[] away" the face value of the disagreement.

The SN account points up a new rejoinder: Even our typically contentious constitutional law may be characterized by significant official consensus on some of the most basic and important norms—structural norms that stabilize our system and create the framework in which other interpretive debates can take place without the system breaking down. Interpretative theory can take place with the system breaking down. Interpretative theory can take place without the system breaking down. Interpretative theory can take place within a system that simply doesn't have the capacity to resolve questions by agreement.

Questions are resolved by arguments without resort to the court.
Institutional adjudication is no longer a counterexample, or even a particularly problematic case, for legal positivism. This response does more than just explain away theoretical disagreement in constitutional cases—it suggests that basic structural constitutional norms may durably exist despite theoretical disagreement on other constitutional issues, rendering the theoretical disagreement critique interesting but not disabling as it relates to constitutional law.

The SPT account of structural doctrine and ex hypothesi SN track the core claims of legal positivism and focus on observed instances of apparent consensus among legal officials; they thus explain a central phenomenon of our constitutional system: Despite our heated and long-lived interpretive, value, and theoretical debates, we have a stable constitutional system.

Value-driven and interpretive theories of law miss or downplay this stability. While there may well be instances of genuine theoretical disagreement—our rule of recognition may even include evaluative or interpretive criteria of legal validity—those are not the only phenomena in the system, and they may not be among the most important.

In any case, we should prefer a theory that captures both the disagreements and the consensuses to alternatives that do not.

CONCLUSION

While one might object that affirming the validity of norms like SPT is too commonsensical to yield any benefits; I offer the foregoing exploration of how explaining of multiple lines of complex constitutional doctrine as predicated on these simple, obvious propositions advances constitutional theory past difficult and persistent conceptual challenges. Building on a broader doctrine of the common profession-SPT is a constitutional doctrine in which the central phenomenon is massive and pervasive agreement about the validity of norms like SPT.

The SPT account of structural doctrine and ex hypothesi SN track the core claims of legal positivism and focuses on apparent instances of legal position. Despite our heated and long-lived interpretive, value, and theoretical debates, we have a stable constitutional system. The SPT account of structural doctrine and ex hypothesi SN track the core claims of legal positivism and focuses on apparent instances of legal position. Despite our heated and long-lived interpretive, value, and theoretical debates, we have a stable constitutional system.

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implementing doctrines and providing a new set of parameters for empirical study of the views of the public and legal officials that could, at last, lead to some falsifiable hypotheses. In the end, I hope that this idea will share a "hallmark of truly deep insights; they seem obvious in retrospect." 309 Roosevelt, supra note 278, at 121.