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The Vanity of Dogmatizing

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Book Reviews

THE VANITY OF DOGMATIZING

BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING. Brian Z. Tamanaha.[1] Princeton University Press. 2010. Pp. xii + 252. Cloth $70.00, Paper $24.95.

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The year 1661 saw the publication of Joseph Glanvill's *The Vanity of Dogmatizing*, a polemic advocating an intellectual break from Aristotle and the Schoolmen in favor of the sort of empiricism that eventually came to fruition in the philosophy of David Hume. Glanvill was deeply irritated by what he perceived as the encrusted academic orthodoxies of his age: "The Disease of our *Intellectuals*," he railed, "is too great, not to be its own [evidence]: And they that feel it not, are not less *sick*, but stupidly *so*."[3] What was needed was a skeptical cast of mind—thinkers who would shatter the tiresomely durable scholarly categories of the past centuries. The entrenchment of certain archetypical ways of knowing had led to the desiccation of knowledge and eventually to its distortion. True knowledge, said Glanvill, "requires an acuteness and intention to its discovery; while verisimility . . . is an obvious sensible on either hand, and affords a large and eas[y] field for loose [i]nquiry."[4]

The passing of academic generations often witnesses challenges to older scholarly categories in favor of the next best

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3. JOSEPH GLANVILL, THE VANITY OF DOGMATIZING: THE THREE 'VERSIONS' 62 (Stephen Medcalf ed., Harvester Press 1970) (1661).

4. *Id.* at 64.

thing. But it is rarer to see the attempted upending of an entire way of thinking about a historical phenomenon whose existence has achieved unspoken universal assent. In his book, *Beyond the Formalist-Realist Divide*, Brian Tamanaha takes up Glanvill's mantle, and his target is one of the most deep-rooted jurisprudential dichotomies of the last century: the concepts of legal formalism and legal realism. The book aims "to free us from the formalist-realist stranglehold," an exercise that, it is claimed, will allow "us [to] recover a sound understanding of judging" (p. 3).

The book makes three contributions—historical, critical, and theoretical. First, it convincingly resuscitates several unjustly discredited figures in American legal history. Second, it offers various perceptive criticisms of the way in which legal scholars and commentators have distorted the views of their predecessors for ideological and other ill-gotten gains. Third, it calls for the repudiation of the formalist and realist categories in favor of what the author touts as "balanced realism" (p. 6), which he claims is both an accurate picture of the way that many judges always have done and continue to do their work, and a normatively attractive jurisprudential account.

This essay summarizes and praises the historical features of the book in Part I. These are the best parts of a very good book. In Part II, the essay explores Tamanaha's interesting critical reconstruction, one which attempts to explain why the formalist/realist dichotomy achieved such salience in the face of copious contrary historical evidence. In the context of assessing the author's critique, the essay expresses some reservations about Tamanaha's appeal to "balanced realism." In specific, it argues that Tamanaha's ultimate reliance on the very scholarly categories that he spends the bulk of his book debunking is surprising and somewhat deflating. This recursive move suggests that even after all the historical smudge-marks have been identified and retouched, the best that can be done is resignation to a kind of murky *via media* somewhere between formalism and realism's grosser excesses. The essay offers two interpretations of Tamanaha's backslide to "balanced realism," which it calls the metaphysical and the historicist interpretations.

What might all of this mean for legal scholarship? The question is too large to be pursued in any detail here, but Part III speculates about how adopting the metaphysical and historicist modes in legal theory might influence one facet of constitutional theory: originalist and living constitutionalist theories of

interpretation. It is tentatively suggested that in light of the sorts of systematic academic distortions that Tamanaha so adeptly documents in the area of jurisprudence, the historicist mode, though rarely pursued by legal theorists, offers a more promising future for this debate in constitutional theory as well as for the formalist/realist question itself.

I

The most successful portion of Tamanaha's illuminating study demonstrates that the so-called "legal formalists" of the late nineteenth and early twentieth centuries have been consistently caricatured and mis-described (sometimes in bad faith) by scholars of later periods. These distortions were often absorbed uncritically—as if by rote—into subsequent academic treatments of American legal history. Tamanaha uncovers evidence that gives shape and texture to the historical portrait of the formalists. He vanquishes the myth that they were "mechanical" jurisprudes fixated on "finding" the law in some sort of nebulous jurisprudential ether, and he shows them to have been keenly aware of the realities of indeterminacy, subjectivity, law's non-autonomy as a discipline, and many other insights of contemporary legal thought. Long-reviled jurists and scholars, including Sir Henry Maine, Thomas Cooley, John Dillon, James Carter, Joseph Beale, Christopher Tiedeman, William Hammond, and Christopher Columbus Langdell, are given well-earned makeovers by Tamanaha's evidence. They are shown to be thinkers in full; no longer robots with cartoonish views, but complex and sophisticated minds.

Conversely, Tamanaha takes legal historians and theorists of later periods to task for gross mischaracterizations of their predecessors. Jerome Frank, Grant Gilmore, and Roscoe Pound come off particularly poorly. Frank is shown to have wantonly manipulated the writings of Maine and Beale by carefully interposed ellipses and other shoddy academic sleight of hand. Where Maine unequivocally asserted that the law was elastic, that judges make law, and that few people then believed that the law was "a complete, coherent, symmetrical body" (p. 14), Frank made it appear that Maine had said precisely the opposite and that lawyers in the 20th century continued to believe Maine's fantastic theories (p. 16).[5]

5. JEROME FRANK, LAW AND THE MODERN MIND (1930).

Gilmore's description of a "Formal Style" of American law in the post-Civil War period, in which as a rule people believed that "law is a closed, logical system" and that a judges' role was to "discover[] what the true rules of law are and indeed always have been"[6] is exposed as a fallacy (p. 18). Tamanaha offers an abundance of fin-de-siècle articles and statements in which lawyers, scholars, and even judges openly acknowledge the existence of "judicial legislation," examples of which include passages from arch-"formalist" historical jurists Cooley and Dillon (pp. 19–20). In Gilmore's telling, Benjamin Cardozo was the great prophet of the "third age" of American law—legal realism—auguring it with his revelation in *The Nature of the Judicial Process*[7] that judges "made law instead of merely declaring it"; this position, according to Gilmore, "was widely regarded as a legal version of hard-core pornography" at the time (p. 21). In fact, Tamanaha shows that much of what Cardozo wrote about judicial legislation was uncontroversial in 1921 and had been said repeatedly at least twenty years earlier (pp. 21–22), though one should point out there is a difference between a well-known and respected judge saying something and someone else saying it. It is a pity that Tamanaha devotes scant attention (p. 104) to Samuel Williston, a "formalist" giant (unlike at least some of the figures Tamanaha resurrects) who was also maltreated by Gilmore as a pedantic conceptualist technician.[8] In his autobiography and elsewhere, Williston acidly remarked that the realists' brash claims to having discovered the fact of law's indeterminacy and their clarion call that judges must treat the law as "a means to social ends"[9] were old news: "brave men lived before Agamemnon."[10]

As for Pound's influential 1908 article, "Mechanical Jurisprudence," which purported to attack the American "jurisprudence of conceptions" in which "everything is reduced to simple deduction" from procrustean, "predetermined" legal ideas,[11] this critique is shown to have been properly directed at a foreign theoretical construct—German legal science, and its

6. GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).
7. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).
8. GRANT GILMORE, THE DEATH OF CONTRACT 14 (1974).
9. SAMUEL WILLISTON, LIFE AND LAW 210–11 (1941)
10. Samuel Williston, *The Case Method of Studying Law*, 43 HARV. L. REV. 972, 972 (1930) (book review). For a thoughtful treatment of Williston's intellectual legacy, see Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).
11. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 610–12 (1908).

scattered academic partisans (pp. 27–32, 54). Whatever its salience among the scholarly set in the United States (and even among academics, Pound's account was hotly contested (pp. 32–33)), "mechanical jurisprudence" was an exceptionally poor description of how most American judges and lawyers thought about law and adjudication.

Even Pound's constitutional mechanical bête noire—*Lochner v. New York*[12] (about which, Pound claimed, "rules have been deduced that obstruct the way of social progress"[13])—was interpreted by other leading jurists of the time in exactly the opposite fashion: the *Lochner* majority had been aggressive with the facts, substituting its own interpretation for that of the New York legislature.[14] *Lochner* instantiated the tyranny of facts, not mechanical concepts (p. 36). And Justice Holmes's celebrated dissent in *Lochner*, in which Holmes famously thundered against the constitutionalization of "Mr. Herbert Spencer's Social Statics,"[15] was in reality a re-run of nearly identical arguments in 1893 by C.B. Labatt in the *American Law Review* in response to a Pennsylvania Supreme Court decision striking down legislation prohibiting mine owners from engaging in various abusive payment practices (p. 78).[16]

Likewise for the doctrine of stare decisis. In Pound's telling, the mechanistic quality of jurisprudence had led to slavish obeisance to precedent and the "petrification" of law.[17] But Tamanaha shows that few, if any, jurists in the formalist era believed precedent to be inviolable; not even Blackstone held this view, let alone formalist lawyers like Christopher Tiedeman, Munroe Smith, or Wilbur Larremore, all of whom plainly acknowledged that while precedent had its claims, those must always be balanced by competing, "'irrepressibl[y] conflict[ing]'" demands (pp. 38–40).

In sum, late nineteenth century jurists' displeasure with legal fictions (pp. 48–49), their keenly felt distinction between law as ideally conceptualized and law as applied in practice (p. 54), their fretfulness over the perils of legal uncertainty and the

12. 198 U.S. 45 (1905).

13. Pound, *supra* note 11, at 616.

14. For similar historically sensitive treatment of *Lochner*, see David Bernstein, Lochner *Era Revisionism, Revised:* Lochner *and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 7–12 (2003).

15. Lochner, 198 U.S. at 75 (Holmes, J., dissenting).

16. The similarities are startling, and Tamanaha suggests that there is strong reason to believe that Holmes would have been familiar with Labatt's article (221–22 n.91).

17. Pound, *supra* note 11, at 606.

rapid proliferation of reported decisional law (pp. 33–36, 55), their skepticism about mechanical or "deductive" adjudication (pp. 49–56), and nothing less than their occasional repudiation of "formalism" itself (pp. 45–48)—Tamanaha brings together all of these historical theses, supported by evidence from many writers of the formalist age, thoroughly debunking the exaggerated claims that have been made about it.[18]

Tamanaha does similar complicating work for the legal realist period. A plain statement of legal realism has always been rather difficult to pin down. This elusiveness reflects both significant differences among self-described legal realists even within the era of their ascendancy and the fact that the realists sometimes defined themselves negatively, in response to what they perceived as the formalist bogeyman (p. 71). Yet the fact that there was no clear-cut manifesto of legal realism does not mean that there was nothing distinctive about it; there would be few academic movements at all if cast-iron marching orders were a requirement. At all events, as an admittedly imprecise formulation of legal realism, one that surely would provoke particular intramural disagreements, Tamanaha's working list of general characteristics is serviceable:

- "legal rules can be interpreted in various ways and [] how judges interpret the rules will be a function of their personal views and the surrounding social forces" (p. 79)
- "one of the main tasks of lawyers is to predict outcomes . . . [which] cannot be done well by attention to the rules only" (p. 80)
- "statutes no less than precedents are open to different interpretations, and judges make law in the course of applying statutes in particular situations" (p. 80)
- "judges have broad leeway in connection with stare decisis" (p. 81)
- judges have "substantial freedom" to "select and characterize the facts upon which the decision is based" (p. 82)

18. Tamanaha's evidence is interesting and important, but (as he acknowledges, at p. 4) he is not the first theorist to make some of these clarifying claims about the formalist era. For a nuanced treatment along similar lines, see ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 57 (1998).

- "judges can regularly find legal support for whatever decision they desire, working backward from the result" (p. 82)
- "there are gaps in the law—and in these situations judges try to work out the right outcome, making new law in the process" (p. 82)
- "when approaching cases judges typically respond to what they perceive as clusters of fact situations or types" (p. 83)
- "when rendering decisions—interpreting the law, precedent, and facts—judges are influenced by subconscious factors" (p. 84)

Tamanaha's case for debunking even a soft formalist/realist divide—that is, one which reflects a transition from formalist to realist thought over several decades—is most powerful with respect to nineteenth century writers, or at least those who wrote primarily, if not exclusively, in the late nineteenth century. As one moves closer to the 1920s and 1930s, the appearance of realist-sounding statements might be more predictable and unremarkable; after all, if legal realism *was* a distinct school of legal thought, it would likely have had some antecedents and one would expect to find some evidence of "proto-realism." It would be unrealistic to insist on a hard divide from, say, one year to the next: "Realism did not simply come about overnight; its evolution was, rather, a hesitant one."[19]

But Tamanaha is alive to this criticism. In each of the nine cases of prototypical legal realism listed above, he presents evidence that at least one prominent "formalist" writing before the year 1900 espoused something very much like the realist view (pp. 79–84). One still might observe that the fact that one or two, or even a few, nineteenth century writers made statements here and there that were congruous with certain legal realist ideas does not indicate anything about either (1) the representativeness of such statements in the nineteenth century;[20] or (2) the degree of commitment of the speakers themselves to their realist-sounding statements.[21] Taken cumulatively, however, Tamanaha's evidence does a respectable

19. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 72 (1995).

20. Brian Leiter makes similar acute criticisms about representativeness. *See* Brian Leiter, *Legal Formalism and Legal Realism: What Is The Issue?*, 16 LEGAL THEORY 111, 116–17 (2010) (manuscript at 9–10) (reviewing BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE (2010)).

21. For example, someone might say something off-the-cuff in a speech or minor writing that was in tension with the bulk of his or her other writing.

job of rebutting the charge of unrepresentativeness or cherry-picking. And as for depth of commitment, Tamanaha might persuasively respond that he is not out to prove that these earlier writers were more authentically or devotedly realist than the writers of the '20s and '30s. He is only interested in showing that they were aware of and had themselves expressed similar insights about law and adjudication. In this, he succeeds.

Just as many legal formalists had embraced many realist insights, so did many legal realists retain the valuable ideas of legal formalism, particularly the necessity and healthfulness of legal rules and principles. Walter Wheeler Cook, Karl Llewellyn, and Felix Cohen are cited as legal realists who knew the worth of legal rules and such "steadying factors" as a legal education focused on the authority of doctrine and its development as well as the desire of judges to live up to an impartial ideal (pp. 95–96). Again, Jerome Frank is presented as something of an impediment to the recognition that most realists were committed to some moderately formalist beliefs. Frank's contention that "the rational element in law is an illusion" and his fixation on individual judges' personalities were not shared by fellow realists (pp. 96–97, 115). Yet it is just these extreme positions—ones which not even Frank held consistently (p. 98)—which are all-too-commonly associated with legal realism.[22] "A careful reading," writes Tamanaha, "shows that Llewellyn and Frank, and the rest of those identified as realists, all along recognized the stabilizing and constraining factors in law" (p. 98). These were important features of formalist legal theory.

There is an unaddressed question lurking here about why many in the generation succeeding legal realism overtly castigated it. Karl Llewellyn, for example, is well known to have retreated from legal realism in the post-war years, a view culminating in his decidedly anti-realist remarks in *The Common Law Tradition*.[23] Tamanaha sometimes relies on this very late work (1960) as evidence that Llewellyn always believed in something less full-bloodedly realist than what he had written earlier (p. 95). But it is not entirely fair to cite a piece thirty years after the heyday of a period of thought to show that there was "*nothing* distinctive" (p. 68, emphasis in original) about that period; indeed, the language in *The Common Law Tradition* is at

22. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997) ("Even among Realists, of course, Frank's view represented a particular sort of extreme—as Frank himself recognized.").

23. KARL N. LLEWELLYN, THE COMMON LAW TRADITION 3–4 (1960).

least equally consistent with the view that legal realism was a distinct historical period, features of which later writers (even writers who had been realists themselves) attacked and rejected.[24] Decades earlier, Lon Fuller, no legal realist he, surely felt himself to be criticizing *something* distinctive when he objected to the "crusade against 'conceptualism'" of the American legal realist movement,[25] even as he recognized that "[t]here were, to be sure, premonitions of it as early as the beginning of the present century."[26] And again later, it was clear enough to Alexander Bickel that he was praising "[t]he realists, who were a substantial company of original minds working in a time of great ferment," and simultaneously taking aim at certain strains of "arrested [legal] realism or surrealism would be more accurate."[27] What were these theorists repenting, commending, or reacting against, if not legal realism or some variety of it?

Lastly, it is not convincing for Tamanaha to point to the seemingly serendipitous quality of the arrival of legal realism on the scene to support the claim that there was nothing distinctive about these writers as a group (pp. 102–03). Much the same serendipity attends many historical phenomena whose distinctiveness is not in doubt.

Despite these unresolved questions, Tamanaha's deconstruction of the more extreme claims made on behalf of formalism and realism is generally plausible and well documented. The evidence that Tamanaha brings to bear is substantial and revealing: the received account is problematic on a number of fronts and anyone doing future work in this field must come to terms with Tamanaha's historical revision.

II

One obvious question is why, given the plentiful evidence that Tamanaha marshals, the distorted and exaggerated view of formalism and realism has, and continues to have, such staying power. Tamanaha offers several explanations for the reasons that certain standard modes of theoretical and historical

24. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 247–50 (1992). In fairness, Tamanaha also relies on other earlier work by Llewellyn to raise doubts about his commitment to a more thoroughgoing legal realism.

25. L.L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443 (1934).

26. *Id.* at 429.

27. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 80–81 (1962).

narratives achieve prominence and become entrenched. He claims that histories tend to be written as stock narratives, with an emphasis on canonical heroes and arch-villains in order to lend a certain psychological satisfaction to the account (pp. 200–01). When the narratives are repeated again and again, generation after generation—and when legal academic citation protocols reinforce that parroting—the meme becomes not merely one narrative among many, but the legal theorist's idea of reality itself. Thus did the distortions of the likes of Frank, Gilmore, and Pound achieve authoritative status in later generations of legal theory and history.

Tamanaha also emphasizes the role of political ideology in perpetuating the false dichotomy. Progressive scholars in the 1920s and '30s used "formalism" to smear whatever socio-ideological view they opposed. The strategic invocation of formalism was rhetorically effective to pump up various political and personal agendas. It also had the ideologically salutary effect of making their political enemies look retrogressive and passé, but it masked important conceptual similarities between formalists and realists (pp. 59–63, 84–89). The very same tropes were welcomed by legal theorists in the 1970s to give scholarly heft and historical continuity to their "seething skepticism" (p. 61) about the law, all in the service of radical political reform (p. 200). How much more appealing—how much grander—to claim with evident historical warrant that one was reliving an epic clash of the titans of American legal theory than to admit that one was engaged in local, modestly contingent, ideologically motivated policy debates.[28]

Likewise, Tamanaha notes the appeal of dichotomous historical and theoretical constructions. Clean, tidy, and radically opposed pairs of intellectual options are easily digested and regurgitated at need. Deep down, legal historians and theorists may know well enough, in dark corners that rarely find the light of the printed page, that reality is more complicated, but the dichotomies are felt to be useful in pointing up basic intellectual currents (pp. 120, 201–02). Something like this, Tamanaha

28. For those who might bridle at the seemingly partisan quality of Tamanaha's anti-Progressive claims, fear not! He restores the balance with some generously anti-conservative sniping at the politicization of the judicial appointments process: "Ronald Reagan was the first president to systematically screen lower court appointees for their ideological views. The practice has continued ever since, especially vigorously by Republican presidents, at the urging and under close scrutiny of conservative and liberal interest groups" (pp. 152–53).

argues, explains the binary distortions of attitudinal studies of judging, the birth of the field of "judicial politics," and the profound influence of the work of attitudinalist theorists on the public's hunger for easy political explanations of law (pp. 111–25). Clownish reductions are, in short, helpfully facile; they are pragmatically useful for the inter-generational inculcation of the gross outlines of academic ideas.[29]

This is an interesting and delightfully bleak perspective on certain features of the academic enterprise. It is the view that the natural—indeed, perhaps the inevitable—tendency of a good deal of theoretical scholarship, at least in law, is toward dogma.[30] Legal theorizing, both as a historical and a philosophical exercise, moves inexorably toward legal dogmatizing. And the movement of legal theory toward legal dogma is catalyzed in each generation of scholarship by the political, professional, and personal vanities of the theorists themselves. The dogmatization of reality—its reduction to simplistic distortions, even sound-bites (e.g., "mechanical jurisprudence" or "activist judging")—is often the way that knowledge is transmitted most effectively and enduringly.

One might take the view that there is nothing to do or fix about this situation; putative fixes are themselves only new distortions. But that is not Tamanaha's approach. There is something to do. There is a fix to be had. Because there are more and less accurate distortions, they ought to be embraced as they approximate the real and discarded as they veer away from it. The formalist/realist distortion should be repudiated because it "obscures more than it clarifies" (p. 202), while his "balanced realism" is enlightening and normatively attractive.

Balanced realism includes the following propositions; some are descriptive while others are both descriptive and normative:

- judges' personalities and beliefs will and should influence their decisions (what Tamanaha terms "cognitive framing"), but this is not the same as "willful judging," which balanced realism condemns (pp. 187–89)

29. What Tamanaha says about the likely response of attitudinal political scientists to his charges bespeaks this view: "Quantitative scholars will defend against these criticisms by saying that the attitudinal and strategic models are just simplified constructs—they are well aware that judging is more complicated." (p. 120).

30. Tamanaha himself suggests the possibility that theorists who are wedded to their academic categories will "dogmatically" reject his evidence. (p. 78)

- the purposes and consequences of a rule will and should nearly always "have a bearing" on judicial decisions (p. 189)
- the law is often uncertain, and when it is, a decision will be "essentially contestable" (p. 190)
- the significance of legally uncertain cases tends to be substantial (pp. 190–91)
- judges are sometimes confronted with what they think are "bad rules and bad results," and their approach to such bad rules or results is varied (pp. 191–92)
- "hard cases" may be divided into cases involving gaps in the law and cases involving bad rules or results, but for either variety, the potential influence of judges' personal values is enhanced (p. 192)
- where the law contains an "open provision," judicial decisions will not and should not be made in "rule-like fashion" (p. 192)
- the influence of social factors on adjudication should be accepted and embraced (pp. 193–94)
- judges are not machines and their prejudices will and should influence their decisions (p. 194)
- many areas of law are always "in the making" or "under construction" (pp. 195–96)
- notwithstanding all of the above, judicial decisions are often rule-based and the institutional quality of judging "helps hammer out a collective product that is distinctively legal in a way that transcends" particular interests (pp. 194–95)

As it happens, balanced realism, Tamanaha believes, is an accurate description of what most judges in both the formalist and realist eras were really up to anyway (pp. 68–69, 90, 125–31, 186–87), so history itself can be conscripted to "recover" balanced realism as a "sound understanding of judging" (p. 3). Balanced realism is used to unify the views of very different judges and theorists sometimes separated by centuries: Francis Lieber, Cooley, Cardozo, Pound, Llewellyn, Richard Posner, Antonin Scalia, and even Duncan Kennedy—all of them and many more share a commitment to balanced realism in adjudication (p. 187). "We are (nearly) all," Tamanaha seems to say, "and we have (generally, in our more reflective moments) always been, balanced realists."

It is at this point that Tamanaha is less convincing. First, one suspects that any theory of adjudication which is sufficiently capacious to accommodate Antonin Scalia, Richard Posner, and Duncan Kennedy (to say nothing of all the others) is overlooking critical distinctions for the sake of an illusory cohesion. True, at some extremely general level, many theorists may recognize as a descriptive matter that certain tenets of realism and formalism in some way affect adjudication. But while stating these tenets may help to pare away some of the more dubious and extreme ascriptions that theorists have made to formalism and realism over the years (something Tamanaha did with great success in the earlier portions of the book), Tamanaha has serious normative fish to fry with balanced realism. On this front, there is a great deal of room for disagreement left within the borders of balanced realism.

And Tamanaha admits as much: "the general recognition of balanced realism . . . will not magically dissolve the many differences that now divide jurists in debates over judicial decision making" (p. 196). If that is true, then one wonders what the payoff of balanced realism is as a normative account of adjudication. Justice Scalia and Judge Posner will have radically different views about the circumstances in which the purposes and consequences of a rule should affect a decision, or whether judges ought to embrace the influence of social factors in adjudication, or whether many important areas of the law are "under construction," or whether "open provisions" should not be interpreted in "rule-like fashion" (*vide* the unenumerated rights of the Constitution), or the extent to which personal values ought to influence "hard cases," and so on. What exactly is gained by grouping Scalia and Posner (and so many others with their own idiosyncratic and historically contingent views) in the same balanced realist basket? Tamanaha gives us little justification for balanced realism as a normative theory of adjudication. Indeed, because balanced realism is so catholic, it is difficult to see how he could.

Second, and more importantly, one might have expected that a book which so assiduously and insightfully illuminates the illusions of the theoretical enterprise when it trains its sights on history would follow through on those very insights. A book that purports to debunk certain scholarly distortions should not return to the same dry conceptual well after purporting to drain it. It is true that Tamanaha does not explicitly use the term "formalism" when he describes balanced realism. At times,

Tamanaha advocates discarding formalism altogether as a meaningless concept (pp. 159–67), but really what he attacks throughout the book are the more *implausible* features of formalism—those which have been used as a club to beat up straw men (e.g., "mechanical jurisprudence," "deductive conceptualism"). He is fully in support of a strong sense of strict, rule-bound decision making (per the last thesis of balanced realism), and he writes favorably of the notion of "fidelity to legal texts—constitutions, statutes, and precedents" (p. 178).

To take one context in which the formalist/realist divide might make a difference, John Manning, whom Tamanaha cites as a new formalist, has argued that formalism involves the lexical privileging of the constitutional structure over other methods of constitutional interpretation: "[B]efore testing whether a default rule promotes any particular interpretive value, we must first ascertain whether the Constitution either enjoins or permits the judiciary to recognize such a value as worthy of promotion . . . ."[31] Anti-formalists might well reject this lexical prioritization, and that is a legitimate difference—one which survives Tamanaha's historical clarifications.[32]

In fact, Tamanaha overstates his theoretical claims when he argues that all meanings of formalism are "empty" (pp. 176–80), or that self-described "new formalists" can excise the term without any loss. The overstatement is surprising because Tamanaha is well-aware of the differences between the new formalism and anti-formalism; indeed, he compiles a list of seven salient differences, and he says (rightly) that "[w]hen this cluster of ideas is taken at the most general level, a broad contrast among contemporary jurists can be drawn between those identified as formalists and their opponents" (p. 179). Why isn't that enough to preserve the divide? That these new formalists and anti-formalists may reject "exaggerated" (p. 179) claims does not mean that there are no non-exaggerated differences

31. John Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686 (1999); *see also id.* at 692. An anti-formalist would not give any lexical priority to a text where it produced a result contrary to what the anti-formalist believed was the overall policy of the legislation; he would adapt the text to its "real" purpose. The formalist would reject this approach. *See id.* at 694–95.

32. For reasons which will appear shortly, the neo-formalist example selected here is drawn from constitutional law, but there has been at least a mild neo-formalist renaissance in contract law as well which in some ways parallels the rise of moderate jurisprudential neo-formalism. *See, e.g.*, Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1529, 1530–31 (2002) (reviewing THE RISE AND FALL OF THE FREEDOM OF CONTRACT (F.H. Buckley ed., 1999)).

between them. Likewise, the fact that Tamanaha purports to incorporate these various moderate formalist theses into balanced realism does not mean that he has stripped formalism of any legitimate content. He has simply subsumed it. Perhaps Tamanaha still can make the case for junking the term "formalism" for pragmatic reasons (e.g., because by this point the term itself is confusing, given its history), but this is merely a matter of picking names. Conceptually, balanced realism is still committed to formalism.

In light of his ostensible aim to debunk the "formalist-realist divide," Tamanaha's backslide to "balanced realism" as normative prescription—a bit of formalism and a bit of realism, in appropriately "balanced" moderation—is confounding. The confusion is especially acute because Tamanaha at one point says that, like formalism, *realism* is also "empty of theoretical content" (p. 180). But Tamanaha is unlikely to believe that realism is empty, or at least as empty as he claims formalism to be, since that would reduce "balanced realism" to the rather unassuming state of "balanced emptiness."

The mystifying backslide to "balanced realism" requires some unpacking: it might be interpreted in two very different ways. The claim here is not that Tamanaha himself interprets his balanced realist project in these terms, but that his appeal to balanced realism powerfully reflects one approach to the intersection of history and legal theory, while the nature of his historical evidence actually might suggest a very different approach to that intersection.

First, the appeal to balanced realism might mean that there is at bottom something essentially true about formalism and realism—something which, once scrubbed clean of its dubious features, is inescapable. If this were so, Tamanaha's injunction to discard or get "beyond the formalist-realist divide" would be nothing of the sort. To the contrary, it would be a reaffirmation of some hybrid of these shopworn categories as intrinsic to theorizing about these issues. The perfect account of law or adjudication (or both) would represent some philosophical blend of the foundational categories of formalism and realism, and it would be up to legal scholars to hunt that elusive beast down. Once we accepted that bits of both formalism and realism were necessary to construct the ultimate normative theory, it would also become clear how much we actually had in common with our theoretical antagonists. The scales of academic distortion would then be lifted from our eyes, as Tamanaha has lifted them

in this book. We can call this the *metaphysical interpretation* of Tamanaha's appeal to balanced realism. Likewise, we can call this general approach to legal theory—one which displays these characteristics—the *metaphysical mode* of legal theory.

Alternatively, Tamanaha's balanced realism backslide might suggest that Tamanaha has not followed through on the implications of his historical evidence. That is, the solution to the many deficiencies of legal scholarship that the book identifies is not to construct a better distortion ("balanced realism"), and continue blindly on the very same trajectory as the vain dogmatizers of the past—enlisting history in the service of theoretical perfection. The solution is instead to abandon the yearning for distortion altogether. One certainly could continue to talk about formalism and realism as a loosely related hodgepodge of dispositions or moods to which this or that figure, today or in the past, shows variable affinity.[33] One could describe historically inflected varieties of formalism and realism—strains of formalism and realism which were particularly influential at distinct historical moments in American law—and one could praise or condemn a decision in which formalist or realist reasoning was used to reach a particular outcome. But one would have no grander aspirations for these categories, no vain desire to conceive *the* ultimate normative judicial or legal theory. The future for legal theory would lie not in devising still more philosophical abstractions of the perfect jurisprudential account, but in the careful study of the history of ideas and how various theories of law or adjudication affected, or are likely to affect, particular legal controversies. We can call this the *historicist interpretation*, and similarly we can call this general approach to legal theory the *historicist mode*.

III

The movement of legal theory in either the metaphysical or historicist direction might have powerful implications not only for the formalist/realist debates but also for scholarship in other legal disciplines. Constitutional theory is perhaps an obvious example, and it is worth a small excursion to consider how the

33. *See, e.g.*, Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 170 (2006) ("As it has developed over the years, American legal realism is as much a mood as a set of doctrines."); DUXBURY, *supra* note 19, at 68 ("Emphasis is placed instead on what can only be described as the 'feel' of realism as an intellectual tendency . . . .").

metaphysical and historicist modes might affect a particularly prominent scholarly disagreement: the contest between originalism and living constitutionalism.[34]

A cursory recapitulation: Originalism is the collective name for a cluster of theories of constitutional interpretation all of which in different ways rely on historical materials—chiefly those that attended the Constitution's ratification in 1789 and the approval of the Fourteenth Amendment in 1868[35]—to understand the meaning of the Constitution's provisions. While early originalists were said to champion a variation that emphasized the framers' intentions in enacting the particular provision at issue,[36] current originalists often (but not always) look instead to the original meaning that a particular constitutional provision would have had for the founding generation. The evidence for such original meaning is broad, consisting of everything from the constitutional text itself, to canonical documents such as *The Federalist Papers*, to the debates at the Constitutional Convention, to the views of the individual state ratifiers, to the ways in which a particular locution or turn of phrase might have applied and been understood by a hypothetical audience in other constitutional provisions or contemporaneous legal contexts, and so on.[37]

The major competitor to originalism of whatever variety has generally gone under the name of "nonoriginalism"[38] or "living constitutionalism."[39] An important part of what distinguishes

34. Tamanaha's book does not focus on constitutional theory, but I consider it here because constitutional theory dominates jurisprudential discussion today.

35. *See, e.g.*, Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085, 1088 (1995) (arguing that it is to the period in which the Establishment Clause was incorporated against the states—that is, the mid-19th century—that originalists ought to look to locate its public meaning).

36. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA 145 (1990) ("If the Constitution is law, then presumably its meaning, like that of all other law, is the meaning the lawmakers were understood to have intended."). For well-known criticisms of original intentions originalism, see Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

37. I am bypassing vast oceans of theoretical work on originalism at light speed. This is regrettable but it does not particularly affect my speculations about how the metaphysical or historicist modes in legal scholarship might impact these issues.

38. *See, e.g.*, KENT GREENAWALT, RELIGION AND THE CONSTITUTION: VOLUME 1: FREE EXERCISE AND FAIRNESS 12 (2006).

39. *See, e.g.*, Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007); Ethan J. Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT. 353 (2007). I set to the side arguments to distinguish non-originalism from living constitutionalism. Mitchell Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 24

living constitutionalists from originalists is that the former "simply do not privilege history . . . in constitutional interpretation. They don't necessarily sideline text, history, and structure; these are just parts of the motley constellation that is constitutional interpretation."[40] The dispute between living constitutionalists and originalists is too complex to go into in great detail, and there is a real question whether it survives the ecumenism of the so-called new originalism (more on this below). Some former opponents of originalism have recently reversed course and become "compatibilist" supporters of the new originalism,[41] reflecting the degree to which the aspiration to constrain judges' power, which was the centerpiece of paleo-originalism, bears an uncertain relationship to the new originalism.[42] Others continue to fly the living constitutionalist flag.[43]

There is little doubt that originalism has powerful affinities with formalism, at least when the subject is the ever-fraught terrain of the interpretation of unenumerated rights. And the same might be said for the instrumental qualities of legal realism and living constitutionalism. Lawrence Solum usefully describes the relationship of the former:

> [T]he core of contemporary originalism is the idea that the Constitution should be interpreted in light of the original public meaning of the constitutional text. That core idea appeals to formalists because (as compared with the alternatives), it seems to provide a method for reducing disagreement about constitutional meaning. To the extent that the Supreme Court's unenumerated rights cases require a

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n.52 (2009).

40. Leib, *supra* note 39, at 358.

41. Jack Balkin is an example. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007) [hereinafter Balkin, *Abortion*]; Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 432–36 (2007); *see also* Lawrence B. Solum, *Semantic Originalism* 166 (Ill. Pub. Law Research Paper No. 07-24, Nov. 22, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

42. *See* Kurt T. Lash, *Originalism as Jujitsu*, 25 CONST. COMMENT. 521, 527 (2009) (reviewing DANIEL A. FARBER, RETAINED BY THE PEOPLE (2007)) ("Today, most originalists have moved away from instrumentalist justifications like 'judicial restraint,' and instead tend to ground the originalist enterprise on the normative theory of popular sovereignty.").

43. *See* Leib, *supra* note 39; *see also* SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

> more latitudinarian approach to constitutional interpretation, formalists will be suspicious.[44]

To say that there is an affinity is not to suggest an identity of outlook: one can certainly be an originalist and reject the formalist's respect for horizontal stare decisis, especially if the precedent in question used an overtly non-originalist methodology to reach its result—if, say, it was insufficiently deferential to the relevant constitutional text or history.[45] Nevertheless, the notion that the textual "form" and historical "form(ation)" of the Constitution ought to be a constraining force on the discretion of judges to decide cases[46]—rather than merely one non-binding factor among many in reaching the best outcome—distinguishes originalists from their opponents.

How might adopting the metaphysical mode in legal theory affect the originalist/living constitutionalist debate? That is, could we think about originalism and living constitutionalism in a way that analogizes from Tamanaha's reconstruction of and normative pitch for balanced realism from the shards of formalism and realism as foundational, inevitable categories of legal theory? The first stage would be the view that there is, in fact, something inescapable in defining our normative constitutional possibilities in the dichotomous categories of originalism and living constitutionalism. These constitutional interpretive outlooks are essential, fundamental, and those academics who work in the realm of constitutional theory are consigned to join one team and do ideological battle with the other. That is simply the way constitutional theory gets done.

This first stage of the metaphysical mode was reached years ago. It is reflected in the decades-long fights about what was essentially a *political* question: originalists were exercised about

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44. Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9. U. PA. J. CONST. L. 155, 163 (2006); *see also* Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 CONST. COMMENT. 97, 102 (2009) (book review) ("In its strongest form, the legalist model is often identified with formalist and, in the constitutional field, originalist judges like Antonin Scalia and Clarence Thomas.").

45. *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005).

46. Mitchell Berman has described this view as splintering into two possible subtypes: the position that original meaning should be the sole object of interpretation; and the position that original meaning should be given "lexical priority," but that other meanings can be considered if original meaning does not resolve the issue. Berman, *supra* note 39, at 10. I am doubtful about how many contemporary originalists hold to the former view.

what they perceived as judicial excesses; living constitutionalists celebrated those very same decisions. Because of the political nature of the fight and the polarities that it sometimes embraced and continues to embrace, it is the kind of debate that can capture the public's political imagination. It can be understood by non-specialists and showcased in, say, judicial confirmation hearings (Robert Bork's, for example, and to a lesser degree, Elena Kagan's), where the phrase "judicial philosophy" has now become a not very mysterious code for judicial methodology.[47] First-stage originalism may not have many scholarly defenders any longer but, as Jamal Green has elegantly shown, it still commands the attention and approbation of a significant segment of the population, judges included.[48] In this first stage, the common-sense simplicity of the originalist/living constitutionalist divide has an appealing Manichean quality that fosters and perpetuates it. It can reach and influence the public's political cerebral cortex[49]; it is a user-friendly distortion, just in the way that formalism and realism (at least pre-Tamanaha) have often been.

The second stage of the metaphysical mode would in one sense reflect a moderating touch. It would introduce conceptual nuance to support the claim that there is some theoretically complex middle road between originalism and living constitutionalism which represents the best of all possible worlds. The distance between originalism and living constitutionalism would thus be narrowed considerably, at least for those scholars laboring in the fields of constitutional theory. Former enemies could now come together with the aim of relocating their disagreements within a single, somewhat murky, constitutional interpretive method, in which original meaning was consulted and given its due, but because of the underdeterminate quality of many constitutional provisions (the ones people usually fight about), other interpretive tools would be necessary. Those on the outside of the treaty between the warring camps would be viewed as recalcitrant fringe figures, or

47. *See* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 98–100 (2007).

48. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 681–82, 690 (2009).

49. *See id.* at 690 ("A second outgrowth of the originalism movement of the 1970s and 1980s is increased public attention to constitutional methodology generally and to originalism in particular."); *see also* Dawn Johnsen, *The Progressive Political Power of Balkin's "Original Meaning,"* 24 CONST. COMMENT. 417, 418 (2007) ("[O]riginalism's enormous influence has come less as a theory of jurisprudence than as a highly persuasive political ideology that inspires passionate political engagement.").

simply people who did not realize that the turbid middle had already absorbed whatever was legitimate in their views. After all, almost everyone agrees that original meaning ought to figure in *somewhere* in our theories of adjudication, just as nearly everyone can agree that the consequences of a rule ought *somehow* to make a difference to a rule's adoption (p. 189). As the approaches began to merge, articles with such titles as "Living Originalism" would begin to appear.[50] In many ways, we have reached the second stage of the metaphysical mode as well. We might even re-describe the new, big-tent originalism in Tamanaha's locution—as the arrival of "balanced originalism." Indeed, it may be that Tamanaha's appeal to balanced realism represents just this second stage of the metaphysical mode in the formalist/realist debate.

The third stage of the metaphysical mode would be characterized by fragmentation.[51] Thomas Colby and Peter Smith have ably documented this feature of contemporary originalist discourse, but the upshot is that rather than representing anything like a single, unified "best" account of constitutional interpretation, the middle-way, big tent approach of the new originalism invariably resulted in fission. The big tent simply could not accommodate all comers. Philosophical sophistication begat a kind of hyper-refined scholasticization of originalism, spawning the categories of original subjective meaning, original objective-public-meaning textualism (which itself fragments into Randy Barnett's "presumption of liberty" variety, Michael Perry's moral reading of the crucial underdeterminate provisions, Lawrence Solum's "semantic originalism," and likely others), original intent (Larry Alexander's sophisticated version, for example), original expected-application, "common law originalism,"[52] and the "method of text and principle,"[53] in which "each generation of Americans can seek to persuade each other about how the text and its underlying principles should apply to

50. Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239 (2009). The varieties of originalism that I offer below are drawn from Colby and Smith's article.

51. *See* JONATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 190–205 (2005) ("Much of academic constitutional theory in the 1990s was devoted to elaborating, refining, coopting, or attacking originalism. In the process, originalism became a more subtle, complex, and fragmented doctrine."). What O'Neill describes as a single movement toward splintering, I think may be better characterized as an almost seamless transition from an illusory unity to fragmentation.

52. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006).

53. Balkin, *Abortion*, *supra* note 41, *passim*.

their circumstances, their problems, their grievances."[54] "[T]here are today countless variations of originalism," explain Colby and Smith, "and the differences among them are sometimes so stark that it is difficult to treat them as one coherent methodology."[55] Once the question, "Are we all originalists now?"[56] was asked and answered affirmatively by a growing chorus of scholars, doom was not far off.[57]

In one sense, the growing philosophical complexity and granularity of originalism was an enormously positive development: in the hands of thoughtful and careful scholars, originalism was stripped of its dubious rhetorical excesses and imbued with theoretical bona fides. But in another sense, it was a serious loss. Originalism now became the exclusive province of the constitutional theorist; it no longer had any claim on the public as a live subject of debate, and it became increasingly difficult to implement by judges, at least those who were not extremely well-versed in the latest state-of-the-art conceptual advances. Steven Smith perceptively observes:

> However the case may be for law generally, though, or for philosophy, *for originalism* exclusion [of non-theorists] has to be counted as a cost, I think—and a significant one. After all, originalism is supposed to be an approach that actual lawyers and judges can employ in deciding actual cases. So if the approach becomes so conceptually cumbersome that only a theoretical elite can fully understand and participate in it, then what good is originalism?[58]

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54. *Id.*

55. Colby & Smith, *supra* note 50, at 245.

56. *See, e.g.*, James E. Fleming, *The Balkanization of Originalism*, 67 MD. L. REV. 10 (2007), (noting the prevalence of the question, though inclining toward a negative answer); Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of the Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 135 (2008), http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf (Tillman, Opening Statement) ("If there was any doubt before, there can be no doubt now, post-*Heller*, we are all originalists now—at least those of us who wish to remain relevant and within the mainstream of our ever-evolving judicial culture."); Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 HARV. J.L. & PUB. POL'Y 495, 496 (1996) ("[W]e are all originalists.").

57. *See* Jamal Greene et al., *Profiling Originalism* 1 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 10-232, 2010) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1567702 ("Hands have been wrung, voices raised, and much ink spilled over the question of whether, to paraphrase Jefferson, we are all now originalists.").

58. Steven D. Smith, *That Old-Time Originalism* 9 (Univ. San Diego Sch. Law, Research Paper No. 08-028, June 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1150447.

Something analogous might be said for Tamanaha's use of the psychologically abstruse notion of "cognitive framing" to explain the real import of the influence of judicial personality on adjudication (pp. 187–89).[59] If we are interested in "balanced realism" as a normative theory of adjudication—one which we hope can at least to some extent guide and constrain judges—then much depends, Tamanaha says, on whether a judge's subconscious inclinations lead her to (benign) "framing" or (malign) "willful judging" (pp. 187–88). But since these two modes of adjudication often "can shade into one another" (p. 188), it seems that we will need to subject our judge to an extensive battery of training in cutting-edge psychological research (or psychotherapy?) and cognition theory in order to stand a chance of distinguishing between the two.[60] Otherwise, only the experts will be able to tell the difference.

Be that as it may—and because my aim here is really to consider legal scholarship and not adjudication—the run-away quality of originalism's ecumenism would elicit efforts to delimit it, to cabin and pin down originalism's core claims; to "strong" views, for example, that bear a resemblance to the position held in the first stage (but which few scholars now hold[61]), and which could then be debunked.[62] But even that descriptive core would be disputed by other theorists with their own originalist core commitments.[63] The eventual result would be that the big tent would be torn asunder and while the label "originalism" would continue to be plausibly assigned to any of its constituent theories, there would cease to be any unifying normative vision

59. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (arguing that courts should take steps to cleanse their decisions of "cognitive biases" using the techniques of social psychology).

60. It is unlikely that a judge's "sincerity" can bear the weight that Tamanaha demands of it in distinguishing between "framing" and "willfulness." The distinction between framing and willfulness can be quite fine and self-delusion might well obliterate it.

61. Even original expected-application theorists such as John McGinnis and Michael Rappaport do not claim that the original expected applications of the constitutional text should be the *exclusive* interpretive target; they are simply non-exclusive evidence of original meaning. *See* John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 379 (2007).

62. Berman, *supra* note 39, at 18–20 ("Originalism proper is strong originalism—the thesis that original meaning is the only proper target of judicial constitutional interpretation or that it has at least lexical priority over any other candidate meanings . . . .").

63. See, e.g., the attempt by Solum to defend a core of originalism in what he calls the "semantic content" of the Constitution. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 411 (2009).

for originalism. Constitutional theorists would tend to their respective normative vineyards, each of them developing their own "best" accounts of originalism, each of them claiming that something like their own version ought to control, and each of them enlisting history to serve their purposes and "empower" their socio-political allies.[64] In this way, the fundamental categories of originalism and living constitutionalism would be fixed in amber as a subject of speculative academic study and contestation.[65] If we have not reached the third stage yet, we are not too far from it.

It is not my intention in the least to disparage this way of proceeding. There is value in continuing to parse and distinguish, to slice finer and more elegant cuts of originalism, to claim theoretical and political preeminence for each as they come and go, and to enlist history as an aid in shoring up those prescriptive claims. This is the way that many non-originalist theories of constitutional interpretation have been developed and championed—perhaps the arch-example being Ronald Dworkin's "right answer" approach and its use of legal history as the handmaid of theory.[66] There is no question that as a result our normative theories of the Constitution have become more philosophically rich.

But I do want at least to suggest—not an alternative, exactly, but another course for legal scholarship, one which I will call a historicist possibility.[67] This is not the place to offer a fully

64. Dawn Johnsen conjectures giddily about the "progressive political power" that Jack Balkin's origino-revisionist interpretation of *Roe v. Wade* might portend. Johnsen, *supra* note 49, at 418 ("Progressives will benefit from *Abortion and Original Meaning* .... As they read, they will feel their spirits soar and at times will silently (perhaps audibly) cheer.").

65. *See* O'NEILL, *supra* note 51, at 204–05 ("Although these recent developments add nuance and sophistication to originalism, they also bespeak a certain fragmentation and diffusion of the originalist project into possibly incompatible versions. Careful historical recovery and philosophical grounding of originalism are more complicated and perhaps more divisive tasks than the critique that particular decisions or doctrines of the Warren and Burger Courts bore little readily discernible relationship to the original meaning of the Constitution.").

66. *See* RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1977).

67. The eminent historian of philosophy Frederick Beiser has cautioned that anyone who uses the term "historicism" "enters an intellectual minefield." Frederick Beiser, *Historicism*, *in* THE OXFORD HANDBOOK OF CONTINENTAL PHILOSOPHY 155, 174 (Brian Leiter & Michael Rosen eds., 2007). One of the many dangers, Beiser writes, is that historicism:

> has acquired opposing meanings because it has been used to refer to diametrically opposed views of history. According to one view, the purpose of history is to know the general laws or ends of history; its aim is to find the system or unity behind the chaos of the past. According to the other view, the

developed theory of historicism in constitutional theory, and only some sketchy outlines will be presented here. The key difference is that the approach to legal scholarship in the historicist mode would require that we forsake the aspiration to devise *the ultimate* constitutional interpretive theory. The historicist theorist would recognize that a wide variety of theories of constitutional interpretation exist, each with its advantages and drawbacks. He would be sensitive to the ways in which these competing theories had been used in the past to ground and justify certain outcomes. He could describe originalism and living constitutionalism as an agglomeration of loosely-related dispositions or moods (rather than hard-edged normative programs), composed of numerous strands of sometimes incompatible arguments, to which this or that figure might more or less closely adhere. And he would analyze how these rivals, or some combination of them, might be used by courts to decide future cases.

Admittedly, taking up the historicist mode might well entail a bit less normative constitutional theory than is now fashionable, at least of a certain kind. This is something of a virtue, though it is not often regarded as such by constitutional theorists. It is the virtue of stopping short,[68] of withholding final normative judgment about the lessons of history. It is the conscious decision not to write "Part III" of the law review article, in which the problems of history are resolved decisively with the neat and tidy coup de grace represented by the "unified theory." The virtue of stopping short is characterized by prescriptive and methodological reserve—not disinterest, but a distinctly conservative reticence—in the face of historical complication.

When constitutional theory confronts constitutional history, the historicist mode is well-suited to interpreting past legal conflicts and historical figures with particular attention to the social concerns and problems out of which they grew. This is not to say that legal history with an explicitly metaphysical

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purpose of history is to know the individual, to plumb the depths of the unique and the singular, through exacting detailed research; it rejects the possibility of discovering general laws or ends of history.

Id. In using the term "historicism" here, I do not mean to appeal directly to the philosophical program in nineteenth century German philosophy that Beiser describes. I am not expert in that literature and it would be anachronistic and intellectually presumptuous to attach myself to that rich philosophical school. Nevertheless, it is fair to say that I intend something much closer to the latter meaning of historicism.

68. I owe this way of putting it to Samuel Bray.

orientation—that is, an orientation which proceeds by way of apology, attempting to explain historical events as fitting or not fitting a particular premeditated theoretical construct—cannot be careful, edifying, and exceptionally well done.[69] Indeed, most historical inquiry proceeds along the lines of explaining events by recourse to some organizing meta-principle or idea, and there is no reason at all to exclude originalism and living constitutionalism from the range of possible organizing concepts.

The point is merely that it might be refreshing to see more work by constitutional theorists whose very purpose for being was not to justify or condemn a particular legal event according to originalist or living constitutionalist premises. Such efforts would not work backwards from history strategically to reach the authors' own brand of originalism or living constitutionalism—with the result that one could conscript history to buttress the perfect theory of the Constitution. History would not be used to justify or condemn contemporary theories of interpretation, or as an instrument to "bash" theoretical rivals in the contest for methodological supremacy.[70]

For example, Professor Balkin's originalist apology for *Roe v. Wade* is as deft and clever a revisionist account as one is likely to see, one which he intends as a weapon to pierce his now intramural methodological rivals. Balkin's originalist reconstruction of *Roe* is meant explicitly to serve the "larger purpose of... demonstrat[ing] why the debate between originalism and living constitutionalism rests on a false dichotomy."[71] Using the originalism of the "method of text and principle," Balkin is able to recharacterize what scores of scholars have deemed the poster-child of living constitutionalist adjudication as actually, truly, originalist, assuming that originalism is understood aright. Yet it ought to surprise no one that Balkin's originalist opponents (those who subscribe to very different originalist premises) would parry his thrust with the claim that the "method of text and principle" originalism—which embraces the power of social movements as agents of change in

69. Michael McConnell's reconstruction of *Brown v. Board of Education* along originalist lines, for example, is a remarkable achievement and a model of careful historical scholarship in the metaphysical mode. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

70. Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 272 (1997) ("Each school of contemporary constitutional thought claims *Dred Scott* embarrasses rival theories.").

71. Balkin, *Abortion*, *supra* note 41, at 292.

constitutional meaning—could be used just as effectively to justify *Lochner v. New York*:

> We cannot help but also point out that Balkin's method of interpreting the text in light of meaning that social movements bestow on it may well justify *Lochner* as well as *Roe*. The free labor movement that began in the mid-nineteenth century suggested that the right to contract was an essential liberty.[72]

It is something of a surprise, however, that one of the most brilliant and distinctly historicist treatments of *Lochner* was written by none other than Balkin himself just a few years before his piece on abortion.[73] Indeed, Balkin's historical analysis of the way in which *Lochner* has regularly been used strategically by successive generations of legal academics to condemn or praise contemporary legal theories to which those scholars had pledged allegiance (e.g., the claim by John Hart Ely that *Roe* represented illegitimate "Lochnering," and contrary claims with mirror-image motivations a generation later) embodies a deeply historicist ethic[74]: "Political agitation and social movement activism, followed by successful elections and judicial appointments change constitutional common sense," and in the process, "both critics and defenders found new uses for *Lochner*."[75]

Balkin concludes that if *Lochner* was wrongly decided, "it will not be for any of the reasons that we law professors continually offer for why it was wrongly decided," but because the judges who actually decided it did not make the fullest use of "the tools of understanding that their legal culture offered them."[76] This claim matches up nicely with Tamanaha's evidence about the way in which *Lochner* was generally received (*pace* Pound) as a piece of legal craft when it was decided. And what is true for *Lochner* should be true for *Roe*: that is, historical treatments of *Roe* by constitutional theorists should not be the exclusive province of interpretive methodologists with contemporary normative axes to grind.

One advantage of adopting the historicist mode might be that it would allow those constitutional theorists who approach

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72. McGinnis & Rappaport, *supra* note 61, at 380 n.13.

73. Jack M. Balkin, *"Wrong the Day It Was Decided":* Lochner *and Constitutional Historicism*, 85 B.U. L. REV. 677 (2005).

74. *Id.* at 688–92.

75. *Id.* at 702–03.

76. *Id.* at 725.

historical events and figures to confront them more forthrightly, particularly when those histories represent dark points in American history. Owning up to the painful truth that the Constitution has been enlisted by what were likely well-meaning and committed theorists and judges to support political and social programs that are widely deemed moral failures is useful for a clear-eyed and realistic view to the problem of the possibility of constitutional evil, in the past and today.[77]

A quite different but perhaps even more important benefit would be distinctly normative: historicism leads to the possibility of acknowledging the costs of methodological commitment. For any given approach to constitutional interpretation is attended by gain and loss, and crowning any single theory king masks the degree to which the loss and sacrifice of values represents a pervasive feature of constitutional law.[78] Even worse than this—methodological fidelity sometimes demands the commitment to making real sacrifice appear either unimportant or a positive good.

Taking the historicist mode would permit a more nuanced view of historical events, and it would entail the belief that there likely exists a legitimate and reasonably broad range of plausible outcomes in any given case: not just "off the wall" or undeniably correct but a gray zone of legitimacy in between, using a variety of historically contingent interpretive approaches.[79] As time passes, the plausible range of interpretive possibilities may shift, but this is not to say that the range is infinite or even ever-expanding. It will always be controlled—by the tether of doctrinal and social history.[80]

"Constitutional theory—both normative and positive," Michael Klarman once wrote, would "benefit from a substantial dose of historicism."[81] This is especially true whenever

77. Mark Graber has developed similar arguments against both originalist and "perfectionist" constitutional theories. MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

78. For more on this issue, as well as the development of a particular style of historicism in constitutional interpretation, see Marc O. DeGirolami, *Tragic Historicism: A Theory of Religious Liberty* (on file with author).

79. Balkin, *supra* note 73, at 717.

80. On the former, see Thomas W. Merrill, *Originalism, Stare Decisis, and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 277–82 (2005) (arguing that if we were really interested in judicial restraint, we would favor a strong theory of precedential constraint far more than originalism, because the norms of precedent are "thicker," the raw materials of precedent far more accessible, and the style of reasoning much more familiar to lawyers and judges).

81. Michael J. Klarman, *Brown, Originalism, and Constitutional Theory: A*

constitutional theory engages (as it always must) with constitutional history.

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The contrast between the metaphysical and historicist modes of legal scholarship leads us directly back to Brian Tamanaha's book. Can we turn the analogy to constitutional theory back onto his formalist/realist divide? If the analogy is persuasive, there is reason to think that Tamanaha has embraced the metaphysical mode: he is chasing down an ideal theory, and he is conscripting history to shore up his arguments for balanced realism. But as sophisticated and inclusive a theory as balanced realism may be, it is unlikely to win the prize he seeks for it, at least for any fixed term. Indeed, and ironically, the nature of the historical evidence that Tamanaha uncovers and the pungency of his criticisms of the legal theoretical enterprise when it sets its sights on history are themselves tacit, but powerful, arguments for historicism in scholarly discussion of the formalist/realist divide. That would manifest the virtue of stopping short.

Yet it is well to conclude with praise. These reservations about the balanced realism prescription should not be read to detract in any way from the genuine achievements of this book. In it, Brian Tamanaha shows himself to be a fair-minded scholar—intellectually, a straight shooter. The book that he has produced—careful, devastating in its criticisms, eye-opening in the evidence that it uncovers—is an authentic reflection of those admirable qualities and is well worth reading by anyone with an interest in jurisprudence and American legal history. It is, in all, a credit to an institution all too often bedeviled and beguiled by the vicious charms of vanity.

Response to Professor McConnell, 81 VA. L. REV. 1881, 1935 (1995).

SPECIFYING CONSTITUTIONAL RIGHTS

THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS. Grégoire C.N. Webber.[1] Cambridge University Press. 2009. Pp. viii + 231. $95.00.

John Oberdiek[2]

Ours is an age of rights. The language of rights permeates moral and political discourse. What rights we have, and what it means to have them, are matters of public debate that are as familiar as they are vital. Discussions of free expression, privacy, or abortion, for example, are almost always cast in terms of the *rights* to free expression, privacy, and abortion. And it is not hard to explain, at least in part, why this is so. A political culture revolving around rights is cultivated and sustained by a constitutional democracy. There are at least two reasons for this. First, constitutions themselves give pride of place to rights. Constitutions define a political framework whose guarantees are defined as rights. Second, rights flourish in constitutional democracies because they serve as a *lingua franca*. They provide a single recognized and seemingly stable normative currency when the moral pluralism characteristic of democracies might otherwise threaten the possibility of there being any common coin whatsoever. Constitutional democracies like ours create and support a culture of rights, then, due to the twin natures and attendant pressures of constitutionalism and democracy.

This explanation of the importance of rights in a constitutional democracy, though, illuminates neither what constitutional rights themselves are nor how—to say nothing of how well—they play the role they are assigned within our political culture. Indeed, by conceiving of constitutional rights as guarantees and as a stable normative currency, the explanation can mislead. It can lend itself to a facile picture of constitutional rights that no one accepts, in which the constitutional status of

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any legislation or conduct can be determined just by invoking abstract rights. Things are not so simple. Constitutional rights may be guarantees, but not against everything; rights may also serve as a stable common currency, but the currency is not fixed and inflexible. There is no democratic constitutional regime whose practices suggest otherwise. In fact, most democratic constitutions or international charters of rights explicitly incorporate what is known as a *limitations clause* (or a set of tailored ones) that qualifies the rights there established. This is true of, for example, the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, the German Basic Law, the South African Bill of Rights, and the New Zealand Bill of Rights. The Canadian Charter is representative, guaranteeing its enumerated rights "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[3] The Canadian Charter and other similar fundamental legal instruments recognize rights, then, but only in tandem with a limitations clause. The rights are necessarily *subject to* whatever constraints the clause articulates. Interestingly, the United States Constitution is the exception that proves the rule, if it is an exception at all: its Bill of Rights contains no express limitations clause, and yet the Supreme Court, of course, interprets the rights contained therein to be limited in various ways, which is why even the First Amendment does not protect, say, incitements to imminent violence or child pornography. This suggests that a limitations clause simply makes explicit what is already implicit whenever rights are invoked, namely, that rights are limited in scope.

Granting that constitutional and other charter rights are typically guaranteed subject to an express limitations clause, what does it mean to say that they are so qualified and what can we learn about constitutions and constitutionalism more generally by reflecting on the ubiquity and role of limitations clauses? In *The Negotiable Constitution: On the Limitation of Rights*, Grégoire C. N. Webber offers contrarian answers to these questions with an ambitious reconceptualization of constitutions and their rights. His primary target is "the received approach" to limitations clauses, and its sins are many, according to Webber:

3. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

> It endorses an overzealous definition of rights, which results in rights-claims to everything thereby prompting almost all legislation (and State action more generally) to conflict with some right. In consequence, there are frequent, and indeed expected and unavoidable conclusions that rights have been infringed. Yet, countless rights-infringements are, as a matter of course, justified, with the result that it is now a governing assumption of the received approach that rights are not absolute and that they are generally opposed to or in competition with the public interest. The definition of a right is determined on the basis of the individual claimant's interest alone and does not take into account other rights or considerations not part of the right's purpose; these considerations are all relegated to the limitation clause analysis. . . . That analysis—considered to be primar[il]y if not exclusively a judicial undertaking—draws on a 'balancing of interests' and a requirement of 'proportionality' between the right and the limitation, which is informed by evidence and (albeit only ostensibly) political morality (p. 88).

Webber rejects the received approach, root and branch. He rejects what he believes is the false technicality of its proportionality and balancing analyses, its hyper-individualistic conception of rights, its denigration of popular legislation as inherently antagonistic to rights and concomitant worship of the judiciary, and its denial that rights are absolute. But the received approach errs most fundamentally, on his view, in its "overzealous definition of rights" (p. 88).

Its definition of rights is overzealous, at bottom, because of overreaching: according the received approach, if a constitution or charter grants a right to free expression, for example, then *everything* that counts as expression is subsumed by the right. No normative distinctions are made, at this stage, between protected and unprotected expression. The received approach thus takes the generality of the formulation of rights literally, as entailing universal application—one's right is to free expression, not to *some* free expression. This is the crux of the first of Webber's complaints about the received approach's understanding of rights. Given how capaciously the model construes rights, legislation will almost always tread upon someone's right to something, and that gives the legislative process—and democracy more broadly—a bad name. At a minimum, construing rights as the received approach does regularly forces a choice between our commitment to rights and our commitment to democracy.

Webber's second complaint about the received approach's conception of rights is closely related. He contends that its overzealous definition of rights actually robs rights of the normative force that is widely held to distinguish them. This is evident, according to Webber, in the two-stage analysis of constitutionality necessitated by the approach's all-encompassing model of rights: one determines, first, whether a right has been infringed and, only if one has been, whether the infringement is justified according to the limitations clause. It is therefore the limitations clause, taken up at the second stage of the inquiry, and not the antecedently-defined right, that does (at least the majority of) the justificatory work. Defining the right or determining what constitutes the right is, on this view, a straightforward empirical exercise of interpretation. Determining whether some conduct is covered by a right to free expression, for example, requires determining (only) whether the conduct in question counts as expression, which is just a matter of interpretive fact. Even concluding that some conduct is expression and is therefore *covered* by the right, however, entails nothing about whether that conduct is actually *protected* by the right. In distinguishing between coverage and protection in this way, Webber charges, the received approach reveals that rights themselves lack normative purchase. For whether a right actually protects anything, and does not merely cover it, is a function of the content of the independent limitations clause, not of the right itself. Webber thus indicts the received approach for underplaying the normative force of rights.

Webber's most fundamental positive thesis, in contrast, is that constitutional rights are actually constituted by their accompanying limitations clause. On the view he endorses, it makes no sense to distinguish and lexically order defining the right and assessing the justifiability of its abridgement. Instead, according to Webber, the very definition of a right draws upon those multifarious considerations that the received approach reserves to the second stage of its analysis, concerning the limitations clause. What is reserved to the second stage of analysis under the received approach, in other words, gets folded into the first stage under Webber's approach, so that one cannot define a right without knowing the right's limitations—what it does and does not protect or entitle one to. The definition of any right, in this way, incorporates the conditions of its permissible contravention.

Conceptualizing rights this way, Webber contends, addresses the two chief shortcomings of the received approach. First, if rights are defined so as not to conflict with justified limitations on them, then legislation will not, as a matter of course, be antagonistic to rights. For if legislative enactments are justified—and surely many of them are—they will necessarily *not* conflict with anyone's rights. The happy upshot is that no choice is forced between democracy and rights. Second, if rights are constituted by their limitations, then rights themselves have a normative heft that they lack under the received approach. Having a right, on this view, entails having conclusive normative protection against some treatment or a conclusive entitlement to something. Insofar as the received approach treats rights as descriptive empirical categories, it fails to do justice to the normativity or prescriptivity of rights. Webber offers a corrective to this conceptual shortcoming: to retain the normativity of constitutional rights, their very definition must incorporate their limitations, and those are (often) conveniently marked out in a limitations clause.

So conceived, the definition of constitutional rights is more open-ended than the received approach admits. The limitations clauses upon which the definition of constitutional rights depend are, after all, themselves open-ended. The Canadian Charter's limitations clause, which again allows limits on rights that "can be demonstrably justified in a free and democratic society," surely provides for a great deal of latitude in determining how to limit the rights it recognizes, even as it focuses the inquiry on the values of freedom and democracy. For the ideal of a free and democratic society is an abstract and open-textured one. This does not mean that rights cannot be misconstrued or limited in ways that are mistaken or just plain wrong. Latitude is not license. Webber makes this clear when he maintains that "the improper limitation of a right *poses a challenge to the political legitimacy of the State.*" (p. 18) Still, there is no single proper limitation. There are only values or principles, many of which are incommensurable, that must be heeded and given due regard in limiting constitutional rights. And while different extant limitations clauses may cite various legitimating considerations, Webber believes that two general principles are paramount, underlying all sound limitations clauses and thus all legitimate constitutions: "the principle of democracy" (p. 18), which emphasizes popular sovereignty, and "the principle of human rights" (p. 21), which captures those basic rights not subject to

majoritarian control.[4] Even these, however, are merely regulative principles and do not dictate any single correct limitation on constitutional rights. Discretion and judgment are unavoidable.

This prompts Webber to re-imagine constitutional rights and constitutions themselves as *negotiable*: "[t]he constitution of a democratic constitutional State, and especially constitutional rights, ought to remain open, on an on-going basis, for democratic re-negotiating" (p. 13). If constitutional rights are not static and wooden as on the received approach, but dynamic and entirely compatible with justifiable legislation as Webber argues, then a constitution and the rights it recognizes can be cast and recast as circumstances on the ground and normative commitments change. And in a democracy, Webber contends, negotiating and re-negotiating rights is the job of the legislature. Webber's is thus a form of common law constitutionalism in which the constitution is regarded as itself an "activity," but with the legislature playing the role that the common law reserves for judges. Indeed, it is Webber's view, following Jeremy Waldron and others, that "[t]he legislature alone is in a position to be both an authority constituted by the constitution as well as an authority with the political legitimacy to re-negotiate the constitution—that is, to (continue to) be a constituent authority" (p. 149). The discretion that is inescapably called for in limiting constitutional rights and in assessing those limitations is thus properly exercised by, and only by, the people's elected representatives.

Much as a court lacks plenary authority to adjudicate more than the case before it and so will not completely specify the contours of any particular right at one fell swoop, however, "the legislature . . . does not, in the normal case, take it upon itself to engage completely with the limitation of a right. It rather seeks to delimit a right by legislating certain aspects of the limitation of that right, from time to time" (p. 171). Envisioning only piecemeal legislative limitations of rights, Webber echoes Cass Sunstein and likens the constitution itself to an incompletely theorized agreement. The agreement is, however, always provisional. For "[t]he legislature is free to change, even radically, the legislative limitation of a constitutional right over

4. See also p. 182, where Webber maintains: "With the exception of the European Convention's appeal to 'necessity', the idea of justification in a free and democratic society animates the question of a right's limitation in all limitation clauses."

time, from one generation to the next, from one election to the next, even from one sitting of the legislature to the next" (p. 175). A constitution is indeed an activity, and quite possibly a constant one.

There is a good deal that is attractive in Webber's picture of constitutional rights, constitutions, and constitutionalism. Its originality lies in the way he combines existing but seemingly unrelated positions into a single multi-faceted theory. As Webber's theory is a synthesis of positions that others, including the present author,[5] have developed in greater depth, however, it cannot help but have a derivative feel in places. Webber could have advanced debate further and avoided this criticism had he endeavored to develop the constituent positions that his overall view comprises instead of just helping himself to them as if they were store bought. There was a missed opportunity here. Still, the synthesis itself is indeed novel and, I think, a real contribution to the literature on constitutional theory. In the remainder of this discussion, my primary aim is to explore how successful Webber is in applying the specified theory of rights, which I have defended in other contexts, to constitutional law. While I think Webber needs to tread more carefully in places, overall I find his account of constitutional rights appealing.

Let me begin by very briefly summarizing the theory of rights, called the specified conception of rights or specificationism, which I have defended and that Webber explicitly incorporates as the central plank of his overall platform.[6] It will be largely familiar from the above synopsis of Webber's view, which hews quite closely to my own view about rights. In contrast to what I referred to as the general conception of rights, which "first identifies the content of whatever right is at issue and only then determines what the right's normative implications are in the circumstances," I held that

5. Webber draws heavily from my work on the theory of rights, quoting from my papers at length and generally echoing many of their points in the keystone chapter, "Constituting Rights by Limitation," and citing them in twenty-three footnotes over thirty pages (pp. 116–46). Those papers are John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and its Place in the Theory of Rights*, 23 LAW & PHIL. 325 (2004); John Oberdiek, *Specifying Rights Out of Necessity*, 28 OXFORD J. LEGAL STUD. 127 (2008) [hereinafter, Oberdiek, *Specifying*]; and John Oberdiek, *What's Wrong with Infringements (Insofar as Infringements are Not Wrong): A Reply*, 27 LAW & PHIL. 293 (2008) [hereinafter, Oberdiek, *What's Wrong*].

6. I am not the first to defend this theory. The most famous invocation of it comes in Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). As it happens, Thomson later renounced her specificationism. I discuss this in Oberdiek *What's Wrong*, *supra* note 5, at 293–94.

specificationism "identifies the content of a right *in light of* and indeed *in response to* what is justifiable to do under the circumstances . . . so as not to conflict in the first place with justifiable behaviour."[7] Rights might be *stated* in general terms, on my view, but rights actually *are* specified, so that the seemingly general right not to be killed, for example, which reads as a right not to be killed *full stop*, is truly the right not to be killed *unjustly*. I supported this conclusion with arguments too involved to repeat here, but which can be gleaned from Webber's discussion—specificationism makes better sense of the way we argue towards rights and neither reifies nor renders rights redundant, for starters.

The foregoing overview underlines the striking parallel in the structures of both the received approach to constitutional rights and the general conception of rights *simpliciter*, as well as Webber's and my respective contrary positions. Both the received approach to constitutional rights and the general conception of rights analytically distinguish the question of what a right itself is from the question of what a right calls for in any particular case. Both views, in other words, hold that rights can be defined independently of their justified abridgement and both also hold that rights can be justifiably abridged. On the former view, it is primarily legislation that tests the right, and one looks to a limitations clause to see if the potentially offending legislation can, in the circumstances, be justified in the clause's terms. On the latter view, it is conduct of any kind that tests the right, and one looks to normative facts to determine whether, in the circumstances, the potentially offending conduct is compatible with the right. Webber's and my respective views, in turn, collapse these two stages: Webber maintains that constitutional rights are constituted by their limitations clause, while I contend that rights are specified so not to conflict with morally justifiable conduct.

The relationship between the received approach and Webber's view, on the one hand, and the general conception of rights and specificationism, on the other, is thus analogous. But the two antithetical pairs of views are not identical. What the two conventional views part over, and what Webber and I part over, is the standard for abridging an antecedently defined right, as the conventional views would have it, or, as Webber and I would put it, for defining the content of the right itself. The

7. Oberdiek, *Specifying*, *supra* note 5, at 128 (quoted in part by Webber at p. 131).

received approach and Webber's alternative to it appeal exclusively to a posited, if open-textured, limitations clause. The general conception of rights as well as the specificationism that I endorse look instead to normative considerations wherever and whatever they might be. This difference is due to the fact that Webber's focus is constitutional legal rights while mine is moral rights and, at one remove, common law rights. And it is that difference that gives me pause in signing on to Webber's application of specificationism to constitutional law.

The relationship between legality and morality is, of course, a source of continuing inquiry and puzzlement in general jurisprudence, and the difficulty of cleanly distinguishing between the two when rights are at issue is especially difficult. This is because moral rights are particularly legalistic. H. L. A. Hart suggests as much in maintaining, "the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules."[8] Moral rights, one might say, are law-apt. Moral rights are nevertheless distinct from legal rights, and *a fortiori* from constitutional rights, and what makes for a compelling account of moral rights does not necessarily make for as compelling an account of constitutional rights.

A distinguishing feature of specificationism, which Webber locates and finds attractive in his own account of constitutional rights, is its dynamism. A right of free expression, again for example, may protect this kind of speech but not that kind, or the same kind of speech in some circumstances but not others. The moral right of free expression (as well as every other moral right) is, in this way, entirely context-dependent. According to specificationism, unless all the considerations that are relevant to the justifiability of expressing oneself in a given way in a given context are brought to bear, the right of free expression is simply indeterminate. Ascribing to someone a right of free expression, full stop, is therefore tendentious. There are just too many ways and too many contexts in which one may *not* express oneself however one sees fit to make so sweeping a declaration. Moral rights as a class, as they are understood on the specified conception of rights, cannot be the *carte blanche* that the general conception of rights assumes them to be.

8. H. L. A. Hart, *Are There Any Natural Rights*?, 64 PHIL. REV. 175, 177 (1955).

There is much that can be said in response to these claims, to be sure, but the question I wish to pursue is whether Webber's embrace of this dynamism about constitutional rights is advisable and appropriate. An implication of specificationism's dynamism is that one argues *towards* and not *from* rights. For if rights themselves are conditional in the way that specificationism entails, then rights cannot be invoked in arguing for a normative conclusion. That would beg the question. A right is not a consideration to be factored into an all-things-considered judgment of what is permissible, according to specificationism, it rather represents the all-things-considered conclusion about permissibility. And conclusions are what we argue towards.

Of course, as a matter of actual practice, it will make a great deal of sense to appeal to rights in moral or legal argument. Rights stated in general terms are useful placeholders. When invoked this way, they purport to summarize the balance of a common subset (but only a subset) of considerations that bear on what people are ultimately entitled to do. Even if specified at some deep level, general rights can thus play a helpful heuristic role in normative argument. It would be unreasonable to expect people to start from scratch, beginning with normative primitives and working their way up, every time they actually engage in normative argument.[9] Rights conceived this way are a kind of normative shortcut. Now, Webber endorses my criticism that rights conceived generally are merely intermediate conclusions about what is permissible and are not, as under specificationism, the final conclusions that we really seek about what is ultimately permissible. If what ultimately matters are the duties that our rights actually impose, then the general conception of rights cannot be the correct theory, for the normative power of general rights is always subject to further context-specific considerations. But this philosophical vice has its virtues, and one of them is practicality, whether the rights at issue are moral or legal. So long as we all know what we are all doing in appealing to baldly stated rights that appear to lack any express qualifications, like "the right of free expression" or "the right to privacy," there is no problem. Webber need not disagree.

A different kind of pragmatic consideration, however, might seem to drive a wedge between moral and constitutional rights,

9. I make this point in Oberdiek, *Specifying*, *supra* note 5, at 133: "As a practical matter, it is of course useful to advert to rights as a way of holding constant the multifarious considerations that justify a particular right."

suggesting that specificationism is not the best account of constitutional rights, even if it is the best account of moral rights. On the best account of constitutional rights, in other words, one might in fact argue *from* them, even if one only argues *towards* specified moral rights. Although he does not distinguish between kinds of rights in the following passage, Joseph Raz captures why this might be so:

> Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties.... The fact that practical arguments proceed through the mediation of intermediate stages so that not every time a practical question arises does one refer to ultimate values for an answer is ... of crucial importance in making social life possible, not only because it saves time and tediousness, but primarily because it enables a common culture to be formed round shared intermediate conclusions, in spite of a great degree of haziness and disagreement concerning ultimate values.[10]

Raz here mentions the first pragmatic consideration canvassed above, that general rights are a convenient handmaiden in practical reasoning, but it is the second that is key; namely, that rights conceived generally make social life possible in a pluralistic society precisely because they only state intermediate conclusions that prescind from their fundamental justifying values. How might this observation counsel against specifying constitutional rights?

One need not claim that politics and law are discontinuous with morality to recognize that norms governing the former domains need to be public in a way that moral norms need not be. Morality is, first and foremost, a system of norms governing individual conduct, after all, while politics and law are systems of norms governing collective and social conduct. The truth about moral rights therefore need not answer to the demands of publicity to the extent or in the way that the truth about constitutional rights must. The content of any moral right depends on belief-independent moral facts along with empirical facts about circumstances. The moral facts are the moral facts, the empirical facts are the empirical facts, and controversy or uncertainty about either is usually irrelevant. The same cannot be said of an analogous politically legitimate constitutional right. The content of any politically legitimate constitutional right surely does depend, in part, on what people generally take the

10. JOSEPH RAZ, THE MORALITY OF FREEDOM 181 (1986).

moral status of the relevant conduct to be and the relevant non-moral facts to be. Controversy is not irrelevant here. For no constitutional framework can be politically legitimate (which is not to say just or legally valid) if the norms it enshrines take no stock of the beliefs, moral or non-moral, held by the people whom the constitution purports to govern. This puts a unique pressure on constitutional rights—they are held to a standard that moral rights are not.

Raz's observation suggests that rights conceived generally, as intermediate conclusions about one's entitlements, offer a way of deflecting this pressure and meeting this additional standard because they focus attention on what we agree about—the existence of some broadly-stated right—and away from what we likely disagree about: namely, the exact implications of the right and the fundamental moral considerations that justify it. General rights, like alcohol, thus serve as a kind of social lubrication. They allow people with diverse moral outlooks to share common moral standards, even if only in the abstract, which facilitate social life because no one need either commit up front to an exhaustive set of conclusive duties or display their deepest normative commitments. They can just focus on the widely shared intermediate conclusions represented by general rights, no matter how contestably those intermediate conclusions might be applied in practice or were reached. This is the way in which general rights serve as a *lingua franca*, noted at the outset. They are like poker chips in Monte Carlo: one can purchase them with any number of diverse currencies and everyone recognizes their universal value regardless of the currency used to buy them. Raz appears to believe that this function is an important desideratum of any type of rights, but I would submit that in light of the distinctive publicity concerns canvassed above, it applies only to legal rights and especially to constitutional rights.

This, in turn, seems to entail that the received approach to constitutional rights has more going for it than Webber recognizes. Raz's observation, suitably focused on constitutional rights, suggests that there is good reason *not* to elide the distinction between the definition of a constitutional right and its limitation. Specified constitutional rights, the argument goes, would fail to take the social dimension of those rights seriously. That generally conceived constitutional rights are mere intermediate conclusions about one's entitlements and not final conclusions about them is not the shortcoming that it is in the

case of moral rights, which need not be sensitive to the demands of publicity. Quite the contrary, it is a credit to the view, counting in favor of the received approach to constitutional rights. And that seems correct. For this reason, Webber is perhaps too quick to apply specificationism to constitutional rights. The case for specificationism cannot be transposed from moral rights to constitutional rights as straightforwardly as he seems to think.

This is not to say, however, that specificationism about constitutional rights is misguided. Any credit that is due to the received approach for its doubly pragmatic conception of rights is surely defeasible. What must be shown is that the social benefit of understanding constitutional rights as intermediate conclusions is more mirage than reality. I believe that specificationism has the resources to expose the received approach on this point, so that Webber can at the end of the day rightfully adopt a specificationist account of constitutional rights. Andrei Marmor is instructive here. Discussing general constitutional rights and their intermediary role, Marmor first makes the Razian point that "[s]ocieties where different groups of people are deeply divided about their conceptions of the good, need to settle on a set of rights they can all acknowledge, in spite of deep controversies regarding the grounds of those rights (and their ramifications)."[11] Still, he argues, rights so understood represent very tenuous agreements that fall apart at crucial junctures. To determine the limitation of a right, Marmor explains, "one would naturally need to go back to the reasons for having the right in the first place, and it is precisely at this point that agreement breaks down. As a matter of fact, more often than not we will discover that there was never an agreement there to begin with."[12] It is precisely when rights must be limited or specified more precisely and duties actually imposed, then, that rights understood as consensual intermediate conclusions give out. The veil of generality and abstraction is lifted in such cases, revealing not deeper agreement about the right, but a cacophony of arguments from contentious first premises to controversial alleged duties.

The weakness of general constitutional rights on this score can be illustrated by two kinds of cases. The first, which appears

11. ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 152 (2d ed. 2005), *excerpted in* ARGUING ABOUT LAW 401, 409 (Aileen Kavanagh & John Oberdiek eds., 2009).

12. *Id.*

to be the type Marmor has in mind, is one where there is indeed agreement in the abstract, but not at a foundational level. We might all agree that there is a right of free expression, for example, but not agree about the nature of its justification. Despite our disparate grounds for recognizing the right, what consensus there is enables us to apply the right in a wide range of cases, and more specifically, just so long as the differing justifications share the same implications in particular cases. But therein lies the problem. As soon as a controversy arises that commands no univocal resolution, but instead elicits different proposed dispositions reflecting the different grounds people have for recognizing the right of free expression, those contested underlying justifications move to the fore and all semblance of agreement disappears. What is left is unencumbered first-order normative argument, not *from* consensual place-holding constitutional rights, as the received approach envisions, but *towards* constitutional rights, as specificationism holds. In such a case, one cannot avoid arguing towards and specifying the constitutional right of free expression by adjudging competing conceptions of the point and value of free expression, like the Millian "marketplace of ideas" account or the non-instrumental autonomy-based one. A final if controversial disposition is required, which will likely be based on equally controversial premises. Hard cases may make bad law, but we must still settle them. Whatever settlement is made, moreover, by definition designates conclusive rights and duties, even if the settlement could not likely gain everyone's acceptance. Rights understood in this specified way remain a *lingua franca* to the extent that everyone knows what it means to have a right and to be subject to a duty, even though there may be little consensus about the content of those forms.

There is a second sort of case that counts against the received approach's embrace of general rights even more pointedly, and that is one where there never was any consensus, intermediate or otherwise, about there being a right at all. The best exemplar of such a state of affairs is the debate surrounding the constitutional right to an abortion in the United States. No one can deny that there is such a constitutional right—as a matter of positive law, it is beyond doubt—but there is nowhere near universal popular support for it. Consequently, "the right to an abortion" cannot be the placeholder that the received approach requires, facilitating inquiry into narrower questions like the potential right to a late-term abortion. Attorneys who

argue against the constitutionality of late-term abortion in court will of course address *Roe* and *Casey* in their briefs, but that recognition falls far short of the image that the received approach promotes, in which *Roe* and *Casey* state intermediate conclusions that hold our society together and from which more specific conclusions can be drawn. Constitutional norms can only hold a society together in this way if they are widely accepted, but when it comes to abortion in the United States, that wide acceptance is absent. Indeed, if attorneys arguing against the constitutionality of late-term abortion before the Supreme Court do not believe (or if their clients do not believe) that *Roe* and *Casey* were themselves correctly decided, they may just as likely attack those precedents directly as attempt to accommodate or parry them. The received approach makes no space for this kind of dissent. This is because the controversy surrounding abortion rights entails that they cannot serve as placeholders, as the received approach requires of rights. The right to an abortion, on that view, is therefore a kind of aberration—a constitutional right in name only. This is sufficient reason to reject the received approach, for despite the controversy surrounding abortion, there is nevertheless a *bona fide* constitutional right to an abortion in the United States.

It is worth adding that the received approach is not saved by the fact that the United States Supreme Court locates the constitutional right to an abortion under the more abstract rubric of privacy, support for which is far more widespread. For no one who cares about the constitutional status of abortion is fooled into thinking that a broader debate about the widely accepted right to privacy will yield agreement about the constitutionality of abortion. If anything, subsuming the constitutional right to an abortion under the right to privacy jeopardizes the consensus about that latter right's constitutional status. If privacy grounds the right to an abortion and one steadfastly believes that there should be no constitutional right to an abortion, one could argue that privacy does not deserve the protection that the Supreme Court affords it—one person's *modus ponens* is another's *modus tollens*. Going abstract in the way the received approach counsels, in short, just does not work when it comes to resolving constitutional controversies about matters that have never commanded consensus.

Specificationism can tolerate disagreement about constitutional rights in a way that the received approach cannot. This is because specificationism treats constitutional rights as

conclusive determinations of entitlements and duties. That there may be little agreement along the way towards those conclusions, or about the conclusions themselves, does not undermine the very idea of there being constitutional rights under specificationism as it clearly does under the received approach. Nothing in this argument, moreover, depends on a claim that law is in general controversial. As a general matter, no one should deny that there is widespread agreement about the law, but the above examples illustrate that there can also be deep disagreements, especially with respect to constitutional rights. What deep disagreements there are must be theoretically accommodated by an account of constitutional rights. Specificationism, but not the received approach, does this. Specificationism maintains that constitutional rights are hard-fought final, if potentially narrow, conclusions that entail duties, not intermediate conclusions of broad compass that command widespread acceptance, as the received approach holds. That latter picture fails to account for too many authentic constitutional rights.

Webber is therefore right to endorse specified constitutional rights and reject the received approach. Yet while I can ultimately join him in supporting the idea of specified constitutional rights, I cannot accept Webber's particular conception of them. In brief, and as noted above, Webber takes an unapologetically Waldronian line, holding that the legislature should be both the source and judge of any limitation on rights: the legislature both "is not only a possible, but in many respects a necessary author of a right's limitation" (p. 150), and "should be identified as the judge of the *proper* limitation against which to evaluate the legislature's limitation on a constitutional right" (p. 179). He parts with Waldron only in supporting some judicial review, albeit a very weak form, in which a legislative limitation on a constitutional right could be overruled only for a "clear mistake" (p. 209), and then only after grudgingly accepting that the practice exists, lamenting that "[w]e may regret the advent of judicial review" (p. 203). In these closing lines, my aim is simply to point out that specificationism about constitutional rights need not end up where Webber takes it, and secondarily to suggest that Webber's destination is not a place one should want to end up.

"Who decides?" is a question that always looms large in law, and any account of the limitation of constitutional rights must answer it. Webber boldly answers that it is the legislature

that ought to decide both how to limit any right initially and whether that limitation is proper upon further review. The arguments that he gives for the lofty status he accords the legislature are familiar chiefly from Waldron's work.[13] But while Webber follows Waldron in taking very seriously the so-called circumstances of politics—the fact of intractable normative disagreement—and contends that a thorough majoritarianism is the only plausible response to it, he nowhere addresses the many compelling challenges that have been put to Waldron on that score, which I will simply gesture towards. The most fundamental of these is well-stated by Aileen Kavanagh: "if disagreement about the best means of protecting rights is the ground on which we should reject the institution of judicial review, then it is difficult to see why it does not impugn participatory majoritarianism on the very same grounds."[14] The fact of normative disagreement, in short, cannot drive one to an all-encompassing majoritarianism given that it, too, fails to command anything like universal support. Nor does Webber consider Cécile Fabre's powerful objection to Waldron that putting rights against the state and its legislative whims beyond the reach of everyday democratic politics is the only way of providing the protection that is owed to the autonomous persons who ideally populate a democracy.[15] Nor does he engage with rejoinders like David Estlund's, suggesting that Waldron must value the substantive outcomes and not just the procedure of unbridled majoritarianism—what, after all, is the point of valorizing reasoned democratic debate if not that it portends better legislative conclusions?[16] Webber's refusal to address these and other criticisms—and there is a not-so-small cottage industry devoted to responding to Waldron's work on democracy—amounts, in my view, to a considerable omission. Whether adequately argued for or not, though, the question remains: does specificationism itself require that constitutional rights be limited and/or reviewed through majoritarian procedures?

13. See especially Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993), and Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2005).

14. Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW & PHIL. 451, 467 (2003).

15. See Cécile Fabre, *The Dignity of Rights*, 20 OXFORD J. LEGAL STUD. 271 (2000).

16. See DAVID ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 95–96 (2007).

In a word, no. Nor does Webber appear to disagree. While he does make claims, like the one quoted above, about a legislature being a "necessary author of a right's limitation," that necessity does not appear to be born of specificationism but rather of completely separable considerations of political legitimacy (which Webber also would have done well to defend more assiduously). Even on Webber's view, in other words, constitutional specificationism does not itself require majoritarian limitation. If we wish to isolate and assess the merits of the specified conception of constitutional rights, and if we wish to defend it, it is important not to overlook this. The theory is obviously controversial quite apart from any affiliation it may have with Waldron's emphatic commitment to majoritarian politics. That it stands against a view called "the received approach" is evidence enough of that. Even if one lacks misgivings about Waldron's views—though I admit to telegraphing some of mine in the previous paragraph—one can recognize both that a theory is easier to defend the thinner it is and that commitments like Waldron's only weigh a theory down. As an avowed partisan defending specificationism about rights, and now following Webber in defending specified constitutional rights, I want to give the theory every possible chance to convince.