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Pluralistic Nonoriginalism and the Combinability Problem

Mitchell N. Berman* & Kevin Toh**

Introduction

The following statements are representative of what contemporary originalists and nonoriginalists say in their debates with each other about constitutional interpretation and adjudication:

- (O) “Originalists 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.”¹
- (N) “[T]he Court should interpret written words, . . . in the Constitution . . . , using tools that help make the law effective in practice. Judges should use traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences, to help find proper legal answers.”²

Although it is usual to read this pair of passages and similar ones as presenting radically divergent and conflicting positions,³ that is not required. For, strictly speaking, these two passages offer different answers to different questions. (O) on its face articulates a position about what the law is or consists of. The content of the constitutional law, according to (O), consists of the meanings of the inscriptions in the text that is called “The Constitution” of the United States. (N), on the other hand, apparently stakes out a position about how judges should decide or adjudicate constitutional disputes. They should resolve such disputes, (N) says, by appealing to the named multiplicity of considerations or factors. A view about what the law is or what it consists of does not by itself entail or presuppose any position about how judges are supposed to adjudicate constitutional disputes; and a view about how judges should go about adjudicating constitutional disputes

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1. Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 552 (1994).

2. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 73–74 (2010).

3. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854–56 (1989) (emphasizing the differences between originalism and nonoriginalism).

does not by itself entail or presuppose any position about what the law is or consists of. The positions articulated by (O) and (N), therefore, seem compatible.

In fact, however, the actual proponents of each view are very likely to reject the other view. The current proponents of the view articulated by (O) maintain that, subject to a few standard qualifications,⁴ judges deciding constitutional cases must enforce the constitutional law.⁵ And most actual proponents of the view that (N) articulates presumably reject the idea that the constitutional law consists solely of the meanings of the inscriptions in the constitutional text.⁶ The bottom line is that although frequent and even typical contemporary formulations of originalism and nonoriginalism outline positions that are strictly speaking consistent with each other, almost certainly the proponents of the two views actually do disagree with each other. But while nonoriginalists have frequently challenged the position articulated by (O)—i.e., the originalist position about what the law is or consists of—they have very rarely articulated a positive position that can be deemed a straightforward alternative and competitor to (O).⁷ Consequently, originalists have been placed in a position of having to engage with nonoriginalist positions that have not been spelled out.

Some originalists do not see a need to scrutinize the details of the nonoriginalist position that (N) can be taken as implying or suggesting. For according to them, any view of our constitutional law that conceives it as consisting of a plurality of considerations or factors is bound to be unstable or even incomprehensible.⁸ A number of constitutional theorists have explicitly articulated this “combinability problem,” as we will call it, and our sense is that the problem resonates with very many constitutional theorists, including even some nonoriginalists.⁹ The purported problem, to reiterate,

4. The exceptions, recognized by some but not all self-described originalists, include: those relating to deference to judicial precedents that may appear erroneous when measured against the originalist standard; a “faint-hearted” willingness not to enforce legal norms that are too morally objectionable or that are likely to provoke overwhelming public opposition; and a prerogative to displace or supplement some interpreted norms with constitutional “constructions.” See, e.g., ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (1997) [hereinafter SCALIA, INTERPRETATION] (asserting that “*stare decisis* is not *part of* [Scalia’s] originalist philosophy; it is a pragmatic *exception to it*”); Scalia, *supra* note 3, at 864 (stating that “faint-hearted originalist[s]” would not uphold a statute that legalized flogging as punishment).

5. See Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823–24 (1997) (distinguishing between originalists’ position on the content of the law and their position on adjudication and making the sociological observation that originalists believe that judges should enforce the law).

6. See *infra* subpart I(C).

7. See *infra* subpart I(C).

8. See *infra* Parts III–IV.

9. See *infra* Parts III–IV.

attaches to nonoriginalism precisely because and insofar as nonoriginalism is pluralistic.¹⁰

One primary purpose of this Article is to discredit the combinability problem, and thereby facilitate development and eventual acceptance of pluralistic nonoriginalism. The other, perhaps more important, purpose is to devise a pluralistic nonoriginalist conception of constitutional law that is clear and plausible enough to provide a focal point for debates about constitutional interpretation. We will begin in Part I by introducing some terminological regimentation that should prove helpful for our subsequent exposition and by disambiguating different theses that originalists and nonoriginalists, respectively, could be seen as advocating. We propose in Part II a template for a pluralistic nonoriginalist conception of constitutional law that is plausible in its own right and that also will enable us to address later on in Part IV what we deem the most forceful version of the combinability problem. We turn to the combinability problem in earnest in Part III. Despite the explicit articulations in the literature, it is no trivial matter to figure out what exactly the combinability problem is and why exactly pluralistic nonoriginalist conceptions of the constitutional law are supposed to suffer from it. Accordingly, we disambiguate and try out three different versions of the problem, disarming each in turn. In Part IV, we identify a fourth version of the combinability problem, which strikes us as most serious. The idea, in short, is that legal norms, or norms generally, cannot be constituted by considerations, facts, or reasons of many kinds. We argue that the force of even this last version of the problem is merely apparent and that the problem gains traction only by way of understanding the nature of constitutional law that is far from nonoptional and ultimately less credible than an alternative. We will invoke the template for pluralistic nonoriginalism that we sketched in Part II to discredit the fourth version of the problem. Our goal throughout this Article is not so much to *solve* the combinability problem, but instead to *dissolve* it by exposing and making explicit a number of assumptions and predilections among constitutional theorists that are very much dispensable in favor of some more credible alternatives.

I. Preliminaries

A. *Terminology*

We begin with some terminological regimentation, and some related observations, to facilitate the reader's comprehension of our subsequent discussion.

10. For a previous expression of this point, see Mitchell N. Berman, *Constitutional Interpretation: Non-Originalism*, 6 PHIL. COMPASS 408 (2011).

Imagine that, by reasoning as follows, we conclude that a set of laws that make up a certain regime of criminal punishment—call the regime “CP”—is constitutionally prohibited:

- (1) Inflictions of cruel and unusual punishments are constitutionally prohibited.
 - (2) CP calls for inflictions of punishments that are cruel and unusual.
-
- (3) CP is constitutionally prohibited.

Here, we could say that the unconstitutionality of CP *consists of* two things—i.e., the constitutional prohibitedness of inflictions of cruel and unusual punishments, and the cruel and unusual nature of the punishments that CP calls for. A number of other idioms are available to designate this relation between (3) on the one hand and (1) and (2) on the other. We could say, for example: that CP’s unconstitutionality is *grounded in* (1) and (2); that CP is unconstitutional *in virtue of* (1) and (2); that CP’s unconstitutionality is *determined by* (1) and (2); etc. We will use the term “determination” to refer to the relation that such locutions posit between the facts like (1) and (2) on the one hand and facts like (3) on the other.¹¹ And we will use “determinants” to refer to the facts that determine, and “resultants” to refer to the facts that are determined.

Some observations go with these terminological stipulations. *First*, notice that once we know the determinants of a legal fact like (3), we also know one good way that we can come to have justified or warranted belief that (3) is the case. In other words, an *epistemological* implication about the relevant evidence can be inferred from an assertion of a determination relation. If we were warranted in thinking that (1) and (2) are the case, then we would also be warranted in believing that (3) obtains. So, one very good way of establishing that (3) is the case is to show that (1) and (2) obtain.

Second, having said what we have just said, we also need to caution. Not all of the facts that count as evidence are determinants, and that means that we sometimes come to have justified or warranted belief that a fact obtains by way of our exposure to some facts that are not determinants. For example, the fact that a local meteorologist has said that it will rain tomorrow is good evidence that it will rain tomorrow, and hearing him say so justifies a belief that it will rain tomorrow. But the fact that it will rain tomorrow does not consist of—is not determined by—the fact that the local meteorologist has said so. The lesson is that we need to be careful not to confuse

11. One of us (Toh) is not entirely happy with thinking of (1)–(3), and other such sentences, as representing *facts* because doing so begs some important metanormative questions—namely, those about the meanings of normative claims and the metaphysical status of norms and values. But given the purpose of this paper and its intended audience, no harm is likely to come from relying on the formulations we use.

determinants and evidence. Some facts are evidence without at the same time being determinants. The two sets of facts overlap, but there are bound to be divergences.

Third, a fact that is a resultant may in turn be a determinant of a further resultant, and a fact that is a determinant of a resultant may itself be a resultant of some more fundamental determinants. Notice that instead of worrying about the determinants of a legal fact like (3), we could worry about the determinants of a legal fact like (1). We may ask: What grounds (1), or by virtue of what is (1) true? It may be the case, for example, that (1) is made true by something like the following pair:

- (4) For all P, if the Founders drafted a text that says that P, and the state ratifying conventions ratified that text shortly after 1789, then P is a constitutional law.
- (5) The Founders drafted a text that says (1), and the state ratifying conventions ratified that text shortly after 1789.

If these were really the case, then (4) and (5) would be the determinants of (1). (4) would be a more fundamental legal fact, and (5) is a nonlegal, historical fact that (4) makes legally relevant.

Fourth, and last, notice that any kind of nonlegal fact may be made legally relevant by way of determinant legal facts. Notice that (2) is a (partly) moral fact, and that (5) is a historical fact. Both kinds of facts, and any other kinds—semantic, psychological, historical, prudential, structural, etc.—could be made legally relevant, and generative of further legal facts, by the operations of fundamental legal facts like (1) and (4). This is a very important point and will play a crucial role in our subsequent arguments.

Equipped with these observations, we proceed by first resuming the task we began in the introductory Part—that of distinguishing different originalist and nonoriginalist theses.

B. *Originalism*

A fuller version of the passage that we quoted and labeled “(O)” in the introductory part reads:

The central premise of originalism (and of Marshall’s opinion in *Marbury*) is that the text of the Constitution is *law* that binds each and every one of us until and unless it is changed through the procedures set out in Article V. It follows that the Constitution is thus like other legal writings, including statutes, contracts, wills, and judicial opinions. The meaning of all such legal writings depends on their texts, as they were objectively understood by the people who enacted or ratified them. Originalists 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*.¹²

According to this view, what the inscriptions in the constitutional text say or mean, and that alone, is the constitutional law. The view could be formulated as:

- (OL) The Constitution or the constitutional law consists solely of the meanings of the inscriptions in the constitutional text.

Here, Steven Calabresi and Sai Prakash, the authors of the above passage, are advancing a *legal* claim or, more precisely, designating what they deem the primary determinant of the ultimate constitutional facts. (OL) makes legally relevant certain semantic facts—namely, the meanings of the inscriptions in the text of the U.S. Constitution—and together with those semantic facts determines the most fundamental or ultimate constitutional facts, or the facts regarding what the Constitution calls for. Putting aside complexities presented by whatever contributions judicial decisions might make to the content of constitutional law, (OL) represents a common originalist legal position.¹³

A certain epistemological position follows from originalists' legal position (OL), and we can formulate it as follows:

- (OE) In order to figure out what the constitutional law calls for, judges and others should find out only what the meanings of the inscriptions in the constitutional text are, and any other evidence that bears on the meanings of those inscriptions.

Since what the inscriptions mean is what the Constitution calls for, in order to figure out what the Constitution calls for, one must seek out the meanings of the inscriptions in the constitutional text. And any facts that bear on what the inscriptions mean, and only such facts, are good evidence for beliefs about what the Constitution calls for. As we observed above, some facts that are not determinants of a particular fact may be good evidence for thinking

12. Calabresi & Prakash, *supra* note 1, at 551–52 (last emphasis added) (footnotes omitted).

13. It is a common originalist position, but not the only one. Some originalists—from icons like Bork and Scalia to contemporary theorists like John McGinnis and Michael Rappaport—advance claims that, on their face, appear to be about how judges should decide constitutional cases and *not* about what the law is. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971) (“The judge must stick close to the text and the history, and their fair implications, and not construct new rights.”); John O. McGinnis & Michael B. Rappaport, *Originalism and the Good Constitution*, 98 GEO. L.J. 1693, 1698–99 (2010) (providing normative and consequentialist justifications for why judges should render originalist decisions); Scalia, *supra* note 3, at 863 (asserting that originalism in judicial review is preferable because its “practical defects” are “less severe”). That is, some originalists seem more plainly to be playing in the same space that nonoriginalists seem mostly to occupy. We explore some consequences of this intramural division within the originalist camp in Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism From Old: A Jurisprudential Take*, 82 FORDHAM L. REV. (forthcoming 2013).

that that fact obtains. For example, what a particular late-eighteenth-century dictionary says is clearly not a determinant of the constitutional law but may still be good evidence for what the Constitution demands. And that is the case only if we have good grounds for thinking that the particular dictionary is a reliable tracker of the meanings of the terms as they are used in the constitutional text. The exact kind of investigation that (OE) calls for then depends on the kind of investigation that is needed to figure out the meanings of inscriptions and to discern the facts that bear on those meanings. Randy Barnett has opined as follows:

It cannot be overstressed that the activity of determining semantic meaning at the time of enactment . . . is *empirical*, not normative. Although we can choose to use words however we wish, . . . the social or interpersonal linguistic meaning of words is an empirical fact beyond the will or control of any given speaker Although the objective meaning of words sometimes evolves, words have an objective social meaning at any given time that is independent of our opinions of that meaning, and this meaning can typically be discovered by empirical investigation.¹⁴

If this were really the case, then what (OE) calls for is strictly non-normative, empirical reasoning.

In addition to their legal and epistemological positions, summarized as (OL) and (OE) above, there is another issue on which many originalists can be seen as taking a position. That issue can be called “the issue of judicial duty,” or more plainly the issue of what judges should do when they are adjudicating constitutional cases. In the following passage, which strikes us as representative of views espoused by many originalists, Nelson Lund seems to be taking a firm position on this third issue, while also asserting (OL):

I have always had a very simple-minded view of judicial duty in constitutional cases: Supreme Court Justices should just apply the law. . . .

If I had to put a label on my own position, it would be “originalism.” The Constitution is a written document that means what its words, in context, would reasonably have been understood to mean at the time it was adopted.¹⁵

Notice that the issue of what judges should do in constitutional disputes is distinct from the legal issue of what the constitutional law is or consists of, and also from the epistemological issue of how to find out what the constitutional law is or calls for. There is logical room for thinking that even if the constitutional law clearly calls for P, judges should not apply P or not

14. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 66 (2011).

15. Nelson Lund, *Stare Decisis and Originalism: Judicial Disengagement from the Supreme Court’s Errors*, 19 GEO. MASON L. REV. 1029, 1029 (2012).

apply P in some specified situations.¹⁶ Lund, like many originalists, rejects this last position. Subject, then, to the caveats flagged earlier,¹⁷ this common originalist position on adjudication could be summed up as follows, at least on a first pass:

- (OA) In constitutional cases, when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them only according to the meanings of those inscriptions.

We believe that the dominant strand of contemporary originalism can be accurately characterized in terms of the three theses we have distinguished and formulated in this section. We hope that distinguishing the three theses will facilitate progress in the debate between originalists and their opponents.

C. *Nonoriginalism*

We shall use the term “nonoriginalism” to refer to constitutional theories that reject originalism. Another term often used to refer to the alternative to originalism—“living constitutionalism”—seems to us to bring with it various associations that are unnecessary and undesirable.¹⁸ Now, how should we characterize nonoriginalism? Although it is fairly plain that nonoriginalists disagree with all three of the originalist theses that we distinguished in the preceding section, their positive positions on these three issues are considerably less clear.

Common nonoriginalist positions on the issue of adjudication are easiest to decipher. Larry Sager, for example, begins his *Justice in Plainclothes*¹⁹ by observing: “Various accounts of our practice disagree on the important question of whether the Constitution contains an essentially complete set of instructions for constitutional judges or whether conscientious judges and courts must make important judgments on their own[.] . . .”²⁰ And his position is that “conscientious judges” should indeed make important independent judgments, and in particular judgments of political morality, and adjudicate constitutional cases before them in ways that further political justice for their community. “Judges are not merely or even primarily instruction-takers,” says Sager, “their independent normative judgment is expected and welcomed.”²¹ Similarly, other nonoriginalists have asserted that judges should, in their constitutional adjudications, “help make the law effective,”²² proceed with “heightened . . . concern for consequences,”²³

16. Once again, see Lawson, *supra* note 5, at 1831–35 for this very point.

17. See *supra* note 4.

18. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24 & n.52 (2009).

19. LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* (2004).

20. *Id.* at 1–2.

21. *Id.* at 76.

22. BREYER, *supra* note 2, at xiii–xiv.

exercise judgment to “account for competing considerations,”²⁴ etc. There is no canonical list of nonsemantic considerations that nonoriginalists believe that judges should take into account in deciding constitutional cases. But perhaps their counterpart to (OA) can be formulated as:

- (NA) In constitutional cases, even when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them not merely according to the meanings of those inscriptions, but also in light of certain nonsemantic considerations, including some normative ones.

The “even when” clause is inserted to distinguish nonoriginalists from those originalists who countenance reliance on nonsemantic, and perhaps even normative, considerations when the meanings of relevant constitutional provisions are unclear or otherwise underdeterminative.²⁵

Although (NA) is inconsistent with (OA), it is compatible with (OL) and (OE). But clearly, a “nonoriginalism” that is committed to the latter two theses would be a fairly shallow form of nonoriginalism.²⁶ The above-quoted passages from Sager, for example, explicitly rule out neither (OL) nor (OE). Our guess is that Sager means to opt for a more thoroughgoing nonoriginalism, but that is not obvious from what he says. Similar diagnoses could be offered for other nonoriginalists’ proposals. Philip Bobbitt famously enumerated six “modalities” of constitutional argument: historical, textual, structural, doctrinal, moral, and prudential.²⁷ Similar lists abound in

23. RICHARD A. POSNER, *HOW JUDGES THINK* 238 (2008).

24. DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* 4 (2009).

25. The so-called New Originalists, for example, think that when the meanings of constitutional provisions are unclear or otherwise underdetermined, judges should move from constitutional interpretation to constitutional construction, and that the latter kind of adjudicative activity legitimately relies on nonsemantic and even normative considerations. That, in any event, appears to be Whittington’s position. See, e.g., Keith E. Whittington, *Constructing a New American Constitution*, 27 *CONST. COMMENT.* 119, 120–21 (2010) (“Interpretation attempts to divine the meaning of the text. There will be occasions, however, when the Constitution as written cannot in good faith be said to provide a determinate answer to a given question. This is the realm of construction.” (footnote omitted)). Barnett and Solum maintain that construction is ineliminable even when the communicative content served up by interpretation is entirely clear. That is, interpretation, for them, always delivers only semantic meaning or communicative content; construction is always necessary to deliver *law*, even when the law precisely corresponds to the communicative content. See, e.g., Barnett, *supra* note 14, at 66; Lawrence B. Solum, *The Interpretation–Construction Distinction*, 27 *CONST. COMMENT.* 95, 100, 107 (2010). But we think this is an idiosyncratic and unnecessary wrinkle that other originalists have not fully appreciated and are unlikely to find congenial. See generally Berman & Toh, *supra* note 13.

26. In case this is not obvious, we are not making any normative assessments in calling such theories “shallow.” We are merely giving a comparative description.

27. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991) [hereinafter BOBBITT, *CONSTITUTIONAL INTERPRETATION*].

the nonoriginalist literature. Richard Fallon, for example, identified five “kinds of constitutional argument” that are near universally acknowledged as legitimate: arguments about the meanings of constitutional text; arguments about the Framers’ intent; arguments about purposes presupposed by constitutional provisions; arguments from judicial precedents; and evaluative and policy arguments.²⁸ It is not always clear what such lists are supposed to represent. Do they amount merely to nonoriginalist positions on what judges should do when they decide constitutional cases, and hence versions of (NA)? Or do they amount to nonoriginalist positions on the epistemological issue of how best to uncover the constitutional law—hence, versions of (NE)—or even nonoriginalist positions on the legal issue of the fundamental legal facts in the American legal system—hence, versions of (NL)?

The term “constitutional argument” is equivocal, and so is “constitutional interpretation.” A theory of constitutional interpretation may be thought of as a theory of how to discover the constitutional law, or as a theory of how judges should decide constitutional cases based on their findings of what the law is and possibly some other considerations as well.²⁹ And nonoriginalists have rarely been explicit about which of these two they are offering. Perhaps it is a significant fact that recently some of them seem to have refrained intentionally from using the term “interpretation” to characterize what they are theorizing about.³⁰ And at least some nonoriginalists have explicitly opted to use alternative terms—e.g., “constitutional decisionmaking”—to clarify their subject matter.³¹ Presumably, the idea is that whereas constitutional interpretation has to do

28. See Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987).

29. See JACK M. BALKIN, *LIVING ORIGINALISM* 4 (2011) (distinguishing “interpretation-as-ascertainment” from “interpretation-as-construction”); Jeffrey Goldsworthy, *The Case for Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 42, 60 (Grant Huscroft & Bradley W. Miller eds., 2011) (distinguishing “clarifying” from “creative” interpretation); Kent Greenawalt, *Constitutional and Statutory Interpretation*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 268, 269–70 (Jules Coleman & Scott Shapiro eds., 2002) (noting a variety of meanings of legal interpretation); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431, 448 (1989) (“[I]nterpretation is a portmanteau word so capacious that virtually nothing that a court might ‘do’ to or with a statute could not be thought interpretation in a semantically permissible, indeed orthodox, sense.”).

30. See, e.g., POSNER, *supra* note 23, at 15 (describing the book as “an effort to develop a positive decision-theoretic account of judicial behavior”). Although David Strauss described his “common law” approach to constitutional adjudication as “common law constitutional interpretation” when he introduced his ideas nearly two decades ago, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996), that phrase does not appear in his more recent book-length development, DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) [hereinafter STRAUSS, *THE LIVING CONSTITUTION*]. At the live conference for this symposium, Strauss confirmed that he thinks “interpretation” a misleading and unfortunate term for the central activity that courts are engaged in when adjudicating constitutional disputes.

31. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 182 (2008).

with finding out what the constitutional law is, constitutional decisionmaking, or some such, has to do with the wider question of how judges should decide constitutional cases. These could be taken as indications that what nonoriginalists are really advancing is an alternative to (OA), and no more. This inference is possibly bolstered by the fact that some nonoriginalists have characterized constitutional argumentation, the subject matter of their theorizing, as a species of practical reasoning. Justice Breyer, for example, in additional passages that further develop the idea presented in the passage we quoted at the beginning of this Article, has said:

In constitutional matters, too, language, history, purposes, and consequences all constrain the judge in that they separate better from worse answers even for the most open questions. . . .

. . . .

This may sound complicated, but consider how most practical arguments proceed: Should we invite your cousin to the wedding? Should we relocate the plant, when and where? As is true of any practical argument, including moral arguments, rarely does a single theory provide a determinative answer.³²

It is not always clear just what nonoriginalists mean by practical reasoning. But the impression that writers like Breyer give is that what they are theorizing about is a set of judgments or an activity that is aimed not merely at delineating what the preexisting legal facts are, but at making up the judging persons' minds as to what to do based on both legal and nonlegal considerations.³³

If we treat, as the foregoing considerations encourage us to do, nonoriginalist proposals as proposals for (NA) or its variants, then the debate about originalism should be conceived as a moral or all-things-considered normative debate about how judges should behave. For the "should" of (OA) and (NA) presumably is a moral "should," or perhaps an all-things-considered "should." If alternatively the "should" were conceived as a legal "should," then (OA) would be a trivial implication of (OL), and (NA) would either be a trivial implication of the nonoriginalist analogue of (OL) or a

32. BREYER, *supra* note 2, at 84–85.

33. The distinction that Breyer and similar-minded constitutional theorists seem to be working with, at least implicitly, is the distinction that moral philosophers often make using the terms "realism" and "voluntarism." *See generally, e.g.*, CHRISTINE M. KORSGAARD, *THE SOURCES OF NORMATIVITY* (1996). *Cf.* Christine M. Korsgaard, *Realism and Constructivism in Twentieth-Century Moral Philosophy*, 28 J. PHIL. RES. (SUPPLEMENT) 99 (2003), *reprinted in* THE CONSTITUTION OF AGENCY: ESSAYS ON PRACTICAL REASON AND MORAL PSYCHOLOGY 302 (2008). According to realism, relevant judgments are meant to discern or find some preexisting facts, and their correctness-makers consist of such facts. According to voluntarism, on the other hand, relevant judgments are substantially a matter of *willing* as well as of discerning or finding, and their correctness-makers consist at least partly of the desiderata of willing well. We will discuss these matters further in Part IV below.

blatant contradiction of such. Some originalists have discerned the resulting conception of the debate and have expressed some frustration about it. Jeffrey Goldsworthy, for example, says:

The controversy over constitutional interpretation is concerned mainly with clarifying interpretation [i.e., the type of interpretation that aims to reveal “a meaning that, despite being previously obscured, was possessed by the text all along”³⁴]. The central question is not how judges should decide constitutional disputes when the constitution itself proves insufficiently determinate to provide a solution, but how they should ascertain whether or not it does provide a solution and, if so, what that solution is.³⁵

Goldsworthy, for one, seems to think that some nonoriginalists are mistakenly applying the lessons of constitutional cases where the law is indeterminate to all constitutional cases, and that the resulting conception of the debate between originalism and nonoriginalism in terms of (OA) and (NA) trivializes or marginalizes it.³⁶

We agree. We think that the debate between originalists and nonoriginalists is more substantial than the debate about (OA) and (NA). Or at least it is not just a debate about those theses about adjudication. We believe that *the debate is best conceived as a legal one about what the constitutional law is or consists of*. (There also would be an epistemological difference implied by that legal difference.) The problem is that nonoriginalists have not set out, not clearly anyway, an alternative positive legal position—something that merits the label “(NL).”³⁷

We suspect that the debate over constitutional interpretation has been significantly hampered by the absence of a clear articulation of the nonoriginalist alternative to (OL). We also suspect that nonoriginalists’ near-universal reticence in spelling out (NL) has been motivated by their inability to devise a conception of how the various different kinds of facts that they typically speak of could fit together into one coherent picture of what the constitutional law is. As we pointed out in the Introduction, some originalists believe that nonoriginalists’ reticence is well-motivated, that there is an insuperable obstacle to combining the different kinds of facts or considerations that nonoriginalists typically discuss—viz., the combinability

34. Goldsworthy, *supra* note 29, at 60.

35. *Id.*

36. *See id.* at 60–61 (arguing “[t]here should be little controversy” that if originalism “does not resolve the dispute,” nonoriginalist thought may be used, but that it is impermissible for judges to “change a constitution when it has a determinate meaning”).

37. A notable and important exception is Ronald Dworkin who consistently presented a clear legal picture of what the law of a community consists of, which includes a picture of what the constitutional law of a community consists of, as well as the accompanying epistemological picture. *See generally, e.g.*, RONALD DWORKIN, *LAW’S EMPIRE* (1986) [hereinafter DWORKIN, *LAW’S EMPIRE*]; Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057 (1975) [hereinafter Dworkin, *Hard Cases*], reprinted in *TAKING RIGHTS SERIOUSLY* 81 (1977).

problem.³⁸ We will do two things in the remainder of this Article. First, in the next Part, we will formulate (NL) and provide a template of how the facts could line up so that (NL) provides an accurate picture of our constitutional law. The picture we devise is not meant to be a wholly accurate picture of how things actually are. In order to get at the accurate picture, a considerable amount of further legal and constitutional research will need to be carried out. It is our view that what is sorely lacking in the current constitutional dialectic, what seems to be a stumbling block to the right kind of legal and constitutional research, is the lack of a picture or template of how the various kinds of facts could fit together into a single coherent constitutional fact. Our template in the next Part is meant to fill this gap. Second, in Parts III and IV, we will defuse the combinability problem. That problem, or the various versions of that problem we will disambiguate, have nothing on our template. The appearance of the problem arises, we believe, from a number of confusions or mistakes on the part of those who proffer it. We propose to make further progress in articulating the nonoriginalist legal position by exposing these errors.

II. A Template for a Pluralist Nonoriginalist Conception of Constitutional Law

Once again, there is no canonical list of the nonsemantic facts that nonoriginalists deem legitimate inputs for constitutional interpretation. But we can use something quite like Bobbitt's list of modalities as our placeholder and formulate the pluralist nonoriginalist legal and epistemological positions as follows.³⁹

- (NL) The Constitution or the constitutional law consists of multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.
- (NE) In order to figure out what the constitutional law calls for, judges and others should find out multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents;

38. *See infra* Parts III–IV.

39. We have dropped the structural considerations from Bobbitt's list because: (i) we are unsure as to how to formulate a fundamental constitutional norm about structural features in a noncircular way—that is, without mentioning in the formulation of the norm what the Constitution envisions; and (ii) that set of considerations might be better construed as a subset of moral or ethical considerations. Nothing of substance should hang on this, however.

(iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.

And we can further update (NA) as follows:

(NA') In constitutional cases, even when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them in light of multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.

Our central goal is to firm up (NL). A success in that endeavor would bring affirmations of (NE) and (NA') in its wake. Now we turn to articulating a clear picture of the relation that (NL) bears to the constitutional law.

A. *Ultimate Constitutional Facts*

That relation, as we conceive it, is a little different from the relation that (OL) supposedly bears to the constitutional law, and we believe that a proper understanding of that difference would go a significant way in clarifying what (NL) says and in enhancing its plausibility.

The difference between the two relations can be summed up in the following two figures:

Figure O: The Originalist Picture.

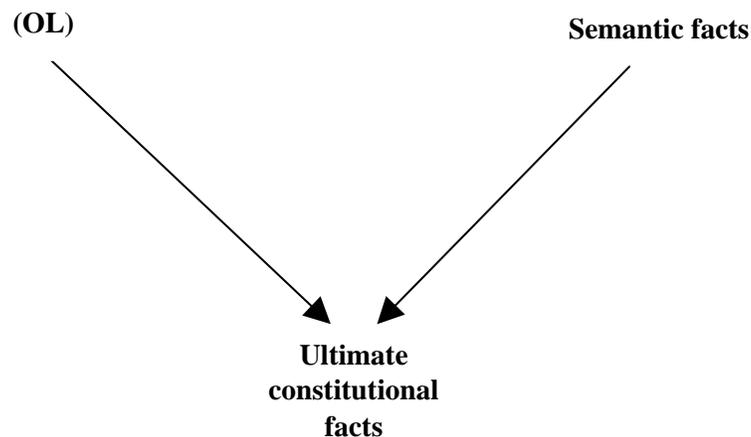
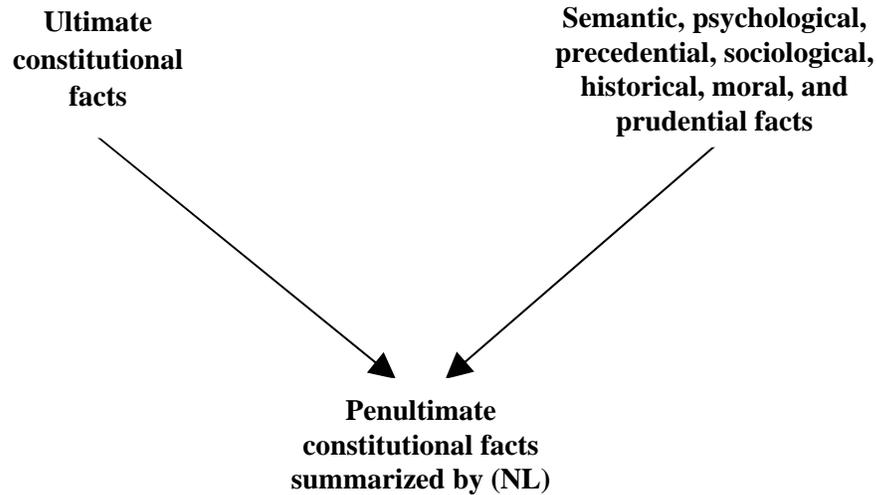


Figure N: The Nonoriginalist Picture.

As Figure O indicates, and as we observed before in subpart I(B), originalists who espouse (OL) typically see that thesis and the meanings of the inscriptions in the constitutional text as jointly determining the most fundamental constitutional facts—i.e., the norms that make up the Constitution. We, on the other hand, take the norms that make up the Constitution, and the nonlegal facts that those norms make legally relevant, as the ultimate determinants of any constitutional law. Unlike (OL) then, (NL) is not an ultimate determinant of the constitutional law. Instead, as Figure N indicates, it can be plausibly construed as a summary of the *penultimate* constitutional facts.

Many constitutional theorists and practicing lawyers and judges—not just avowed originalists but others as well—implicitly assume that the norms that are found in the text of the Constitution are the ultimate constitutional facts, and Figure O articulates that assumption. But this is far from a non-optional picture, and nonoriginalist conceptions of constitutional law may require something like what is pictured in Figure N. Our constitutional practice, and the constitutional judgments that we often make, posit fundamental constitutional facts that “lie behind,” so to speak, the text of the Constitution and that are represented, implied, evidenced, or presupposed by that text. David Strauss, for example, has argued, with much plausibility in our view, that appeals to judicial precedents are the main driving force in our actual constitutional argumentative practice.⁴⁰ But the doctrine of precedent cannot be found in the text of the Constitution. Nor, of course, is the norm or

40. STRAUSS, *THE LIVING CONSTITUTION*, *supra* note 30, at 34.

doctrine of judicial review. The motivation to posit fundamental constitutional facts, including some versions of the doctrine of precedent and of the doctrine of judicial review, is analogous to the motivation that scientists have to posit fundamental laws of nature to explain and systematize our observations of natural phenomena, or the motivation that moral philosophers have to posit fundamental moral principles to justify and systematize our moral judgments.

Obviously, it would take much legal and constitutional research to figure out which norms exactly we should posit as the most fundamental constitutional facts of the American legal system. Once again, however, providing an accurate list of those facts is not our goal in this paper. Instead, we are concerned with sketching a template of how the pluralist nonoriginalist conception of the constitutional law could be true, as we see a sore lack in the current literature of just such a template. Let us then proffer the following list of the ultimate constitutional norms as illustrative of what the real version of such a list might look like:

- (a) In cases of first impression, if the issue in question is explicitly addressed by a part of the text of the Constitution, what is plainly said in the text is controlling.
- (b) Even in cases of first impression, the plain meaning of the text of the Constitution should be set aside if it conflicts with what historical evidence clearly indicates were the Founders' shared intentions.
- (c) Legal standards that have a long history of acceptance and practice by courts and the society more generally have pro tanto legal legitimacy. Such standards and the practices around them may be viewed as legally recognized depositories of common practical wisdom that have developed incrementally and have been subjected to repeated testing.
- (d) What is set up by the Constitution is a system of government in which no single branch of the government or a faction in the society can concentrate upon itself political, social, or military powers. Power corrupts, and the system of government envisioned is one in which mutual checks and balances ward off power-induced corruptions as much and as long as humanly possible.
- (e) What the Constitution calls for is an economic system of free trade and competition that enables citizens to vigorously pursue economic well-being free from the constraints of mercantilism and other kinds of economic entrenchments, and to bring about thereby continuously improving collective well-being.
- (f) Constraints and costs imposed on individual citizens by laws and institutions must not violate their dignity as

human beings and the widest conception of autonomy that such dignity implies and that is compatible with citizens' mutual exercises of such autonomy.

- (g) Compliance with all of the aforementioned fundamental norms must be pursued while maintaining collective survival and security.

Although we ourselves find this list highly plausible, we reiterate that we are not arguing that this very list is accurate of how things actually are. Instead, we are merely asserting here that something like this list could comprise the most fundamental constitutional norms of our system, or a significant part thereof. And if that were so, then it would be quite unsurprising that (NL) is true. These fundamental constitutional facts make legally relevant the various kinds of nonlegal facts that (NL) enumerates, including many nonsemantic facts, and even some normative facts. And if the actual list were anything like our list, then it would not be surprising and we should expect that the penultimate constitutional facts are partly determined by those many kinds of facts, and not just semantic facts as (OL) would have it.

B. Determinants of the Ultimate Constitutional Facts?

As we see it, there are two main objections to the kind of picture of the ultimate constitutional facts and their relation to (NL) that we are sketching. One is the combinability problem that we shall begin to address in the next Part. The other problem, which we address in the balance of this Part, could be formulated as follows: If the ultimate constitutional norms of our legal system are something like (a)–(g) that we outlined in the preceding subpart, what makes those norms the most fundamental constitutional norms? To put it slightly differently, in virtue of what are those norms, whichever they are, the most fundamental constitutional norms? Unless this question can be answered in a satisfactory way, the objection would continue, the relevant norms would be sort of left hanging in the air, and the plausibility of (NL) would be left largely unaccounted for.

Many people that we have conversed with believe that something like this question needs to be addressed. In fact, many contemporary legal theorists, both legal philosophers and jurisprudentially informed constitutional theorists, think that a central goal of the branch of legal philosophy that goes by the name “general jurisprudence” is to furnish answers to this question.⁴¹ The two main schools of jurisprudence in their

41. *See generally, e.g.*, JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 74–102 (2001); ANDREI MARMOR, *SOCIAL CONVENTIONS* 155–75 (2009); SCOTT J. SHAPIRO, *LEGALITY* 35–50 (2011); John Gardner, *Law as a Leap of Faith*, in *FAITH IN LAW: ESSAYS IN LEGAL THEORY* 19 (Peter Oliver et al. eds., 2000); Leslie Green, *Positivism and Conventionalism*, 12 *CANADIAN J.L. & JURIS.* 35 (1999). These legal philosophers are followers of Joseph Raz, who in turn traces the problem to Hans Kelsen. *See generally* Joseph Raz, *Kelsen's Theory of the Basic Norm*, 19 *AM. J. JURIS.* 94 (1974), *reprinted in*

minds are the two main camps in answering this question. Natural law theorists are supposed to have taken the position that it is in virtue of some moral considerations or facts that particular norms or the conjunction of them amount to the ultimate legal norm of a legal system. Legal positivists are supposed to have argued that it is in virtue of some social facts that some particular norms or a conjunction of them is the most fundamental norm of a legal system.

We ourselves believe that the question should be taken up with extreme caution, for the question is an output of some much-tangled strands of contemporary legal philosophical thinking, and we believe that one should be quite suspicious of the thought that there is a genuine, nonspurious question in place here. One of us has elaborated on these themes at some lengths elsewhere,⁴² and in this Article we limit ourselves to just three observations that we hope go some distance toward blunting the worry behind the question. First, whatever bind that nonoriginalists are in by not providing an answer to this question is not really any worse than the bind that originalists are in. On first glance, originalists may be seen to do somewhat better than nonoriginalists in addressing this question. For according to them, certain norms are the most fundamental constitutional norms of our legal system in virtue of (OL) and the relevant semantic facts. So they furnish an answer to the relevant question. But any advantage that originalists may claim is quite negligible and short-lived, for as one of us has argued elsewhere, originalists have offered no persuasive story as to what makes it the case that (OL) is the determinant of the most fundamental of our constitutional facts.⁴³ All of the proposals we are aware of that justify treating (OL) as the primary determinant of the ultimate constitutional facts are defective and susceptible to obvious counterexamples.

Second, we are skeptical that the jurisprudential story that is most popular with legal theorists, both originalists and nonoriginalists—namely, the story that relies on H.L.A. Hart’s theory of the nature of law as laid out in his seminal *The Concept of Law*, or more precisely the orthodox understanding of that theory prevalent among contemporary legal philosophers—can furnish the help that is claimed for it. According to the orthodox understanding, the norm or the conjunction of norms that is jointly

THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 122 (1979); Joseph Raz, *Legal Validity*, 63 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 339 (1977) [hereinafter Raz, *Legal Validity*], reprinted in THE AUTHORITY OF LAW, *supra*, at 146. There is also the Dworkinian tributary to the dialectic that yields the problem. See Ronald M. Dworkin, *Social Rules and Legal Theory*, 81 YALE L.J. 855 (1972) [hereinafter Dworkin, *Model II*], reprinted as *The Model of Rules II*, in DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 37, at 46.

42. Kevin Toh, *Jurisprudential Theories and First-Order Legal Judgments*, 8 PHIL. COMPASS 457 (2013) [hereinafter Toh, *Jurisprudential Theories*]; Kevin Toh, *Legal Philosophy à la Carte* (September 2011) (unpublished manuscript) (on file with author) [hereinafter Toh, *Legal Philosophy*].

43. Berman, *supra* note 18, at 59–68.

accepted and treated as the ultimate criterion of legal validity by the officials of a legal system is actually the most fundamental legal norm—or what Hart calls the “rule of recognition”⁴⁴—of that legal system. This particular reading of Hart’s legal theory is what most legal philosophers take away from *The Concept of Law*,⁴⁵ and jurisprudentially informed constitutional theorists have followed in the track.⁴⁶ The thought prompted by this understanding of Hart’s theory then is that the determinants of the ultimate constitutional norms are the psychological and behavioral facts that amount to American legal officials’ joint acceptance of those norms, or the conjunction of them, as the ultimate criterion of legal validity.

There are, however, some quite significant problems for such a “Hartian” conception of the determinants of the ultimate constitutional norms. For one thing, the prospects of making a plausible empirical case that a particular set of norms is commonly accepted by the legal officials of the

44. H.L.A. HART, *THE CONCEPT OF LAW* 100 (3d ed. 2012).

45. For example, Scott Shapiro, in his recent book *Legality*, says:

[I]f Hart is correct, and social practices explain how legal systems are possible, then legal reasoning must always be traceable to a social rule of recognition. Arguments about who has authority to do what, what rights individuals have, which legal texts are authoritative, and the proper way to interpret them must ultimately be resolved by reference to the sociological facts of official practice.

SHAPIRO, *supra* note 41, at 102. This typical construal of Hart’s theory began with Dworkin’s influential articles in the 1960s and 1970s. See generally Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967) [hereinafter Dworkin, *Model I*], reprinted as *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY*, *supra* note 37, at 14; Dworkin, *Model II*, *supra* note 41. While many have come to look askance at other parts of Dworkin’s arguments, this take on Hart’s theory has pretty much stuck. See, e.g., Raz, *Legal Validity*, *supra* note 41, at 150–51; Eugenio Bulygin, *Sobre La Regla De RECONOCIMIENTO*, in *DERECHO, FILOSOFÍA Y LENGUAJE: HOMENAJE A AMBROSIO L. GIOIA* 31 (1976), reprinted in *ANÁLISIS LÓGICO Y DERECHO* 383, 385–86 (1991); Jules L. Coleman & Brian Leiter, *Legal Positivism*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 241, 246 (Dennis Patterson ed., 1996); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1222 (2009) [hereinafter Leiter, *Theoretical Disagreement*]; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 166–72 (1982); Leslie Green, *Legal Positivism*, *STAN. ENCYCLOPEDIA OF PHIL.* (Jan. 3, 2003), <http://plato.stanford.edu/entries/legal-positivism>.

46. See, for example, the articles collected in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION* (Matthew D. Adler & Kenneth Einar Himma eds., 2009). Fallon for one has relied on Hart’s theory, as outlined above, to accuse originalists of an “implicit jurisprudential mistake in failing to acknowledge that the foundations of law lie in current practices of acceptance.” Richard H. Fallon, Jr., *Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra*, at 47, 64 [hereinafter Fallon, *Precedent*]; cf. Fallon, *supra* note 28, at 1213. He explains that “the fact that a [constitutional] provision was once intended or understood to have future binding force cannot suffice to make that provision law today unless a *current* rule or practice of recognition gives that intent or understanding legally controlling force.” Fallon, *Precedent*, *supra*, at 52. For an argument for originalism that relies on this orthodox understanding of Hart’s theory, see Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 954 (2009). One constitutional theorist has tried to “operationalize” Hart’s theory, thus understood, by trying to ascertain exactly which group of people’s practices determines our constitutional law. See generally Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719 (2006).

American legal system as the ultimate criterion of legal validity of their community are rather dim. Of course, some extensive empirical studies would be required to substantiate any position on this issue. But as Dworkin has consistently argued over the years, and as Fallon agrees, at least the initial overwhelming appearance is that the American constitutional practice is marked by controversies and disagreements about what the constitutional law consists of, and not by any marked agreement or consensus.⁴⁷ Even if some broad agreement or consensus could be discerned, the agreement or consensus would not be sufficiently thorough or fine-grained to yield a set of complex norms of the sort that we would need.⁴⁸

More importantly, as Dworkin has also pointed out, and as the two of us have argued separately elsewhere, the Hartian approach taken here matches neither our phenomenology when we make legal or constitutional judgments, nor the observed sociology of our practice of making legal and constitutional judgments.⁴⁹ The fact is that the lack of official consensus about the ultimate

47. See generally DWORKIN, *LAW'S EMPIRE*, *supra* note 37, at 1–86, 355–99; Dworkin, *Model I*, *supra* note 45; Fallon, *supra* note 28, at 1231–37.

48. See, e.g., Kent Greenawalt, *The Rule of Recognition and the Constitution*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 46, at 2, 2–3, 42–43 (applying Hart's theory to the United States and questioning his notion that the ultimate rule of recognition will allow for clear identification of what counts as law and easy prediction of legal outcomes). While agreeing with Dworkin's initial point that mature and thriving legal systems may not include official consensuses about the ultimate criteria of legal validity, Fallon has recently held out hope that some further psychological facts, namely the facts about judges' broadly shared dispositions about how to decide cases, could be relied upon to identify the rule of recognition of the American legal system:

[R]eferences to the rule or rules of recognition mark the existence of broadly shared, often tacit understandings on the part of those at the center of constitutional practice (most notably Supreme Court Justices and judges, but also other[] [officials] . . .) about how to "go on" in ways that will be acknowledged by others as appropriate or correct.

Fallon, *Precedent*, *supra* note 46, at 56. We do not, however, think that this is a very promising way to go. The fact is that the totality of a population's dispositions is limited and finite, whereas there are an unlimited number of potential legal controversies, including controversies about the ultimate determinants of the constitutional law, in which judges would have to make decisions that outstrip the existing dispositions of the relevant population. In fact, appealing to judges' dispositions does not appear to settle the debate about what the constitutional law consists of. Fallon appeals to Wittgenstein's celebrated discussion of rule-following to buttress his position just described. *Id.* at 56 & n.46. In one of the most influential commentaries on Wittgenstein's discussion of rule-following, however, Saul Kripke has forcefully argued against the view that the facts of a person or population's psychological dispositions can be appealed to to distinguish correct extrapolations of a rule from incorrect ones. See SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION* (1982). And Kripke's reasoning is partly based on the point that we have just made—i.e., that the totality of a person or population's disposition is finite, whereas there is no limit to the applicability of rules. See *id.* at 22–37.

49. See Mitchell N. Berman, *Constitutional Theory and the Rule of Recognition: Toward a Fourth Theory of Law*, in *THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION*, *supra* note 46, at 269; Kevin Toh, *The Predication Thesis and a New Problem about Persistent Fundamental Legal Controversies*, 22 *UTILITAS* 331 (2010) [hereinafter Toh, *The Predication Thesis*]. Although we agree on this broad point, neither of us agrees with all the details of the other's exposition of this point. One of us has also argued extensively elsewhere that the supposedly Hartian approach that we have outlined in the text is not really Hart's, and that Hart's real position is quite compatible with both the observation that a legal system may be marked with controversies about the ultimate

criterion of legal validity does not detract from judges' or anyone else's sense of entitlement to make judgments about what the constitutional law consists of that they deem correct. For example, Justice Scalia knows that there is no common acceptance of any originalist standard of constitutional interpretation,⁵⁰ and in any case would not abandon his commitment to originalism even if a thorough sociological study were to show that there is no such common acceptance. And even if a consensus among the officials about the ultimate criterion of legal validity were to exist in our community, judges and others would not feel that the question of what the ultimate criterion of legal validity in our legal system is is a closed question. We would not think that a judge or anyone else is making a legal or constitutional mistake merely because he is flouting the prevailing consensus about the ultimate criterion of legal validity.⁵¹ Simply put, we do not think, and our practice does not display our commitment to the idea, that the real ultimate determinant of our constitutional law is the official consensus or agreement.

Third, and most important, in our opinion, there is no happy or unproblematic version of the question about the determinants of the ultimate constitutional norms. Let us explain.⁵² The question, once again, could be formulated as:

(Q0) What makes it the case that some norms are the ultimate constitutional norms of our legal system?

Or, put another way:

(Q0') In virtue of what are certain norms the ultimate constitutional norms of our legal system?

What exactly is being asked by these questions? There are multiple possibilities, none quite satisfactory. The question could be conceived as an

criteria of legal validity among its officials and members, and the phenomenological cum sociological point about our legal and constitutional judgments. See Kevin Toh, *Hart's Expressivism and His Benthamite Project*, 11 *LEGAL THEORY* 75 (2005); Toh, *The Predication Thesis*, *supra*; Toh, *Legal Philosophy*, *supra* note 42. Thus, the quotation marks around the term "Hartian" when used in the text above.

50. See Scalia, *supra* note 3, at 852 (observing that "originalism is not, and had perhaps never been, the sole method of constitutional exegesis"); SCALIA, *INTERPRETATION*, *supra* note 4, at 38 ("The ascendant school of constitutional interpretation affirms the existence of [']The Living Constitution[']], a body of law that . . . grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and 'find' that changing law.").

51. Brian Leiter has asserted that a judge who does so would be making a mistake—viz., a jurisprudential mistake stemming from his jurisprudential ignorance. See Leiter, *Theoretical Disagreement*, *supra* note 45. We do not share this diagnosis.

52. The way that we defuse the relevant question in what follows is the way we believe that we should defuse what Shapiro calls "the Possibility Puzzle," which is the motivating puzzle of his arguments in *Legality*. See generally SHAPIRO, *supra* note 41, at 35–50, 79–117.

empirical one about etiology and could be formulated as one of the following:

- (Q1) What caused a particular set of norms to come to be treated as the ultimate constitutional norms of the American legal system?
- (Q1') What causes a particular set of norms to be treated as the ultimate constitutional norms of the American legal system?

But this cannot really be the crucial question. There is nothing really puzzling about such empirical questions. We, or the specialists among us, should be able to gather the pertinent historical, anthropological, sociological, and psychological evidence to answer such questions.

Alternatively, the question could be conceived as a particular metaphysical question as follows:

- (Q2) What facts constitute or amount to our community's treating a particular set of norms as the ultimate constitutional norms of the American legal system?

Here, there is a philosophical problem, and it is actually to this question that Hart provided an answer in terms of officials' shared acceptance of a set of norms. The mistake that the orthodox understanding of Hart's legal theory makes is to conflate this question with a slightly different question that (Q0) or (Q0') could be construed as raising. Notice that as an answer to (Q2), as we believe that it was meant to be, Hart's proposal is a cogent and forceful answer that has hardly been bettered.⁵³ And it is not really vulnerable to the Dworkinian worries that we outlined above. It is only when (Q0) or (Q0') is construed as a question about the determinants of our ultimate constitutional norms, not as a question about the determinants of the psychological phenomenon of treating certain norms as the ultimate constitutional norms, that Hart's proposal is vulnerable to those worries. This is a clear indication that (Q2) is not really the right version of the relevant question. And if,

53. In case the reader thinks that there is really no difference between (Q0) and (Q0') on the one hand and (Q2) on the other, think of the moral analogues of these several questions. The difference between the questions is much more obvious in the moral context, and that enables us to see the distinction more clearly in the legal context as well. It may be argued, however, that in the legal context, the whole *raison d'être* of legal positivism is to collapse the distinction between these two sets of issues and questions. We are suspicious of that line of thinking, however. Hart is the paradigmatic legal positivist of recent times, and he sought to clearly mark the distinction between the two sets of issues and questions by his famous distinction between internal and external legal statements. See HART, *supra* note 44, at vi, 88–89, 102–05, 291; see also Eugenio Bulygin, *Norms, Normative Propositions, and Legal Statements*, in 3 CONTEMPORARY PHILOSOPHY: A NEW SURVEY 127, 136 (Guttorm Fløistad ed., 1982). Unfortunately, that distinction has been all but overlooked in recent years, much to the detriment of recent legal philosophical thinking. One of us has argued against what he considers inadequate arguments by Joseph Raz for overlooking the distinction. See Kevin Toh, *Raz on Detachment, Acceptance and Describability*, 27 OXFORD J. LEGAL STUD. 403 (2007).

contrary to what we have just argued, the relevant question were (Q2), then we have a ready answer in Hart's proposal.

Perhaps the relevant question is not an empirical or metaphysical question of the preceding sorts, but is instead a first-order *legal* question. In that case, it could be formulated as:

- (Q3) What legally validates certain norms as the ultimate constitutional norms of the American legal system?

But notice that if we take seriously the functional role of the norms like (a)–(g) as the ultimate constitutional norms, then (Q3) cannot be taken as a genuine, nonspurious question. Such norms are supposed to be the ultimate legal norms in the American legal system, and that means that there cannot be a set of facts or considerations that *legally* validates those norms as the ultimate constitutional norms of the American legal system.⁵⁴

Finally, the question could be construed as one of the following moral or all-things-considered normative questions:

- (Q4) What makes it the case that we have reasons to comply with the ultimate constitutional norms of the American legal system?
- (Q5) What makes it the case that we have duties or obligations to comply with the ultimate constitutional norms of the American legal system?

Despite the fact that many legal philosophers have assumed that an adequate conception of the ultimate norms of legal systems must answer such normative questions,⁵⁵ there is no good ground for the presumption that ultimate legal norms must be justifiable, morally or all things considered, for them to qualify as the ultimate legal norms.⁵⁶ It follows that our conception of certain norms as the ultimate legal norms of the American legal system is not held hostage by the possibility of providing satisfactory answers to (Q4) or (Q5).

It follows that none of (Q1)–(Q5) could be thought the right construal of the crucial question we began with. And once we exclude these versions of the question, it is not clear that there is any genuine, nonspurious question

54. On this point, as applied to Hartian rules of recognition, Raz, for one, has vacillated. Sometimes, he seems to say that a rule of recognition is legally validated by its being accepted and followed by legal officials as the ultimate legal norm; at others, he asserts that it is a mistake to talk about the legal validity of a rule of recognition. Compare, e.g., Raz, *Legal Validity*, *supra* note 41, at 150–51, with Joseph Raz, *Postema on Law's Autonomy and Public Practical Reasons: A Critical Comment*, 4 LEGAL THEORY 1 (1998), reprinted in BETWEEN AUTHORITY AND INTERPRETATION 373, 381 (2009).

55. See, e.g., JOSEPH RAZ, PRACTICAL REASONS AND NORMS 49–58 (Princeton Univ. Press 1990) (1975); Dworkin, *Model II*, *supra* note 41, at 48–58; Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165, 171 (1982).

56. For a set of compelling arguments to this effect, see David Enoch, *Reason-Giving and the Law*, in 1 OXFORD STUDIES IN THE PHILOSOPHY OF LAW 1 (2011).

left to be asked. Social scientists can worry about (Q1), legal philosophers about (Q2), lawyers and judges among us about (Q3), and moral and political philosophers about (Q4) and (Q5). But there is no further question of similar shape or wording, as far as we can determine, that we need to have answered in order for us to deem it a strong and nonproblematic possibility that there is some set of norms such as (a)–(g) that are the ultimate constitutional norms of the American legal system, and that (NL) is an accurate summary of the penultimate constitutional facts that such ultimate constitutional norms determine along with the various kinds of nonlegal facts that they make legally relevant. Of course, as Figure O in subpart A of this Part indicates, originalists believe that there are determinants of the ultimate constitutional facts—namely, (OL) and the semantic facts that (OL) makes relevant. But the important point here is that the lack of any such determining facts for the ultimate constitutional facts is not worrisome. It is perfectly sensible to think that the ultimate determinants of our constitutional facts are the ultimate constitutional norms and not something else that determines those ultimate constitutional facts.⁵⁷

Some of our readers may retain a nagging sense that there is some genuine or nonspurious question which is a version of (Q0) and (Q0'), and which is not covered by any of our (Q1)–(Q5). To such readers, we simply issue a challenge: Try to come up with a formulation of a question that we must answer with respect to a set of purported ultimate legal norms of a legal system—a question which is not covered by our (Q1)–(Q5). Our current diagnosis is that any nagging sense results from a conflation of the several questions that we have disambiguated. But we would be happy to be surprised.

III. The Combinability Problem

No nonoriginalist says that meanings of constitutional inscriptions are irrelevant to constitutional interpretation. Instead, nonoriginalists argue that facts or considerations other than such semantic facts are legitimate inputs

57. Here, our position is analogous to that of Paul Horwich, who has argued that the ultimate epistemic norms, such as that of *modus ponens*, are the ultimate determinants of epistemic justification and that it is a mistake to seek further justification of such norms. See generally PAUL HORWICH, *Meaning Constitution and Epistemic Rationality*, in REFLECTIONS ON MEANING 134 (2005) [hereinafter HORWICH, *Meaning Constitution*]; Paul Horwich, *Ungrounded Reason*, 105 J. PHIL. 453 (2008), reprinted in TRUTH-MEANING-REALITY 197 (2010). Horwich's arguments are reactions to some philosophers who have argued that fundamental epistemic norms (e.g., the norm of *modus ponens*) are justified by the rules that are constitutive of certain concepts (e.g., the rules that are constitutive of the logical connective "if . . . then . . ."). See, e.g., CHRISTOPHER PEACOCKE, *A STUDY OF CONCEPTS* (1992); Paul Boghossian, *How Are Objective Epistemic Reasons Possible?*, 106 PHIL. STUD. 1 (2001); Paul Boghossian, *Knowledge of Logic*, in NEW ESSAYS ON THE A PRIORI 229 (Paul Boghossian & Christopher Peacocke eds., 2000). Such proposals for "semantogenetic justification," as Horwich dubs them, HORWICH, *Meaning Constitution*, *supra*, at 136, of our fundamental epistemic norms bear at least some superficial resemblance to the originalist picture summed up in Figure O.

for constitutional interpretation. And as the above-mentioned lists of Bobbitt and Fallon indicate, nonoriginalists typically include psychological, historical, structural, doctrinal, and normative considerations among the nonsemantic considerations that are legitimate grounds of constitutional interpretation.⁵⁸ Some have argued that such a “pluralist” approach to constitutional interpretation is inherently unstable, if not downright incoherent or impossible, because it is difficult or even impossible to combine different types of considerations. It is to this “combinability problem,” or the various versions it could take, that we now turn. This is the second of the two main objections to our picture of pluralistic nonoriginalism that we address in this Article.

No legal theorist has been as forthright and unqualified in his assertion of the combinability problem as Larry Alexander. In the most extensive of his discussions of this problem that we are aware of, and speaking of legal interpretation in general, Alexander says:

There are some theories of interpretation that not only require a combination of different empirical inquiries or of empirical and moral inquiries, but also require that the results of those different inquiries be “blended” to arrive at the authoritative meaning of the legal norm. For example, some theorists argue that the meaning of a statute is a product of its text, its authorial intentions, its past judicial interpretations, and what is good and just. Moreover, these different factors are not arranged in some clear lexical order—with text constraining intentions and both constrained by justice, for example—but rather are factors to be mixed together in some interpretive stew.

How is the legal interpreter to ascertain the meaning rendered up by such a nonstructured combination of different inquiries and types of reasoning? It is here that some special faculty, the ability to engage in what some call “practical reason,” enters the picture. We grasp the meaning of a posited legal norm through practical reasoning in light of text, authorial intentions, history, and morality. . . .

I have written elsewhere on why I think the claims on behalf of such practical reason are hogwash. No one—not even lawyers—can meaningfully “combine” fact and value, or facts of different types, except lexically in the manner I described above. Any non-lexical “combining” of text and intentions, text and justice, and so forth is just incoherent, like combining *pi*, green, and the Civil War. There is no process of reasoning that can derive meaning from such combinations.⁵⁹

58. See *supra* notes 29–31 and accompanying text.

59. Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 521 (1998) (footnotes omitted).

This is strong stuff, and we suspect that not all legal theorists who believe that nonoriginalists suffer from a combinability problem will want to sign on to every aspect of Alexander's exposition. But the suspicion that there is such a combinability problem seems quite widespread. Fallon, who is a nonoriginalist, takes the problem seriously enough to consider it one of the most important and pressing problems in constitutional law⁶⁰ and to propose a solution to it in a long article. Listing the different kinds of constitutional argument that we have already listed above in subpart I(C), Fallon says that the problem, which he calls "the commensurability problem," "is to show how arguments of all of these various kinds fit together in a single, coherent constitutional calculus," and he says that difficult constitutional cases cannot be resolved without solving the problem.⁶¹

Despite these statements of the problem, however, we are not at all sure about its nature and contours. The following subparts of this Part and the first subpart of Part IV try out different interpretations of the problem and try to settle on a version that makes best sense of what constitutional theorists like Alexander and Fallon may be getting at.

A. *Moral–Political and Epistemological Versions*

Let us first quickly set aside two versions of the combinability problem that plainly should not bother or detain us for long. The first of the two is the version that is familiar as an objection to Bobbitt's work on constitutional interpretation. When Bobbitt introduced his six modalities of constitutional argument in his 1982 book, *Constitutional Fate*, many critics took issue with his failure to provide any meta-rule or other guidance regarding what judges should do to address any legal indeterminacies that would obtain when the modalities point in different directions.⁶² This is a supposed defect that Bobbitt claimed as a virtue in his 1991 follow-up volume, *Constitutional Interpretation*.⁶³ In that later work, he argued that a choice among the outcomes that each modality "legitimizes" can only be effectuated by a "recursion to conscience," and that the need for conscientious choice, far

60. Fallon, *supra* note 28, at 1191.

61. *Id.* at 1189–92; *see also, e.g.*, Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1787 (1997) ("Because multiple sources will sometimes give rise to conflicting and incommensurate arguments, . . . an eclectic theory would appear to require some metaprinciple that mediates among conflicts between different kinds of arguments."); Michael Stokes Paulsen, *The Inherently Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 295 (2005) (criticizing Fallon's inclusion of precedent in his interpretive method because the consideration of multiple sources of constitutional meaning creates the need for a system of rules about the priority of the various modalities).

62. *See, e.g.*, Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107, 1111 (1993) ("Despite the clear power of *Constitutional Fate*, critics identified [some] substantial shortcomings. . . . [P]erhaps mo[st] troubling, *Constitutional Fate* presented no methodology for decisionmaking when conflicts between the various modes of argument arise. It was, therefore, massively indeterminate.").

63. BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 27, at 31–42.

from undermining the moral justifiability of a system of constitutional governance complete with judicial review, supplies the requisite justification.⁶⁴ As Bobbitt put it:

The US Constitution engages our moral sensibilities by the clash of its interpretive modalities, which require the moral instance of our judgment. The justice of the system lies in the extent to which it is able to confer legitimacy on the right moral actions of its deciders. It is thus the very fact that legitimate rationales *do* conflict that enables justice to be done.⁶⁵

Many readers deemed this an inadequate solution and argued that judicial choice among practice-legitimated outcomes, unconstrained by law, exacerbates countermajoritarian objections to judicial review and therefore fails to provide moral justification for the practice.⁶⁶

For our purposes, the important thing to recognize about this particular running of the debate—which we have, of course, ruthlessly simplified—is that those who insisted that Bobbitt’s multimodal account required a meta-rule did not charge that combining or integrating the diverse modalities is impossible. Instead, they charged that insofar as the independent modalities, or their outputs, necessitated the exercise of conscientious choice, they deliver a practice of judicial review that fails some test of political justice.⁶⁷ We ourselves are not moved by that particular objection. In broad outline, we believe that the standard responses to the countermajoritarian objection to judicial review⁶⁸ are adequate to justify the American practice of it, even to the extent that unelected judges appeal to many kinds of considerations and do not rely on a meta-rule that would adjudicate among them. Whether we are right about that or not, the combinability problem that interests us for now and that Larry Alexander’s arguments invoke is one that charges pluralism with incoherence or a like defect, and not with violating claimed principles of political morality.

Another version of the combinability problem that can be rather quickly dispatched is the one that construes it as an epistemological problem. Fallon’s talk of the need for the different types of constitutional arguments to fit together into a single calculus possibly indicates his view that there is a problem of combining different types of evidence in investigations aimed at

64. *Id.* at 184.

65. *Id.* at 170.

66. *See, e.g.*, H. Jefferson Powell, *Constitutional Investigations*, 72 TEXAS L. REV. 1731, 1741 (1994) (identifying without endorsing this line of criticism).

67. *Id.*

68. *See generally, e.g.*, Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981), reprinted in A MATTER OF PRINCIPLE 33 (1985); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381 (1992), reprinted as *What the Constitution Says*, in RONALD DWORIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 72 (1996). And for Bobbitt’s own response, see Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEXAS L. REV. 1869 (1994).

gaining access to constitutional facts.⁶⁹ And some of what Alexander says in the long passage we quoted above⁷⁰ suggests that he is invoking the same epistemological problem, although in his correspondence with us he has explicitly disavowed this version of the combinability problem. In any case, the problem, as so construed, lacks substance. Paleontologists, for example, have no problem combining different types of evidence—the shape and size of the fossils, the information from carbon dating, the surrounding geological formations, accumulated evidence about the location’s environment in different time periods, well-confirmed zoological theories about the present-day organisms that might have descended from older organisms, etc.—in determining the nature of the organism whose fossils they are studying. And physicians have no problem combining different types of evidence—the patient’s particular symptoms, the past treatment history, the patient’s travel history, prevailing medical theories about various maladies, etc.—when they diagnose a patient. In our attempts to find out what is the case, we routinely seek hypotheses that would best explain many different kinds of available evidence, and we see no reason to think that such inference patterns are inappropriate or especially problematic in legal or constitutional investigations.

A judge who really is unable to proceed in the absence of a decision procedure or calculus that sets out how the different types of evidence are to be combined would be a victim of a serious cognitive impairment. The decision procedures of the sort that legal theorists like Alexander and Fallon could be read as hankering after are not only an epistemological chimera but also wholly unnecessary for conducting our epistemic lives. If anything, the thought that such procedures are necessary would hamper our inquiries. Our epistemic lives can be difficult enough without putting artificial and unnecessary straitjackets on our thinking, and the decision procedures in question would be such straitjackets.

B. The Metaphysical Version—I

As the third paragraph of the long quoted passage at the beginning of this Part indicates, Alexander seems to think that there is a general metaphysical problem with combining facts and norms, or facts of different varieties. In the “elsewhere” that the first sentence of that paragraph refers to, after noticing that some legal theorists conceive statutory interpretation as a form of practical reasoning that takes into account normative considerations, Alexander helpfully distinguishes the metaphysical (or “ontological” in his terminology) issue from the epistemological one.⁷¹ He concentrates on the former, and asks:

69. See Fallon, *supra* note 28, at 1189–92.

70. See *supra* text accompanying note 59.

71. See Larry Alexander, *Practical Reason and Statutory Interpretation*, 12 LAW & PHIL. 319 (1993).

[M]y second question . . . [is] how normative and factual are supposed to blend. If the practical reason approach to statutes is supposed to tell us what statutes “are”, then why isn’t the metaphysical mixing of norm and fact—of, say, what is just and what someone said or thought at a particular time or place—incomprehensible, somewhat like mixing “pi, green, and the Civil War”?⁷²

Alexander’s metaphysical objection here is no easier to understand than the epistemological version of the combinability problem, and his explanation of the objection in the passages subsequent to the just-quoted passage, and his citations, indicate that the objection most likely stems from incomplete and wayward understandings of some philosophical issues. But the metaphysical version is the one that Alexander has reaffirmed in his communication with us, and for this reason we dwell on it at a greater length.

Before we get to the philosophical issues just mentioned, notice that the kind of blending of the factual and the normative that Alexander deems impossible and incomprehensible is very much unremarkable and commonplace. For example, the fact that a particular thing is a *weed* consists of the fact that the thing has a biological makeup of a plant and the fact that it is undesirable in gardens. Analogous things can be said about the fact that some person is *cowardly*,⁷³ the fact that some musical performance is *pedestrian*, etc. Far from treating combinations of facts and norms as problematic, there is a minor cottage industry in contemporary Anglo-American philosophy of exploring the facts or statuses that are partly factual and partly normative, and the concepts—the so-called *thick concepts*—which we deploy to think and talk about such facts and statuses. In fact, some philosophers have gone to some lengths to deny that the factual and normative components of the relevant facts are separable or detachable from each other, not that they cannot be combined.⁷⁴ If, as Alexander asserts, blending of norms and facts were impossible and incomprehensible, then much of our social world, including our moral and legal worlds, would be ill-founded and incomprehensible.

Alexander’s talk of “lexical order[ing]”⁷⁵ may indicate his willingness to countenance what could be described as “structured” blended facts—i.e., the facts in which the different constituents, both normative and non-normative, are cleanly ordered in particular ways. Perhaps the worry then is that the kind of blended facts that pluralist nonoriginalism envisions are a lot

72. *Id.* at 322.

73. BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 140–41 (1985).

74. See, e.g., *id.* at 132–55; John McDowell, *Non-Cognitivism and Rule-Following*, in WITTGENSTEIN: TO FOLLOW A RULE 141 (Steven H. Holtzman & Christopher M. Leich eds., 1981). For a proposal to construe our legal concepts as thick concepts, see David Enoch & Kevin Toh, *Legal as a Thick Concept*, in *PHILOSOPHICAL FOUNDATIONS OF THE NATURE OF LAW* 257 (Wil Waluchow & Stefan Sciaraffa eds., 2013).

75. Alexander, *supra* note 59.

“messier.” We are not sure that all of the blended facts that we discussed above have the kind of neatness that would be provided by a lexical ordering. But there are even clearer examples to undercut this particular strand of the worry. Think, for example, of what it takes for an organism to be *healthy*. To be healthy, an organism must have a number of different properties many of which are “contingently clustered,” to borrow the philosopher of science Richard Boyd’s terminology.⁷⁶ These properties are likely to include bodily integrity, resistance to diseases, a certain level of psychic well-being, disposition to longevity, ability to reproduce, etc. Such properties are contingently clustered in the sense that in at least certain conditions, they tend to co-occur in nature because the existence of some of the properties, through various causal mechanisms, reinforces the existence of other properties in the set. Boyd calls such clusters of properties “homeostatic cluster[s]” and argues that they are ubiquitous in nature.⁷⁷ Think of what it takes for a piece of land to be *arable*, what it takes for an animal to be *domesticated*, what it takes for a tune to be *catchy* or *hooky*, etc. All of these higher-order properties, we conjecture, could be conceived as homeostatic clusters in Boyd’s sense. At least some of the properties in any such cluster would be unnecessary for the existence of the cluster; and it would be unclear which collections of the relevant properties would be sufficient for the existence of the cluster. There appears then to be no problem with “messy” blended facts that do not consist of any neat necessary and sufficient constituent facts.

It may also be worth pointing out that the particular example that Alexander has repeatedly brought up—namely, the allegedly impossible and nonsensical blending of pi, green, and the Civil War—is not a problem. It is quite easy to think of such a blending. Imagine a Civil War monument that consists of a sculpture in the middle of a circular green field. Here, we would have a fact that unproblematically combines pi, green, and the Civil War. Such a Civil War monument may not be actual, but it certainly is metaphysically possible.⁷⁸

76. Richard N. Boyd, *How to Be a Moral Realist*, in *ESSAYS ON MORAL REALISM* 181, 197–98 (Geoffrey Sayre-McCord ed., 1988).

77. *Id.* at 196–97.

78. Sometimes, Alexander has extended his list and talked about the supposed impossibility of combining pi, green, the Civil War, and the categorical imperative. LARRY ALEXANDER & EMILY SHERWIN, *DEMISTIFYING LEGAL REASONING* 214 (2008). We can then imagine a monument of the above description that was built using labor practices that complied with the categorical imperative. With or without the categorical imperative, we anticipate that some readers will feel that these proposed counterexamples to Alexander’s slogan are a trick and that they do not really threaten the particular manner in which pi, green, and the Civil War—and the varied factual and normative considerations that pluralism invokes—are supposed to be uncombinable. That is certainly possible. We hope, then, that our proposed counterexamples will spur Alexander or like-minded critics to explicate the nature of alleged uncombinability more precisely.

C. *The Metaphysical Version—II*

Let us now turn to the philosophical themes that seem to be at least partly motivating or buttressing Alexander's line of thinking. We believe that we can further undermine that line by exposing what we suspect are confusions about these themes. Right after the passage we quoted at the beginning of the last subpart, Alexander says:

At least since Hume, philosophers have been wary of ontologically mixing the normative and the factual. And some have been skeptical about the existence of any normative ontological realm that is not completely reducible to the factual. For instance, John Mackie thought that moral realism requires "queer" metaphysical entities. Even if we can give a satisfactory non-reductionist account of moral ontology, however, are not the moral-factual blends that ontological practical reason refers to vastly more queer?⁷⁹

A lot is tangled in this short passage, but once untangled the philosophical issues that Alexander is referring to do not in any way question the status of blended facts the way that he appears to be thinking.

To begin, Alexander is quite right that J.L. Mackie, in the introductory chapter of his book *Ethics: Inventing Right and Wrong*, questioned the reality of moral facts that our moral discourse posits, and called them metaphysically "queer," because our cognition of them is supposed to have noncontingent influence on our wills and action.⁸⁰ Mackie averred that no other facts we posit in our explanations of the world are like that and that we should be extremely wary of positing such *sui generis* facts. There are three standard responses to Mackie's queerness argument in the philosophical literature: (i) some have argued that moral facts do not actually have the kind of noncontingent connection to our will and action, and that they are just natural facts quite like other kinds of facts that we posit in our natural and social sciences, which have only contingent connections to our will and action;⁸¹ (ii) some have agreed with Mackie that moral facts, if they existed, would be queer, but that our moral discourse is better conceived as a non-fact-positing discourse like our imperatival discourse;⁸² and (iii) some have argued that moral facts do have the kind of noncontingent sway on our wills

79. Alexander, *supra* note 71, at 322 (citations omitted).

80. See J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 15–49 (1977).

81. See generally, e.g., FRANK JACKSON, *FROM METAPHYSICS TO ETHICS* 113–38 (1998); Boyd, *supra* note 76; Peter Railton, *Moral Realism*, 95 *PHIL. REV.* 163 (1986); Nicholas L. Sturgeon, *Moral Explanations*, in *MORALITY, REASON AND TRUTH* 49 (David Copp & David Zimmerman eds., 1984).

82. See generally, e.g., A.J. AYER, *LANGUAGE, TRUTH AND LOGIC* 104–26 (Penguin Books 2001) (1936); R.M. HARE, *THE LANGUAGE OF MORALS* (1952); Charles Leslie Stevenson, *The Emotive Meaning of Ethical Terms*, 46 *MIND* 14 (1937). These are works by the authors that Alexander cites in his footnote 7, which is attached to the second of the sentences quoted in the text. Alexander, *supra* note 71, at 322 n.7.

and actions, but still that we should not refrain from positing them for they are nonoptional for our moral thinking and discourse, and further that there are plenty of other seemingly strange facts we posit in our thinking, such as sets in mathematical thinking, possible worlds in counterfactual thinking, and the myriad of astounders we posit in quantum mechanics.⁸³

An important point here is that even if moral facts were problematically queer, blended facts would be no more problematically queer than the simple unblended moral facts. What makes moral facts queer, according to Mackie, is that they have noncontingent influence on our wills and action. Blended facts are not different in this regard. The fact that a particular action would be cowardly—i.e., a blended fact—generates reasons for us to refrain from engaging in such an action. This noncontingent relation between a blended fact and the reasons we have to act in a particular way could be considered queer, but it is no queerer than the similar relation between, say, the fact that a particular action would be wrong—i.e., a simple, nonblended normative fact—and the fact that we ought not to engage in that action. A second, more important point is that we cannot merely stop with the conclusion that moral facts are queer and that we ought not to posit them in our moral thinking unless we cease moral thinking altogether. We need to opt for one of the standard options, or some other option that has so far been overlooked by philosophers, or at least think that an option, whichever it is, is satisfactory. Mackie himself, later in his book, flirts with the second “nonfactualist” or “noncognitivist” option.⁸⁴ Since Alexander does not refrain from moral thought and talk,⁸⁵ he supposedly thinks that one of the options, even if he himself has not identified it, is available. But if we opted for one of the options, then with that option, moral facts, or normative facts more generally, would not be problematically queer. Moreover, since, as we have observed already, blended facts are no queerer than simple normative facts, blended facts would not be problematically queer either. In sum, Mackie and similar-minded philosophers give no support to Alexander’s claim that blended facts are metaphysically problematic and that philosophers have been treating them as such. Arguably, Alexander would be entitled to appeal to Mackie and similar-minded philosophers to substantiate his claim if he himself refrained from normative thought and talk, but that is not the case.

Alexander also thinks that Hume can be a source for his metaphysical qualms about blended facts. We can think of two philosophical themes that Hume is often associated with that Alexander may be thinking of. The first is the so-called Hume’s law, according to which a normative conclusion

83. See generally, e.g., DAVID ENOCH, *TAKING MORALITY SERIOUSLY: A DEFENSE OF ROBUST REALISM* (2011); RUSS SHAFER-LANDAU, *MORAL REALISM: A DEFENCE* (2007); RALPH WEDGWOOD, *THE NATURE OF NORMATIVITY* (2007).

84. MACKIE, *supra* note 80, at 50–63.

85. See, e.g., Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006).

cannot be inferred from purely factual premises alone.⁸⁶ Notice that in a practical syllogism like the following:

- (6) One ought to maximize prospects of happiness.
 (7) Among the available options, ϕ -ing would maximize the prospect of happiness.

-
- (8) One ought to ϕ .

a normative conclusion (8) is inferred from a normative premise (6) and a descriptive or factual premise (7). Hume's law says that derivations of normative conclusions like (8) would be illicit if the set of premises contained only descriptive or factual premises. Whether this is right, or whether it should really be attributed to Hume, is immaterial. What should be noticed is that there is nothing here about the problematic nature of blended facts. In fact, here, we can think of (8) as representing a blended fact that consists of the normative fact represented by (6) and the descriptive fact represented by (7).

A second Humean theme that we can think of has to do with Hume's emphasis on the distinction between cognitive psychological attitudes like belief on the one hand and conative psychological attitudes like desire on the other.⁸⁷ In contemporary terminology, these two sets of attitudes are "modally" separable.⁸⁸ A belief that P differs from a desire that P in that the two react differently to an indication that not-P is the case. Upon learning that not-P, a person who has a belief that P would abandon that belief, whereas a person who has a desire that P would not. This and other such modal differences stem from the very natures of belief and of desire, or of cognitive and conative attitudes more generally. A belief that P would not be abandoned in reaction to a clear indication that not-P is not really a belief, or is at least a very defective belief. Now, according to noncognitivist conceptions of moral and normative discourses we have already mentioned, which some have traced to Hume,⁸⁹ our moral and normative judgments belong to the category of conative or noncognitive psychological attitudes. If we were to adopt this view and combine it with the Humean modal separability point, then it would follow that the kinds of psychological

86. See generally, e.g., ARTHUR N. PRIOR, *LOGIC AND THE BASIS OF ETHICS* (1949); Nicholas L. Sturgeon, *Moral Skepticism and Moral Naturalism in Hume's Treatise*, 27 *HUME STUD.* 3 (2001).

87. See generally, e.g., MICHAEL SMITH, *THE MORAL PROBLEM* 92–129 (1994).

88. *Id.* at 119. The senses of "modal" and its cognates used here are different from the senses that Bobbitt and his followers use when they speak of different modalities of constitutional interpretation. Or we believe that that is the case most of the time. For Bobbitt's discussion of what he means by "modality" see BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 27, at 11–22.

89. See SIMON BLACKBURN, *ESSAYS IN QUASI-REALISM* 5 (1993); RICHARD B. BRANDT, *ETHICAL THEORY* 205 (1959); J.L. MACKIE, *HUME'S MORAL THEORY* 52 (1980).

attitudes that moral and normative judgments are would be quite different, viz., modally separable, from the kinds of psychological attitudes that purely descriptive or factual judgments are. Perhaps what Alexander has in mind is this modal separability point combined with the noncognitivist conception of normative judgments. But once again, these philosophical themes do not help Alexander's case against blended facts. If noncognitivism is right, then in making normative judgments, we are not positing any facts but expressing our conative or noncognitive attitudes. And in making what could be called "blended judgments"—i.e., judgments that deploy thick concepts like "weed," "courageous," etc.—we are describing some prosaic facts—e.g., that thing is a plant, that person fears yet confronts danger—and simultaneously expressing some conative attitudes—e.g., boo to that thing growing in the garden, hurray to that person. There is nothing in Hume or Humean thinking that makes such combinations of cognitive and conative attitudes, or any verbal manifestations of them, problematic or illicit. And if constitutional interpretation is a type of judgment that is partly factual and partly normative, we have the option of following the just-outlined Humean-noncognitivist line of analyzing them as combinations of cognitive and conative psychological attitudes.⁹⁰

Simply put, there is no support in any serious philosophical themes we can think of for Alexander's metaphysical objection to the blending of norms and facts. And this further undercuts his claim that there is a metaphysical problem with blended facts.⁹¹

90. For an exploration of the possibility that legal concepts are thick concepts and that legal judgments are blended judgments deploying such concepts, but without the noncognitivism, see Enoch & Toh, *supra* note 74.

91. In his reaction to an initial draft of this Article, Alexander objected to our use of weeds and cowardice as counterexamples to his position. According to him, weeds are plants that share certain biological properties and which we happen to share in our negative evaluations. They do not really involve blending of facts and norms, in his opinion. Alexander seems to think that a similar diagnosis of cowardice is available. See E-mail from Larry Alexander, Warren Distinguished Professor of Law, Univ. of San Diego Sch. of Law, to authors (Feb. 7, 2013, 6:28 PM) (on file with authors). But this reaction displays a misunderstanding of the kind of metanormative theorizing that is called for. There are certain facts that look like they have normative properties of either blended or pure kinds. Such facts count as data, and philosophers have come up with some standard strategies—the three that we have enumerated in the text—to explain such data. See *supra* notes 81–83 and accompanying text. One of these is the noncognitivist strategy—(ii) in our list. Alexander is simply taking it for granted that that strategy is the one to go with to explain the "weediness" of certain plants and, presumably also, for the cowardliness of some people. Alexander presents no argument for that assumption. Moreover, if this noncognitivist strategy is the way to go for weeds and cowards, why does it not work for other (apparent) blended facts? Why in particular would it not work for apparently blended constitutional facts? We could construe our judgments attributing such constitutional facts as cognitions of certain prosaic, empirical facts and our normative attitudes, of both moral and prudential kinds, of approving them. Why would that not work? Again, Alexander offers no argument. Alexander is simply assuming that one metanormative strategy is the way to go for some of the data, and that no strategy works for some other parts of data. But as far as we are aware, he has offered no argument for these assumptions and has offered no hint as to how to carve up the data.

IV. The Legal Version of the Combinability Problem

There is no general epistemological problem about making judgments based on multiple sets or sorts of considerations. Nor is there a general metaphysical problem about the possibility of combining facts and norms, or facts of different sorts. Construed either of those two ways, the combinability problem is a pseudo-problem that gains traction only by way of confusions and misunderstandings. Is there then anything to the worry that legal and constitutional theorists like Alexander and Fallon have expressed about combining multiple kinds of considerations, including some normative ones, in constitutional interpretation?

A. *Found or Made?*

We are not entirely sure. But we believe that the following version of the problem may amount to the most compelling version of the combinability problem and is hence worth considering. There is a possibility that many constitutional theorists, both originalists and even nonoriginalists, may be thinking (perhaps only implicitly) that any pluralist conception of constitutional interpretation implies or presupposes that there is no domain of preexisting legal facts that constitutional interpreters are supposed to be discovering or delineating. That seems to be an impression given by the following characterization of constitutional interpretation by Justice Breyer, which we quoted once before:

In constitutional matters, too, language, history, purposes, and consequences all constrain the judge in that they separate better from worse answers even for the most open questions. . . .

. . . .

This may sound complicated, but consider how most practical arguments proceed: Should we invite your cousin to the wedding? Should we relocate the plant, when and where? As is true of any practical argument, including moral arguments, rarely does a single theory provide a determinative answer.⁹²

It could seem quite unlikely that there is a *fact of the matter* as to whether a cousin should be invited to one's wedding, where a plant should be located, and—to continue with the kind of questions that Breyer seems to have in mind—where one should take one's vacation, which commuting route to take, which television program to watch, etc. The world is populated with many different kinds of facts, the thinking goes, but the fact that a cousin should be invited to one's wedding, or the fact that she should not be, is not one of them.⁹³ And if there is no fact of the matter as to what the right

92. BREYER, *supra* note 2, at 84–85; *see supra* text accompanying note 32.

93. Some readers will think this is too quick. Presumably there are cases in which there is a fact about whether a cousin should be invited to one's wedding, including some in which the

answers to such questions are, then it makes sense to think, as Breyer suggests, that there are only better and worse decisions to make, based on extrinsic considerations, to address such questions.⁹⁴ No decision about wedding invitations can really be right or wrong in the way that, for example, a scientific or mathematical or moral judgment can be right or wrong in delineating some domain of preexisting facts. Instead, a decision can only be better or worse. And discriminations between better and worse answers can proceed in light of other, “extraneous” facts or considerations that one can take into account in making up one’s mind. And if constitutional interpretation is really like decisions about wedding invitations, as Breyer suggests, then the implications seem to be that there are no preexisting constitutional facts and that there can only be better and worse answers rather than right and wrong answers in constitutional interpretation.⁹⁵

considerations that determine the answer to that question point in different directions and are made of different stuff. That is, in some cases when we struggle over an invitation decision and invoke disparate considerations such as those of reciprocity and forgiveness, cost, treating likes alike, respecting grievances and sensibilities of other family members, and so on, we believe—and believe correctly—that the struggle is to get the fact about what we are to do right, and not merely to make up our minds partly based on considerations that do not fully determine the answer. In such cases (however relatively frequent or infrequent they may be), the plural considerations determine a fact of the matter in essentially the same way that the plural ultimate legal norms that we posited earlier determine legally correct answers to non-ultimate legal questions.

94. Relevant here is the distinction between realism and voluntarism that we took note of in note 33 above.

95. What Daniel Farber, one of the proponents of the practical-reasoning approach to legal interpretation in general, and one of the targets of Alexander’s criticisms, says about practical reason lends some credibility to this diagnosis. Farber says:

Advocates of practical reason . . . are most united by what they reject—the primary (or even exclusive) reliance on deduction as a method of analysis. At the level of legal theory, practical reason means a rejection of foundationalism, the view that normative conclusions can be deduced from a single unifying value or principle. At the level of judicial practice, practical reason rejects legal formalism, the view that the proper decision in a case can be deduced from a preexisting set of rules. Both of these rejected techniques rely heavily on deductive logic (i.e., the syllogism) as the primary method of analysis. Both endorse a procedure in which a court first explicitly identifies the applicable abstract rule or principle for a class of situations and then determines whether a particular situation belongs to the class.

Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 539 (1992) (footnotes omitted). The most salient feature of this characterization of the practical-reasoning approach to legal interpretation is the rejection of deductive reasoning. But this is unfortunate and difficult to take seriously. After all, not all of theoretical reasoning is deductive, and deduction is a crucial component of practical, nontheoretical reasoning. When constitutional theorists like Barnett insist that the kind of reasoning involved in figuring out the meanings of the constitutional inscriptions is empirical reasoning, they are rejecting the practical reasoning approach and also not endorsing the view that constitutional interpretation consists solely of deductive reasoning. Barnett, *supra* note 14, at 66 (“It cannot be overstressed that the activity of determining semantic meaning at the time of enactment . . . is *empirical*, not normative.”). For no empirical scientist, or anyone else, conceives empirical reasoning as purely deductive reasoning. Once we overlook the misguided emphasis on the rejection of deductivism, what we notice is that the proponents of the practical reasoning approach to legal interpretation are supposed to reject the view that legal interpretation has to do with delineating and deploying

The critics of pluralistic nonoriginalism may then be assuming that the appeals to multiple kinds of considerations and factors are indicative of nonoriginalists' assumption that there is no domain of preexisting constitutional facts that the acts of constitutional interpretation are supposed to discover and delineate. And the critics' rejection of pluralism or combinability may be their rejection of that supposed assumption of the nonexistence of preexisting constitutional facts. Originalists' objection is not merely about judges taking into account many kinds of considerations in their acts of constitutional adjudication. It also cannot be charitably interpreted as an objection about judges relying on multiple sets of evidence in their attempts to gain epistemic access to the constitutional law. And it cannot be charitably interpreted as one about the possibility or actuality of there being facts that are constituted by facts and norms, or by facts of different varieties. Those were the lessons of our discussion in the preceding Part. Perhaps then the most charitable interpretation is that what Alexander, Fallon, and like-minded legal theorists are objecting to is the view, supposedly implied by pluralism, that there is no domain of preexisting constitutional facts that acts of constitutional interpretation are meant to discern.

This fourth version of the combinability problem is not a moral-political, epistemological, or metaphysical problem, but is instead a *legal* problem. If it could be made out that the legal, and more specifically constitutional, facts that the acts of constitutional interpretation are meant to discover and delineate consist of the multiplicity of considerations or facts that pluralistic nonoriginalists treat as legitimate inputs into constitutional interpretation, then this fourth version of the objection to pluralistic nonoriginalism would be effectively disarmed. Recall the originalist and nonoriginalist conceptions of the constitutional law from Part I:

- (OL) The Constitution or the constitutional law consists solely of the meanings of the inscriptions in the constitutional text.
- (NL) The Constitution or the constitutional law consists of multiple kinds of facts or considerations including: (i) the meanings of the inscriptions in the constitutional text; (ii) the Framers' and ratifiers' shared intentions; (iii) judicial precedents; (iv) extrajudicial societal practices; (v) moral values and norms; and (vi) the norm of prudence.

In effect, the fourth version of the combinability problem that we are considering is that the idea that the Constitution or the constitutional law

preexisting legal standards. Instead, it seems, legal interpretation is supposed to be, at least in part, a creative endeavor.

consists of the different sets of considerations or facts of the sort that (NL) refers to makes little *legal* sense.

As far as we can see, the picture of a pluralistic nonoriginalist conception of constitutional law that we presented in Part II goes a long way toward blunting this worry. Recall the fourth and last observation we made in subpart I(A) above. We pointed out that any kind of fact—semantic, psychological, historical, moral, prudential, etc.—could be legally relevant if they were made so by fundamental legal facts. For example, the fact that a particular regime of criminal punishment calls for cruel and unusual punishment is a (partly) moral fact, and it is made legally relevant by the fundamental legal fact of the American legal system that inflictions of cruel and unusual punishments are constitutionally prohibited. It then makes perfectly good sense in scrutinizing a regime of criminal punishment to delve into its moral properties. Analogously, the fundamental legal facts that partly make up our Constitution may make relevant the various kinds of facts that (NL) enumerates. And if this last possibility can be made out, then the fourth version of the combinability problem would be completely disarmed. Surely, there would be no legal problem in combining the different kinds of facts that (NL) enumerates if the fundamental legal facts themselves call for combining them. In other words, if the ultimate constitutional facts consist of anything like norms (a)–(g) that we outlined in Part II, subpart A, then there should be no legal problem with seeing the constitutional law, from the penultimate constitutional laws on down, as consisting of many different kinds of facts, including some normative considerations.

Let us quickly sum up where we are. According to the fourth and last version of the combinability problem, if there were multiple sets of determinants of the constitutional law, then judges could not be conceived as finding preexisting law, but instead must be conceived as making new law or acting in extralegal ways. But if the Constitution or the constitutional law consisted of a set of fundamental legal facts or norms which make legally relevant a number of different kinds of facts—semantic, psychological, historical, sociological, moral, prudential, etc.—then judges and others could see the activity of constitutional interpretation that takes into account these myriad kinds of nonlegal facts as attempts to discover and delineate preexisting legal facts rather than as attempts to create new legal facts or act extralegally.⁹⁶

96. Our burden is to explain how preexisting legal facts can be determined by pluralistic ultimate legal facts even in cases where those ultimate legal facts point in different directions. We do not mean to deny that there are also cases, presumably including some nontrivial percentage of the constitutional disputes that reach the U.S. Supreme Court, in which the ultimate legal norms bear indeterminately on the legal question that is presented, thus requiring judges either simply to will one of the non-defeated legal resolutions or to decide on extralegal grounds. We take no position here on the relative frequency of these situations; we aim only to establish that there is no philosophical or legal problem with the fundamental pluralistic nonoriginalist tenet that pluralistic considerations can “combine” to constitute determinate non-ultimate legal facts. In effect, the

Now, this is a conditional conclusion. A fully thorough case for a pluralistic nonoriginalism would substantiate the *antecedent* of the conditional statement at the end of the preceding paragraph—that is, show that the Constitution or the constitutional law actually consists of a set of fundamental legal facts or norms that make legally relevant a number of different kinds of facts that (NL) or a variant enumerates—and thereby entitle us to detach the consequent. Doing so is clearly beyond the scope of a stand-alone paper such as this. In Part II, we merely presented one possible way in which the antecedent could be true, for illustrative purposes. What we will now provide in the balance of this Article is a thumbnail sketch of how nonoriginalists can go about substantiating such an antecedent—in other words, the epistemological means that can be deployed to vindicate something like the view that we sketched in Part II.

B. Wanted: A Non-Metaphysical Vindication

One possible avenue that pluralistic nonoriginalists can take is to argue for some set of norms as the ultimate constitutional norms by relying on or exploiting the orthodox understanding of Hart's theory of the nature of law that we discussed in subpart II(C) above. According to that understanding, the ultimate constitutional norms of our legal system are the ones that are commonly accepted by the officials of our system. We have already thrown a lot of cold water on this way of proceeding.

We are also skeptical of the broad family of approaches, of which this orthodox Hartian approach is a member, that try to vindicate a particular legal thesis about what the constitutional law consists of. Each approach belonging to this family appeals to the metaphysical nature of something, or some noncontingent features of it, to vindicate a particular legal thesis. We have just referred to an approach that appeals to the nature of law, or the nature of legal systems, to vindicate a pluralist nonoriginalist conception of the most fundamental constitutional facts. Actually, nonoriginalists are not the only ones who have opted for approaches belonging to this family. As noted earlier, Larry Solum has appealed to the very same Hartian conception of the nature of law, or of legal systems, to argue for an originalist conception of the fundamental constitutional law.⁹⁷ And many originalists have appealed to the nature of other things—communication, written texts, interpretation, authority, etc.—to argue for their originalist legal theses. As

constitutional picture is much like the case of wedding invitations discussed earlier. *See supra* note 93 and accompanying text. Sometimes plural ultimate norms or facts determine non-ultimate facts within a domain, and sometimes they underdetermine non-ultimate facts; the relative frequencies of the actual situations cannot be determined a priori.

97. *See supra* note 46.

one of us has argued at length elsewhere, the existing attempts have been less than successful.⁹⁸

These arguments from the metaphysical nature of things for legal theses about what the constitutional law consists of bear some resemblance to the tradition in moral philosophy of arguing from the metaphysical nature of various things for some ultimate moral principles. For example, Aristotle infers a particular conception of *eudaimonia*, or of human flourishing—actually, many would say, two distinct conceptions—from his conception of the nature of man,⁹⁹ and Kant argues for the categorical imperative from his conception of practical reason, or that of rational agency.¹⁰⁰ More specifically, there are arguments for the fundamental principles of particular kinds of practices—e.g., punishment, promise-keeping—by appeals to the nature of those practices.¹⁰¹

The approach that John Rawls has taken in *A Theory of Justice* and elsewhere for his two principles of justice exemplifies an alternative tradition in moral philosophy. Instead of appealing to the nature of something to vindicate these two principles of justice, which are meant to be the most fundamental principles of political justice, Rawls argues that, among the competing conceptions of political justice, those two principles mesh best with our *considered judgments*, or the judgments of political justice in which we have the highest degree of confidence.¹⁰² The kind of vindication we ought to seek, Rawls is opining, is not something that we can extract from the nature of anything, but instead something we get by reaching, through reflective processes, which involve needed adjustments at both ends, a point where the fundamental moral principles we accept and our considered moral judgments form a conflict-free and mutually supporting set. This is the famed method of reflective equilibrium. The legal analogue of this mode of argumentation is what we believe is the way to go in our attempts to establish

98. Berman, *supra* note 18.

99. See 2 ARISTOTLE, *Nicomachean Ethics*, in THE COMPLETE WORKS OF ARISTOTLE I.7.1-097a15–1098b8, X.7.1177a11–1178a8, at 1734–36, 1860–62 (Bollingen Series No. 71, Jonathan Barnes ed., 1984) (Revised Oxford Translation); see also JOHN M. COOPER, REASON AND HUMAN GOOD IN ARISTOTLE 1–143 (1986); Thomas Nagel, *Aristotle on Eudaimonia*, in ESSAYS ON ARISTOTLE'S ETHICS 7 (Amélie Oksenberg Rorty ed., 1980).

100. See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed., 1998); see also J. DAVID VELLEMAN, *A Brief Introduction to Kantian Ethics*, in SELF TO SELF 16 (2006).

101. See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) [hereinafter Rawls, *Two Concepts*], reprinted in JOHN RAWLS: COLLECTED PAPERS 20 (Samuel Freeman ed., 1999). As we are about to point out in the text, Rawls's work in general exemplifies an approach to doing moral philosophy that is an alternative to the one that his *Two Concepts* presents.

102. See JOHN RAWLS, A THEORY OF JUSTICE (1971); see also John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980), reprinted in JOHN RAWLS: COLLECTED PAPERS, *supra* note 101, at 303; John Rawls, *The Independence of Moral Theory*, PROC. & ADDRESSES OF THE AM. PHIL. ASS'N, Nov. 1975, at 5, reprinted in JOHN RAWLS: COLLECTED PAPERS, *supra* note 101, at 286; T.M. Scanlon, *Rawls on Justification*, in THE CAMBRIDGE COMPANION TO RAWLS 139 (Samuel Freeman ed., 2003).

some set of norms as the ultimate constitutional norms of our legal system and thereby vindicate the crucial antecedent of the conditional conclusion we stated in the preceding subpart.

Some have argued that a vindication or confirmation of our fundamental moral principles must rely on something more solid and more independent of our moral views than our considered moral judgments. In particular, R.M. Hare, one of the other great moral philosophers of the twentieth century, argued that the fundamental moral principle—in his view, the principle of act-utilitarianism—can and should be inferred from the nature of our moral discourse, or, more particularly, from the meanings of our moral terms, and that Rawls’s approach of reflective equilibrium seeks to vindicate the fundamental principles of morality by reliance on too unstable or ephemeral a basis.¹⁰³ A number of moral philosophers, however, have in turn responded to Hare that in order to argue for some ultimate principle of morality, we must deploy *substantive* moral arguments and not merely conceptual or linguistic intuitions; and further that Hare himself in effect reads much of substantive and controversial moral positions into the meanings of moral terms.¹⁰⁴ Even if a convincing case could be made that a particular ultimate principle of morality is required by the meanings of moral terms, we can always ask: first, why we should not think that our moral language has built into it moral mistakes, just as our talk of “sunrise” and “sunset” incorporates a defective cosmology; and second, relatedly, why we should not proceed to talk slightly differently to dispense with the unwanted implication. These are lessons that are generalizable to any attempts to vindicate some fundamental principle by appealing to the nature of something.¹⁰⁵

In any case, at the very least, the approach provided by reflective equilibrium presents a genuine alternative to the approach of trying to vindicate an ultimate principle or a set of them by appealing to the nature of something. And it is not only in moral philosophy that this alternative approach is available. Nelson Goodman’s deployment of reflective equilibrium to choose among competing conceptions of the rules of

103. See generally R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* (1981); R.M. Hare, *Foundationalism and Coherentism in Ethics*, in *MORAL KNOWLEDGE?* 190 (Walter Sinnott-Armstrong & Mark Timmons eds., 1996).

104. See generally, e.g., Thomas Nagel, *The Foundations of Impartiality*, in *HARE AND CRITICS: ESSAYS ON MORAL THINKING* 101 (Douglas Seanor & N. Fotion eds., 1988); Bernard Williams, *The Structure of Hare’s Theory*, in *HARE AND CRITICS*, *supra*, at 185. There is also the criticism that Hare is not actually able to derive act-utilitarianism from the meanings of moral terms. See generally Allan Gibbard, *Hare’s Analysis of ‘Ought’ and Its Implications*, in *HARE AND CRITICS*, *supra*, at 57.

105. For example, even if, as Rawls early on argued, the nature of punishment requires that only the guilty get punished, it is open for us to wonder whether we should opt for a slightly different practice—call it, as Rawls does, “telishment,” Rawls, *Two Concepts*, *supra* note 101, at 27—that would allow infliction of some penalties on innocent people in some exceptional circumstances.

deductive and inductive inference was nearly contemporaneous with Rawls's first introduction of the method.¹⁰⁶ And we do not see any reason to think that this approach is unavailable or unsuitable for vindicating a nonoriginalist legal thesis, a version of (NL), about what the constitutional law consists of. In fact, in his many seminal writings, Dworkin has been a practitioner and an advocate of the method of reflective equilibrium. Eschewing what he calls "Archimedean epistemology," Dworkin has urged what he calls "integrated" epistemology, which essentially is a reflective-equilibrium epistemology.¹⁰⁷ He has argued that the way to argue for a first-order moral position is to show how it fits into a network of first-order moral positions that are plausible.¹⁰⁸ And, more specifically in legal philosophy, he has long championed a particular form of coherence, which he calls "integrity," as the chief guiding ideal of first-order legal reasoning.¹⁰⁹

But a note of caution is in order here to prevent any confusion of our position with Dworkin's. What we believe that judges should be striving for is a reflective equilibrium between a set of ultimate legal or constitutional norms on the one hand and our considered constitutional or legal judgments on the other.¹¹⁰ It follows that we should not be looking for a set of *moral* principles that would mesh with or justify our considered constitutional or legal judgments. This is the move that Dworkin makes in his deployment of the method of reflective equilibrium in his legal and constitutional theorizing, and we believe that it leads him astray. A telltale sign that this is a mistake is that Dworkin has much difficulty accounting for the possibility of legal systems, the laws of which are fundamentally unjust and hence not morally justifiable.¹¹¹ We do not think that the nature of law, or anything else, imposes a requirement that the ultimate constitutional norms are those that can justify the norms of our legal system or our legal practices. The actual

106. Compare NELSON GOODMAN, *FACT, FICTION, AND FORECAST* 62–66 (4th ed. 1983) (passages from lectures originally delivered in 1953), with John Rawls, *Outline of a Decision Procedure for Ethics*, 60 *PHIL. REV.* 177 (1951), reprinted in *COLLECTED PAPERS*, *supra* note 101, at 1.

107. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 82–86 (2011) [hereinafter DWORKIN, *HEDGEHOGS*]; Ronald Dworkin, *Hart's Postscript and the Character of Political Philosophy*, 24 *OXFORD J. LEGAL STUD.* 1 (2004), reprinted in *JUSTICE IN ROBES* 140, 160–61 (2006); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *PHIL. & PUB. AFF.* 87, 118–19, 128 (1996) [hereinafter Dworkin, *Objectivity and Truth*].

108. See DWORKIN, *HEDGEHOGS*, *supra* note 107, at 191–324.

109. See generally DWORKIN, *LAW'S EMPIRE*, *supra* note 37. Cf. Dworkin, *Hard Cases*, *supra* note 37.

110. Similarly, Goodman observes: "An inductive inference, . . . is justified by conformity to general rules, and a general rule by conformity to accepted inductive inferences." GOODMAN, *supra* note 106, at 64. What Goodman is calling "accepted inductive inferences" are what we, following Rawls's terminology, would call "considered inductive judgments." See Rawls, *supra* note 106, at 181–83.

111. Hart lodges this objection to Dworkin's position in H.L.A. Hart, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM* 127, 150 (1982). Dworkin responds in DWORKIN, *LAW'S EMPIRE*, *supra* note 37, at 111–13; H.L.A. Hart, *Comment*, in *ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 35, 41 (Ruth Gavison ed., 1987) [hereinafter *ISSUES*]; Ronald Dworkin, *Legal Theory and the Problem of Sense*, in *ISSUES*, *supra*, at 9.

ultimate constitutional norms of the American legal system may be capable of providing such a justification. But that would be a contingently fortunate feature of our legal system.¹¹²

To repeat what we said at the end of the last subpart, if the Constitution or the constitutional law consisted of a set of fundamental legal facts or norms which make legally relevant a number of different kinds of facts—semantic, psychological, historical, sociological, moral, prudential, etc.—then judges and others could see the activity of constitutional interpretation that takes into account these myriad kinds of nonlegal facts as attempts to discover and delineate preexisting legal facts rather than as exercises in creating new legal facts or acting extralegally. What we have argued in this subpart is that the way to substantiate the antecedent of that conditional conclusion is to deploy the epistemological method of reflective equilibrium. Obviously, we are not in a position to carry out the process of reflective equilibrium and thereby spell out the very long and complex statement of the most fundamental constitutional facts of the American legal system. But here, we are not in any worse position than that of originalists. Because originalists have not been able to provide a vindication of (OL), or some version of it, by appealing to the nature of something, they too are in a position of having to try to vindicate it by some alternative means, and the method of reflective equilibrium is the obvious natural way to go. This means that (OL) and (NL) are in quite analogous positions, and that both originalists and nonoriginalists will have to deploy arguments to show that some legal thesis meshes better with our considered constitutional judgments, and more generally with our considered legal judgments, than any competing legal thesis. And without going through the hard and long slog of reflective equilibrium to show that there is no version of (NL) that meshes better with our considered constitutional judgments than any version of (OL), originalists like Alexander are not in a good position to claim that nonoriginalism suffers from any version of the combinability problem.

Lest what we are proposing here sound excessively theoretical or philosophical, or both, let us point out that the epistemological method of

112. An important difference between Dworkin's and our positions may be worth mentioning. Although we, like Dworkin, believe that the ultimate determinants of our constitutional law are the ultimate constitutional norms (and the nonlegal facts that those norms make legally relevant), and not some metaphysical facts, and hence that our first-order constitutional or legal thinking does not bottom out with some metaphysical theorizing, we, unlike Dworkin, think that our first-order constitutional and legal conclusions must mesh or hang together with our conclusions in our metaphysics, epistemology, semantics, psychology, etc. Dworkin's writings from the mid-1990s and on have vigorously argued that first-order normative thinking can proceed without any regard for our conclusions in any of the meta-normative disciplines. See DWORKIN, HEDGEHOGS, *supra* note 107; Dworkin, *Objectivity and Truth*, *supra* note 107. We believe his position here is exaggerated and unwarranted, and very much against the regulative epistemic ideal of wide reflective equilibrium that Rawls has endorsed. On this point, see Toh, *Jurisprudential Theories*, *supra* note 42.

reflective equilibrium is the method of reasoning that judges and lawyers instinctively and commonly resort to in their legal deliberations. To give just an example, think of Justice Holmes's famous dissenting opinion in *Lochner v. New York*,¹¹³ in which he said:

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.¹¹⁴

Here, Holmes is employing the method of reflective equilibrium, and he is asserting the view that our legal system's ultimate constitutional norms may include morally incorrect norms.¹¹⁵ Justice Scalia has similarly deployed the method of reflective equilibrium in a series of significant recent dissents. For example, in the 2005 case *Roper v. Simmons*,¹¹⁶ the Supreme Court appealed to a prevailing consensus among advanced foreign countries to disallow an imposition of a death penalty on a minor.¹¹⁷ Such appeals to legal consensus in foreign countries also occurred in a number of other cases as well.¹¹⁸ In *Roper* and elsewhere, Scalia has objected to the Court's seemingly inconsistent and opportunistic appeals to foreign laws.¹¹⁹ Scalia was pointing out that a fundamental constitutional norm that Justice Kennedy's majority opinion posited and appealed to—which Scalia characterized as “the basic premise . . . that American law should conform to the laws of the rest of the world”¹²⁰—does not mesh with the reasoning of many other Supreme Court cases that are unimpeachable.¹²¹ He was in effect arguing that the basic premise of the Court's reasoning does not pass the test of reflective equilibrium. Scalia has similarly objected to the seemingly inconsistent and opportunistic appeals by the Court's majorities to the doctrine of

113. 198 U.S. 45 (1905).

114. *Id.* at 75 (Holmes, J., dissenting).

115. We can discount Holmes's excesses in advocating the prediction and command theories of law in his less estimable, jurisprudentially self-conscious hours.

116. 543 U.S. 551 (2005).

117. *Id.* at 575–78.

118. *E.g.*, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 830–31 (1988).

119. *E.g.*, *Roper*, 543 U.S. at 624–28 (Scalia, J., dissenting).

120. *Id.* at 624.

121. *See id.* at 624–28.

precedent,¹²² and to the developing moral consensus in our society on various issues (or “emerging awareness” as Justice Kennedy put it in *Lawrence v. Texas*¹²³) in order to identify and delineate the contours of unenumerated rights in the Fourteenth Amendment.¹²⁴ We find Scalia’s complaints and more generally his call for coherence and consistency in the Court’s reasoning quite compelling. The Justices of the Supreme Court too often appeal to some fundamental constitutional norms without sufficiently minding how those norms mesh with our considered constitutional judgments, and their appeals consequently all too often take on the appearance of being ad hoc and opportunistic. And the same complaint could be made about Scalia’s own proposal, made in *Michael H. v. Gerald D.*,¹²⁵ about the level of generality at which the scope of constitutionally recognized liberties should be defined.¹²⁶ What more conscientious and able judges should do is formulate the versions of the fundamental constitutional norms that are more disciplined by and consistent with the plethora of constitutional judgments that are considered unproblematic and unimpeachable. Unlike Scalia, we happen to believe that the doctrine of precedent, something close to what could be called “the doctrine of *jus gentium*” (which calls for some deference to prevailing consensus in foreign law),¹²⁷ and a norm that calls for updating the content of the Fourteenth Amendment in light of developing societal mores are likely to be constituents of our fundamental constitutional law. But these surmises need to be subjected to the tests of reflective equilibrium. And in any case, judges should be appealing to the versions of these fundamental norms that have good prospects of meshing well with our considered constitutional judgments.

Far from being exotic or excessively theoretical, the epistemological method of reflective equilibrium is very much practiced by judges in their daily work, and its demands and constraints can be observed in their interactions with each other, including Scalia’s criticisms of the majority positions in a number of important recent Supreme Court cases. It is this very method that we are proposing as the way to determine whether our Constitution or constitutional law consists merely of the meanings of the

122. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 993–94 (1992) (Scalia, J., concurring in part and dissenting in part) (criticizing the majority’s version of stare decisis as a “keep-what-you-want-and-throw-away-the-rest version”).

123. 539 U.S. 558, 572 (2003).

124. See *Roper*, 543 U.S. at 616–18 (Scalia, J., dissenting) (questioning the Court’s methods in identifying and adopting what they deem to be a moral consensus).

125. 491 U.S. 110 (1989).

126. *Id.* at 127 n.6.

127. See JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 28 (2012).

inscriptions in the constitutional text, or also of other facts that pluralistic nonoriginalist views of the Constitution enumerate.

Conclusion

The bottom line is that whether an originalist or nonoriginalist view of what our Constitution or constitutional law consists of is better than others depends on the fundamental constitutional facts of our legal system. And there are no a priori grounds for thinking that a pluralistic nonoriginalist conception of those fundamental constitutional facts is a nonstarter, or incomprehensible as Alexander has declared. As the reader will have gathered from what we have written above, our own bet is with pluralistic nonoriginalism. But our central point has been that there is no shortcut to figuring out which view is better, and that the only way of arbitrating between the two is the long and hard slog of reflective equilibrium. Pluralistic nonoriginalism is in good epistemological and metaphysical shape, contrary to what some legal theorists have argued. The only remaining question is whether it is legally accurate.