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

TABLE OF CONTENTS

INTRODUCTION ............................................................................. 354
I. COMPLEX DOCTRINE, SIMPLE NORMS ...................................... 361
A. Standard Dormancy Doctrines .......................................... 362
B. Immigration Power Doctrine ............................................. 367
C. Obstacle Preemption ...................................................... 369
II. CONCLUSION: DOCTRINE, SIMPLER NORMS ................. 396

INTRODUCTION

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

Constitutional theory is primarily normative. Of so I will argue.

diminished policy engagement in disputes about even our most basic constitutional principles. Of so I will argue.

Constitutional theory accordingly lines up well with public views that constitutional issues are grist for deep disagreements about even the most basic constitutional questions.

what gets lost in all this arguing about what should be done or how things should change is the basic truth that, despite all our disagreements, we have a stable and durable constitutional system.

We need an account of our constitutionalism that reconciles the existence of deep and wide-ranging division over basic political and moral matters that bear on constitutional decision-making with our system's undeniable stability. I explore the conceptual foundations for such an account here. Broadly formulated, my main claim is that, despite the overwhelming emphasis of scholarly and public debates on constitutional controversies and disagreements, there is also evidence of broad and durable consensus among legal officials about important structural constitutional norms that transcend differences of party, interpretive discipline, and views on political morality. And the existence of broad consensus supports my main claim in that, despite the overwhelming emphasis on schol- larly and public debate, we have a stable and durable constitutional system.

The new emphasis I will suggest for constitutional theory advances our substantive understanding of constitutional law and provides a realistic picture of the system as it stands. Highlighting matters of constitutional consensus, in what sometimes seem like a deeply divided polity engaged in disputes about even our most basic constitutional organizing principles, may be worth em- phasizing.

INTRODUCTION

1. Fundamental Principles and Theoretical Foundations

A. Legal Positivism

B. Theoretical Controversies

C. Constitution-making

II. Consensus Norms, Legal Positivism, and Interpretive Controversy

A. Legal Positivism

B. Interpretive Controversy

C. Constitution-making

III. Evaluating Constitutional Theory

A. Legal Positivism

B. Theoretical Controversies

C. Constitution-making

The research program accordingly lines up well with public views that constitutional issues are grist for deep disagreements about even the most basic constitutional questions. Of so I will argue.
Perhaps most important among the oversights resulting from constitutional scholarship's overwhelmingly normative and interpretive focus is that, so far, we have not thoroughly grappled with the following question: How can we best identify the constitutional norms we actually have, given the practices we observe and regardless of the competing views about what our norms or practices should be? I do not mean that we cannot write a treatise synthesizing from judicial decisions what the constitutional law is; I mean that we still fundamentally disagree about the basic propositions of constitutional meaning that explain and justify the rules applied in those judicial decisions.

One manifestation of this division is the debate between competing theories of constitutional interpretation, which increasingly dominates constitutional scholarship.

See, e.g., Herbert L. McCloskey, Consensus and Ideology in American Politics, 58 AM. POL. SCI. REV. 361, 371–82 (1964) (concluding from survey results that "a democratic society can survive despite widespread popular misunderstanding and disagreement about basic democratic and constitutional values," and calling for exploration of how stability through such disagreement is possible).

debate is important, but it may be insoluble and as it becomes more contentious it increasingly stalls progress.

One cannot engage an issue of constitutional law or theory without copping to interpretive priors; and any progress on such an issue is bracketed by the specter of counterarguments from competing interpretive theories. Interpretative disagreement is if anything magnified in the structural context—federalism and separation-of-powers doctrines are conventionally explained by a series of contestable interpretive inferences from scattered constitutional provisions and organizational characteristics of the text; unsurprisingly, this generates significant interpretive disagreement in structural cases. We need a way around this controversy—not to ignore it, but to make progress on other fronts possible. We should be able to identify those constitutional propositions on which we agree regardless of our interpretive views. This Article suggests a way to do that.

We should accordingly want to attend to the positive constitutional theory question—what norms do we have?—and showing that there is value in doing so, this Article contributes to a perennial and fundamental debate about the kinds of theories that are worth pursuing—a debate that... extends far beyond Dworkin and Posner and has a venerable and ancient history that runs through Plato and Thucydides, Kant and Nietzsche, Hegel and Marx, as well as Rawls and Geuss... a dispute between Moralists and Realists, between those whose starting point is a theory of how things (morally) ought to be versus those who begin with a theory of how things really are.

I argue that work identifying what constitutional norms we actually have in our system is, in fact, worth pursuing for a variety of reasons. My thesis is that we can explain structural constitutional doctrines applied in constitutional cases as the products of pragmatic reasoning about how to implement a handful of abstract and uncontroversial constitutional norms—we might call them skeletal norms because they are both thin and fundamental to the structure of the overall system...
In Part I, I illustrate this idea’s plausibility with a capacious example. Assume arguendo that one of our structural norms is that “states may not take actions that undermine the constitutional structure of which they are parts.” Call this the State Preclusion Thesis (SPT).

I argue that a number of structural doctrines that are conventionally characterized as implementing distinct and more particularized norms—including, for example, the dormant Commerce Clause doctrine, dormant admiralty doctrine, dormant foreign affairs doctrines, doctrines of dormancy and preemption in immigration, and the obstacle preemption doctrine—all may be explained as mechanisms for implementing SPT in different contexts. Decisions developing and applying these doctrines form a pattern that suggests SPT is one of our constitutional norms. On this account—which draws on the recent move in constitutional theory to distinguish constitutional norms from the doctrinal rules with which courts implement those norms in concrete disputes—10 the specifics of the doctrinal rules, tests, or standards we observe in these areas are attributable to pragmatic considerations that relate to the process of judicial implementation of SPT and that vary from one context to another.

I then generalize to look at the implications of building an account in which most of the structural doctrines we observe can be explained as implementation of a few abstract norms like SPT in differing ways depending on the context. Call this the Skeletal-Norms account (SN). We can debate the reasons why officials accept norms like SPT and whether they should do so; we can debate the pragmatic rationales for its various implementing doctrines; and so forth—SN just recommends that we first acknowledge evidence of official consensus that certain basic structural norms are part of our constitutional system. SN is preferable to conventional views about how we should identify the constitutional norms that we have, not least because it is not necessary to posit such abstract basic structural norms as part of our constitutional system in order to acknowledge the existence of essentially constitutional norms that have the force of law. SN is preferable to conventional views because it recognizes that we have not acknowledged the existence of such norms in our constitutional system, and so forth—SN just accepts that such norms are an essential part of our constitutional system. We can develop the reasons why officialsacceptable norms like SPT and develop the reasons why officialsaccept the Constitution. Change doctrine, dormant admiralty doctrine, dormant foreign affairs limited norms—indeed, for example, the dormant Commerce Clause doctrine, dormant admiralty doctrine, dormant foreign affairs limited norms—including, for example, the dormant Commerce Clause doctrine, dormant admiralty doctrine, dormant foreign affairs limited norms—which courts implement constitutional norms in different contexts, differing and applying those doctrines form a pattern that suggests developing and applying those doctrines form a pattern that suggests developing and applying those doctrines form a pattern that suggests developing and applying those doctrines form a pattern that suggests
simpler, eliminating the need to infer a wide variety of norms from our sparse constitutional text to explain the structural doctrines judges apply. It is also more consistent with our best general theory of law—legal positivism—and may even provide the beginning of a way to answer Judge Richard Posner’s challenge that constitutional theory should either provide some empirically falsifiable claims or close up shop.

Expanding our methods for determining which constitutional norms we actually have immediately raises two related conceptual issues: First, because complex constitutional practices may have more than one plausible explanation, we need criteria for assessing competing explanations. Presently, we lack criteria even for assessing competing normative constitutional theory claims, at least if valid criteria should be independent of the normative commitments of the competing claims. To demonstrate the SN’s comparative merit, in Part II I begin filling this gap by exploring criteria for assessing competing claims. To demonstrate the SN’s comparative merit, in Part II I begin filling this gap by exploring criteria for assessing competing claims. To demonstrate the SN’s comparative merit, in Part II I begin filling this gap by exploring criteria for assessing competing claims.


See generally Ronald Dworkin, Law’s Empire (1986) (arguing that valid legal principles are derived from a moral process).
claims that our actual constitutions are those derived by proper originalist interpretation—on these theory selection criteria. SN is simpler than these alternatives because it can explain numerous doctrines with a single, uncontroversial norm rather than with multiple norms derived by contestable interpretive or value-based arguments. It reconciles the stability of the constitutional system with the appearance of widespread disagreement on various issues by suggesting that what we disagree about are the implementing rules, not the more basic underlying constitutional requirements. And it is consistent with our other well-founded views about the world, including legal positivism.

Second, we need to develop a way to determine whether a norm proposed to explain a set of constitutional doctrines is, in fact, a valid norm of constitutional law—that is, whether our best explanatory account actually reflects reality. This creates an important opportunity to begin reconciling constitutional theory with general theories of law. In Part III, I draw on one general theory of the nature of law—legal positivism—to argue that norms about which there is robust and durable consensus among legal officials may be valid in virtue of that consensus. One of positivism’s core claims is that the content of the law of any given legal system—including its constitutional law—is ultimately a matter of social facts. Norms are valid laws in a legal system if they are accepted by most judges, legal officials, or members of the public. On this view, evidence of widespread official consensus on the validity of a norm like SPT may be evidence of that norm’s actual legal validity—its existence as a norm of the system. This kind of view might even give way to some empirically testsable hypotheses about the con-

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


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

To bracket these interpretive debates and develop claims about constitutional practice independent of contestable interpretive assumptions, I argue that we should assume that structural norms are simple propositions on which interpreters of every view could agree. This allows us to set aside the interpretive theory debate—judges may have different reasons for accepting those skeletal norms, but evidence that they are accepted by learned legal decision makers is here. By taking evidence of acceptance of structural norms and other judgments under judicial explanation other than interpretive, and other judgments under judicial explanation other than interpretive, we can bracket interpretive debates and develop claims about constitutional practice independent of contestable interpretive assumptions.

Constitutional theory and doctrine are complex and confusing; constitutional debates—both public and academic—portray the system as fundamentally divided and disharmonious; and the reasons judges give for particular structural case outcomes are often vague, contradictory, or hotly disputed by other members of the court. But constitutional theory, as we have just developed, makes sense of judicial decisions and reason why judges may have different reasons for accepting certain structural propositions. This allows us to set aside interpretive debates and develop claims about constitutional practice independent of contestable interpretive assumptions. I argue that we should assume that structural norms are simple propositions on which interpreters of every view could agree. This allows us to set aside the interpretive theory debate—judges may have different reasons for accepting those skeletal norms, but evidence that they are accepted by learned legal decision makers is here. By taking evidence of acceptance of structural norms and other judgments under judicial explanation other than interpretive, and other judgments under judicial explanation other than interpretive, we can bracket interpretive debates and develop claims about constitutional practice independent of contestable interpretive assumptions.

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I. COMPLEX DOCTRINE, SIMPLE NORMS

I have argued at length elsewhere that the State Preclusion Thesis ("SPT") is supported by the constitutional text, history, straightforward constitutional purposes, and the pragmatic necessities of modern constitutional practice. Perhaps the clearest and simplest reason to accept it is that SPT is the kind of norm you would adopt if you were trying to structure a durable federalist constitutional system. Generally speaking, the fewer specifications you make about the structure, the lower the risk of major pushes to abandon the Constitution in order to restructure the government. It is SPT’s appeal to common sense that I rely upon here. The point is to hypothesize that SPT is a valid norm in our system and then see how much of the decisional phenomena it can explain. In this Part, I offer a new account of the constitutional foundation of immigration and obstacle preemption doctrines, arguing that they may be viewed as implementing SPT in different ways depending on instrumental (pragmatic) adjudicatory concerns that differ with the context. In the process, I explain how this kind of account can help resolve several curiosities and controversies surrounding these doctrines to set the stage for the more general case for this kind of re-theorizing that I make in Parts II and III. In these Parts, I defend the view that the approach to demonstrating the existence of a constitutional norm—gathering evidence of patterns in constitutional practice that suggest the norm is at work—is preferable to conventional accounts that derive norms by interpretive method (originalism, etc.) or by the application of value criteria (justice, etc.). Among other reasons, this approach is preferable because it is more consistent with our best general theory of law, which says that the idea of patterns in constitutional practice that suggest the norm is at work is the essence of a constitutional norm—demonstrating the existence of a constitutional norm means collecting and interpreting these patterns. In this Part, I explain how this kind of account can help resolve several curiosities and controversies surrounding these doctrines.

Throughout this Part, I draw heavily on the "two-output thesis," viz.: "[T]here exists a conceptual distinction between two sorts of judicial work product each of which is integral to the functioning of judicial work product, each of which is integral to the functioning of constitutional adjudication, namely judge-interpreted constitutional meaning and judge-crafted tests bearing an instrumental relationship to that meaning." To avoid confusing this conception with one with which some particular theory of interpretation is required, I call statements of judge-interpreted constitutional meaning "constitutional" and judge-crafted tests "constitutional preemption doctrines." I explain how this kind of account can help resolve several curiosities and controversies surrounding these doctrines.
The judge-crafted rules, tests, and standards are the "decision rules" by which courts determine whether conduct falls within the scope of a constitutional prohibition or permission and are separate from the constitutional operative propositions themselves. The instrumental relationship between the operative propositions and the decision rules is that the latter implement the former—they facilitate the application of broad propositions of constitutional meaning to resolve disputes in concrete cases.

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

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

### A. Standard Dormancy Doctrines

The dormant Commerce Clause, dormant admiralty, and dormant foreign affairs doctrines—what we might call the "standard" dormancy rules—are at best difficult to derive from the constitutional text. Conventionally, they are said to subtend "negative aspects" of national governmental power, but the relevant constitutional provisions say nothing about precluding state action as the dormant doctrines do.

The dormant Commerce Clause doctrine is shaped by instrumental considerations in adopting a single norm by way of judicially creating exceptions to the general rule. These considerations vary by context, according to the discretion the decision rules implement. The decision rules are meant to resolve disputes in concrete cases by shaping both by the operative propositions that they implement and the decision rules themselves.
subjects state actions that discriminate against out-of-state commercial activity—for example, by favoring local over out-of-state entities—to strict scrutiny that amounts in practice to a "virtually per se rule of invalidity;"

and evaluates nondiscriminatory state actions according to whether the burdens they impose on interstate commerce are "clearly excessive in relation to the putative local benefits."

The dormant admiralty doctrine invalidates state action that "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations."

There are multiple dormant foreign affairs doctrines; the best established are the background rule that "state involvement in foreign affairs and international relations . . . is forbidden;"

the dormant Foreign Commerce Clause rule precluding state actions that affect international commerce in a manner likely to provoke international retaliation—"with a categorical preclusion of state actions that facially discriminate against foreign commercial actors that mirrors the dormant Commerce Clause's virtually per se invalidity rule— or that "prevents the Federal Government from 'speaking with one voice when regulation commercial relations with foreign governments.'"

Although their dramatic differences make a unifying explanation of these dormancy doctrines seem unlikely, they do have something in common: They all preclude state action that interferes with the constitutional structure and thus may be characterized as implementing SPT. I have argued this point at length elsewhere and will only briefly rehearse it here:

briefly, state action that undermines

the dormant doctrine precluding state interference with executive discretion with regard to foreign affairs and international relations; and

somewhat less than clear, the Garamendi doctrine precluding state interference with executive functions in foreign affairs and international relations—"with a categorical preclusion of state actions that affect international commerce in foreign affairs and international relations—whether the burdens they impose on international relations are clearly

The dormant foreign affairs rules thus have the peculiar property of prioritizing their particular area of concern above all others. This is significant because it highlights the area's relative importance within the constitutional structure, and the relative weight accorded to concerns in the dormant doctrine precluding state action that interferes with the constitutional structure and thus may be characterized as implementing SPT.
364

JOURNAL OF CONSTITUTIONAL LAW

Vol. 18:2

The national economy (and thus, potentially, the stability of the entire system of government) are targeted; in admiralty, dormancy invalidates applications state law that undermine the uniformity of maritime law and, thus, the functioning of admiralty jurisdiction; and in foreign affairs, dormancy precludes state actions that interfere with federal control of international relations. These doctrines thus all may be viewed as implementing the simple structural proposition that states are constitutionally precluded from acting in a manner that undermines the larger constitutional structure of which they are a part.

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

The standard dormancy doctrines' differences thus may be attributable to pragmatic reasons for courts to enforce SPT in different ways or with differing degrees of stringency in different contexts. The dormant Commerce Clause precludes relatively little state action and incorporates substantial deference to Congress because, in principle, Congress has greater capacity on economic questions and courts, accordingly, face significant risks of adjudicatory error. The dormant admiralty and foreign affairs doctrines, by contrast, preclude a wider array of state actions and incorporate less deference because the potential negative consequences of state interference are more significant and the risk of adjudicatory error is reduced by the existence of decent proxies for state interference (the waterline or the relatively readily discernible indicia of international effect).

An explanatory account on which these standard dormancy doctrines all implement SPT is preferable to conventional accounts for

37 See id. at 500 (arguing that state preclusion is important to maintain constitutional integ-


40 Pursley, supra note 9, at 534–54.
several reasons. First and most obviously, it explains several complex lines of doctrine with a single, simple normative predicate rather than by positing a distinct norm of contestable validity for each area. Second, the SPT account explains a number of exceptions and other features of these doctrines that are puzzles for conventional accounts. I have discussed these in detail elsewhere; here I will emphasize just a couple of examples. Conventional explanations of the dormant Commerce Clause doctrine ground the doctrine either on the text of the Commerce Clause or on some implied free-market or interstate-harmony promoting norm.

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


44 See West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 217 (1994) (Rehnquist, C.J., dissenting) (calling the dormant Commerce Clause an artifact of “a grim sink-or-swim policy of laissez-faire economics”). See generally Mark Trayne, Rebuilding the Dormant Commerce Clause (1999) (arguing that the Supreme Court has employed and should employ in its dormant Commerce Clause cases).

In the foreign affairs context, the conventional external sovereignty/plenary power rationale for preclusion doctrines is difficult to reconcile with the observable shift in judicial decisions away from applying the broad Zschernig dormancy rule to a greater reliance on the narrower dormant Foreign Commerce Clause, Garamendi, and preemption doctrines.

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

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

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

For nearly a century, courts have treated immigration as a matter for exclusively federal regulation.

But state and local government involvement in immigration regulation has increased dramatically in recent years. Since the federal government, so far, has not responded to calls for immigration reform in a systematic way, state and local governments have moved in to fill the perceived vacuum.

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

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

I argue that refocusing debates about structural immigration law on the principle of federal supremacy is needed.
tion doctrine around SPT, rather than a constitutional provision for an exclusively federal immigration power, will clarify and advance these debates and, importantly, better explain immigration powers doctrine as it stands.

The Supreme Court has repeatedly held that the national government's immigration power is both plenary and exclusive. The exclusivity holding means, as with the standard dormancy doctrines, that certain state actions touching on immigration are precluded by "the Constitution of its own force"—that is, ex ante—without regard to the existence of positive federal immigration law. Courts have made clear that this "dormant immigration doctrine" at least bars state enactment of so-called "pure" immigration law, viz.: Laws determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization.

Along with its contestable foundation in the constitutional text and history of acceptance in judicial practice, the dormant immigration doctrine has been refined in light of recent developments in constitutional law. For example, the Court has held that the dormant immigration doctrine does not preclude state action where the federal scheme is not clear


56 Takahashi v. Fish & Game Commission, 334 U.S. 410, 419 (1948). See also Huntington, supra note 52, at 807 (discussing exclusivity with respect to pure immigration law); Michael J. Wishnie, Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism, 76 N.Y.U. L. REV. 493, 502 (2001) (noting the accepted definition of immigration law as the regulation of "the admission and expulsion of noncitizens").

Dec. 2015
SKELETAL NORMS
369

... tion doctrine draws support from the connection between immigration and foreign affairs. The latter context has broad doctrines precluding state interference, including the background rule that state involvement in "foreign affairs and international relations is... forbidden" and the dormant Foreign Commerce Clause rule precluding state actions that undermine the nation's ability to "speak[] with one voice" in foreign affairs. These doctrines straightforwardly implement SPT: Foreign policy is crucial to national stability and is undermined when national and state governments send mixed or conflicting signals; thus state action affecting foreign affairs will frequently threaten the constitutional structure and is therefore properly presumed invalid.

... The substantial connection between immigration and foreign relations means that state action on immigration will almost always have some effect on foreign affairs. Arizona's S.B. 1070, for example, sparked a diplomatic uproar and condemnation from foreign governments. Despite strong reasons to favor a uniform federal immigration law, the dormant immigration doctrine is less than an absolute preclusion of state action in practice. There are two fairly well-established exceptions: First, while the Court has expressly held that states do not possess authority to directly regulate immigration, it has also acknowledged that the states' police powers encompass some actions that affect immigrants in the course of advancing "traditional" state interests like "education, crime control, and the regulation of health, safety and welfare." These decisions draw a rough distinction between immigrant "selection" and "regulation" rules. Selection rules—or rules of "entrance and abode"—have to do with allowing immigrants across geographic borders, whereas regulation rules, or rules of "duration and continuance," deal with the management of immigrant communities. The Court has expressly held that states do not possess authority to directly regulate immigration, and classification shows a tough distinction between immigration "section" and regulation. The doctrine of foreign affairs and foreign relations, defined as the regulation of health, safety, and welfare, and the doctrine of traditional state interests, come from an evolving "dormant" foreign affairs doctrine.

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

...
areas and are considered the core of the federal immigration power. Accordingly, states are precluded from enacting their own immigrant-selection measures and from interfering with federal selection law.

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

In principle at least, state regulatory rules need not be categorically precluded because they only indirectly affect immigrant selection.

A simple dormant immigration rule would dictate clear results in a vacuum—absent positive federal immigration law, state laws touching on immigration are wholly precluded. Things become more complicated when positive federal law enters the picture, both because federal immigration laws are complex and because they may contain signals of federal views about the permissibility of state action in the field. In its most recent immigration power case—the decision invalidating most of the challenged provisions of Arizona's controversial S.B. 1070—the Supreme Court both reaffirmed the primacy of federal immigration power and demonstrated that the volume of existing positive immigration law makes preemption doctrine a useful substitute for the broader dormant immigration rule in contemporary cases.

Congress may, for example, preempt state immigration regulatory actions even if they would be otherwise permissible, as in Arizona v. United States, 132 S. Ct. 2492, 2499 (2012).
provision expressly preempting state laws imposing penalties on employers who hire unauthorized immigrants. 74
Judicial recognition of congressional primacy on immigration also, however, gives rise to the second exception to the dormant immigration rule—just as state actions that would otherwise fall within the police power exception to the dormant immigration rule may be preempted by statute, so too may congressional signals about state action's permissibility be preempted as well. Congressional permission in federal immigration statutes requires a preemption-like inquiry into the existence of express or implied congressional permission, strikingly like the search for congressional permissions under the parallel exception to the dormant Foreign Commerce Clause. 75
States may exercise authority pursuant to express or implied delegations from the federal government to regulate immigration themselves or enforce federal immigration laws. 76 Federal statutes that expressly delegate immigration authority to state governments include, for example, an Immigration and Nationality Act ("INA") provision permitting states to decide whether to provide public benefits to unauthorized immigrants; 79 an Immigration Reform and Control Act ("IRCA") provision allowing states to sanction hiring of unauthorized immigrants "through licensing and similar laws;" 80 and Section 287(g) of the INA, authorizing states to enter into agreements with the Justice Department for cooperative enforcement of federal immigration law. 81 Given the substantial deference courts accord the federal political branches on immigration issues, it is not surprising that courts treat congressional signals about state action's permissibility as dispositive most of the time. But plumbing for these signals complicates judicial application of the dormant immigration rule. The search for congressional permission in federal immigration statutes requires a preemption-like inquiry into the existence of express or implied congressional permission.
A representative articulation is found in *Toll v. Moreno*. The inquiry resembles preemption analysis insofar as the Court examines relevant federal enactments for signals regarding the permissibility of the challenged state law; but this is, in an important sense, the reverse of conventional preemption analysis. The search is not for congressional intent to preempt state law against a default rule of state power in the absence of such intent as in a conventional preemption case; instead, it is a search for congressional permission for state action against a default rule that states lack power without congressional permission.

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

Put differently, a power-focused doctrine magnifies the risk of adjudicatory error in a context in which the foreign relations implications of immigration questions are high. The power-focused doctrine magnifies the risks of adjudicatory errors that underenforce the constitutional preclusion of state action. State police power authorizes a variety of actions that raise the same concerns as direct state exercise of the federal immigration power, but such actions cannot readily be characterized as direct usurpations of federal power. Deciding immigration questions according to the category of power under which state action is taken thus will allow a substantial volume of state interference to slip through the proverbial doctrinal cracks. This "power matching problem" inheres in most judicial attempts to fashion rules that preclude state encroachment on fields of exclusive federal authority.


84 458 U.S. 1 (1982).


86 *Toll*, 458 U.S. at 11 n.16, 13 n.18.

87 Pursley, supra note 9, at 516–17 (discussing the power matching problem generally).

88 See *id.* at 557 (arguing that adjudicatory error costs are heightened in foreign-affairs-related doctrinal contexts); Spiro, supra note 54, at 144 (arguing that in immigration and foreign affairs "the stakes are of such magnitude as to readily defeat the interests of federalism; echoes of 'the Constitution is not a suicide pact' haunt any claim of state right" (footnote omitted) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963))).
The Court recognized this problem early on in the immigration context:

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

This suggests that doctrine might avoid the power matching problem by focusing on the subject of state action rather than the power under which it is taken. Determining state action's true purpose is also difficult; but one way to begin is by assessing the action's real effects.

SPT is concerned, of course, precisely with the effects of state action on the stability of the constitutional system. SPT grounds an alternative account of immigration power doctrine that reconciles the dormant immigration doctrine with its exceptions, with courts' continuing use of the slippery distinction between selection and regulatory rules in the immigration field, and with the shift in recent decades from a dormancy analysis to a preemption-first approach.

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

The hypothesis that SPT grounds the doctrine immediately seems legitimate and worthy of exploration because the reasons conventionally cited by courts and commentators in support of the dormant immigration doctrine relate directly to the undesirable consequences of state interference with the federal immigration system. For example, some argue that allowing state immigration regulation might “erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and


directly to the undesirable consequences of state interference with the federal immigration system. For example, some argue that allowing state immigration regulation might “erode the antidiscrimination and anticaste principles that are at the heart of our Constitution and
And, states empowered to regulate immigration may export the costs of immigration onto other states by enacting immigration restrictions designed to funnel immigrants away into other, more hospitable, state legal environments, which might fuel undesirable races to the bottom.

The harder question is how the doctrinal exceptions permitting state actions affecting immigration also may fairly be characterized as implementing SPT. The first puzzle is the tension between judicial statements about the primacy of federal immigration power and the reality of widespread state action affecting immigration. The federal exclusivity, foreign affairs, and federal uniformity rationales for the dormant immigration doctrine apply in principle to every state action that affects immigrants, no matter how indirectly or insubstantially.

But the cases demonstrate that a variety of state actions are not precluded even though they may interfere to some degree with federal immigration authority; thus, contrary to the conventional account, it is difficult to square the existing doctrine with the claim that federal immigration power is categorically exclusive.

On an exclusive-federal-power account, reconciling the normative predicate with the actual decision requires either a counterintuitive conception of the scope of federal exclusivity or the conclusion that federal exclusivity is significantly underenforced by courts.

Some commentators argue, instead, that the exceptions exist because states possess some measure of concurrent authority to regulate immigration. That may be true, but the exceptions exist because states possess some measure of concurrent authority to regulate immigration. The many measures of concurrent authority to regulate immigration, albeit indirect, give rise to the exceptions because states possess some measure of concurrent authority to regulate immigration.

The reason why the exceptions exist is because states possess some measure of concurrent authority to regulate immigration. The many measures of concurrent authority to regulate immigration are significant underenforced by courts. Some commentators argue that the exceptions exist because states possess some measure of concurrent authority to regulate immigration.

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SKELETAL NORMS

375

explain the doctrine, but it does not explain a century of judicial rhetoric emphasizing the primacy of federal power. The SPT account explains both. The high cost of adjudicatory error in immigration cases flows from their connection to foreign affairs; the risk that any given state action affecting immigrants will interfere with federal authority on immigration is magnified by the pervasiveness of positive federal immigration law; and the history of minimal state involvement with immigration makes even small state forays into the field seem like large departures from standard practice.

Together, these instrumental considerations could make reasonable a default presumption that state action affecting immigration likely will interfere with the constitutional structure. A state action's visible connection to immigration, on this view, is a proxy for a likely violation of SPT. There is little risk of adjudicatory error in applying this default rule, since most state actions' immigration effects, or lack thereof, will be fairly obvious for the reasons I have mentioned.

The distinction between selection and regulatory rules, however, bifurcates the general dormancy doctrine: State actions that amount to the imposition of selection rules are presumptively invalid, but state actions that function primarily as regulatory rules are evaluated more case by case. This is difficult to explain on the exclusive power view, but if the underlying constitutional norm is instead about assessing the magnitude of state interference, then an exception for state regulation of immigration pursuant to police power may be justifiable as a way to identify and preserve actions that are valuable to states and unlikely to undermine the system. Not every immigration issue has significant foreign affairs implications; nor does every state action affecting immigration actually risk destabilizing the system. And many state actions that are adjudicated to interfere with federal immigration law may be small and relatively insignificant. Yet the distinction between section and regulation makes even small state actions vulnerable to invalidation. The high cost of adjudicatory error in immigration cases flows from these instrumental considerations, but it does not explain a century of judicial doctrine.
Courts will need to weigh federalism concerns against the reasons for federal exclusivity. The question for doctrine makers is: What rule best accommodates these competing considerations?

One instrumentally justifiable approach is to use the selection/regulation distinction as a front-end filter to distinguish state actions that should be presumed to threaten significant interference from those that pose less systemic risk and may have greater federalism value. Courts can identify with relative ease state actions that are effectively selection rules, and it would be reasonable in the light of pragmatic considerations for courts to presume that those actions likely will be destabilizing in light of the comprehensive federal selection regime. It is more difficult to justify a categorical presumption that state actions with only indirect effects on immigration violate SPT: Whether the constitutional structure will be better served by invalidating such a measure or permitting it to further federalism values is less clear and will vary from case to case. For these state actions, courts might reasonably conclude that SPT is best implemented by a more searching inquiry into the weight of the relevant considerations in the particular case. The distinction between selection and regulation thus can be viewed as a proxy identifying cases that present the difficult question of where federal immigration power ends and legitimate state police power begins—a question that the Court has not yet thoroughly answered.

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

If there is a core of non-delegable federal immigration power, then any attempt to delegate it exclusively by constitutional mandate is forbidden to reconcile with the idea that federal immigration power is exclusive by constitutional mandate. If there is a core of non-delegable federal immigration power, the constitutional structure will be better served by invalidating such a measure of federalism intervention. For these state actions, courts might reasonably conclude that SPT is best implemented by a more searching inquiry into the weight of the relevant considerations in the particular case. The distinction between selection and regulation thus can be viewed as a proxy identifying cases that present the difficult question of where federal immigration power ends and legitimate state police power begins—a question that the Court has not yet thoroughly answered.

The question for doctrine makers is: What rule best accommodates these competing considerations? Courts will need to weigh federalism concerns against the reasons for federal exclusivity. The tension for certain purposes remains the reason for federal exclusivity. The question for doctrine makers is: What rule best accommodates these competing considerations?
requirement (the exclusive provision of power to Congress).

Even if federal immigration power includes the discretion to delegate it as Congress sees fit—as one might argue on a strong view of that power's unconditionality—unauthorized state exercises of it would still violate SPT.

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

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

Accordingly, courts might reasonably conclude that the best way to implement SPT is with a rule that combs these errors to the way in which SPT is with a rule that combs errors to the way in which SPT is. According to this line of reasoning, courts might reasonably conclude that the best way to implement SPT is within the context of immigration, connection with foreign relations, and the political branches have long been regarded as having superior institutional capacity on immigration. The SPT account thus explains the congressional permission exception. In each formulation, the SPT account thus explains the congressional permission exception.
whether delegating that authority to states is desirable under the circumstances. If there is no exclusive federal immigration power, the same instrumental considerations nevertheless counsel judicial deference to the political branches on whether any given delegation of authority to states will interfere with foreign affairs or the system of immigration law.

Judicial attention to these comparative institutional capacity considerations also may support an SPT-based explanation of the shift in recent decades from dormancy to preemption analysis in immigration power cases.

Just as a statutory delegation provision can be viewed as a signal that a state action is no threat to structural stability from a better institution; a statutory preemption provision (or substantive provision that conflicts with the challenged state action) can be viewed as an expertise-backed signal that state action poses a structural threat. Federal immigration statutes and regulations, on this view, function as another kind of proxy for the more difficult underlying question of state action's effect on the stability of the system.

Positive federal immigration law crystallizes the scope and contours of federal immigration policymaking discretion. In the light of Congress's institutional capacity advantage on immigration, courts using federal immigration statutes as a proxy for structural interference is a form of deference that may be more defensible than instead using federal immigration statutes as a proxy for structural interference to state action. Congress's institutional capacity advantage on immigration counts positive federal immigration law crystallizes the scope and contours of federal immigration policymaking discretion. In the higher positive federal immigration policy-making discretion, the scope and contours of federal immigration law crystallizes the scope and contours of federal immigration policymaking discretion.

If the question of state action's effect on the stability of the system.

Judicial deference is another kind of proxy for the more difficult under-
It seems increasingly justifiable in terms of error risks and costs for courts in immigration power cases to presume that congressional silence on state action affecting matters with which federal immigration law regularly engages and that are of significant moment to national stability connotes permission. An SPT-based account of immigration doctrine is thus preferable for several reasons. First, it dissolves the need for the kind of judgment required to identify preemption thresholds, which makes the SPT-based approach more attractive when the general preclusion exception is at issue. Second, it explains the exceptions to the general preclusion as incorporating reliable proxies for violations of SPT. The SPT account unites immigration power doctrines with the dormant Commerce Clause, admiralty, and foreign affairs doctrines as judicial rules designed to implement a single, simply constitutional norm in different ways depending on the pragmatic adjudicatory considerations in each context.

C. Obstacle Preemption

Immigration is a useful case study for inquiring more broadly about the conceptual connections between different structural constitutional doctrines. It is a field in which a broad background rule of dormancy has been for the most part supplanted in practice by the application of preemption doctrines as positive federal immigration law has expanded. From what seems to have been a straightforward application of dormancy rules in cases decided in the nineteenth century, the Court seems to have shifted to a preemption-first approach, asserting that the power preemption problem makes it difficult to distinguish what the Court has described as the “general preclusion of federal power” from the “general preclusion of federal action.”

The SPT account does not require disregarding a century of judicial effort to delineate the limits of federal immigration power—polishing the general preclusion of federal action to the general preclusion of federal power, as well as the general preclusion of federal action to the general preclusion of federal power. Rather, the SPT account unifies immigration power doctrines with the dormant Commerce Clause, admiralty, and foreign affairs doctrines as judicial rules designed to implement a single, simply constitutional norm in different ways depending on the pragmatic considerations in each context.

An SPT-based account of immigration doctrine is thus preferable to preemption because preemption is an inherently judgmental process. The SPT account, by contrast, provides a clear and simple constitutional norm that can be applied in different ways depending on the circumstances.

In contrast to the preemption-first approach, the SPT account recognizes the significance of national security concerns in determining the scope of federal power. It also recognizes the importance of the constitutional foundation of immigration law and regulation, which is constitutional law and regulation.

The SPT account also recognizes the significance of national security concerns in determining the scope of federal power. It also recognizes the importance of the constitutional foundation of immigration law and regulation.
proach beginning with the seminal 1941 decision in
Hines v. Davidowitz,
continuing through important decisions in
Graham v. Richardson,
De Canas v. Bica,
Mathews v. Diaz through the most
recent encounter with an immigration power question in
Chamber of Commerce v. Whiting.

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

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

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

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

First, courts have never made clear the constitutional foundation for characterizing judicial
preemption holdings that have the effect of fully nullifying state law or, even more extreme, displacing state regulatory authority rather than simply rendering the challenged state law inapplicable in a particular case—as one might expect on an intuitive reading of the Supremacy Clause as a choice-of-law rule that would merely render the preempted state law inapplicable in the particular case. 121

The foundation is not obvious. 123 Call this the "displacement" problem. 124

Second, commentators have been frustrated by the Court's haphazard application of the presumption against preemption—a rule that, when applied, requires an especially salient manifestation of congressional preemptive intent before federal law may be construed to preempt state law. 125 While the Court has stated that the presumption is grounded on constitutional federalism considerations and has hinted on occasion—consistent with the generality of its rationale 126—that it applies in every preemption case; 127 it has not applied the presumption in every preemption case and the reasons for its non-application in some cases have not been explained. 128


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

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

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

126 See Young, supra note 43, at 1834–35, 1849–50 (discussing how the "courts were not envision[ed]...as the primary line of defense" for enforcing federalism and separation of powers).


128 See, e.g., AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1751 (2011) (ignoring the presumption in preemption analysis); Williams on v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011) (same); see also Merrill, supra note 124, at 728 (noting the Court's varying methods of application regarding presumption); Ernest A. Young, "The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court, 2011 Sup. Ct. Rev. 253, 307–08 (2012) (noting the Court's unreliable use of the presumption).
Preemption doctrines invalidate state actions that conflict with positive federal law in one of several ways. Express preemption occurs where federal law contains a provision expressly barrin g certain existing state laws or categories of existing and potential state laws. 

Field preemption—rare but applicable in some narrow circumstances—occurs where federal law is clearly meant to be the sole source of regulation on a subject or category of activity. 

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

The Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof, and all Treaties made ... under the Authority of the United States" are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There is a longstanding debate about whether the obstacle preemption doctrine can be justified by the Supremacy Clause—it is unclear at best that congressional "purposes and objectives" can render state law "contrary" to federal law and, for that matter, that "purposes and objectives" are "laws of the United States." We can place the more controversial preemption doctrines—especially the obstacle preemption rule—on firmer conceptual footing by characterizing them as implementing SPT rather than the Supremacy Clause; but to do so we must adopt a somewhat broader conception of the constitutional structure that SPT protects against state interference.

First, we might argue that obstacle preemption is justified where a federal statute is enacted pursuant to arguably exclusive, or at least importantly discretionary, federal authority. Federal immigration statutes, for example, arguably crystallize federal immigration policymaking discretion—which may be an exclusively federal discretion—and thus are part of the constitutional structure in the sense that they constitute what the federal government has decided to do with its immigration power. State interference with these enacted federal statutes, then, may be characterized as interference with these enacted statutes in the exercise of the federal government's discretion. But this proves far too much. On this view, however,
nearly every positive federal law can be characterized as part of the constitutional structure—we need criteria for limiting what qualifies as part of the constitutional structure to prevent SPT from becoming a general prohibition on states doing anything at all.

We might limit the range of positive federal laws that count by introducing some kind of significance criterion—assessing either the significance of state interference with a given law for the stability of federal policy or the significance of the head of federal authority under which the law was enacted. Another ready-to-hand criterion of significance is found in recent constitutional theory work suggesting that broad, comprehensive federal statutes may become part of the constitutional structure in some sense. Statutes that create rights and empower government institutions to elaborate and enforce those rights through legislative and adjudicatory processes discharge quintessentially constitutional functions. What's more, long-lived constitutive or rights-bearing statutes of this sort also seem quasi-constitutional because they are entrenched in a sense, not by Article V, but by the pragmatic factors—including, for example, institutional settlement and incentives to maintain status quo allocations of administrative jurisdiction, anti-reform pressures from powerful status quo stakeholders, regulatory endowment effects, and so forth—that make altering significant federal statutes more difficult and costly.

The INA, for example, displays some of these features—it creates rights and remedies; it has been around for a long time and has generated a large body of institutions and implementing regulations, resulting in strong endowment effects, and so forth. Since SPT is supported in large part by the desire to avoid the practical consequences of destabilization, it is a natural next step to argue that SPT's definition of interference with the constitutional structure should be capacious and flexible enough to include interference with statutes that display these characteristics.

Preemption doctrine thus may be viewed as implementing SPT in some instances. State actions' conflicts or interference with federal statutes can serve as proxies for interference with federal sensitive or exclusive federal authority—important features of the constitutional structure. Obstacle preemption in particular seems better explained on this account; while the doctrine's focus on Congress's policy objectives may seem odd because those objectives are not by law within the scope of this account, when the doctrine's focus on Congress's policy objectives is considered, the practical consequences of potential conflicts or interference with federal sensitive or exclusive federal authority are captured. Moreover, some instances of interference with federal statutes may be viewed as proxying for interference with federal sensitive or exclusive federal authority.


143 Eskridge & Ferejohn, supra note 142, at 1230–46 (listing features of statutes with quasi-constitutional status); Young, supra note 142, at 415–18 (same).
Dec. 2015
SKELETAL NORMS

385

the meaning of the Supremacy Clause, that focus is consistent with an
SPT-based doctrine insofar as Congress's objectives are directly rele-
vant to determining the extent to which state action threatens to de-
rail a federal policy process crucial for systemic stability. Or, if we
want to take the super-statutes idea more literally, we might say that
certain statutes become elements of the constitutional structure in a
functional sense in virtue of their constitutional characteristics. Doc-
trines is (ideally) responsive to pragmatic concerns; thus it makes
sense for courts to select doctrines that treat certain federal statutes
as quasi-constitutional. On either view of federal statutes' role in the
analysis, SPT improves upon the conventional Supremacy Clause ex-
planation of preemption doctrine, which does not straightforwardly
suggest these considerations. The SPT account is thus preferable in
the sense that it provides a new solution—in the form of a new nor-
mative grounding—for the "atextuality" critique of obstacle preemp-
tion.

The SPT view also points out a new defining solution to the

Distinguishing federal statutes by their significance or connection
with systemic stability as is suggested by the SPT rationale also better
explains the presumption against preemption's seemingly haphazard
application in some cases but not others—shifting the focus of the
doctrine from conflict to interference with the larger system suggests
a more nuanced inquiry balancing systemic interests with those of the
states. It stands to reason that state actions conflicting with structural-
ly significant statutes are on balance more likely to violate SPT, thus
the presumption may be inapposite if the balance of structural stabil-
y and significant statutes are on balance more likely to favor the SPT.

The SPT view also points out a new clarifying solution to the
common conflation of the "preemption" and "displacement" effects
of preemption holdings. Displacement finds at best contestable justi-
fication in the Supremacy Clause; but full displacement of destabiliz-
ing state action is exactly what you would expect from decision rules
implementing SPT. The potential for structural interference, after
all, will typically be a feature of the state law in all applications, not
just its application to a particular set of facts. And even if a generally
justified application of SPT improves the procedural mechanism in
its strict sense, which you would expect from decision rules
implementing SPT, the procedural mechanism in its strict sense is
inherently flawed. SPT is not only a better way of applying the
Supremacy Clause, but also a better way of defining preemption that
makes stare decisis more palatable to the constitutional courts. Doing
so makes stare decisis a new solution in the form of a new normative
grounding, thereby remediating one of the major problems with
SPT-based decision making at Congress's expense.
tion of no more than a handful of other SPT-like norms, to explain

how preemption law such an account could be expanded, with the affor-
ded and double consensus among legal officials and the public
constitutional accounts, and then are thus agreed on measures of sub-
significant and express than those proposed in
unilateral doctrine as predicated on normative propositions that are
constitutional explanation accounts that characterize complex courts.
These SPT examples demonstrate the potential fruitfulness of

* * * * *

run on the plan of the super-statute account
sacred preemption doctrine implementing SPT does not in any sense,
run on the plan of the super-statute approach in obstacle preemption cases. The case for ob-
run a proxy for the degree of structural instability posed by state inter-
reach the threshold of characteristic if a super-statute.
interests that would lead her to characterize it as a super-statute.
A judicial finding that the statute implicates significa-
the public's partiality, subject to the significance of the ob-
most structural constitutional doctrine. In Parts II and III, I assume that such an account—the SN account of structural constitutional doctrine—is possible and explore the implications; first developing a theoretical framework for assessing the merits of SN relative to conventional explanatory accounts and then arguing that pursuing accounts like SN may advance constitutional theory by reconciling it with legal positivism and moving it past the preoccupation with debates about constitutional interpretation.

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

Instead, my argument is in favor of these norms’ legal validity—that is, their status as legal norms qua legal. So, too, my approach to identifying certain constitutional norms does not entail or imply any theory of adjudication. Indeed, the underlying distinction between constitutional operative propositions and constitutional decision rules, and to corollary observation that decision rules are influenced by instrumental as well as legal considerations, highlights the possibility that multiple categories of non-legal reasons might be legitimately relied on by courts in constitutional adjudication. One might respond to this view by adopting a theory of adjudication that instructs courts to prioritize or deprioritize deep consensus norms, but any reason to do so—even if it is some reason directly related to the fact that they are matters of deep consensus (such as, for example, an argument that deep consensus can be identified in the sense that there are matters of deep consensus in constitutional law—rather than it is some norm that has any legal force) would be out of order by adopting a theory of adjudication that views constitutional operative propositions and constitutional decision rules as entirely separate categories.

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


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

147 See supra notes 10–24 and accompanying text.

148 See Pursley, supra note 9, at 504.
VALIDITY) is analytically distinct from the reasons I offer for thinking that these norms are, in fact, valid constitutional norms of our system.

II. EVALUATING CONSTITUTIONAL THEORY CLAIMS

This kind of explanatory account of constitutional doctrine—what could be called an explanatory theory of doctrine—would feed the best outcomes in measured amounts when crafted for the right constitutional norms. It would also be suitable for such a project, given that the theory for constitutional doctrine is a normative one, and that the theory for constitution-making is normative as well. In other words, the theory of constitutional doctrine is both a theory of law and a theory of adjudication; the theory of constitution-making is both a theory of law and a theory of political morality. These distinctions illuminate the difficult question of how we should evaluate competing theories of various kinds. I argue that while the conventional way of assessing a constitutional theory, which involves normative criteria of political morality and the like, is apt for theories of adjudication, it is problematic for positive theories of law. Theories of law should be evaluated according to criteria that help us choose between competing claims about what is the case. Accordingly, I propose a set of evaluative criteria for positive constitutional theories—divided into theories of law and theories of adjudication, following the traditional distinction in jurisprudence; and into positive and normative theories following the convention of most disciplines.

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

150 Fallon, supra note 14, at 540.

151 See Berman & Toh, supra note 6, at 552 (noting this distinction's commonality in jurisprudence); see also SCOTT J. SHAPIRO, LEGALITY 247–48 (2011) (same). No categorization is airtight. See Berman & Toh, supra, at 553–54 (arguing that “new originalism” advances claims belonging to both a theory of law and a theory of adjudication); Fallon, supra note 14, at 544–45 (noting that categorizing constitutional theories is not to “define polar opposites so much as to identify regions along a continuum”). The test of a conceptual distinction is its utility. Cf. Mitchell N. Berman, Constitutional Constructions and Constitutional Decision Rules: Thoughts on the Carving of Implementation Space, 27 CONST. COMM. 39, 45–47 (2010) (rejecting certain arguments that could be made to defend the “two output thesis” because they would result in denying its utility).

152 See, e.g., Fallon, supra note 14, at 538 (arguing generally that the criteria for selecting among competing constitutional theories “must reflect a judgment about which theory would yield the best outcomes, as measured against relevant criteria”).
A. Constitutional Theory Taxonomy

Constitutional theories are many and varied. For our purposes, it is most useful to first distinguish the theories of law from theories of adjudication. By a theory of law, I mean an account of the content of law. It is more useful to think of constitutional theories of law than of theories of adjudication because other kinds of norms (a moral rule, a rule of etiquette, etc.) do not necessarily raise the question of what law is. A theory of adjudication is a theory of methodology, not a theory of law. It answers the question, "What method should we use to resolve disputes?"

Constitutional theories of law, however, address the question, "What is law?" Constitutional theories of law of this kind help us avoid the implications of the inescapably normative and seemingly unresolvable contest among proponents of competing theories of constitutional interpretation.

III. Constitutional Theory Taxonomy

This taxonomy makes clear that the view I am defending here is a theory-of-law thesis whose compatibility with legal positivism is another of its theoretical virtues. I explore this in Part III.A. And in Part III.B, I argue that a constitutional theory of law of this kind can help us avoid the implications of the inescapably normative and seemingly unresolvable contest among proponents of competing theories of constitutional interpretation.
account of the necessary or essential conditions that must be present in order to be a proposition of law. Among other problems, the conditions under which a proposition will be a proposition of law will vary by jurisdiction, and perhaps by area of legal practice within a given jurisdiction. Accordingly, the focus of theories of law is on the criteria of legal validity—the conditions under which a proposition will be a proposition of law and not something else—that obtain within a jurisdiction Y. Or, more ambitiously, some theorists aim for a general theory of law that tells us something generally true about criteria of legal validity, and thus the content of the law, in every jurisdiction. Claims belonging to theories of law tend to take the following form:

Propositions whose content satisfies conditions $\alpha$ and $\phi$ are propositions of law in jurisdiction Y.

The primary contribution of theories of law is to describe, and thereby illuminate, the criteria of legal validity—conditions $X$ and $Z$. Professors Mitchell Berman and Kevin Toh characterize some "new" originalist claims as belonging to a theory of law—"for example, Steven Calabresi and Sai Prakash's claim that "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 like grammar more than history."

On this view, the conditions under which $\phi$ will be a proposition of law and not something else—that obtain within a jurisdiction Y— tells us something generally true about criteria of legal validity, and thus about the content of the law, in every jurisdiction. Claims belonging to theories of law tend to take the following form:

Propositions whose content satisfies conditions $\alpha$ and $\phi$ are propositions of law in jurisdiction Y.
Perhaps the most famous general theory of law is the positivist account that H.L.A. Hart articulated in his seminal work *The Concept of Law*. I set out Hart's core claims in more detail in the next Part (for now, summarizing Hart's core thesis is enough to show that his is a theory of law—viz.:)

In any legal system, the legal validity of any given norm depends on whether it comports with criteria of legal validity that a consensus of the system's legal officials accept as obligatory. Hart characterized his view as one of "descriptive" sociology—he sought to give a general account of law on which the concept of law is exhausted by facts about the practices of participants in municipal legal systems. Contrast theories of law with theories of adjudication, which describe or prescribe how officials—usually judges—do or should resolve disputes under law. The American Legal Realists' theory of adjudication, developed in the first part of the Twentieth Century, was that "judges respond primarily to the facts of the case" such that legal reasons have less to do with causing judicial outcomes than was aptly called Hart's "social fact" or "conventionalism" thesis because the operative criteria of legal validity in any system, which constitutes that system's ultimate "Rule of Recognition," may be identified by patterns of convergent official practice suggesting criteria that are accepted by broad consensus as obligatory.

This is why, for example, a legal rule that at first seems unacceptable to one person might turn out to be perfectly acceptable after exposure to the relevant criterion of legal validity. Hart's "social fact" theory of law suggests that, in legal systems with a "Rule of Recognition," judges respond primarily to the facts of the case, and the legal validity of any given norm depends on whether it comports with criteria of legal validity that a consensus of the system's legal officials accept as obligatory.
Political and legal theorists involved in modern projects like the construction of the attitudinal model of judging that measures the extent to which judicial decisions can be predicted according to observable proxies for the judges' political leanings.

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

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

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

For example, originalists insist that courts must go beyond the ordinary meaning of constitutional provisions intended to apply to the facts at hand in order to truly discover the meaning of the constitutional text.

Dworkin, supra note 14, ch. 10; Leiter, supra note 8, at 876 (characterizing Dworkin's constructive interpretation as a "theory of adjudication"—"although Dworkin claims to be describing what judges actually do—"the hidden structure of their judgments," as he says—the theory is about a judge's "hidden structure," not the immediate meaning of their judgments. As he describes where judicial interpretation proper comes in, to the extent it has a theory of judicial interpretation it is a theory of constructive interpretation, not some other theory of judicial interpretation.

Ely, supra note 77; see, e.g., Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (arguing that the goal of constitutional interpretation is to "discover the meaning, to ascertain and give effect to the intent of its framers and the people who adopted the Constitution").
This is distinct from a theory of law—to instruct courts how to discover the proper legal meaning of the governing law presupposes “an account of what the law is or consists of”—as it must, in order to guide courts toward the proper legal meaning of the constitutional law and not some other set of norms.

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

The two-output thesis, for example, belongs to a theory of adjudication but not to a theory of constitutional interpretation; the process of generating constitutional operative propositions may but need not involve the application of a theory of constitutional interpretation, and the formulation of constitutional decision rules involves a distinct operation, which has come to be called constitutional construction.

If the claim is positive, then it aims to explain what is the case in the actual world; if the claim is normative, then it aims to demonstrate that some set of facts or some condition should be the case in some possible world that is more desirable than the actual world.

The two-output thesis follows from this distinction, which has come to be called constitutional “construc-

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tion.”

This is distinct from a theory of law—to instruct courts how to discover the proper legal meaning of the governing law—or some other set of norms. Some theories of constitutional law and not some other set of norms. Some theories of constitutional law and not some other set of norms.

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

Moralistic theories of law—e.g., natural law theories like that of John Finnis—are normative insofar as they claim that we can identify what the law actually is only by evaluating putative legal propositions on some moral criterion. Most theories of adjudication are normative—although there are some notable exceptions such as the positive claims of the American Legal Realists and, more recently, the attitudinal modelers—but not all normative constitutional theories are exclusively theories of adjudication. Some also make claims belonging to a theory of law, such as the originalist claim mentioned above; Ernest Young's contention that some statutes gain (or should be said to gain) constitutional status when they discharge constitutional functions; or popular constitutionalist claims that constitutional law corresponds in some way with public views.

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

Evaluative criteria that will be useful for assessing claims of this sort for evaluating constitutional theories claims will focus on developing claims belonging to a positive theory of law; thus in discarding constitutional claims are normative claims that should be evaluated and protected by their proposers. The precise label for a positive theory of law is often theoretical matter, and certain of the normative claims that are valid constitutional norms in our system, because of the nature of the normative claims that are valid constitutional norms in our system, because of the nature of the normative claims that are valid constitutional norms in our system, and because of the nature of the normative claims that are valid constitutional norms in our system, and because of the nature of the normative claims that are valid constitutional norms in our system, and because of the nature of the normative claims that are valid constitutional norms in our system. The question of whether these claims can be evaluated and protected by their proposers is one of the most important issues in philosophy of law. The question of whether these claims can be evaluated and protected by their proposers is one of the most important issues in philosophy of law. The question of whether these claims can be evaluated and protected by their proposers is one of the most important issues in philosophy of law.
B. Criteria for Theory Evaluation

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

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

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

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

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

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

For these reasons among others, two typical scientific theory evaluation criteria—falsifiability and predictive power—seem inapt for choosing among positive constitutional theory claims.

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196 See supra notes 158–59 and accompanying text.
198 See e.g., MILTON FRIEDMAN, The Methodology of Positive Economics, in ESSAYS IN POSITIVE ECONOMICS 7–9 (1953) (arguing that the principal, perhaps only, proper test of a positive economic theory should be its predictive power).
199 Although they are routinely referenced in legal theory literature, see Jeanne L. Schroeder, Just So Stories: Posnerian Methodology, 22 CARDOZO L. REV. 351, 355 n.17 (2001), there is debate in the philosophy of science about the propriety of predictive power and falsification as criteria for evaluating scientific theories. Popper's views have been abandoned by mainstream philosophers of science. See e.g., Susan Haack, Federal Philosophy of Science: A Deconstruction—and a Reconstruction, 5 N.Y.U. J. LAW & LIBERTY 394, 415–16 (2010). Thomas Kuhn, for example, does not include falsifiability on his list of five criteria for choosing among scientific theories. See KUHN, supra note 12, at 52–229.
200 One problem with falsifiability as a test for positive legal theory claims is the following: Assuming that constitutional norms are meaningfully constituted by patterns of convergent official practice of acceptance, then for claims of the form "Θ is a constitutional norm in legal system X," potentially falsifying counterexamples (e.g., a judicial decision in which the court upholds some state action that pretty clearly threatens structural stability) could be interpreted as either: (1) proof that Θ is not a norm of the system; or (2) evidence that Θ was (or perhaps still is) a norm of the system but that the official consensus in which the court upheld some state action is changing or has changed. It is not obvious how—
Thomas Kuhn argues that there is not an objectively correct set of scientific theory selection criteria—because there is debate about whether scientific theories actually disclose truths about the world, we say that they approximate truths about reality, and these theory selection criteria are meant to identify the likely more accurate approximation among competitors.

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

There is some debate about what distinguishes science from other forms of inquiry; but it seems uncontroversial to suggest that science as a practice "avoids appeals to final causes, vital forces, or general bunkum[, ... answers] to criteria of empirical adequacy[, ...] and makes claims that are general, capable of supporting counterfactuals, and above all, that purport to be true or false with reference to something external; that is, science must relate to the natural world. [...]

Given these aims, it is unsurprising that criteria for the theory selection that enjoy broad and long-lived consensus support among scientists include accuracy, simplicity, consilience (or explanatory power/capacity), conservatism (or consistency with other well-accepted views about the world), and potential fruitfulness for future research. There appears to be no such consensus with respect to the propriety of the various normative criteria. [...]

constitutional theory claims—enough consensus for Kuhn to suggest that scientific theory selection decisions on these criteria can, over time, approach objectivity.

Theories may fare differently along different dimensions, and where there is no consensus as to the weight that should be accorded, say, simplicity relative to conservatism; but it seems reasonable at least to think that theories may compensate for failure on some dimensions with success on others.

Identifying what the law is may require the application of some moral, economic, historical, or other interpretive or evaluative criterion currently argued by some to be relevant to identifying the legal norms that we have; but whether such criteria must be so applied is one of the core disputes between competing theories of law.

If we want to evaluate positive constitutional theory claims according to how well they discharge the aim of disclosing what is the case about law; then the general theory selecting criteria developed in the philosophy of science for application to other theories that aim to disclose what is the case are preferable.

This is not to deny that the

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207 See Kuhn, supra note 12, at 325 (noting that the choice between competing theories "depends on a mixture of objective and subjective factors").

208 See id. at 327–29 (noting this relative weighting problem).

209 I want to move away from the view that legal theory's "characteristics and virtues," Wendel, supra note 191, at 1059–60, are exclusively bound up with certain values of political morality—say democracy or justice.

See supra notes 192–195 and accompanying text.

Cf. Fallon, supra note 14, at 538–41 (arguing that legalistic values bear on legal theory choice); Wendel, supra note 191, at 1061–64 (noting problems with this view).

210 See Kuhn, supra note 12, at 327–329 (arguing that theory selection criteria in science are properly drawn by theorists based on their perception of the objectives of the relevant inquiry); Bartrum, supra note 197, at 269 (suggesting the Kuhnian approach for legal theory selection); see also Leiter, supra note 16, at 9–13 (applying scientific theory selection criteria to compare legal positivism to natural law theories and Dworkin's theory). This is not to assert something like "Langdell's widely mocked claim that law can be treated as a science." Wendel, supra note 191, at 1064. Instead, I carefully qualify this analysis to reflect the deep uncertainty surrounding the basic ideas of knowledge and explanation in science. I am using the language of the inference to the best explanation approach to theory-building and explanation, rather than anything like a hypothetico-deductivist approach, to avoid vexed debates in the philosophy of science about the logical possibility of confirmation, whether science creates knowledge, and so forth. For this reason, I also set aside the philosophically difficult question of what an "explanation" really is. For an overview of these debates, see Hempel, Studies in the Logic of Confirmation, in Aspects of Scientific Explanation, supra note 204 (examining the hypothetico-deductivist method of confirming proposed explanatory hypotheses with empirical evidence); Carl G. Hempel, Philosophy of Natural Science 5–8 (1966) (canvassing problems with deductive models of scientific explanation); Nola & Sankey, supra note 204, at 335–45 (canvassing the realism/antirealism debate in philosophy of science); Gilbert Harman, The Inference to the Best Explanation, 74 Phil. Rev. 88, 88 (1965); Paul R. Thagard, The Best Explanation: Criteria for Theory Choice, 75 J. Phil. 76, 76–77 (1978).
process of assessing competing theories is inherently normative—of course it is, but limiting normative claims to the second-order question of which theory selection criteria we should adopt (and not, therefore, extending it to the first-order question of which theory we should select) avoids conflating the question what makes a good theory of law with the question what values does law serve or reflect—after all, the latter is one question that theories of law seek to answer.

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

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

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

SN is simpler than conventional accounts in two senses illustrated by the SPT account of the standard dormancy doctrines, immigration doctrine, and obstacle preemption doctrine. First, positing a single structural norm to explain all these doctrines is ontologically simpler than conventional accounts that posit multiple distinctive norms, perhaps one for each line of doctrine.

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

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

"We prefer more comprehensive explanations—explanations that make sense of more different kinds of things—to explanations that seem too narrowly tailored to one kind of datum." Everyone agrees that theory must fit the phenomena under consideration—it cannot have explanatory power if it does not explain anything. But among competing theories that roughly fit some aspects of the relevant phenomena, the consilience inquiry shifts to how many phenomena the theories explain, respectively. So, for example, "Darwin’s theory of natural selection was able to account for observations that initially seemed unrelated, such as those pertaining to anatomy (the presence of vestigial organs) and zoology (the observed differences in related species);" and thus is more consilient than alternatives that cannot explain these phenomena.

The SPT view explains at once a variety of doctrines that alternative accounts typically characterize as based on several different constitutional norms (and thus in this sense unrelated). A built-out theory accounts fully for the phenomena, the consilience that cannot explain these phenomena, explaining a variety of doctrines that alternative accounts typically characterize as based on several different constitutional norms (and thus in this sense unrelated). The built-out theory accepts a single constitutional norm (and thus in this sense unrelated).
like SN would hypothetically explain a great deal more, perhaps most structural doctrine. Moreover, the interpretive and value neutrality of SN means that it explains doctrines and judicial decisions that proponents of value-based or interpretive theories would characterize as non-lawful—for example, it explains why, despite the protestations of originalists that the dormant Commerce Clause doctrine is not legitimately derived from the original meaning of the Constitution, courts continue to apply the doctrine and other government officials systematically behave as though it is valid law.

Originalists advancing a theory of law claim that the many judges who appear to accept the validity of the dormant Commerce Clause doctrine in its current form are either mistaken about what the constitutional law is or are intentionally disregarding the law.

Accuracy—a theory's capacity to explain actual observations—is a closely related criterion. The thin-norms view also explains distinctions that legal practitioners and scholars make in everyday talk between, say, what the law is and what the law should be; value-based or interpretive theories of law cannot capture this dichotomy.

See, e.g., Tyler Pipe Indus. v. Wash. State Dep't of Revenue, 483 U.S. 232, 260, 263 (1987) (Scalia, J., concurring in part and dissenting in part) (attacking the dormant Commerce Clause doctrine because "[t]he historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce.")
Moreover, the thin-norms theory can explain, in a manner that competing theories cannot, an even larger and in some senses more obvious phenomenon: the stability and durability of the constitutional system despite various apparently deep disagreements of method and value.

Another accepted criterion, conservatism, suggests that desirable positive theory should leave intact our other well-accepted views about the world. Leiter maintains that legal positivism is more desirable than alternatives on this dimension because, among other things, positivism is consistent with, supported by, and potentially generative of empirical research programs.

A theory of law that makes explicit the tacit or inchoate concept at play in scientific research is probably to be preferred to its competitors. Positivism is that theory. If one surveys the now vast empirical literature on adjudication, which aims to explore the relative contributions of legal versus non-legal norms to decision-making by courts, that literature always demarcates the distinction in positivist terms. So, too, SN's capacity to distinguish what the law is from what one thinks the law should be facilitates empirical analysis of the relative influence of legal and non-legal reasons for decision. What matters on this view is that judges act as if they accept SPT and similar norms as valid norms of the constitutional system, not their reasons for that acceptance; thus SN is consistent with any account of the real causes of judicial decisions.

Value-driven and interpretive theory-of-law claims, however, are inconsistent with empirical work like that on the attitudinal model—they claim that judges should decide cases based on some set of values or interpretive commitments, but the empirical evidence suggests that such proposals are unrealistic in light of judges' claim that their judges should decide cases according to legal standards. Accord Leiter, supra note 16, at 10 (making a similar argument for favoring legal positivism over alternatives). See Kuhn, supra note 12, at 321–22 (“[A] theory should be consistent, not only internally or with itself, but also with other currently accepted theories applicable to related aspects of nature.”); Leiter, supra note 19, at 1239. Some argue that this is more of an ex ante threshold for distinguishing facially plausible theories from those unworthy of serious consideration. See, e.g., Wendel, supra note 191, at 1049.

Leiter, supra note 16, at 12. See generally Segal & Spaeth, supra note 173 (presenting the attitudinal model of judicial decision-making that tests for the causal power of non-legal reasons in adjudication).
A related criterion is fruitfulness—the extent to which a theory "enable[s] us to say significant things, generate[s] insights, and has implications for future research."

It is not right to say that legal theory cannot generate predictive hypotheses. The literature on the attitudinal model of judicial decision-making, which tests the hypothesis that proxies for judges' political views (such as the party of the appointing president), is widely viewed as a robust and successful predictive research program. This shows that legal theory can spur empirical research—the attitudinal model was prompted and supported by the theoretical claim of the American Legal Realists and others that legal reasons alone are insufficient to explain many judicial decisions.

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

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

In this Part, I explore aspects of Skeletal Norm’s theoretical conservatism in detail. First, I argue that this kind of account is more consistent than alternatives with our best going general theory of law, the legal positivism developed by Hans Kelsen, given definitive formulation by H.L.A. Hart, and refined over the last half century by Joseph Raz, Leslie Green, John Gardner, and others.

Explaining this consistency also makes clear that this account is consistent with current, ongoing empirical research programs in law. Interpretive controversy has two salient consequences. Interpretive controversy is the phenomenon that motivates Dworkin’s “theoretical disagreement” objection to legal positivism. If Supreme Court Justices’ disagreeing about the proper theory of constitutional interpretation constitutes disagreement about the criteria of legal validity, the argument goes, than either we have no settled rule of recognition for constitutional law or there is something wrong with Hart’s account of the rule of recognition as a social rule.

SN generates a new refutation of the theoretical disagreement line as it relates to constitutional law. Additionally, interpretive controversy dominates constitutional theory. SN creates a path around interpretive debate so that theorists may proceed with other inquiries without so much interpretive throat clearing. Or so I shall argue.

From the taxonomy developed above we can group two clusters of views that dominate modern constitutional theory—value-laden theories and interpretive theories. Both are normative. Value-laden theories are those theories of law or adjudication in which the constitution is the phenomenon that motivates Dworkin’s “theoretical disagreement” objection to legal positivism. If Supreme Court Justices’ disagreeing about the criteria of legal validity, the argument goes, than either we have no settled rule of recognition for constitutional law or there is something wrong with Hart’s account of the rule of recognition as a social rule.

SN creates a path around interpretive debate so that theorists may proceed with other inquiries without so much interpretive throat clearing. Or so I shall argue.

Footnotes:
236 See Gardner, supra note 14, at 192-209 (outlining a number of intellectual history that from Dwork in’s “semantic” objection).
237 See supra Part II.A.1 for my more detailed taxonomy.
238 See supra Part II.A.1 for my more detailed taxonomy.
tutional norms that we have are said to be those that best promote some value (democracy, justice, etc.) or on which proper constitutional adjudication has courts working to maximize some value. Interpretive theories are normative theories of adjudication according to which courts should go about discovering what the constitutional law is through some particular series of steps. I argue that my view is superior to value-driven theories because it is more consistent with legal positivism and that my view is superior to interpretive theories because it diffuses the problem of theoretical disagreement in a manner that interpretive theories cannot.

A. Legal Positivism

Legal positivism is characterized by its two core claims—the "sources" thesis and the "social rule" or "conventionality" thesis. The sources thesis is that norms may be rendered legally valid solely in virtue of their sources, without recourse to their merits. In other words, a legal system's ultimate criteria of legal validity, viz. the content of its rule of recognition, need not include merits-based criteria. The social rule thesis is that a legal system's ultimate rule of recognition is established by empirical fact, namely, the existence of a pattern of convergent practice by legal officials demonstrating the existence of a pattern of convergent practice by legal officials, without recourse to their merits. In other words, a legal system's ultimate criteria of legal validity, viz. the content of its rule of recognition, need not include merits-based criteria.

Legal positivism is a theory of law—a "view that explains the crucial question that arises about law: Namely, how do we determine which norms in any society are norms of the legal system, that is, norms that are legally valid?"
I will argue, however, that SN is more consistent with legal positivism than competing theories of constitutional law, such as the value-laden theories, and that this is an important reason to prefer SN. So far, there is no account of constitutional norm identification that is wholly compatible with legal positivism.

Norms that comport with the criteria of legal validity contained in a legal system's rule of recognition are law in the system. Accordingly, to identify the constitutional norms that we have, positivism suggests that we look for the American rule of recognition's criteria of legal validity for constitutional norms.

However, thus far we have no comprehensive account of our own rule of recognition—only a collection of competing theories of constitutional norm identification. Furthermore, these theories do not always comport with the criteria of legal validity. Gardner notes that rules of recognition, including the ultimate criteria of legal validity may be "indeterminate in numerous respects." This is especially likely for criteria of legal validity that are not explicit or definite. Consequently, it is difficult to determine whether a particular norm is law in our system.

For example, Hart argues that norms of basically any source—legislation, judicial decisions, customs, etc.—can be law if officials treat them as law under the rule of recognition. However, this is not necessarily the case. The rule of recognition is not a simple rule, but rather a complex set of practices that may change over time. Therefore, it is not always clear whether a particular norm is law in our system.

Additionally, the criteria of legal validity may be "conditioned," meaning that they may be applicable to one form of purported legal norm but not others. This makes it difficult to determine whether a particular norm is law in our system.

In summary, there is no completely satisfactory account of constitutional norm identification that is compatible with legal positivism. Therefore, it is difficult to determine whether SN is consistent with legal positivism. However, this is an important question to consider when evaluating theories of constitutional law, and it is necessary to determine whether the positivist approach is consistent with legal positivism in order to provide a positive theory of law.
How, then, should we approach the norm identification question? Without a complete account of our ultimate rule of recognition with respect to constitutional norms, we might do well to look for norms that appear to sit at the center of convergent official practice—as I have done above.

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

Indeed, there is no theoretical obstacle to our (or any) rule of recognition validating some norms as law just in virtue of their broad and durable acceptance as legally binding by official practice. Such norms are analogous to norms of customary law; that is, law which “in foro” requires for its existence a temporally extended pattern of relatively convergent behavior by multiple law-applying officials, which pattern suggests that the officials accept the custom as legally binding.

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

Importantly, while the formation of a system’s rule of recognition requires a pattern of convergent official practice recognizing a set of validity criteria, legal obligations themselves do not require such a pattern to be operative legal obligations.

...
The rule of recognition may recognize duly enacted legislation, judicial decisions, and so forth, as legally binding in virtue of their sources regardless of any official behavior or public attitudes about the specific legal norm embodied in the statute or decision. However, the nature of the rule of recognition does not prescribe the procedure that must be followed. Hence, we may recognize the rule of recognition and the rule of law as necessary, but not as sufficient. The result is a rule of recognition that is central to legal systems. Hence, we need not concern ourselves with the criteria of legal validity that are not necessary for legal systems. Instead, we need only concern ourselves with the criteria of legal validity that are central to legal systems.

But this does not rule out the possibility that some norms—like customary law norms—may be legally valid in virtue of patterns of convergent practice alone, or perhaps in combination with the satisfaction of other validity criteria if convergent practice alone is insufficient under the particular rule of recognition.

The State-Preclusion-Thesis-like norms I hypothesize here may be constitutional norms of the form of customary law;

such a form of popular constitutionalism, in which judges and justices tacitly accept norms ex ante, before they formulate implementing doctrines and render decisions consistent with the norms. I have elsewhere explored a slightly different account of how these norms might be accepted, see Garrick B. Pursley, Properties in Constitutional Systems, 92 N.C. L. Rev. 547, 584–89 (2014) (reviewing Adrian Vermeule, THE SYSTEM OF THE CONSTITUTION (2011)), an account that diverges slightly from Hart's view that acceptance from 'the internal point of view' requires a conscious decision to abide by a norm viewed as legally obligatory. Hart, supra note 16, at 255. If, instead, norms simply emerge as durable patterns in constitutional decisions over time—as emergent properties of the constitutional system—we might extend Hart's conception of how criteria of legal validity become part of a system's rule of recognition to include something other than standard, conscious adoption. Pursley, supra, at 585–88.

My view is not a form of popular constitutionalism, although it is compatible with popular constitutionalist theories. See supra, note 190. On Hart's view, the consensus of legal officials on the criteria of legal validity is a central feature of legal systems, Hart, supra, note 16, at 94–95, even if there may also be a public consensus, the two are not necessarily connected and the latter is not necessarily required. Hart, supra note 16, at 60–61. However, this view neither requires nor precludes the possibility that our rule of recognition might contain criteria that validate popularly accepted norms. Gardner, supra note 246, at 34 (discussing customary law); Abner S. Green, What is Constitutional Obligation, 93 B.U.L. Rev. 1239, 1245–46 & n.37 (2013) ("Hart says only official acceptance is necessary, but he does not say rules of recognition may not include citizen participation.")
"we have long accepted," "it is well-established," or "courts accept," which suggest that our rule of recognition might well incorporate a criterion of legal validity for patterns of official consensus.

Now contrast, in terms of consistency with legal positivism, a value-based theory of law on which the constitutional law consists in those norms that best promote a substantive value like social justice.

Though a rule of recognition on the "exclusive" legal positivist view may incorporate only source-based criteria of legal validity: "inclusive" legal positivism holds that any given rule of recognition may include evaluative criteria (although no rule of recognition need do so).

But on either positivist view, where a consensus of officials accepts criteria that validate the norm as binding, we need not be concerned with the reasons why they decide in a manner that suggests the norm's binding character. We may simply conclude that the norm is "well-accepted" or "courts accept."
acceptance of the relevant criteria. Thus a system's rule of recognition may validate norms based on their merits, validate customary norms based on a consensus that they are law, or validate norms that both enjoy consensus acceptance and comply with merits criteria.

Value-based theories of law are in tension with positivism's social fact thesis. There is substantial debate about the proper value criteria on which to assess competing claims about the content of constitutional norms. In addition to the various claims that \( \Phi \) or \( \Psi \) is the principal value a norm must advance to be properly considered a valid norm of constitutional law; other accounts combine multiple values in various ways.

This makes it difficult to square value-driven theories of law with legal positivism, since the debate about values would seem to forestall the possibility of official consensus on value-based criteria of legal validity.

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

The point here is just that one validity criterion might be whether there is a durable consensus as to the legal and constitutional status of the relevant proposition. Whether there is a durable consensus as to the legal and constitutional status of the relevant proposition.

On this view of our rule of recognition, we could make sense of the idea of official acceptance constituting prima facie evidence of legal validity—where the officials' reasons for acceptance are irrelevant. On a value-driven view, we could not make sense of the idea of official acceptance as evidence of legal validity—where the officials' reasons for acceptance might be relevant. On this view of our rule of recognition, we could categorize certain norms as part of the Constitution by observing the fact of their general acceptance as illustrated by patterns of convergent official behavior without regard to the officials' reasons for accepting the norm. On a value-driven view, we could not make sense of the idea of official acceptance constituting prima facie evidence of legal validity—we would need to know the officials' reasons for acceptance.

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268 See supra notes 231–33 and accompanying text.
269 See supra note 206; Dorf, supra note 193, at 595–96 (discussing value disagreement).
270 See Dworkin, supra note 14, at 4–6; Leiter, supra note 19, at 1220–22 (discussing this kind of dispute and its effect on the social fact thesis).
271 See supra note 250 and accompanying text (discussing complex rules of recognition).
272 This seems to be the simplest form of validity criterion a system's legal officials might adopt, at least insofar as it is similar to the criteria by which we validate the rule of recognition itself, namely a convergent pattern of acceptance and the requisite attitude. See Hart, supra note 16, at 94–105 (discussing the process of social rule formation).
only if their reasons match our basic value proposition and the norm itself advances the value could we explain why they legitimately accept the norm as legally binding. Such a view will also frequently require us to characterize some norms that clearly are accepted by a consensus of legal officials as not legitimately part of the Constitution (that the officials' acceptance of the norms is in error) because it is in a manner norm for example in which the norms, whether and the way in which they are made or enforced, exceed the accepted SPT. Such constitutional exemptions might depend on a rule of recognition. Accord, supra note 9, 491 U.S. 542 (1989) (granting reasons why the majority of valuations are not the social fact thesis; but both are likely to arise frequently on a value-based constitutional theory of law because of the deep disagreement among officials on questions of political and moral value.

SN, by contrast, can reconcile value criteria with legal positivism by suggesting that both consensus norms and deep disagreements about values can obtain under a single, admittedly complex, rule of recognition. This approach helps explain how we can observe both deep disagreement on questions of political morality and constitutional interpretation and relatively robust stability and durability in our constitutional system.

B. Interpretive Controversy and Theoretical Disagreement

The State Preclusion Thesis and the other hypothetical structural norms that I propose we use to augment our explanatory account of structural doctrine are abstract for a variety of reasons; but one important benefit of their abstractness is that they might be affirmed by adherents to most major theories of constitutional interpretation.

This suggests that some basic consensuses survive the clash of interpretive theories. Of course, my primary goal here is explanatory—I want to explain what courts are doing in structural cases and, accordingly, if these norms are the best explanation of the doctrine and results we observe, I'm not terribly concerned with the extent to which interpretive theorists agree that the norms are validly derived from our theoretical positions.

Pursley, supra note 9, at 514–528 (giving reasons why adherents of various interpretive theories could accept SPT). Strict constitutional textualists might deny SPT's validity just because it is an unwritten norm, see for example John F. Manning, Federalism and the Generality Problem in Constitutional Interpretation, 122 Harv. L. Rev. 2003, 2013–20 (2009) (denying the legitimacy of unwritten structural norms). But inferring SPT requires only the modest assumption that the obvious intention to make the Constitution durable, which seems sufficiently fundamental to their purpose of a Constitution as to be a relatively uncontroversial imputation, is relevant to interpretation, an assumption that even strict textualists would be hard pressed to deny. Pursley, supra note 9, at 534–36.
This is a breakthrough in at least two senses: It can help advance constitutional theory past interpretive debate and it can provide a new answer to the “theoretical disagreement” objection to legal positivism. But it is easy enough, if it appears that all constitutional questions hang in suspense until the interpretive theory debate is resolved, analysis of other forms of reasoning in constitutional cases will tend to take on secondary importance. Identifying certain basic consensus norms like SPT, acceptable on most theories of interpretation, that are implemented in a variety of contexts with a wide range of doctrinal mechanisms shifts the focus of our normative debates about structural doctrine from interpretive issues to the instrumental reasoning issues that shape doctrinal rules once the interpretive question is settled in an operative proposition.

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

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

Living constitutionalism, by contrast, is “juristocratic” — its proponents evince a wide-bodied trust in judges’ capacity to fairly update constitutional meaning in the light of changing circumstances. This debate is, in other words, partly a debate about the actual bite of the countermajoritarian difficulty, a problem that has preoccupied constitutionalists and judges for decades. But it is easy enough, if it appears that all constitutional questions hang in suspense until the interpretive theory debate is resolved, analysis of other forms of reasoning in constitutional cases will tend to take on secondary importance. Identifying certain basic consensus norms like SPT, acceptable on most theories of interpretation, that are implemented in a variety of contexts with a wide range of doctrinal mechanisms shifts the focus of our normative debates about structural doctrine from interpretive issues to the instrumental reasoning issues that shape doctrinal rules once the interpretive question is settled in an operative proposition.
theorists since the beginning of the research program; until it is resolved the interpretive debates driven by concerns about judicial constraint will continue. Perhaps none of the theories offered to address the countermajoritarian difficulty and the premises supporting it do not rest upon an accurate portrayal of the constitutional system we actually enjoy. Although it is tangential here, this once again points to the need for a renewed focus on positive constitutional theory.


See Barry Friedman, Dialogue and Judicial Review, 91 MICH. L. REV. 577, 584 (1993) (noting that the problem may be “insoluble”).

See Roosevelt, supra note 278, at 122–23 (“The political description, reductionist though it may be, is largely correct.”). Roosevelt’s statement suggests that the choice of theories is a matter of determining which is most consistent with one’s value-related priors, then judge. Posner was right to suggest that interpretive theories do not have “agreement-coercing” power. Here again, the differences between normative constitutional theory and scientific theory bear emphasizing—people may legitimately disagree on questions of political morality or other constitutional values; thus the criteria for theory acceptance in this context are not sufficiently universal to make such coercion possible. Even Jack Balkin’s grand ef-
fort to reconcile originalism with living constitutionalism faces an uphill battle so long as inter-theoretical competition is driven by incompatible underlying normative agendas.

Finally, one might conclude that both originalism and living constitutionalism "as they are conventionally understood," are "both obviously defective theories that no sensible person would hold." As Kermit Roosevelt explains:

Classic living constitutionalism is silly for all the reasons conservatives point out. The idea that judges must sometimes, somehow "update" the Constitution to keep it in step with the times is neither helpful to a judge trying to do her job, nor encouraging to a citizen wanting to see himself as a participant in the ongoing project of constitutional self-governance . . . . Classic originalism is no better, however. It makes a profound error in supposing that fidelity to the original meaning of the Constitution requires that cases be decided, to the extent possible, as if they had been brought immediately after the Constitution was ratified. The idea that judges must sometimes, somehow update the Constitution to keep it in step with the times is neither helpful to a judge trying to do her job, nor encouraging to a citizen wanting to see himself as a participant in the ongoing project of constitutional self-governance . . . .

On top of everything else, then, theorists engaged in interpretive debates might be chasing a truly elusive prize. These observations suggest that we should embrace new methods for doing constitutional theory without the need for throat clearing regarding interpretive priors and careful bracketing of possible interpretive objections against claims the theories want to defend.

SN also suggests a new refutation of the "theoretical disagreement" objection to legal positivism. The objection trades on the supposition that when judges disagree about interpretive method, they disagree about the criteria of legal validity. But see id. at 264 ("[S]hared values can provide some objective ground to assess particular theory choices."); Fallon, supra note 150, at 549–50 (same). The idea of consensus-based value acceptance remains with my claim about consensus norms but the empirical question as to whether such value consensuses exist is open and worth exploring.

289 See generally BALKIN, LIVING, supra note 278.

290 See Roosevelt, supra, at 125–26 (criticizing Balkin's project on the ground).

291 Id. at 125.

292 Id. (footnotes omitted). For a comprehensive catalogue of the problems with originalism both classical and new, see generally Berman, supra note 181.

293 D WORKIN, supra, at 4–6. Dworkin's examples of theoretical disagreement arise in the context of statutory interpretation; however, the argument, mutatis mutandis, has the same force in the context of constitutional interpretation.
Law can arise despite having a settled rule of recognition; for example, officials operating under a consensus view of the criteria of legal validity may nevertheless have "empirical" disagreements about (1) whether there is sufficient consensus on some validity criterion (e.g., a dispute about whether judges generally accept customary international law as binding in the United States); or (2) whether settled criteria of legal validity are satisfied in a particular case (e.g., a dispute about whether Congress actually enacted the statute).

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

So, Dworkin argued, legal positivism is incomplete because it cannot explain this phenomenon of our legal system.

We saw above that value-based theories of law are inconsistent with legal positivism's source thesis; interpretive theories run into trouble with legal positivism here—they invite theoretical disagreement and thus are inconsistent with positivism's social fact thesis as to constitutional law. By way of general response to the theoretical disagreement objection, Leiter has correctly noted that legal positivism explains perfectly well the most important phenomenon of our legal system, the "massive and pervasive agreement about the law throughout the system."

The vast majority of legal issues are resolved without the theoretical disagreements Dworkin emphasizes, which arise only in a small subset of appellate cases while most judicial decisions are resolved with the legal norm of legal criteria that fix the law. So, Dworkin argued, legal positivism's source thesis is inconsistent with legal positivism's social fact thesis. By way of general response to the theoretical disagreement objection, Leiter has correctly noted that legal positivism explains perfectly well the most important phenomenon of our legal system, the "massive and pervasive agreement about the law throughout the system."
Thus, Dworkin's seeming insistence that theoretical disagreement is a central phenomenon of the legal system is misplaced. This problem of theoretical disagreement is, however, more pointed when we focus on cases involving substantial interpretive questions, where the "history of interpretive theory in American courts is, above all, a history of persistent and deep disagreement among judges and courts about the proper methods and sources of legal interpretation." Questions of constitutional interpretation provoke the most theoretical disagreement; thus the objection has the heightened force with respect to constitutional adjudication and potentially undermines the existence of a settled rule of recognition for constitutional law. While this affects only a small faction of legal disputes, and thus does not threaten legal positivism's superiority as a general account of the operation of a system's most fundamental laws, it might undermine positivism's capacity to account for the operation of a system's most fundamental law.

Leiter offers two straightforward positivist responses to the objection: Judges engaged in theoretical disagreement act as though there is a fact of the matter about what the law is, but they are either being disingenuous or they are in error insofar as the theoretical disagreement disproves the existence of consensus validity criteria on the issue. He admits, however, that these responses only "explain[] away" the face value of the disagreement.

The SN account points up a new rejoinder: Even our typically contentious constitutional law may be characterized by significant official consensus on some of the most basic and important norms—structural norms that stabilize our system and create the framework in which other interpretive debates can take place without the system breaking down. Interpretive theory claims—maintaining that the only correct way for courts to identify the constitutional norms we have is to adopt one of the interpretive theories that are so hotly contested—enhance our ability to modify and update these norms in light of new facts, but they are also an obstacle to the operation of our system's most fundamental law.

Questions of constitutional interpretation proceed as usual, but the operation of the constitutional theory claims is seen as fitting into the interpretive disagreement.

Leiter argues that the operation of these theories must be explained in light of the interpretive disagreement, but this explanation is not necessary because the theories are not the only way to interpret the law. The SN account, however, argues that the theories are the only way to interpret the law and that the interpretive disagreement is a problem that must be resolved by judges who have no legal text to refer to.
tutional adjudication is no longer a counterexample, or even a par-
ticularly problematic case, for legal positivism. This response does
more than just explain away theoretical disagreement in constitu-
tional cases—it suggests that basic structural constitutional norms
durably exist despite theoretical disagreement on other constitu-
tional issues, rendering the theoretical disagreement critique inter-
esting but not disabling as it relates to constitutional law.

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

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

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

CONCLUSION

While one might object that affirming the validity of norms like SPT is too commonsensical to yield any benefits; I offer the foregoing exploration of how explaining of multiple lines of complex constitutional doctrine as predicated on these simple, obvious propositions advances constitutional theory past difficult and persistent conceptual challenges. Building on a broader theory of this form promises significant fruit, enabling entirely new categories of normative constitutional theory work focusing on the pragmatic justifications for various constitutional norms.

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This mirrors Leiter’s argument that theoretical disagreement is not a central feature of a legal system in which the central phenomenon is massive and pervasive agreement about the law.

See id. at 1228.

Cf. id. (“One of the great theoretical virtues of legal positivism . . . is that it ex-
plains . . . the pervasive phenomenon of legal agreement.”).

See supra note 272.

Cf. Leiter, supra note 19, at 1220 (“[E]ven if we agreed . . . that legal positivism provided an unsatisfactory account of theoretical disagreement in law, this would be of no signifi-
cance unless we thought that this phenomenon was somehow central to an understand-
ing of the nature of law and legal systems.”).
implementing doctrines and providing a new set of parameters for empirical study of the views of the public and legal officials that could, at last, lead to some falsifiable hypotheses. In the end, I hope that this idea will share a "hallmark of truly deep insights; they seem obvious in retrospect."