A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism

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Abstract

Two leading schools of thought among U.S. conservative legal elites—Law and Economics (L&E) and Originalism and Textualism (O&T) —both purport to use their formalist structures to guide analysis in ways that are objective, substantially determinate, and apolitical. Because they rest on very different theoretical underpinnings, L&E and O&T should only randomly reach similar policy or legal conclusions. After all, L&E implements neoclassical economics, a theory of utility maximization, whereas O&T is a theory of semantics. Yet as practiced, L&E and O&T rarely result in conflict. What explains the missing intra-conservative clash? Despite their respective pretenses to objectivity, determinacy, and political neutrality, neither theory delivers on its promises. Economic efficiency, the linchpin of L&E, is incoherent because it relies on typically hidden but ultimately normative assumptions about preferences that would exist in an impossible world without law. O&T as it has been refined in response to devastating criticisms of earlier versions is indistinguishable from ostensibly less determinate rivals like Living Constitutionalism and purposivism. Accordingly, conservatives use L&E and O&T to obscure the role of normative priors, perhaps even from themselves. Liberals could use the same techniques for different results but heretofore generally have not, instead mostly settling for counterpunching against charges of result-orientation.

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I. Introduction

The Republican-controlled Senate's 2018 confirmation of Justice Brett Kavanaugh and numerous like-minded lower federal court judges shifted the federal judiciary's ideological center of gravity to the right.[1] Depending on electoral outcomes, the balance could shift back, but for the medium term, the most important lines of division may not be between liberals and conservatives but between differing conceptions of legal conservatism.

One need not look very far to find intra-conservative differences. Justice Clarence Thomas emphasizes original meaning more than precedent.[2] Justice Samuel Alito has expressed admiration for Burkean conservatism,[3] which could suggest a somewhat greater role for precedent.[4] Justice Scalia had a civil libertarian streak in criminal procedure cases,[5] and Justice Gorsuch might be exhibiting the same tendency.[6] Chief Justice John Roberts clearly values the

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[1] In less than three years in office, President Trump had named one in four active judges on the federal appeals courts. *See* Colby Itkowitz, *1 in Every 4 Circuit Court Judges is now a Trump Appointee*, WASH. POST. (Dec. 21, 2019), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fa1e98-2336-11ea-bed5-880264cc91a9_story.html.

[2] *See*, *e.g.*, Frank B. Cross et al, *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 563 ("Justice Thomas, by contrast [with Justice Scalia], has shown some disregard for *stare decisis* and proudly claimed that originalism should trump precedents.").

[3] *See* Steven G. Calabresi & Todd W. Shaw, *The Jurisprudence of Justice Samuel Alito*, 87 GEO. WASH. L. REV. 507, 553–577 (2019) (describing "the Burkean jurisprudence of Justice Alito").

[4] For a useful explanation of the difference between originalism and Burkean conservatism, see Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL'Y 509 (1996).

[5] *See Apprendi v. New Jersey*, 530 U.S. 466, 498–99 (2000) (Scalia, J., concurring) ("the jury trial guarantee . . . has never been efficient; but it has always been free."); *see also Giles v. California*, 554 U.S. 353 (2008) (Scalia, J., for the Court) (reversing a murder conviction for a Confrontation Clause violation).

[6] *See* Ilya Shapiro, *A Tale of Two Justices*, 2019 CATO SUP. CT. REV. ix, x ("Justice Gorsuch is rapidly becoming a libertarian darling in many ways—his 'defections' tend to be in criminal law").

public perception of the judiciary as an apolitical branch,[7] which may moderate his conservatism. And at least so far, Justice Kavanaugh has aligned himself closely with the Chief Justice.[8]

Thus, Republican appointees do not comprise a monolithic bloc.[9] Consider the October 2018 Term, in which twenty cases were decided by a 5-4 margin. Although the most common alignment pitted the five Republican appointees against the four Democratic ones, other combinations accounted for nearly twice as many cases. Indeed, there were slightly more 5-4 cases in which one Republican appointee joined his Democratic colleagues than in which the Republican appointees all voted together.[10] Cleavages no doubt exist among Republican appointees to the lower courts as well.

Yet to date, we see scant evidence of what ought to be a fundamental intra-conservative division—between jurists who subscribe to the law-and-economics movement (hereafter "L&E") and those who brand themselves originalists in constitutional interpretation and textualists in statutory interpretation (hereafter "O&T"). The absence of much conflict is surprising, because the two approaches are at best orthogonal and should frequently lead to different results. Faced with legal uncertainty, the L&E judge asks what legal rule will best promote economic efficiency.[11] By contrast, the O&T judge will consult dictionaries, corpora, and other sources to discern the original public meaning of the relevant legal text.[12] Based on their underlying theoretical commitments, there is no reason to think that these approaches should consistently point to the same result.

To be sure, courts sometimes acknowledge a conflict. Consider *Tennessee Valley Authority ("TVA") v. Hill*,[13] which just barely pre-dates the rise to

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[7] *See* Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge'*, THE NEW YORK TIMES (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html; *see also* John Roberts, *2019 Year-End Report on the Federal Judiciary* (2019), https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf.

[8] *See* Adam Feldman, *Final Stat Pack for October Term 2018: Voting Alignment – All Cases*, SCOTUSBLOG (Jun. 28, 2019, 5:59 PM), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_30_19-35-43.pdf.

[9] Neither do the Democratic appointees, but we do not focus on them here.

[10] Adam Feldman, *Final Stat Pack for October Term 2018: 5-4 Cases*, SCOTUSBLOG (Jun. 28, 2019, 5:59 PM), https://www.scotusblog.com/wp-content/uploads/2019/07/StatPack_OT18-7_2_19-21.pdf.

[11] *See* Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512–20 (1980),

[12] *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 53–69 (2012).

[13] 437 U.S. 153 (1978).

prominence of both L&E and O&T. There the Supreme Court held that the Endangered Species Act required the halting of mostly-completed construction of a multimillion-dollar dam in order to preserve habitat for a then-recently-discovered species of fish, the snail darter.[14] Chief Justice Burger's opinion for the Court sounded themes that we would now associate with textualism as he overrode the L&E-style objection that halting the dam's construction so late in the game would cost substantially more than justified by the sum of the resulting benefits and that therefore Congress ought to be presumed not to have intended that result. He wrote:

> It may seem curious to some that the survival of a relatively small number of three-inch fish among all the countless millions of species extant would require the permanent halting of a virtually completed dam for which Congress has expended more than $100 million. The paradox is not minimized by the fact that Congress continued to appropriate large sums of public money for the project, even after congressional Appropriations Committees were apprised of its apparent impact upon the survival of the snail darter. We conclude, however, that the explicit provisions of the Endangered Species Act require precisely that result.[15]

The dissent by Justice Powell followed the path typically taken by L&E-friendly jurists, acknowledging that if the statutory language were truly unambiguous, he would have no choice but to follow it, but then finding ambiguity and resolving it in a way that avoided wasting resources.[16]

Cases like *TVA v. Hill* ought to be common, but they are in fact very rare. Instead, just as the Republican Party coalition of social conservatives and economic libertarians has remained remarkably stable since Richard Nixon's

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[14] Congress subsequently overrode the specific ruling. 16 U.S.C. § 1536 (1988). *See also* Jared des Rosiers, *Exemption Process Under the Endangered Species Act: How the God Squad Works and Why*, 66 NOTRE DAME L. REV. 825 (1991).

[15] 473 U.S. at 172–73. Contemporary textualists would disapprove of the majority opinion's reliance on legislative history, *see id.* at 181–84 (discussing, *inter alia*, committee reports), but for present purposes that distinction need not concern us. Here we highlight the Court's view that its role is to discern a statute's meaning largely independent of the costs and benefits of that meaning, which both Chief Justice Burger's majority opinion and textualism regard as a policy consideration not suited for courts absent a textual command.

[16] *See id.* at 207–08 (Powell, J., dissenting); *cf. id.* at 210 (decrying "an interpretation of the Act that requires the waste of at least $53 million").

southern strategy realigned the parties,[17] so too, for decades the L&E and O&T branches of conservative judicial ideology have co-existed.

Political compromise and horse-trading—in which social conservatives get fiery speeches and judges who are supposed to overturn or at least limit *Roe v. Wade*,[18] while economic libertarians get deregulation and tax cuts—mediate the intra-Republican ideological conflict between social conservatives and economic libertarians in the political realm. By what mechanisms do legal elites reconcile or suppress the substantial potential conflict between L&E and O&T? The answer is not immediately apparent. Indeed, it is not even clear that key actors—whether conservatives themselves or (to a lesser extent) their critics—recognize the tension's existence.

This Article argues that we have witnessed substantially less direct conflict between L&E and O&T than one would expect because, despite their different foundations, the two approaches closely resemble each other in a way that permits conservative jurists to make all-things-considered and ideologically laden value choices and then use L&E, O&T, or both to offer post hoc rationalizations for those choices.

L&E is economic formalism. O&T is legal formalism. Both brands of formalism purport to be positive rather than normative, objective, and apolitical, but both are in fact highly under-determined and thus open to manipulation in a way that makes them normative, subjective, and ideologically value-laden. A conservative judge can and typically will reach the same result using either L&E or O&T, because L&E and O&T function as mechanisms for rationalizing results reached on other, unstated and normative, grounds.

Readers of law journals will likely find our claim about legal formalism familiar, even clichéd. After all, since at least the early twentieth century, legal realists and their heirs have sought to debunk legal formalism. We can assure our readers that we will not simply recapitulate (or even cite much of) the vast literature that critiques legal formalism.

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[17] *See* JOSEPH A. AISTRUP, THE SOUTHERN STRATEGY REVISITED: REPUBLICAN TOP-DOWN ADVANCEMENT IN THE SOUTH 113–42 (2015) (describing the contemporary legacy of the southern strategy). To be clear, we do not contend that Nixon invented rather than exploited existing divisions. *See id.* at 5 (noting how Nixon built on Barry Goldwater's appeal to "strongly ideological, racially motivated, white conservatives" by "melding economic conservatives with states' rights advocates"); DOUG MCADAM & KARINA KLOOS, DEEPLY DIVIDED: RACIAL POLITICS IN POST-WAR AMERICA 104 (2014) (characterizing "Nixon's much ballyhooed 'southern strategy'" as less a top-down creation than "a reflection of . . . the racially conservative white countermovement [that emerged] first in the South in the early 1960s, but spreading to the rest of the country in the mid- to late 1960s").

[18] 410 U.S. 113 (1973).

Readers might also think they know what we will say to critique L&E—that it under-values distributional concerns, difficult-to-measure diffuse harms (like negative environmental externalities), and other so-called "soft" variables. We agree with that line of criticism, but our critique goes deeper. We do not simply contend, for example, that practitioners of L&E trade off too much equity for efficiency. Our argument—which is not original to us but largely unknown even among professional economists and virtually completely unknown among lawyers, judges, and legal scholars—is that the very idea of efficiency is empty without a highly contestable set of value judgments.

Skeptical readers might believe they have a reasonably workable understanding of efficiency. If you want to move a gallon of water from a spigot to your garden, you will think it less efficient to do so by filling a leaky bucket than by filling a bucket that does not leak.[19] Isn't that roughly all that economists mean when they say that some legal rule is more efficient than some other rule—that it results in less waste? Perhaps, but if so, the word "waste" hides more than it illuminates.

Suppose that the framers of a new constitution are trying to decide whether the government must prove a person's guilt beyond a reasonable doubt in order to obtain a criminal conviction. Let us imagine that the alternative is the clear-and-convincing evidence standard. An economist at the constitutional convention cites a study showing that going from clear-and-convincing to beyond-a-reasonable doubt will increase the number of guilty people who are acquitted by more than the resulting decrease in the number of convictions of innocent people it will prevent. Thus, the economist says, the rule is not cost-justified. It is inefficient.

Is the economist right? The answer depends on the relative weights that the constitution writers place on avoiding acquittals of the guilty versus avoiding convictions of the innocent. Those who agree with the adage that it is better for ten guilty to go free than for one innocent to be convicted will reject the economist's conclusion so long as the ratio of wrongful convictions avoided to unjustified acquittals is at least one-tenth.

In response to our example, one might object that the civil libertarians are making a conscious choice to adopt the *inefficient* rule, but we think that objection simply confuses the issue. Whether the rule is efficient or inefficient in the first place depends on what counts as waste. That might be easy to answer if the choice is between two buckets, one with and one without a hole in it, so that the leak dissipates a valuable resource for no countervailing benefit. But few choices in life or law look like that. Typically, various rules, standards, and procedures will come with packages of costs and benefits.

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[19] We borrow the metaphor of a leaky bucket from Arthur Okun. *See* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY, THE BIG TRADEOFF 91 (1975).

Indeed, whether a particular outcome counts as a cost or benefit will itself often be contentious.

We hope we have said enough so far to overcome the initial skepticism of readers who, based on everyday usage of the term "efficiency" or what they learned in an introductory economics course, think that efficiency is positive, objective, and apolitical. Part II develops and expands the critique of the concept of efficiency on which neoclassical economics and thus L&E rest. We show how these approaches rely on the false assumption that there exist natural baselines against which market "distortions" can be gauged and thus efficiency can be judged.

Part III critiques legal formalism. Unlike L&E, which is indeterminate to its core, O&T could, in principle, provide determinate answers, but we explain how O&T evolved in recent decades to become indeterminate in practice. The differences in principle between L&E and O&T end up being much less important than the similarities in how they operate in practice—to obscure value judgments behind a mask of objectivity and determinacy.

Part IV illustrates our thesis in action by examining how leading scholars and judges who bridge the L&E and O&T movements have sought to reconcile the different sorts of results to which the two approaches should routinely lead if their claims to objectivity and determinacy were valid. We show how the leading scholars and judges use the very substantial wiggle room that L&E and O&T provide in order to suppress contradictions and disguise value choices.

Part V offers and explores several hypotheses to answer the following question: Given the open-endedness of the two formalisms we discuss, why haven't liberal-leaning jurists also made extensive use of the rhetorical justification structures that are L&E and O&T? Why, in other words, do liberals not try to beat conservatives at their own game?

II. Economic Efficiency is an Inherently Incoherent—and thus Manipulable—Concept

The law-and-economics movement features two primary claims to legitimacy, each of which depends on and then reinforces the other. The first claim is that by striving to maximize efficiency, L&E brings rigor to discussions that have heretofore supposedly been riddled with flabby logic and mere sentiment. The second claim is that efficiency is an objective and scientific concept, thus inoculating L&E adherents against the tendency to substitute personal normative priors for cold-blooded logic.[20]

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[20] *See, e.g.,* Jedediah Purdy, *State of the Debate: The Chicago Acid Bath*, THE AMERICAN PROSPECT (Nov. 16, 2001), https://prospect.org/culture/books/state-debate-chicago-acid-bath/ (describing and quoting Richard Posner's foundational work in L&E, noting in particular that, "although [Posner] admires the aesthetic accomplishments of art and

Both of those claims turn out under scrutiny to be, to put the point bluntly, false. This is not to say that everything written under the L&E banner is false, of course, but that the claims that the L&E approach is uniquely rigorous and objective are simply unsupportable. Why? Because L&E is based on neoclassical economic theory, from which it draws not just its methods but its pretenses to rigor and objectivity, but with which it shares a fatal reliance on an incoherent and ultimately unmoored notion of efficiency.

As we noted in Part I, the problems with neoclassical economic theory that we discuss here (as well as many other problems that, while important in further undermining neoclassical theory, are not relevant to the current discussion) have been discussed at length among some economists and philosophers over the more than half-century since neoclassicism emerged as the dominant school of thought in economics departments in the United States and elsewhere. In that sense, these critiques are "known" to (some) scholars and are thus not novel insights on the part of the current authors. Similarly, it would be quite wrong to suggest that legal scholars have been passive in pushing back against L&E, with top scholars offering sometimes withering criticisms of the by-now dominant approach.[21]

However, the most fundamental critiques of L&E and neoclassical economics are generally not taught in law schools or even in economics departments, where the focus is not on exploring the limitations and internal contradictions of the theory but on promoting its supposed explanatory and predictive power (as well as, one must note, emphasizing and even celebrating the supposedly rigorous math-intensive approach that L&E often adopts). Therefore, those critiques of L&E and the neoclassical theory that spawned it are known only to the rather small group of scholars who happen to have come across them but are not widely known even to many who write with great facility and passion about the power of the neoclassical economic/L&E approach.

Our purpose here, then, is to shine a light on the logical incoherence of

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literature, he believes that morality, for instance, is a tangled mass of taboos that offers us no possibility of increased insight. … Posner repeatedly describes his task as 'providing an acid bath' that washes away ethical taboos and shows human behavior in its elemental, economic character.")

[21] See Guido Calabresi, *An Exchange: About Law and Economics; A Letter to Ronald Dworkin*, 8 HOFSTRA L. REV. 553 (1980). See also Jules Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Robert Ashford, *Socioeconomics and Professional Responsibilities in Teaching Law-Related Economics Issues*, 41 SAN DIEGO L. REV. 133 (2004); David M. Driesen, *Two Cheers for Feasible Regulation: A Modest Response to Masur and Posner*, 35 HARV. ENVTL. L. REV. 313 (2011); Neil H. Buchanan, *Can Economics Get Better, Even Though It Can't Get Better?*, Justia (Dec. 5, 2019), https://verdict.justia.com/2019/12/05/can-economics-get-better-even-though-it-cant-get-better.

neoclassical economics as a theory, concentrating specifically on the pride of place enjoyed by efficiency assessments as the *sine qua non* of acceptable economic analysis (including economic analyses of the law).

We hasten to emphasize, however, that although our discussion in this Part necessarily focuses on the aspects of the theory that make it analytically incoherent, we do not limit ourselves to saying merely that such incoherence makes the L&E approach "no better or worse than" all other necessarily non-objective approaches. As we will argue, it is worse.

To be clear, even to demonstrate that neoclassical efficiency analysis does not deserve the glow of supposed objectivity that it has long enjoyed is quite a lot. As we will emphasize at the end of this Part, however, efficiency-based analyses are frequently in practice used for ethically repugnant ends. Before we get there, however, it is essential to understand why economic efficiency is incoherent even on technical grounds. We set aside moral considerations to do so, but only temporarily.

A. Other Prominent Critiques of Efficiency

Any school of thought as influential as neoclassical economics (and its offspring, such as L&E) will of course have come under extended scrutiny, both from scholars who reject the new orthodoxy and even from those who might end up embracing it. We have no reason, and frankly no interest, in rehashing all of those debates, although we do note that this particular orthodoxy has the remarkable ability to come out on the short end of virtually all such debates but somehow never to "lose" in the sense of being jettisoned due to its flaws.

We do, however, think it important to clearly set aside two particular debates that have raged within the economics and L&E communities that might be easy to confuse with our critique, but which are not our focus.

First, there is an extensive literature discussing the difference between two types of efficiency—*Pareto* efficiency and *Kaldor-Hicks* efficiency.[22] Pareto efficiency is typically described as a situation in which it is not possible to make anyone better off without making someone else worse off (where "better off" is defined in a very tendentious way, but we digress). Kaldor-Hicks efficiency allows policies to be adopted that make someone worse off so long as the gains to the winners exceed the harms to the losers, thus opening a space for policy actions that Pareto efficiency seems to foreclose.

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[22] *See* Francesco Parisi, *Positive, Normative, and Functional Schools in Law and Economics*, 18 EUR. J. L. & ECON. 259, 266–68 (2004); *compare* Daniel A. Farber, *Autonomy, Welfare, and the Pareto Principle*, in LAW AND ECONOMICS: PHILOSOPHICAL ISSUES AND FUNDAMENTAL QUESTIONS (Aristides N. Hatzis & Nicholas Mercuro, eds. 2015) (hereinafter LAW AND ECONOMICS), *with* Gerrit de Geest, *Any Normative Policy Analysis Not Based on Kaldor-Hicks Efficiency Violates Scholarly Transparency Norms*, in LAW AND ECONOMICS (2015).

There are situations in which it is useful to explore the differences between those two types of efficiency, but this is not one of them. Both of those definitions of efficiency are based on the same assumptions, and especially on the same theory of value (the so-called willingness-to-pay criterion, in which value is determined by the amount of money that a person can and will pay in an arms'-length transaction). Both claim to be objective and rigorous. Our critique undermines both of these conceptions of economic efficiency, which means that we need not concern ourselves with the intramural debates about which specific version of neoclassical efficiency is in play. They both are.

Second, there is a possibly even more extensive literature that critiques neoclassical approaches to policymaking (including L&E) not by attacking efficiency itself but by arguing that efficiency should not be the sole criterion in public decision making. This is commonly known as the equity/efficiency debate, where some scholars (rightly, in our view) fault the elevation of efficiency over concerns about fairness, justice, and so on.[23]

Our point here is that the even the critics of efficiency in the equity-efficiency debate generally do not question whether efficiency has a coherent meaning. Instead, they at least tacitly accept the purported power of efficiency but argue—often passionately and persuasively—that there are other important values that should not be trampled in a rush to make the economy more efficient.

Again, we happen to be deeply sympathetic to such critiques. *If* efficiency were a coherent concept and were as powerful as its proponents claim, we still would side with those who say that, for example, income and wealth redistribution would enhance social and political (and economic) values that are too important to sacrifice at the altar of a heartless and technocratic notion of efficiency.

Yet the equity/efficiency debate's frustrating tendency for the sides to talk past each other is evidence of its fundamentally unsatisfying nature. One side says, "Don't forget about fairness, which has to count for *something*," while the other side retorts, "Are you saying you *want* the economy to be *in*efficient? Think with your heads, not your hearts."[24]

Indeed, one of our key points here is to attack the presumption underlying the accusation—often accepted on both sides of the debate—that

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[23] For an especially good recent example of this type of analysis, see James R. Repetti, *The Appropriate Roles for Equity and Efficiency in a Progressive Income Tax*, 24 FLA. TAX REV. (forthcoming 2020) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3470360). *See also* DAVID A. BRENNEN, KAREN B. BROWN, AND DARYLL K. JONES, BEYOND ECONOMIC EFFICIENCY IN UNITED STATES TAX LAW (2013) (a collection of essays by scholars arguing in different contexts for more focus on equity and less on efficiency).

[24] *Cf.* ALAN S. BLINDER, HARD HEADS, SOFT HEARTS: TOUGH-MINDED ECONOMICS FOR A JUST SOCIETY (1987).

those who in any way demote efficiency from pride of place in policy analysis are elevating soft values over hard values. As we will demonstrate, there is nothing hard-headed about efficiency analysis until one makes contestable and ultimately normative baseline assumptions that necessarily predetermine where the supposedly objective analysis will lead.

While we happen to be among those who believe that neoclassical economists and L&E scholars are normatively wrong to disparage fairness issues, therefore, nothing in our analytical critique here hinges on that belief. Indeed, we could be utterly heartless about issues of inequality, poverty, and so on, but that would not in any way change our conclusion that efficiency-based theorizing is incoherent.[25]

B. The Baseline Problem and the Lack of a "State of Nature"

Many readers of this Article might have taken an economics course or two as part of their undergraduate studies, while others will surely have run across references to "supply and demand" as the basic tool of neoclassical economic theory. (Aside: Most people will not, of course, even be aware of the modifier *neoclassical* when thinking about economics. Tellingly, those who call themselves economic theorists are now so monolithic in their acceptance of the fundamental neoclassical approach that "economic theory" is used as a standard synonym for neoclassical economics,[26] as if there were only one economic theory.)

Although supply-and-demand curves are merely the graphical representation of a paradigm based on rational utility maximization under a

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[25] In this sub-Part we have distinguished the critique we mean to offer from debates over which conception of efficiency—Pareto versus Kaldor-Hicks—is preferable and over the efficiency/equity tradeoff. We do not mean to suggest that these debates exhaust the universe of critiques of neoclassical economics. For example, in recent decades, scholars influenced by psychology have challenged the rationality assumption, leading to a school of behavioral economics and thence to behavioral law-and-economics. *See*, *e.g.*, Christine Jolls, Cass R. Sunstein, & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000); RESEARCH HANDBOOK ON BEHAVIORAL LAW AND ECONOMICS (Joshua C. Teitelbaum & Kathryn Zeller eds., 2018). To the extent that this or other alternatives to neoclassical economics rest on critiques that differ from our own, we need take no position on them, although we do note below that we find those critiques to be at best incomplete. *See infra,* notes 45 and181.

[26] *See* GUNNAR MYRDAL, THE POLITICAL ELEMENT IN THE DEVELOPMENT OF ECONOMIC THEORY (Paul Streeten trans., 1990).

variety of assumptions,[27] that ubiquitous approach to understanding neoclassical economics is useful in exploring why the concept of efficiency lacks a neutral, objective baseline. In Part V, we will discuss and critique the so-called utility functions that undergird (and are mathematically equivalent) to the supply-and-demand curves, but the examples in this Part fit more naturally with the formulations with which readers who have taken a basic economics course will be familiar.

1. Supply, Demand, and Slavery

Supply curves represent the quantities of a good or service that sellers would be willing to sell at various prices, while demand curves represent the quantities that buyers would be willing to buy at various prices. Under standard assumptions, there is one price at which both suppliers and demanders are willing to sell and buy the same quantity. For example, if at a price of five dollars per widget, sellers would willingly sell one thousand widgets and buyers would willingly buy the same number, then we have an equilibrium price and quantity.

More generally, the supply and demand curves intersect at the point reflecting the equilibrium price and quantity of the good or service in question, as illustrated by the following one and only supply-and-demand graph to which we will subject our readers. In this particular graph, supply and demand respectively increase and decrease *linearly* with price, but the key point about equilibrium applies to other functional forms as well (that is, for nonlinear supply and demand curves).

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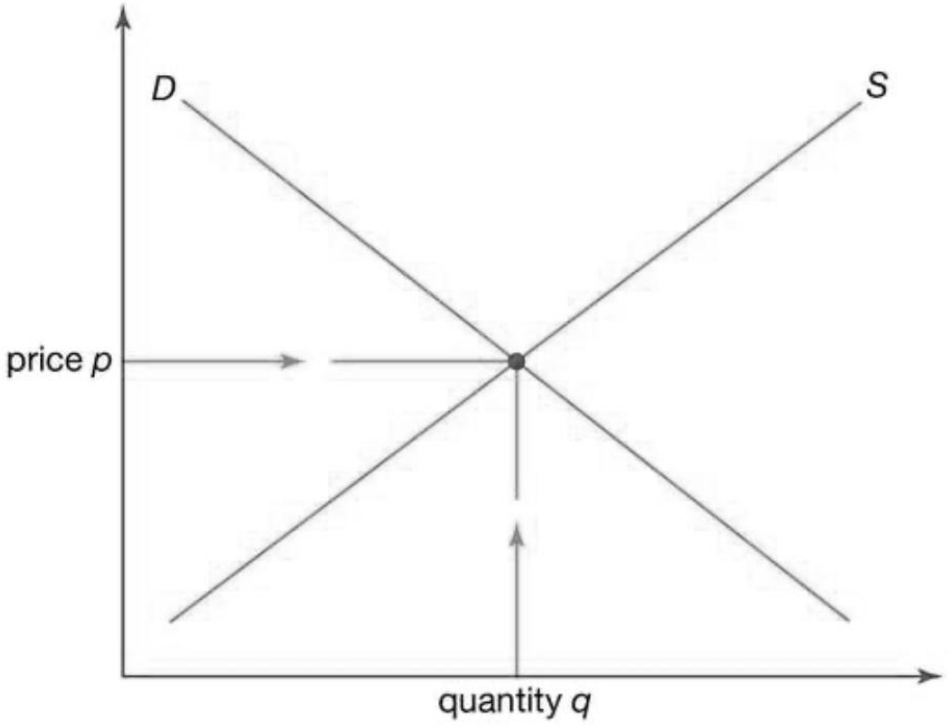
[27] *See* Neil H. Buchanan, *Playing with Fire: Feminist Legal Theorists and the Tools of Economics*, in MARTHA A. FINEMAN & TERENCE DOUGHERTY, FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY (2005) (hereinafter *Playing with Fire*).



What is the supposed significance of the equilibrium price and quantity? Descriptively, we can say that if the market for widgets is in equilibrium, then it will continue to be in equilibrium unless some outside force disturbs it. Again, there is a great deal missing from that analysis—for example the overlooked fact that the process of reaching an equilibrium must necessarily change the equilibrium itself,[28] which means that even something called an equilibrium is not necessarily stable over time. But setting that rather fundamental problem aside, the basic idea is that supply and demand curves purport to represent a situation in which there is neither surplus nor shortage, because the price mechanism has matched up willing sellers with willing buyers in exactly sufficient numbers.

But why does that matter? The key move in neoclassical economics is not merely to describe an equilibrium as stable but as efficient. What does efficiency mean in this context? It says that the quantity of goods bought and sold *maximizes value* (again, where value is measured by the willingness and ability to pay), which means that all other possible quantities of goods or services are inefficient because they do not maximize value thus measured.

This is the linchpin of neoclassical economics-based critiques of all other

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[28] See Neil H. Buchanan, *How Realistic is the Supply/Demand Equilibrium Story? A Simple Demonstration of False Trading and its Implications for Market Equilibrium*, 37 J. SOCIO-ECONOMICS 400 (2008).

approaches to policy. There is a quantity of goods that would maximize the value generated by a market for a good or service, which means that anything that leads to a different quantity being sold has *destroyed value*. That is, all quantities other than the equilibrium quantity are by construction inefficient.

If the efficient quantity in each market is determined by where supply and demand curves cross, then it becomes rather important to know what determines the position of those curves. Demanders have money to buy things, preferences about what they like and dislike, and so on. Suppliers have access to technology, machinery, labor, and so on. Where do *those* underlying determinants of demand and supply come from?

If Jane currently has one million dollars in wealth, a salary of $100,000 per year, and access to many alternatives to any given good, she will decide how much of each good to buy. But why do we take those facts to be the natural baseline? If it turns out that Jane stole her wealth from Calvin, we are left with two options: first, we can say that however Jane came to possess a million dollars, she does possess it, so her demand curve is correctly measured using that baseline; or second, we could say that the correct baseline is to return the million dollars to Calvin, the rightful owner, changing both Jane's and Calvin's demands (in ways that cannot be presumed to offset each other).

Crucially, the quantity sold in those two situations will differ (except in the truly fortuitous case where the market demand curve changes in perfectly offsetting ways after proper ownership is restored). Which one is efficient? Both are equilibria based on supply and demand curves, but the equilibrium quantities are not the same.

And what if the notion of ownership is not merely a matter of holding dollars as a store of wealth? A more highly educated population (with each person owning her so-called human capital) is all but certain to have higher demands for some goods and services coupled with lower demands for others, compared to a less educated population, because education will cause people to make different decisions about (among other things) acceptable risks and simply liking or disliking some things more than others. To give some examples that admittedly rely on stereotypes, other things being equal, an economy with more educated people will likely produce more violins, avocado toast, and public radio tote bags, while producing fewer banjos, pork rinds, and tractor-themed baseball-style hats. More consequentially, better-educated populations are more productive, moving supply curves outward. In that case, educating people will lead to different measures of efficient outcomes, compared to the supposedly efficient outcomes in the pre-educated situation. This indeterminacy cannot be resolved merely by saying that the pre- and post-education equilibria are different, because moving from one to the other involves deploying economic resources differently and thus changing the later outcome in a particular way that was not foreordained.

As an especially vivid example of the baseline problem, we can ask what happens when the ownership of people themselves is one of the alternatives. If

people are legally permitted to enslave other people, the measures of demand and supply will reflect the pattern of ownership of people—just as they reflect the patterns of ownership of land, physical capital, human capital, and so on.

A perverse aspect of the efficiency concept is that both slavery and abolition can be described as both efficient and inefficient. That is, if the baseline is that slavery exists, then ending slavery will move supply and demand curves such that equilibria will change. Any changes—increases or decreases—are per se inefficient, because overproduction of a good is inefficient no less than is underproduction. Therefore, an efficiency-respecting economic analysis would disparage abolition, because it would lead to inefficient outcomes.

On the other hand, if slavery is currently banned, a legal change to allow slavery would be no less inefficient, because one starts from supply and demand curves that exist when all people are free. Allowing people to be enslaved (even to sell themselves into slavery at market prices) would shift the curves and thus the equilibrium quantities in markets across the economy. In direct contradiction to the conclusion of the preceding paragraph, legalizing slavery would be inefficient in this view.

2. The Legal System and the Baseline Problem

Lest one suspect that we are using slavery merely as an extreme example to bring readers around to our point of view, we emphasize that there is nothing specific to the example of slavery that drives the conclusion that where one starts as a baseline determines what counts as efficient and inefficient. We do use slavery for its rhetorical and emotional power, but only because one would think that a truly neutral economic theory could at the very least distinguish between two such radically different worlds, one in which people live free and another in which humans own other humans. That neoclassical efficiency theory cannot objectively distinguish the two situations is thus telling.

Even so, we need not rely on the slavery example at all. The problem, after all, is that an efficiency assessment can only be carried out after having determined what the appropriate baseline positions are for all supply and demand curves. One possibility would be to say that where the curves are "right now" is the baseline and that policy should not interfere with the markets' efforts to find equilibrium based on today's baseline. That idea is captured in the famous French term *laissez-faire* (literal translation "let do"), in which governments are admonished to "leave it alone".

Again, that approach leaves in place whatever unacceptable aspects of the baseline happen to have come into existence over time (Jane's hypothetical thievery and actual slavery being only two particularly potent examples). More fundamentally, however, virtually all efficiency-based analyses are in the end arguments that one or more laws that exist right now need to be changed. Are

there minimum wage laws? Standard neoclassical analysis says that those are inefficient, because they are part of the problem rather than the baseline. Why is that move tolerated, however, when there are so many other things going on right now that one could argue need to be changed? Maybe minimum wage laws actually move us closer to the correct quantity of labor, if other factors have combined to move the supply and demand for labor to inefficient positions.

Moreover, even if one could sustain the argument that minimum wage laws are inefficient, analyses of other supposed inefficiencies must take all existing supplies and demands right now as their baseline. For example, if one is worried about the effects of land-use restrictions in cities on the efficient level of housing, we can only know what that efficient level is by reference to some baseline.

Yet any such baseline will be affected by supposed inefficiencies in other markets, not just in the market under current inspection. Are we saying, for example, that housing supply and demand curves need to be adjusted not merely for the existence of housing policies but also of minimum wage laws (requiring us to specify what housing demand would be—not what it is—in that alternative reality where wages are lower) and for any other inefficiency in still other markets?

Beyond the sheer complexity of such an analysis, our fundamental point is that using the right-now baseline is arbitrary, because it allows any analysis to select which parts of the world are fundamental to the "true" positions of supply-and-demand curves and which are unnatural deviations.[29] Put differently, even the most avid users of efficiency analysis do not truly believe that the right-now baseline is right. Instead, they presume to say which parts of the baseline are acceptable and which are not. Minimum-wage laws are said to deviate from the right-now baseline even though they exist right now, whereas laws authorizing inheritance of substantial fortunes are said to be part of the baseline.

But wait. A proponent of neoclassical economics might admit that the right-now baseline is arbitrary but argue that there is in fact a single true baseline that could be used to measure efficiency. One might contend that it would be efficient to eliminate minimum wage laws, rent control laws, labor unions, environmental regulations (at least, those that cannot be justified through a "correcting externalities" approach,[30] which is itself subject to the

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[29] *See* Martha T. McCluskey, *Deconstructing the State-Market Divide*, in MARTHA A. FINEMAN & TERENCE DOUGHERTY, FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY 156 (2005) (describing how economists make political choices when demarcating activity as "inside" or "outside" the market).

[30] See Hans Wijkander, *Correcting Externalities Through Taxes On/Subsidies to Related Goods*, 28 J. PUB. ECON. 111 (1985); see also Vidar Christiansen & Stephen Smith, *Externality-Correcting Taxes and Regulation*, 114 SCAND. J. ECON. 358 (2012).

baseline problem), and every other item on the American conservative policy agenda. Once there, we would supposedly have achieved the elusive natural baseline.

There are two fatal problems with that approach, however. First, because of the interaction of all of the current laws and other factors that underlie equilibria in different markets, it is possible that a single intervention could move us in the inefficient direction. For example, suppose that the true-baseline analysis would show that it would be efficient to have 1,000 single-family rental units in a neighborhood, but the current equilibrium quantity (due to "distortions"[31] in any number of other markets) is 1,200. Abolishing rent controls is typically described as removing an arbitrary barrier preventing landlords from bringing more units onto the market, eliminating an artificial shortage. But doing so here moves us further away from the efficient level of 1,000 units, not toward it.

The true-baseline approach, then, requires that all deviations from that baseline be corrected simultaneously. Otherwise, incremental interventions can make matters worse from an efficiency perspective, not better.

The second difficulty, however, exposes the deeper problem with efficiency analysis. In response to our discussion in the previous two paragraphs, a believer in efficiency analysis might say: "It might not be realistic to think that we could fix all of the inefficiency-creating problems in our system, but at least we know what the proper baseline is, and that is to have the government stay out of economic affairs. Laissez-faire is, at least in a theoretical sense, efficient."

We set aside here the abandonment of any pretense of practical applications of an approach that otherwise prides itself on its hard-nosed realism. We still must ask, however, what that set of laws would be that constitutes our true, natural baseline. "Having the government stay out of the way" is ultimately simply not possible—even for those whose dearest wish is for the government to go away—as we discuss in more detail presently in the next sub-Part.

C. Infinite Varieties of Government Minimalism as a Baseline

The most extreme forms of libertarianism admit that there is some bare minimum level of government intervention—a so-called Night Watchman

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[31] *See* Louis Kaplow, *On the (Ir)Relevance of Distribution and Labor Supply Distortion to Government Policy*, 18 J. ECON. PERSPECTIVES 159, 167 (warning against the "distortionary cost of redistributive taxation."). Note the loaded language by which everything that deviates from true-baseline efficiency measure is described as a distortion, not merely a different level of output. By implication, only one situation is undistorted.

state[32]—that is necessary and thus ultimately efficiency-enhancing (in the narrow neoclassical sense). But the hope that one can shrink the government to the bare minimum size is based on a misunderstanding of the inherent involvement of government policy choices that must be made to allow an economy to exist in the first place. Put differently, the bare-minimum approach to government ignores the reality that determining baselines is radically underdetermined even when one requires the government to do as little as possible.

All economic transactions will be negotiated and consummated in the shadow of a legal regime that creates and enforces laws relating to property, contracts, torts, crime, and so on. Looking at any of those areas of law quickly reveals that there is no such thing as a no-government baseline, because the government of necessity sets the baseline.

More importantly, there is not even a single way to meaningfully claim to minimize the government's involvement, because the necessary rules governing economic transactions cannot be measured under a single "government interference" metric and then totaled. Consider just a few baseline questions that arise in property law.

Will the property system have a rule of adverse possession? We know that some jurisdictions allow adverse possession not as a big- or small-government choice but based on other factors. Even if someone said, "Change your property laws to be minimally intrusive," it is not possible to say which choice (allowing adverse possession or not) involves "the government that governs least."

Similarly, does the government have a patent system? If so, do patents expire in 14 years, 20 years, 75 years, or never? Which of those is the government-minimizing choice? A government that decides simply to stay out of the business of issuing patents is arguably doing *less* than is required by a Night Watchman approach, because such a government could be said to be refusing to protect people's intellectual property. Certainly, a government that refused to create and enforce property and criminal laws regarding theft would be doing far more (or less) than simply "staying out of people's way," because people and the businesses in which they work expect to be able to know what is theirs and under what conditions ownership can be alienated. Why buy goods if doing so does not confer legally enforceable ownership?

We will mention here, without elaboration, the questions raised by inheritance. What is the government-minimizing set of laws there? What is the natural baseline for having unearned property change hands at death? If the answer is anything other than unfettered inheritance (with its attendant anti-

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[32] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26 (1974).

democratic ills[33], along with effects on supply and demand curves), what limitations on *inter vivos* giving follow naturally?

These are not even a handful of examples drawn from an unlimited range of choices that a government must make in setting up its property laws. What about contract law? There must obviously be a government that sets up and enforces contract laws, so zero-government is again impossible. And as above, it is meaningless to say that the choices that one makes about, say, whether to use offer/acceptance/consideration, promissory estoppel, or an all-promises-are-enforced-under-all-circumstances approach to contract law can be described as exhibiting different degrees of government intrusiveness in the economy.

The same can be said regarding specific performance versus money damages (and the choice among expectation, reliance, or restitutionary damages). Is the substantial performance doctrine an example of smaller government (because it reduces the number of times that the government's courts order a party to do something that she would prefer not to do) or larger government (because it requires a government employee to determine when "good enough is enough")? Endless variations on these questions are inevitable, because there must be contract law rules or standards for every situation.

Although we could provide myriad examples from tort law, criminal law, and so on, we hope that what we have provided here suffices to make the more general point that there is no single set of laws that constitutes the bare minimum, laissez-faire approach to governing.

Given that there is no bare minimum, different sets of seemingly minimalist laws are defensible as the baseline, and each set will generate its own unique supply-and-demand curves for goods and services. A society with no inheritance tax will produce more yachts than one with a substantial such tax; a society with slavery will produce more manacles than one without it; etc. Every baseline looks inefficient from the perspective of any other baseline, and every set of laws can be a baseline that tautologically determines that it is efficient.

Two legal philosophers, Liam Murphy and Thomas Nagel, have focused on what amounts to an application of the baseline problem that bedevils L&E: how the lack of a baseline set of laws undermines the familiar libertarian claim that taxes are theft.[34] They readily acknowledge that they did not suddenly see a hole in neoclassical theory that no one had seen before, but they did find it

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33 See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 54 (J.P. Mayer ed., George Lawrence trans., 1835) (arguing that America was a uniquely democratic society due to its abandonment of primogeniture, resulting in "[t]he last trace of hereditary ranks and distinctions [being] destroyed.").

34 LIAM B. MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002).

useful to explore how a tax system can be analyzed when there is no single baseline against which to measure all government action.

Their conclusion—which is not really an argument but rather a simple statement of the inexorable logic of the broader baseline problem—is that it makes no sense to say that there is a coherent category of pretax income, because a government must exist in order to create the laws by which market transactions take place, but the government itself must be funded by some kind of taxes.

Notably, even if there were a single baseline in all other areas of law that represented a minimized government as a matter of size and expenditures (which we demonstrated above is impossible) there would still be infinite latitude in determining what and whom to tax in order to raise the money necessary to fund even that very small government. People will of course hope that the government will make choices that allow them to maximize their after-tax income, but saying that what the government decides to tax was "my income" and thus that taxation is theft ignores the fact that no one would be able to earn that income if there were no government to make and enforce the rules of commerce.

This conclusion does not, of course, mean that people's pretax income *belongs* to the government in some metaphysical, normative, or any other sense. It means, instead, that no one can say how much money they would earn if there were no government, because there can be no income from economic transactions without the legal framework that governments provide. This point holds true even for a very small government, because that government would have to fund itself through one or more of a variety of taxes (even if labeled "fees"), and there is no small-government argument that proves that any individual's particular sources of income are never to be taxed (while others can be).

Again, the Murphy/Nagel framework is properly seen as a subcategory of what we are calling the baseline problem. There are no neutral, objective laws that deserve primacy in determining what should count as the baseline for determining efficiency; and in the tax area, the seemingly much more narrow question of how to fund any given size of government turns out to be much broader than it initially appears, because the tax system itself has so many moving parts, none of which can be called natural.

In the end, we are making what is truly not an argument but an observation: efficiency in the neoclassical (and thus L&E) sense can only be meaningfully measured by reference to a baseline set of laws, but there is no single such baseline. Efficiency is not good or bad. It is incoherent. Calling something efficient has no content.

D. Two Simple Examples

A skeptic might object that we have become lost in abstractions, that

surely there is a way to know what the baseline is that does not require us to rely on first-order normative judgments. If this were a valid objection, we would embrace it, because efficiency as imagined by its proponents could be a useful concept (even if still subject to objections like the efficiency/equity tradeoff); but the objection is not valid, not even a little.

Consider a very straightforward, non-theoretical question: What is the efficient annual output of sport-utility vehicles (SUVs) in the U.S. market? Even before attempting to calculate the answer, how would we set up the exercise to determine the efficient level of SUV production?

As described above, even if we are willing to ignore the effects that supposed inefficiencies in one market might have on another (such as the effects on the automobile market of laws regulating and even subsidizing oil production), we are supposed to determine the efficient level of SUV production by asking where the supply and demand curves intersect. As always, however, we need to ask what underlies and determines the positions of those supply and demand curves.

We choose SUVs as our example not merely because of their familiarity (even ubiquity), but because their very existence is a result of an accident of history, or more accurately an unintended consequence of laws aimed to solve a different problem. Before the 1980s, there simply were no SUVs.[35] There were light trucks that were truly work vehicles and not at all intended for non-business use, and there were passenger cars. The oil crises of the 1970s, however, had induced Congress to pass a law mandating the production of vehicles that would use less gasoline.[36] (Note that this law can easily be described under standard economic analysis as efficiency-enhancing to the extent that it functioned like a Pigouvian tax that required people to internalize the costs that they were imposing on others through pollution, automobile accidents, and so on. It can also, however, be described as an inefficient intrusion by government into the automobile market. Take your

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[35] *See* Alexis C. Madrigal, *Why Crossovers Conquered the American Highway*, The Atlantic (Jul. 10, 2014), https://www.theatlantic.com/technology/archive/2014/07/how-the-crossover-conquered-americas-automobile-market/374061/ (describing the "SUV craze" that took hold in the late 1980s and early 1990s). *See also* Lawrence Ulrich, *S.U.V. vs. Sedan, and Detroit vs. the World, in a Fight for the Future*, THE NEW YORK TIMES (Sept. 12, 2019), https://www.nytimes.com/2019/09/12/business/suv-sedan-detroit-fight.html. Conventional wisdom treats the 1984 Jeep Cherokee XJ as the first real SUV, although Chevrolet claims that its 1935 Suburban Caryall anticipated the modern passenger vehicle on a commercial truck chassis. GENERAL MOTORS, *Chevrolet Invented the SUV in 1935 and Continues to Build on its Legacy With All-New Trailblazer* (Apr. 11, 2018) https://media.gm.com/media/vn/en/chevrolet/home.detail.html/content/Pages/news/vn/en/2018/apr/Chevrolet-SUV-heritage.html.

[36] Energy Policy and Conservation Act of 1975 § 301, Pub. L. No. 94-163, 89 Stat. 871 (adding Title V, Improving Automotive Efficiency, to the Motor Vehicle Information and Cost Savings Act).

pick.)

Writing the resulting legal standards—known as Corporate Average Fuel Efficiency (or CAFE) —presented a design choice for Congress (and an implementation choice for the Secretary of Transportation, to whom the law delegated rulemaking power).[37] Because most gasoline was burned by passenger cars, and because light trucks were used in businesses, should there be a different CAFE standard for light trucks? Lawmakers said yes, and the SUV was inadvertently born, as automakers rushed to use the lower CAFE standard to sell cars that fit the formal definition of light trucks.[38]

Our point here is not merely to point out that lawmaking can have unintended consequences. We are asking instead how to determine the efficient level of SUV production. The supply curve only exists at all because the government made a choice decades ago that it did not have to make (but for which there was no default baseline).[39]

And the demand curve? What, in the state of nature, would be people's baseline preferences for SUVs? Do we take the state of nature to be what it was before SUVs even existed, meaning that the efficient number of SUVs is zero (no matter what the supply curve looks like)? Do we try to guess what current demand would be for SUVs in a world in which they were subject to the same CAFE standards as cars? If so, based on what assumptions? Or do we simply throw up our hands and say that people's current preferences—even if those preferences have government's fingerprints all over them—are the proper baseline for determining efficiency?[40]

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[37] UNION OF CONCERNED SCIENTISTS, A BRIEF HISTORY OF U.S. FUEL EFFICIENCY STANDARDS (Jul. 25, 2006), https://www.ucsusa.org/resources/brief-history-us-fuel-efficiency.

[38] *See* Robinson Meyer, *How the Carmakers Trumped Themselves*, THE ATLANTIC (Jun. 20, 2018), https://www.theatlantic.com/science/archive/2018/06/how-the-carmakers-trumped-themselves/562400/.

[39] For analysis of tax policies incentivizing use of SUVs for business purposes, see Congressional Research Service, Tax Preferences for Sport Utility Vehicles (SUVs): Current Law and Legislative Initiatives in the 109th Congress (Apr. 4, 2006) (available at https://www.everycrsreport.com/reports/RL32173.html); Carrie M. Dupic, *The SUV Tax Loophole: Today's Quintessential Suburban Passenger Vehicle Becomes Small Businesses' Quintessential Tax Break*, 9 LEWIS & CLARK L. REV. 669 (2005).

[40] We first posed these questions about the supply of and demand for SUVs in a draft of this Article written before the severe economic contraction resulting from the COVID-19 pandemic and subsequent public-health measures. The foregoing analysis does not account for the resulting dramatic decrease in demand for automobiles (and most other manufactured goods). Taking it into account would only further illustrate our point by adding complexity along another dimension. In the post-pandemic world, is the efficient quantity of SUVs produced measured against a baseline in which demand dropped due to the actual state shelter-in-place orders? A hypothetical higher baseline in which no public-

A skeptical reader might nonetheless object that the SUV example is extraordinary, because more typically laws regulate something that sufficiently approximates a pre-existing market for us to identify distortions relative to a commonsensical background. Fair enough—or not, but we will accept the point for the sake of argument. Accordingly, let us consider a situation in which a legal rule causes behavioral changes that seem unquestionably to be a distortion from what people should and would otherwise be doing.

The basic law school course on income taxation typically includes a discussion of the tax treatment of fringe benefits. One leading casebook offers an example in which an employer pays an employee's rent on an apartment.[41] Is that taxable? Yes.[42] What if the employer also happens to own an apartment building and simply allows the employee to live in a unit rent-free? That, too, is taxable, because the employee receives compensation with a fair-market value equal to the rent on similar apartments, which must be included in a taxpayer's gross income.[43] What if the law were changed to allow the second type of fringe benefit—employees living for free in employers' buildings—to be tax-free but not the fringe benefit in the first example (which in substance is the equivalent of giving the employee money that she then gives to her landlord)? Such a rule could be seen as a recognition that business owners might want to use their unrelated buildings in conjunction with the business, whereas we might not want to allow employers to reduce tax payments simply by giving employees free rent as a partial substitute for salary.

Yet such a rule would give businesses a reason to own apartment buildings, simply to allow them to offer a tax-free fringe benefit to employees (and, most likely, to recoup some or all of the tax savings by then reducing the employees' salaries). Some business owners, then, would become landlords simply for tax reasons. More apartments would probably be built, and in any event the equilibrium price and quantity of apartments would change. Surely, that would count as a "distortion" under anyone's definition, would it not?

We are not so sure. As we discussed above, there is no reason to think that the current supply-and-demand curves for anything, including apartment buildings, are where they would be in whatever state of the world might be called a neutral or natural baseline. Given how many other laws could be changed in the name of efficiency, and especially given reasons to believe that the current housing market has too few apartments available (especially for

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health measures were taken? One in which stricter measures were enacted and kept in place longer? Or some other baseline?

[41] JOSEPH BANKMAN ET AL., INCOME TAXATION 68 (17th ed., 2017).

[42] 26 U.S.C. § 61.

[43] *Id.*

lower-income renters), no one can say with any confidence that an increase in the number of apartments would not increase efficiency in the neoclassical sense, even if it happened as an unintended consequence of a change in the tax code that was enacted for some other purpose.

Even so, it would be possible for a person to say, "It's crazy to have a tax provision that induces non-landlords to become landlords simply to provide a fringe benefit to their workers in an unrelated business." With that, we might agree. Note, however, that this conclusion would not be based on any firm notion of what counts as efficient in the neoclassical sense but instead on the more general intuition that we probably should not change the way people behave accidentally by creating tax loopholes.[44]

When such an accident happens, however, it might in fact move us to a new equilibrium price and quantity that is no less defensible than any other equilibrium. Asymmetrical tax treatment of what amount to functionally equivalent events (the provision of rent-free housing in employer-owned versus non-employer-owned units in our example) might seem intuitively to be bad policy on other grounds, but there is no way to know whether it is efficient or not.

Why does all of this matter? Neoclassical economists and L&E scholars argue that their policy preferences are efficient and that others' preferences are inefficient. Their claims of objectivity and neutrality, however, are based on the assumption that there is a non-manipulable set of laws that would set a single baseline that would determine what is and is not economically efficient.[45]

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[44] The term "accidentally" is important in that sentence. There very well could be good reasons to *purposefully* use the tax code to encourage the construction of low-cost housing units. *See* Tax Reform Act of 1986, Pub. L. No. 99-514 § 252 (codified at 26 U.S.C. § 42 (2018)) (creating a Low-Income Housing Tax Credit (LIHTC) to incentivize developers to provide affordable rental housing units).

[45] The so-called Behavioral Law & Economics movement (many of the adherents of which would be likely to describe themselves as policy liberals) has tried to amend the neoclassical approach to take account of advances in cognitive theory. We certainly understand the appeal of relying upon assumptions about the ways in which actual human beings think and make decisions that are more realistic than those that undergird the rational actor model. We are also aware, however, that the behavioral version of L&E has been (perhaps with some justification) criticized for being too open-ended and ultimately nothing more than a series of non-generalizable anecdotes. *See*, *e.g.*, Neil H. Buchanan, *Has Behavioral Law and Economics Jumped the Shark? Understanding When a Promising Research Agenda Has Run Its Course—And Why It Matters in the Real World*, VERDICT (Aug. 5, 2013), https://verdict.justia.com/2013/08/05/has-behavioral-law-and-economics-jumped-the-shark.

Our larger objection is that the behavioral approach need not deny the primacy of efficiency analysis. In fact, it can be framed as making the analysis "more scientific" by updating neoclassicism's behavioral assumptions. In turn, those purportedly better (or

There are, however, infinitely many possible combinations of laws that not only differ from each other but that are mutually contradictory in terms of how one would assess what is efficient and inefficient in policy analysis. If there is no way to determine what is efficient and what is inefficient, then those assessments are not merely false but categorically impossible to evaluate. They are incoherent.

As we noted at the beginning of this Part, we do not believe that because all claims to efficiency are baseline-dependent they are all thus equally valid or invalid. The choice of a baseline can itself be examined and critiqued. The standard approaches to efficiency analysis, including L&E, fare poorly when so scrutinized, because they tend to rely upon and validate existing injustices and inequalities. An approach that, say, rejects as inefficient a proposal to provide income supports for the feeding of impoverished children does not merely rely on an arbitrary baseline; it *chooses* as its baseline existing unequal endowments and *asserts* that policies that might change those endowments (or at least mitigate their consequences) are—as a scientific matter—wasteful and based on mere sentiment. Needless to say, both the choice and the assertion can and should be criticized on moral grounds. Nothing in our decision to focus here on the analytic incoherence of efficiency analysis should be read to suggest that, as typically practiced, it is even amoral, much less morally defensible.

III. The Manipulability of Originalism and Textualism

This Part argues that O&T as employed by the courts in contested cases rarely produces determinate answers and thus chiefly serves to obscure value judgments. We begin by explaining what O&T is, how it differs from its chief rivals, and why we consider originalism in constitutional interpretation and textualism in statutory interpretation together, despite the fact that they rest on somewhat different justifications. We then offer grounds for doubting the objectivity and determinacy claims frequently made on behalf of O&T. We conclude this Part by examining empirical evidence tending to show that jurists who claim to practice an O&T approach in fact vote their normative priors, unconstrained by ostensible jurisprudential commitments.

A. What are Originalism and Textualism?

Our use of the monikers L&E and O&T throughout this Article may suggest somewhat more parallelism than exists. "Law and economics" refers to a school of thought that applies neoclassical economic principles to law. There

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more realistic) assumptions would supposedly allow us to determine efficient outcomes more accurately. This approach is obviously quite different from our description of the fundamentally incoherent nature of the efficiency concept. We are not saying that efficiency is poorly measured; we are saying that it is inherently unmeasurable.

are, of course, many different approaches to L&E, but the category itself is singular. By contrast, originalism and textualism are formally distinct animals. Originalism is an approach to interpreting the U.S. Constitution, while textualism is an approach to interpreting statutes. An argument thought to justify one might not justify the other, and vice-versa.[46]

Nonetheless, we think we are warranted in treating O&T as a single category, because as originalism and textualism have evolved over time, they have come to offer roughly the same prescription: *In interpreting an authoritative legal text—whether that text is a constitutional provision or a statute*[47]*—judges (and others tasked with legal interpretation) should consider themselves bound by and should give effect to the original public meaning of the words in the authoritative text*.

O&T can be best understood in contrast with two main rivals. One rival is intentionalism.[48] An intentionalist judge interpreting a statute asks what the legislature intended with respect to whatever question the judge must decide. Likewise in constitutional cases, an intentionalist—sometimes called an intentions-and-expectations originalist—will ask what the framers and/or ratifiers of the relevant constitutional provision intended or expected with respect to the issue at hand.[49]

The other main rival to textualism is purposivism. A purposivist judge aims to give effect to the purposes that can reasonably be ascribed to the legislature in light of the language of a statute.[50] Purposivism need not be, but usually is, *dynamic* in the sense that it allows a judge to give effect to a statutory provision in ways that might surprise the legislators who enacted it

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[46] *But see* Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016) (questioning conventional arguments for regarding the Constitution as calling for special interpretive methods that do not apply to other legal texts).

[47] We do not mean to deny that O&T could be applied to the interpretation of other authoritative texts, such as treaties, municipal ordinances, or administrative regulations, but we do not consider such domains here.

[48] See, e.g., RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988); Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493 (2005).

[49] *See*, *e.g.*, Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 511 (1988) (distinguishing the framers' and ratifiers' private intentions, which should not count, from their public intentions, which should).

[50] *See* Michael C. Dorf, Foreword: *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 17 (1998) (a "purposivist judge aims to infer" the reasonable purposes that could be attributed to reasonable legislators "and apply them").

or the People at the time of enactment.[51] The labels are admittedly a bit confusing, because the "purpose" that this approach attempts to determine is the purpose that specific words serve in the relevant context, not necessarily the drafters' purposes in writing those words (which, again, is the domain of intentionalism). Although purposivism as such does not name an approach to constitutional interpretation, so-called Living Constitutionalism is a reasonably close analogue to dynamic purposivism.

In statutory interpretation, intentionalists typically give greater weight to legislative history than do purposivists, who downplay but do not entirely discount legislative history; by contrast, the complete irrelevance of legislative history is a key tenet of textualism. One can find amusing examples of self-described textualists like Justices Scalia and Thomas concurring in all of a colleague's opinion except for some footnote that cites legislative history.[52] Textualists eschew legislative history because they deem it unreliable as a measure of the intentions of the legislature as a whole. Legislative staff may have sneaked material into a committee report or a bill's sponsor might make a floor speech that goes beyond the actual text on which the full legislature votes.

The reliability objection does not rule out the possibility that the legislature has a single discernible intent; it purports to show only that legislative history does not necessarily capture that intent. But textualists—and to a large extent purposivists as well—typically go further in denying that there even is such a thing as a coherent legislative intent. Each individual legislator will usually have mixed motives for voting for a law,[53] and there is

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[51] *See generally* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

[52] *See Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring) (decrying the Court's use of Congressional reports, "unreliable evidence of what the voting Members of Congress actually had in mind."); *Digital Realty Trust, Inc. v. Somers*, 138 S.Ct. 767, (2018) (Thomas, J., concurring) (critiquing the Court's reliance on Senate reports: "[e]ven assuming a majority of Congress read the Senate Report, agreed with it, and voted for Dodd–Frank with the same intent, 'we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended.'") (quoting *Lawson v. FMR LLC*, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring)).

[53] Writing to explain why he rejected an illicit-motive test in the Establishment Clause context, Justice Scalia put the case against ascribing intentions to individual legislators this way:

> a particular legislator need not have voted for the Act [which mandated the teaching of "creation science" if evolution were taught in Louisiana public schools] either because he wanted to foster religion or because he wanted to improve education. He may have thought the bill would provide jobs for his district, or may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the majority

no agreed-upon or obvious way to aggregate the mixed motives of all the legislators.[54]

Casual critics of O&T sometimes accuse its practitioners of inconsistency because they eschew legislative history with respect to statutes but look to such materials as the Federalist Papers and James Madison's notes on the 1787 Constitutional Convention to infer the original meaning of the Constitution.[55] That is a fair criticism, although over the last three decades, practitioners and champions of O&T have been increasingly careful to avoid relying on such materials for the purpose of ascertaining the subjective intentions of the framers and ratifiers, as opposed to the purpose of gleaning a sense of how the words in question were used at the time of their adoption. Meanwhile, and consistent with the new theory, recent years have witnessed expanded reliance on materials that are not specifically law-related—such as dictionaries and so-called corpuses that collect period usage—to infer the semantic content of words and phrases used in the Constitution at the time of their adoption. [56]

> leader, or he may have hoped the Governor would appreciate his vote and make a fund-raising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been mad at his wife, who opposed the bill, or he may have been intoxicated and utterly unmotivated when the vote was called, or he may have accidentally voted "yes" instead of "no," or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations. To look for the sole purpose of even a single legislator is probably to look for something that does not exist.

Edwards v. Aguillard, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting).

[54] *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 428–32 (2005).

[55] *See* Ben W. Heineman, Jr., *The Supreme Court: 'Originalism's' Theory and the Federalist Papers' Reality*, The Atlantic (Jan. 11, 2011), https://www.theatlantic.com/politics/archive/2011/01/the-supreme-court-originalisms-theory-and-the-federalist-papers-reality/69158/.

[56] *See* Neal Goldfarb, *A Lawyer's Introduction to Meaning in the Framework of Corpus Linguistics*, 2017 BYU L. REV. 1359 (2017) (arguing that corpus linguistics can reveal meaning beyond the meaning of individual words); Thomas R. Lee and Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 828 (2018) ("Corpus linguists draw inferences about language from data gleaned from 'real-world' language in its natural habitat—in books, magazines, newspapers, and even transcripts of spoken language."). For a skeptical view, see Kevin P. Tobia, *Testing Ordinary Meaning: An Experimental Assessment of What Dictionary Definitions and Linguistic Usage Data Tell*

Yet if practitioners of O&T are increasingly careful to avoid the charge of inconsistency, the charge itself raises a question: *Why would it be inconsistent to treat statutes and constitutional provisions differently?* After all, the tenets of textualism rest on a particular understanding of how a legislature as an institution generates law. That understanding might not apply to the processes and institutions that give rise to constitutional provisions.

For example, as we will explore at greater length in Part IV, some scholars and judges justify textualism on grounds of public choice theory, which views the legislature chiefly as the site of interest-group bargaining.[57] In this view, statutes reflect compromises, and so the purposivist idea of giving effect to a statute's underlying public-regarding purpose should be rejected. There is no such thing as a statute's public-regarding purpose, public-choice-inflected textualists say; there is only the aggregation of forces that bear on venal legislators seeking re-election by a large enough slice of the rent-seeking and otherwise selfish public. Whatever the merits of the public-choice argument for textualism, it depends on a particular understanding of legislatures and legislation which might not hold (or might not hold to the same degree or in the same way) with respect to constitutional conventions, the process of constitutional amendment, or constitutional provisions.

Other justifications for textualism also have limited application with respect to constitutional as opposed to statutory interpretation. For example, John Manning has argued that textualism should be understood as a nondelegation doctrine. By giving legal effect to legislative history, a judge improperly allows a subset of Congress—those who write committee reports or give floor speeches—to exercise power that belongs to Congress as a whole.[58] Suppose one thinks Manning is right. Even so, his conclusion has no necessary implications for constitutional interpretation. The nondelegation doctrine as Manning understands it is an implication of the procedure by which Congress makes law under Article I, Section 7 of the Constitution. By its terms, the nondelegation doctrine has nothing to say about how to interpret the Constitution itself, which is not a product of the Article I, Section 7 process. Accordingly, like the public-choice justification, the nondelegation justification for textualism does not necessarily apply to constitutional interpretation.

Conversely, one can identify arguments for constitutional originalism that do not automatically translate into arguments for textualism in statutory interpretation. Consider the view of John McGinnis and Michael Rappaport,

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Legal Interpreters, 133 HARV. L. REV. ___ (forthcoming 2020), available at https://ssrn.com/abstract=3266082 (concluding from experiments that both dictionaries and corpora have high error rates and frequently disagree with one another).

[57] *See* Frank H. Easterbrook, *Statutes' Domains*, U. CHI. L. REV. 533, 546 (1983).

[58] *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997).

who have argued at length that originalism follows from the supermajoritarian procedure that was required to create the Constitution and is required to amend it.[59] Allowing judges to update or change the Constitution based on changing social norms circumvents the requirement of a supermajority for constitutional change, McGinnis and Rappaport say. Therefore, understandings of the Constitution should remain unchanged—that is, judges should stick with the *original* meaning via originalism. Yet even if that were a persuasive argument for originalism in constitutional interpretation, it has no obvious relevance for statutory interpretation, because statutes require only a simple majority for enactment, amendment, or repeal. One could thus be persuaded by the McGinnis/Rappaport argument for originalism in constitutional interpretation (although, to be clear, we are not thus persuaded) but reject textualism in statutory interpretation.[60]

And yet we observe that originalism in constitutional interpretation and textualism in statutory interpretation tend to travel together. Why? Part of the answer is that while some arguments for originalism and textualism do not overlap, others do. In particular, two closely related arguments apply to both.

First, many scholars and jurists think (or at least say) that originalism and textualism constrain judicial discretion. In an insightful book review published twenty years after the book under review, Manning described what he called Justice Scalia's commitment to an "anti-discretion" principle.[61] Although Scalia championed rules as against standards,[62] Manning contended that "an insistence upon decisional justifications external to the judges' will, and not a naked preference for rules, provided the central grounding for all of Justice Scalia's commitments," including textualism and originalism.[63] We share Manning's view of Scalia's motives, but we would add that neither the concern about judicial discretion nor the claim that O&T constrains it was unique or even special to Justice Scalia. Both the concern and the claim can be

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[59] *See* John O. McGinnis & Michael B. Rappaport, *Originalism and Supermajoritianism: Defending the Nexus*, 101 NW. U. L. REV. 1919 (2007); John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007).

[60] *Accord* Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 COLO. L. REV. 1, 5 (2004) (offering reasons why "constitutional and statutory interpretation [should] diverge").

[61] John F. Manning, *Classic Revisited: Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749 (2017) (reviewing Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW ((Amy Gutmann ed., 1997)).

[62] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[63] Manning, *supra* note 61, at 749–50.

found prominently in the writings of other self-described originalists and textualists.[64]

Second, originalists and textualists often claim (at least implicitly) that they are simply engaged in ordinary linguistic practice.[65] If what it means to interpret a text is simply to give effect to the meaning of the words as understood by a typical addressee at the time of the making of the statement, then a commitment to originalism in constitutional interpretation will go hand in hand with a commitment to textualism in statutory interpretation and, for that matter, with a parallel commitment in any other linguistic domain.

To be clear, in pointing to the shared professed concern with judicial discretion and the view that real interpretation simply *is* O&T, we do not mean to endorse these claims. On the contrary, we think they are highly dubious.

At least with respect to constitutional interpretation, a genuine concern about judicial discretion would lead, in our view, not to originalism but to something like James Bradley Thayer's view that courts ought to grant legislation a strong presumption of constitutionality[66] or perhaps to John Hart Ely's view that legislative outputs should receive Thayerian deference unless judicial review is needed to correct failures in democratic representation.[67]

Meanwhile, the idea that interpretation is a single activity that proceeds similarly across all domains strikes us as very odd. One uses poems, recipes, contracts, statutes, and constitutions (to name just five kinds of writings) for different purposes, and so there should be nothing surprising, much less illegitimate, about using different modes of interpretation for each kind of writing, in light of its respective purpose.

But if one were forced to select a single, most natural, mode of interpretation, it strikes us that intentionalism—well-suited as it is to making sense of ordinary language—would be the leading candidate, not O&T. We can explain why with a hypothetical example.

Suppose one of the current co-authors asks the other co-author whether he would like some *milk* with his coffee. According to O&T, the question refers to milk from a cow, because that is the way in which most people use and

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[64] *See* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 66 (1988) ("To claim to find missing answers by 'interpretation' is to seize power while blaming Congress."); *see also* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213 (2018).

[65] *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47 (2006); Steven G. Calabresi & Livia Fine, *Two Cheers for Professor Balkin's* Originalism, 103 NW. U. L. REV. 663, 698–700 (2009); ROBERT BORK, THE TEMPTING OF AMERICA 218 (1990).

[66] See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[67] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

understand the word *milk*. The public meaning of milk is milk from a cow. However, because both of the current authors are vegan, and each of us knows that the other is vegan, it would be foolish for the askee to answer "no" on the ground that he does not want cow's milk if the askee in fact wants a plant-based milk with his coffee.[68] As used by the asker and as understood by the askee in light of who did the asking, in this context *milk* refers to a plant-based milk of some sort because that is the *intended* meaning. The askee might want to clarify whether he is being offered soy milk, oat milk, or some other plant-based milk, but he would not simply assume that he is being offered milk from a cow on the ground that that is how the public would understand the term. In ordinary language, we are intentionalists, not textualists.[69]

Accordingly, to the extent that one thinks that the Constitution and statutes should be understood in the same way as everyday communication[70]—that is, to the extent that one thinks, as textualists often say, that there is an obvious way to read legal texts that is not at all distinctive to legal texts—one will land on intentionalism, not textualism.

Moreover, taking account of the nature of distinctly *legal* texts tends to reinforce the appeal of intentionalism, via the following straightforward near-syllogism: (1) The People choose our lawmakers, whether via special processes

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[68] The federal government defines milk as the "lacteal secretion . . . of a cow." 21 C.F.R. § 131.110. (1993). That definition is overly restrictive as a standard of identity. Soy milk labeled simply "milk" would admittedly cause consumer confusion, because many people would simply assume the package contained milk from a cow. However, suitably qualified as "soy milk," there would be little likelihood of confusion. *See Painter v. Blue Diamond Growers*, 757 Fed. Appx. 517, 519 (9th Cir. 2018) (affirming dismissal of lawsuit against almond milk seller on the ground that no reasonable consumer would be misled into thinking that almond milk labeled "almond milk" was cow's milk).

[69] Stanley Fish gives an example in which he construes his father's statement "Go through the light" to mean "As soon as the light turns green, drive straight ahead; don't turn either left or right," rather than "Don't stop, just barrel on through" the red light. Stanley Fish, *There is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 629 (2005). Fish thinks that the difference between his interpretation and the rejected one is not between his father's intentions and "meaning an utterance has by virtue of the lexical items and syntactic structures that make it up," *id*, but between one account of his father's intent and another. *See id.* at 630–33 (arguing that meaning is impossible without some attribution of intention). Although our example draws the same contrast as Fish's, we do not find it necessary here to endorse (or reject) his further view that any comprehensible notion of public meaning also depends on attributed intentions.

[70] To be clear, we do not argue that legal interpretation should be just like everyday communication. As Richard Fallon observes, legislation differs from ordinary conversation. Hence, one should not assume that the words of a statute convey meaning in the same way that words in ordinary conversation do—or even that meaning can be attributed to a legislature's authoritative utterances in roughly the same way that it can be attributed to the utterances of ordinary speakers. *See* Richard H. Fallon, *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 276 (2019).

for constitutions or through periodic elections for legislators; (2) the enactments of our lawmakers are legitimately law as a consequence of that democratic/republican pedigree; (3) thus, when uncertainty about the content of the law arises, it should be resolved in favor of the original intentions and expectations of the lawmakers and the People they represented, rather than in accordance with some implication of the words they used, at least if that implication would have surprised them, because surprising implications (such as the idea that the Fourteenth Amendment forbids *de jure* racial segregation and most forms of official sex discrimination) were never adopted by the People or their representatives.

To be clear, we ourselves are Living Constitutionalists and purposivists in statutory cases, not intentionalists. Our point here is simply that proponents of O&T are mistaken in thinking and arguing that general principles of language naturally support their view; experience from everyday communication more naturally supports intentionalism. That said, we think proponents of O&T have very strong normative grounds for rejecting intentionalism in constitutional and statutory interpretation.

As we expect the parenthetical references to Jim Crow and patriarchy two paragraphs up indicate, while intentionalism may have a certain natural linguistic appeal, it often leads to unacceptably odious results, especially in constitutional cases, where the very high bar for constitutional amendments locks in archaic views if one consistently interprets the text in accordance with the concrete intentions and expectations of those who framed and ratified it in an earlier, and by our standards much less enlightened, era. Accordingly, over the last generation or two, self-styled originalists have largely disavowed intentions-and-expectations originalism in favor of original public meaning.

To be sure, public-meaning originalists rarely *say* that they favor public meaning because it can be defined at a sufficiently high level of generality to enable them to avoid the odious results to which intentions-and-expectations originalism sometimes leads. Rather, they typically cite the indeterminacy of shared intentions and expectations that one sees in the arguments that the likes of Scalia offered against intentionalism in statutory interpretation.[71] And, to be fair, that is also a good argument against intentionalism when dealing with large representative bodies.

The upshot in both domains (statutory and constitutional interpretation) is the same: An emphasis on original public meaning at a sufficiently high level of generality to enable judges and scholars to have their cake and eat it too. They avoid being bound by concrete intentions and expectations they wish to avoid, while still claiming a substantially greater

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[71] *See* Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19. HARV. J. L. & PUB. POL'Y 411 (1996); Thomas B. McAffee, *Originalism and Indeterminacy*, 19. HARV. J. L. & PUB. POL'Y 429 (1996).

measure of objectivity and neutrality for their approach than one sees in the work of supposedly result-oriented scholars and jurists who favor Living Constitutionalism and purposivism. As the next sub-Part explains, however, the claim of objectivity and neutrality is false in all nontrivial senses.

B. The Under-determinacy of O&T

In arguing that O&T only pretends to objectivity and neutrality, we do not mean to stake out a nihilistic position. We acknowledge that in a great many contexts, the law's content is sufficiently determinate to provide primary actors and government officials with enough guidance to allow the law to play its vital coordination function. We agree with a prominent response to the most extreme claims of legal realism and later critical legal studies: focusing almost exclusively on contested appellate cases provides a misleading picture of the law as a whole.[72]

According to Dennis Patterson, "[i]nterpretation is an activity of clarification."[73] Insofar as Patterson was making a deep claim about the difference between easy and hard questions, that view is controversial.[74] But as a practical account of legal practice, he got it right. What makes an easy case easy is that whether or not interpretation is going on, there will be little doubt about the result. For example, textualists, intentionalists, and purposivists will agree—without needing to consult their respective interpretive theories—that dollar amounts listed in the Internal Revenue Code refer to U.S. dollars rather than, say, to the Spanish silver dollar.[75] The age limits for serving in the House, Senate, and the presidency present even easier cases, because one strains to imagine what else, say, "the Age of thirty five Years" could possibly mean. A great deal of law works in this way. The critics of legal realism were right that a too-narrow focus on appellate cases exaggerates the law's gaps and ambiguities.

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[72] See Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TUL. L. REV. 15, 21–32 (1990); John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not To Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84 (1995).

[73] DENNIS PATTERSON, LAW AND TRUTH 87 (1996).

[74] *See* Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 149–50 (1997) (reviewing Patterson, *supra* note 73 and RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996) (contrasting Patterson's account with Dworkin's view that interpretation occurs even in easy cases)).

[75] *Cf.* Lawrence B. Solum, *Surprising Originalism: The Regula Lecture*, 9 CONLAWNOW 235, 244 (2018) (arguing that the Seventh Amendment's reference to dollars does invoke the Spanish silver dollar).

But the legal realists were also right to turn their attention to appellate cases, because it is precisely in such cases that one needs interpretation, understood per Patterson as clarification. And once one recognizes that fact, one understands why textualism is practically a non sequitur. Appellate courts review trial court determinations of fact deferentially, but they review legal findings de novo. Accordingly, litigants are most likely to prevail on—and thus most likely to pursue an—appeal when there is uncertainty about the law. Saying, as textualism does, that in such circumstances the courts should be bound by the text is almost completely unhelpful. Cases are on appeal because the text, at least as applied to the particular circumstances, is unclear.

Legislation on any reasonably complex subject will contain gaps and errors that judges will need to fill and correct when concrete cases bring to light problems that the legislature could not and/or did not anticipate.[76] In filling such gaps, judges' values, experiences, and ideological druthers will play an important role, whether or not they acknowledge as much to themselves or others. As Richard Fallon puts the point provocatively but, we think, accurately, in the cases that generate real controversy, "a statute's meaning . . . will be an invention. . . ."[77]

To be sure, self-described O&T judges deny their own agency,[78] but their claims are not plausible,[79] as we can see from the convergence of O&T with other approaches over time. It has been nearly a decade and a half since Jonathan Molot insightfully observed: "Textualism has outlived its utility as

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[76] *Accord* Jonathan R. Siegel, *The Legacy of Justice Scalia and his Textualist Ideal*, 85 GEO. WASH. L. REV. 857, 907 (2017) ("The legislature, acting in advance, can never anticipate every situation to which its statutes will apply, and it therefore writes general language that covers some situations that legislators would probably not wish to cover if these situations had occurred to them. [Further,] it can never catch every drafting error in its work product.").

[77] Fallon, *supra* note 70, at 276.

[78] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2121 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) ("not buying" such "excuses" as the claim that "[s]tatutory interpretation is an inherently complex process" that permit judges, who should act as "umpires" to "largely define their own strike zones"); SCALIA AND GARNER, *supra* note 12, at 5 ("beyond . . . retail application, good judges dealing with statutes do *not* make law. They do not 'give new content' to the statute, but merely apply the content that has been there all along.").

[79] Indeed, one can argue that textualists are *less* bound by law than judges who seek guidance in such sources as legislative history. *See* William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 536 (2013) (reviewing SCALIA AND GARNER, *supra* note 12) (arguing that "the actual effect of the Scalia-Garner canons would not be greater judicial restraint but instead a relatively less constrained and somewhat more antidemocratic textualism.").

an intellectual movement"[80] because of the "convergence"[81] of textualism and other approaches.

Some textualists fought back, but only at the great cost of neutering textualism. For example, Manning conceded that textualism's early claims to determinacy were overstated, but defended what he called "second-generation textualism," in which judges "have a duty to enforce clearly worded statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment."[82] That ostensibly tactical retreat more nearly resembles a complete surrender, for now textualism's office is limited to addressing "clearly worded statutes," but, as we explained above, the point of an interpretive philosophy is to address cases in which the law is unclear.

At best, perhaps Manning's gambit just barely distinguishes textualism from versions of intentionalism and purposivism that accept the so-called absurdity doctrine, which authorizes judges to disregard the plain meaning of a statute to avoid absurd results,[83] but even if so, that distinction amounts to precious little. The paradigmatic example of the absurdity doctrine is *Holy Trinity Church v. United States*, in which the Supreme Court conceded that the pre-payment of a foreign pastor was "within the letter" of a federal statute forbidding the hiring of aliens "to perform labor or service of any kind" but nonetheless held that the payment was not covered by the statute "because not within its spirit nor within the intention of its makers."[84] Yet, given the unimportance of the absurdity doctrine in the Court's recent jurisprudence, "a method of interpretation that defines itself in opposition to *Holy Trinity* is grossly underdetermined."[85] Manning's "second-generation textualism" ends up looking a whole lot like contemporary purposivism.

Meanwhile, one sees the same convergence with respect to originalism in constitutional interpretation. Already in 1996, Ronald Dworkin considered "semantic originalism" sufficiently "innocuous" to embrace it in a book that advocated what he called the "moral reading" of the Constitution.[86] Jack

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[80] Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006).

[81] *Id.* at 4.

[82] John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1290 (2010).

[83] *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391 (2003) ("If one accepts the textualist critique of strong intentionalism, it is difficult to sustain the absurdity doctrine.").

[84] 143 U.S. 457, 458–59 (1892).

[85] Dorf, *supra* note 50, at 15.

[86] DWORKIN, *supra* note 74, at 291. The term "semantic originalism" has come to be associated with an influential paper by Lawrence Solum. *See* Lawrence B. Solum, *Semantic Originalism* (Nov. 22, 2008) (unpublished manuscript) (on file at the Social Science Research Network (a/k/a SSRN), available at

Balkin drove the point home in his provocatively titled book *Living Originalism*, in which he wrote that originalism and Living Constitutionalism are "two sides of the same coin."[87] Likewise, in his book titled *The Living Constitution*, David Strauss observed that "professed originalists" sometimes "define 'original meaning' in a way that ends up making originalism indistinguishable from a form of living constitutionalism."[88]

If it were only Living Constitutionalists who claimed that contemporary originalism gives judges as much room to maneuver as Living Constitutionalism, one could perhaps dismiss the claim as tendentious, but one sees the same propensity in the works of, for lack of a better term, "core" originalists. For example, during his Supreme Court confirmation testimony in 1987, Judge Robert Bork endorsed a version of originalism sufficiently capacious to embrace *Brown v. Board of Education*.[89] In addition, leading originalist scholars like Randy Barnett, Lawrence Solum, and Keith Whittington have long acknowledged that while originalism is a method for discerning the *meaning* of the Constitution, meaning is often indeterminate, leaving substantial room to engage in what they call *construction*.[90] And going even further, William Baude and Stephen Sachs have offered an account of originalism so broad that they can classify nearly all of existing constitutional jurisprudence as originalist.[91]

Put simply, while there might remain small differences between, on one hand, textualism and originalism and, on the other hand, their respective main rivals in statutory and constitutional interpretation, there has been so much

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244 (last visited Feb. 11, 2020)). In using the term, we do not mean to invoke Solum's entire account of originalism. Rather, we use the term as Dworkin did, simply to refer to original public meaning rather than original intent. *See* Ronald Dworkin, *Comment*, in SCALIA, *supra* note 61, at 115, 121 (chiding Justice Scalia for his inconsistent application of "semantic-originalis[m]").

[87] JACK M. BALKIN, LIVING ORIGINALISM 21 (2011).

[88] DAVID A. STRAUSS, THE LIVING CONSTITUTION 10–11 (2010).

[89] 347 U.S. 483 (1954). For a description of Bork's testimony, see DWORKIN, *supra* note 74, at 294–301.

[90] Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999). Recently Barnett has argued that original meaning provides some constraint even in the "construction zone," Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: a Unified Theory of Originalism*, 107 GEO. L. J. 1, 14–17 (2018), but that is a far cry from the determinacy that originalists used to proclaim.

[91] *See* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); William Baude & Stephen E. Sachs, *Grounding Originalism*, 13 NW. U. L. REV. 1455 (2019).

convergence that O&T cannot fairly be deemed more objective, neutral, or determinate than those rivals.

One might therefore wonder why any of this debate matters. If O&T differs little from other prescriptive methodologies, perhaps we are wasting our time debating about methodology.

The debate nonetheless matters because proponents of O&T opportunistically switch between the intellectually defensible but under-determinate versions of their approach—which do not differ substantially from rival approaches to interpretation—and the ostensibly more determinate approaches—such as intentions-and-expectations originalism—which they invoke to criticize as result-oriented those who disagree with their concrete judgments.[92] Accordingly, we conclude this sub-Part more or less as we concluded the previous one. We observe that O&T pretends to but does not in fact provide more constraint than other leading approaches to constitutional and statutory interpretation.

C. O&T in Practice: Predictably Ideological

Our argument that O&T merely pretends to be substantially more objective, neutral, and determinate than other approaches to constitutional and statutory interpretation has, to this point, relied on the nature of O&T as it has evolved over time. But our argument is also empirically testable. If O&T substantially constrained jurists, one would expect that a justice who practiced it would be somewhat ideologically unpredictable. And yet, as we shall explain, O&T in practice is predictably ideologically conservative.

We will provide evidence for that claim momentarily, but first, we need to address a threshold objection. Perhaps O&T produces conservative results because that is simply where an honest approach to uncovering original public meaning leads. This is a *prima facie* plausible objection in various categories of cases. For example, perhaps the original public meaning of "commerce . . . among the several States" referred only to trade, not other economic activity, which would mean that an originalist justice would be less inclined to uphold federal power than a non-originalist justice. Given that "states' rights" codes as conservative, here honest originalism would have a conservative bent because of the nature of the historical materials, not because of any lack of constraint on the ideological preferences of the academics, judges, and justices who purport to practice originalism.

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[92] *Cf.* Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2022 (2012) (reviewing BALKIN, *supra* note 87, and STRAUSS, *supra* note 88) (describing Justice Thomas as a "public-meaning-in-theory-but-expected-application-in-fact" originalist and noting that Senators and the broader public treat "original intent, original expected application, and original semantic meaning more or less interchangeably.").

Moreover, we might expect that O&T would lead to conservative results on average, not just in particular cases, because O&T is backward looking. Non-practitioners of O&T will be more inclined to say that changing social attitudes warrant changing constitutional and statutory doctrines. And as those attitudes tend (on average over the very long run) to change in the direction of more liberal approaches, the resistance that O&T provides against change will be conservative.

For example, the modern LGBTQ rights movement postdates the adoption of the Fourteenth Amendment in 1868 and the enactment of the 1964 Civil Rights Act. Accordingly, one might think that O&T would reject LGBTQ rights because those texts reflect earlier norms, rather than because conservative justices disapproved of same-sex marriage in 2015[93] and workplace protections for LGBTQ persons in 2020.[94]

Even that example, however, does little to establish that O&T is just about uncovering public meaning, because the relevant texts—"equal protection" and "discriminat[ion] . . . because of . . . sex"—are certainly broad enough to cover anti-LGBTQ bias. Indeed, prominent originalists have contended that the original meaning of the Fourteenth Amendment supports marriage equality,[95] and the most straightforward argument for finding that federal employment discrimination law protects against anti-LGBTQ bias is textualist.[96] Backward-looking arguments against constitutional and statutory protection against such bias rely on intentions-and-expectations originalism[97] and intentionalism[98] as specifically distinguished from original-public-meaning originalism and textualism.

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[93] *See Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

[94] See Bostock v. Clayton County, No. 17-1618 (argued Oct. 8, 2019); R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, No. 18-107 (argued Oct. 8, 2019). [We will update after the rulings.]

[95] *See*, *e.g.*, Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIA. L. REV. 648 (2016).

[96] *See* William N. Eskridge, Jr., *Textualism's Moment of Truth*, SCOTUSblog Symposium (Sep. 4, 2019), *available at* https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth/ (asking rhetorically whether "the justices who say they apply a scrupulously neutral commitment to statutory text, structure and precedent have the courage of their methodological convictions").

[97] *See* Brief of *Amici Curiae* Scholars of Originalism in Support of Respondent, *Obergefell v. Hodges*, 135 S.C.t 2584 (2015) (No. 14-556), at 5 (objecting to the original-public-meaning argument for same-sex marriage proposed in a brief supporting petitioners by arguing that the "distinction between what a provision 'means' and what its enactors and the public subject to it 'understood' it to mean is untenable.").

[98] *See*, *e.g.*, Brief of *Amici Curiae* Members of Congress in Support of Employers, *Bostock v. Clayton County* (No. 17-1618) (argued Oct. 8, 2019), at 3–4 ("The legislative history of Title VII does not support the view that Congress intended to include sexual orientation

However, there may be substantial overlap between original intentions and expectations on the one hand and original meaning on the other.[99] If so, perhaps the conservative bent of intentions-and-expectations originalism gives a conservative bent to public-meaning originalism. Let us concede only for the sake of argument, therefore, that O&T should lead to conservative results on average, even when practiced by an academic, judge, or justice with no ideological axe to grind.

Yet even that *arguendo* concession is extremely modest. It might not apply at all to large domains of statutory interpretation, because many statutes that currently give rise to contested cases (such as those protecting the environment) were enacted in the relatively recent past during somewhat more liberal or progressive periods. In statutory interpretation, we would expect that an honestly backward-looking approach would yield a fair number of liberal or progressive results when the judges deploying it looked back to, say, the 1970s.

And even with respect to constitutional interpretation, a genuinely constraining backward-looking approach should lead to an ideologically mixed record rather than one that is decidedly conservative. That is because the ostensibly expected conservative lean from looking backward is small-c conservative—i.e., it will tend towards *conserving* past attitudes and practices. But while some contemporary views that observers today describe as ideologically conservative (what we might call Big-C Conservative), are also small-c conservative, many are not. For instance, the contemporary Big-C Conservative attacks on campaign finance regulation,[100] mandatory union dues,[101] and regulations of commercial speech[102] do not "conserve" any 1791 understanding of the First Amendment or any 1868 understanding of the Fourteenth Amendment (which, according to the Court's cases, makes the First Amendment applicable to the states). Nor does the contemporary conservative view favoring color-blindness conserve an 1868 understanding (as reflected in the fact that the Court's color-blindness jurisprudence says virtually nothing about original meaning).

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and gender identity as protected classes under Title VII. While the legislative history of the sex amendment is not extensive, it is sufficient to establish that Congress intended the amendment to protect women's rights.").

[99] *See* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 493 (2016) ("the lines between founders' expected applications and their beliefs in the meanings of the words that they drafted or ratified may be blurred.").

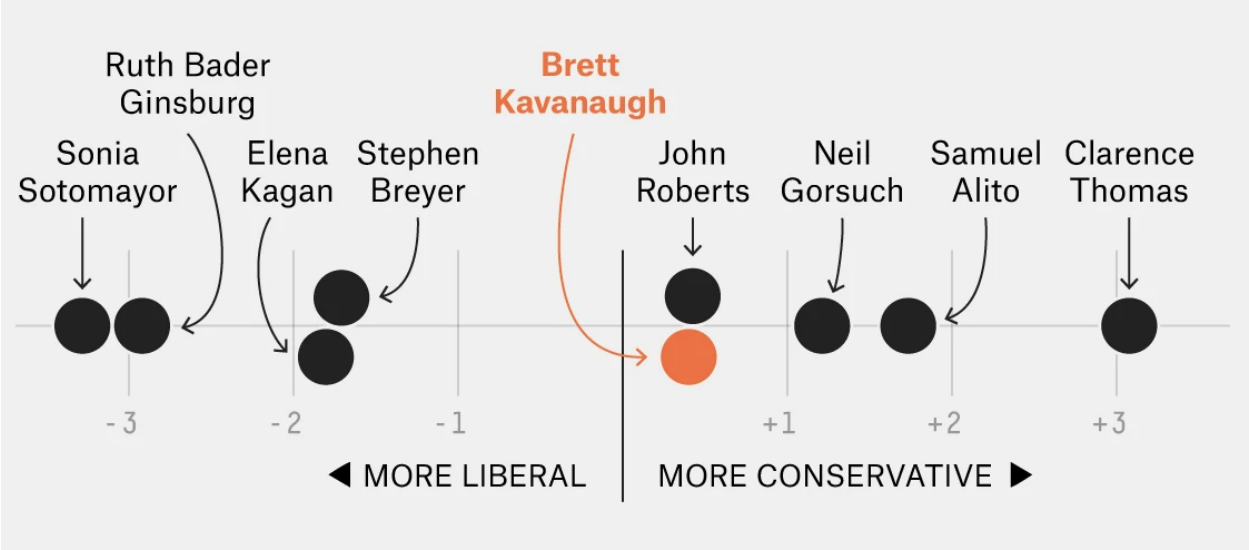
[100] *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

[101] *Janus v. American Federation of State, County, and Mun. Employees, Council 31*, 138 S.Ct. 2448 (2018).

[102] *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

Indeed, it would be astounding if an honest effort to unearth the original understanding of various constitutional clauses from the Founding and Reconstruction yielded the contemporary Conservative program—which reflects the peculiar mix of anti-regulatory business interests, social conservatism on gender relations, and white resentment of racial minorities that characterizes the current, highly contingent, Republican Party coalition. One might expect some overlap and even some net positive correlation to the extent that there may be some positive correlation between small-c conservatism and Big-C Conservatism. But if O&T were constraining and determinate, the sheer messiness of history and contemporary politics would mean that an honest originalist (of any flavor) voting his or her methodological rather than ideological druthers would end up roughly center-right on average (at most), with a high degree of variance.

Is that what we find when we examine the data? Not even close. When political scientists code for ideological valence of the issues that come before the Supreme Court, they find that the most consistently ideologically conservative justice is Clarence Thomas—who also most consistently espouses and purports to practice originalism. Here is a useful chart that we have borrowed from a *FiveThirtyEight* data rendering based on a technique created by political scientists Andrew Martin and Kevin Quinn.[103]



[103] Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (Jul. 2, 2019), https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/; Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999*, 10 POL. ANALYSIS 134 (2002). Martin-Quinn scores are based on a Bayesian-inference dynamic item response model. *Id*. at 135.

That pattern contradicts the *arguendo* hypothesis that originalism has a slight on-average conservative lean with a high degree of variance. What is really happening? The most natural explanation is that originalism might affect the style in which an opinion is written but has no more constraining force on how a justice votes than do other methodologies.

One sees the same effect in statutory cases. Joseph Kimble reviewed data on Justice Scalia's votes in statutory cases[104] and on the votes of self-professed textualist justices on the Michigan Supreme Court.[105] We commend his analysis to interested readers, though here we merely quote his conclusion with respect to the Michigan study, which mirrors his findings about Justice Scalia. Kimble discovers overwhelming evidence that "[i]n practice, textualism has devolved into a vehicle for ideological judging—disguised as deference to the legislature."[106]

We are tempted to end this Part with that quotation, but before concluding we should respond to an objection to an earlier version of the foregoing argument.[107] Perhaps it is true, the objection goes, that self-professed originalists and textualists have not heretofore had the courage of their convictions, but if so, that is not an indictment of O&T; it might simply mean that the judges and justices who profess O&T have failed to apply it honestly. A better, more principled breed of O&T judges might produce the neutral, objective, and relatively determinate results that O&T promises.

We offer three responses. First, as we argued above in sub-Parts A and B of this Part, the indeterminacy of O&T across a wide range of issues that come before appellate courts follows from the nature of the methodology rather than its misuse. Indeterminacy—and thus the capacity to serve as a vessel for ideology—is baked into O&T.

Second, there is a certain unreality about the objection. If no one who has yet exercised judicial power—not even Justice Scalia or Justice Thomas—counts as a "real" originalist or textualist, then perhaps we should not regard

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[104] Joseph Kimble, The Doctrine of the Last Antecedent, the Example in Barnhart, Why Both Are Weak, and How Textualism Postures, 16 SCRIBES J. LEGAL WRITING 5, 30–35 (2015).

[105] Joseph Kimble, What the Michigan Supreme Court Wrought in the Name of Textualism and Plain Meaning: A Study of Cases Overruled, 2000-2015, 62 WAYNE L. REV. 347 (2017).

[106] *Id*. at 376.

[107] *See* Lawrence B. Solum, *Comments on Dorf on Originalism & Determinacy: Part One, Concepts and Terminology*, https://lsolum.typepad.com/legaltheory/2017/08/comments-on-dorf-on-originalism-determinacy-part-one-concepts-and-terminology.html (Aug. 25, 2017) (commenting on Michael C. Dorf, *How Determinate is Originalism in Practice?*, http://www.dorfonlaw.org/2017/08/how-determinate-is-originalism-in.html (Aug. 25, 2017)).

O&T itself as real. To dismiss all self-styled originalists and textualists as impostors bears an uncomfortable resemblance to what communists in the west used to say when confronted with the murderous and otherwise disastrous record of Soviet and Chinese communism. That is not *real* communism, they would say, pointing to some difference between Leninism or Maoism on the ground and what they regarded as the proper understanding of Karl Marx's often-opaque writings.[108] And the western communists were right, in a sense: the real-world efforts to build communist states ended up departing in various ways from the orthodoxy that can plausibly be constructed from the theoretical tomes. However, at some point one must judge a prescriptive theory by the actual real-world results of the efforts to apply it, even if those efforts depart in some ways from the theory. That is why it is fair to pronounce communism a dismal failure. Likewise, we may be reaching the point where it is also fair to pronounce O&T—understood as anything other than a rhetorical smokescreen for extremely Conservative results—a failure.

Third, even if at some time in the future a cadre of principled, neutral practitioners of O&T emerges, that would not undercut our current project. We aim in this Article to explain why we see so little conflict between L&E and O&T. Our explanation is that both L&E and O&T merely pretend to neutrality, objectivity, and determinacy, while in practice serving as a cover for ideology. The next Part develops that explanation in greater detail by focusing on the mechanisms scholars and jurists have used to suppress the potential conflict between L&E and O&T. For now, we simply emphasize that the theoretical possibility of a different kind of O&T emerging in the future does not bear on our explanation for the pattern we observe to date.

IV. The Unreconciled Conflict Between the Two Formalisms

Thus far we have offered grounds for questioning the claims that L&E and O&T are—or indeed ever could be—objective and apolitical methodologies for resolving concrete cases. In the sorts of legal conflicts that courts must decide, we argued above, whether one outcome is more "efficient" than another or whether one outcome hews more closely to the original public meaning of the statutory or constitutional text than another will typically be impossible to answer without at least unconscious recourse to normative views. Accordingly, we concluded that L&E and O&T typically obscure rather than substitute for normative value judgments. We further suggested that this obscuring of normative value judgments may be the basis of a significant measure of the appeal to the adherents of both methodologies.

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[108] See Satya Gabriel et al., *State Capitalism Versus Communism: What Happened in the USSR and the PRC?*, 34 CRITICAL SOC. 539 (2008).

This Part challenges the claims L&E and O&T to neutrality, objectivity, and determinacy in another way. If they were neutral, objective, and determinate, their prescriptions would not generally point in the same direction. According to O&T, a judge has license to adopt the rule that best promotes "efficiency"—as L&E instructs—only if the original public meaning of the relevant authoritative text so commands. The framers of the Constitution or members of Congress might on occasion have written such a command into the law, but most constitutional provisions and statutes contain no such licensing of L&E. Accordingly, one should expect to see O&T and L&E openly conflicting with some frequency. And as we noted in the Introduction, one does occasionally encounter such conflict, as in *TVA v. Hill*. More commonly, however, the mirroring manipulabilities of each methodology mediate and muzzle potential conflict.

This Part surveys the field of battle as characterized in the scholarly literature and case law. We focus on the writings of prominent jurists who are or were also scholars. We show that when prominent conservative jurists even recognized the conflict between L&E and O&T, they reconciled the methodologies with mechanisms that are either inadequate or, if adequate, come at the substantial cost of undercutting the claims to neutrality, objectivity, and determinacy common to both formalisms.

A. Mistaking Ideology for Consistency and Coherence

In an article titled *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*,[109] Judge Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit lauds what he regards as the ascendancy of both O&T and L&E in the Supreme Court. Each philosophy, he claims, "promote[s] consistency and coherence in judicial decision making."[110] Ginsburg's discussion of L&E focuses on antitrust cases. Either unaware of or deliberately choosing to ignore the Brandeisian conception of antitrust as serving social and political ends, not merely economic ones,[111] Ginsburg audaciously asserts that, prior to the triumph of L&E, "the U.S. Supreme Court simply did not know what it was doing in antitrust cases."[112] However, Ginsburg cheerily reports that under the influence of scholars who identified the goal of antitrust as promoting consumer welfare (typically understood as low prices), the Court eventually came to its senses.[113] He takes great satisfaction in observing that while in the mid-1960s to 1970s antitrust defendants won just over a third of their Supreme Court cases, by the first decade of the twenty-first century their record was perfect: thirteen wins in thirteen cases.[114]

Why celebrate such a track record? Ginsburg aims to show that L&E in antitrust cases promotes consistency, and a methodology that consistently favors one side certainly does that. Yet numerous alternative rules of law would also promote consistency in this minimal sense. For example, if one construed the antitrust laws according to the mechanical rule "defendant always wins," outcomes would be perfectly consistent. But perfect consistency in the sense of a prediction that the defendant always wins undercuts any plausible claim that the courts are giving effect to the statute, which would serve no purpose if it covered no conduct at all. Perhaps aware that a perfectly predictable batting average of zero for plaintiffs should not be the *sine qua non* of sound judicial decision making, Ginsburg acknowledges that "[e]conomic analysis does not indicate a single indisputable result in every case . . . ."[115] Nonetheless, he contends, L&E "does significantly constrain

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[109] 33 HARV. J. L. & PUB. POL'Y 217 (2010).

[110] *Id.* at 217.

[111] *See* Daniel A. Crane, *Antitrust's Unconventional* Politics, 104 VA. L. REV. ONLINE 118, 122 (2018) (describing the "Brandeisian school" of antitrust) (citing Louis D. Brandeis, *A Curse of Bigness*, HARPER'S WKLY. 18 (Jan. 10, 1914)).

[112] Ginsburg, *supra* note 109, at 217.

[113] *See id.* at 223.

[114] *Id.* at 219.

[115] *Id.* at 223.

the decision making of the Court and thereby narrow the range of plausible outcomes. Economic analysis thus promotes consistency in antitrust jurisprudence."[116]

After pronouncing L&E a success in antitrust cases, Ginsburg next turns to constitutional originalism, which he also deems a substantial improvement over the muddle that he thinks immediately preceded it—here Living Constitutionalism.[117] Ginsburg credits various scholars and lawyers for the rise of originalism, including Raoul Berger, Attorney General Edwin Meese, and Justice Antonin Scalia,[118] but the key figure—the bridge between Ginsburg's laudatory treatment of L&E in antitrust cases and originalism in constitutional interpretation (and beyond)—is his fellow failed nominee for the Supreme Court seat that Justice Anthony Kennedy eventually filled, Judge Robert Bork.

Ginsburg credits Bork's antitrust scholarship in the 1960s and 1970s with catalyzing the ensuing judicial reorientation around consumer welfare.[119] Although Ginsburg does not discuss Bork in the part of his article that sings the praises of originalism, that fact is more a shortcoming of Ginsburg's article than of Bork's proper place in the originalist firmament. Justice Scalia came to be seen as the leading judicial champion of originalism because he sat on the Supreme Court, but judged by the different receptions each received in the Senate just one year apart, it is evident that before that ascent, liberals more closely associated Bork than Scalia with originalism and its perils: Scalia was confirmed 98-0,[120] while Bork was rejected in large part because of the fear that his brand of originalism would roll back civil rights.[121]

History is not only written by, but also about, the victors. However, a fair retelling of what we might deem the rise-and-fall-and-subsequent-rise of originalism would regard Bork as a central figure because of the role that his support for originalism played in his high-profile 1987 confirmation hearing,

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[116] *Id.*

[117] *See id.* at 225 (contrasting the supposed "intuitive and normative weight of the originalist idea" with the "obvious difficulties for the Rule of Law" posed by Living Constitutionalism's adaptability).

[118] *See id.* at 223–24.

[119] *See id.* at 223 n.8 and accompanying text (citing Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 10–11 (1966); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50–51 (1978)).

[120] See Michael Patrick King, *Justice Antonin Scalia: The First Term on the Supreme Court—1986-1987*, 20 RUTGERS L.J. 1, 2 (1988).

[121] Contrary to a narrative that the political right promotes to this day, Bork's rejection was mostly on the merits, not a result of a smear campaign. *See* Michael Kinsley, *Bork Is Back,* ATLANTIC MONTHLY (June 2010) (arguing that Bork was not "borked" by a political hit job but rejected based on the substance of his views).

i.e., his role in the (apparently temporary) "fall" part of the story.[122] Thus, to understand the relation between L&E and O&T among conservative jurists and scholars over the last half century, one could hardly do better than to study Bork.

So, how did Bork reconcile L&E in antitrust cases with O&T? He claimed that the original understanding of the Sherman Act gave pride of place to consumer welfare,[123] not the other values (such as the political economy associated with small businesses) that judges both contemporaneously and subsequently had found in the Act. First articulating his view in the 1960s, before the rise of modern textualism, Bork's brand of statutory originalism relied on legislative history[124] in a way that textualists like Scalia would later reject,[125] but we can put that point aside because it would be relatively simple to recast Bork's argument about the subjective intent of the Sherman Act's framers in contemporary terms as an argument about the original public meaning of the Act. Either way, Bork and likeminded conservatives would seem to have a ready means of reconciling L&E with O&T: The judge employs L&E because the meaning of the authoritative text (whether inferred using old-school methods for divining legislative intent or newfangled methods for discerning original public meaning) so commands the judge. In this reconciliation, O&T is the fundamental interpretive methodology, with the employment of L&E contingent on the output of O&T.

So far so good. If judges employed L&E only where O&T directed them to do so, the reconciliation would work. But in fact that is not the pattern we observe. Instead, we see judges either straining to derive L&E from O&T or ignoring the problem altogether.

Consider Bork's attributing to the Sherman Act's authors a focus on consumer welfare. A scholarly consensus holds that despite citing the Congressional Record, Bork was dead wrong about the goals of the Congress that passed the Sherman Act. As Herbert Hovenkamp would observe, "Bork's analysis of the legislative history was strained, heavily governed by his own

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[122] For a theoretically sophisticated account by one of Bork's intellectual opponents, see DWORKIN, *supra* note 74, at 263–305 (critiquing both Bork's originalism and Bork's portrayal of it during and after the confirmation hearing).

[123] *See* Bork, *Legislative Intent*, *supra* note 119, at 11–21 (discussing legislative history of the Sherman Act).

[124] *See id.*

[125] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in SCALIA, *supra* note 61, at 3, 32 ("assuming, contrary to all reality, that the search for 'legislative intent' is a search for something that exists, that something is not likely to be found in the archives of legislative history").

ideological agenda."[126] Indeed, even Daniel Crane, who offers a "modest defense of Bork against his sharpest critics on the question of antitrust's goals,"[127] does not defend Bork's claim that the Congress that enacted the Sherman acted had the subjective intentions that Bork ascribed to it. Rather, in Crane's view, although Bork was less skeptical of legislative history than Justice Scalia or Judge Frank Easterbrook,[128] he was nonetheless seeking an objective rather than a subjective understanding of the antitrust statutes, an understanding that fits reasonably well with the textualist turn by other conservative jurists that followed Bork's landmark antitrust scholarship.[129]

But so what? Perhaps Bork goofed by attributing his brand of consumer welfare motives to the authors of the Sherman Act, but if that is what the Act requires on O&T grounds, then there is no conflict here between O&T and L&E. Right?

Not really. It might be true that one can read the Sherman Act's language in a way that does not contradict Bork's consumer welfare interpretation, but one can also read it in any number of other ways. Certainly nothing Crane cites suggests that Bork *derived* consumer welfare as the driving purpose of antitrust from the statutory text, much less that the best textualist reading of the statute makes consumer welfare the master principle.

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[126] Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989). *See also id.* ("Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."); John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125, 1137 (1987) (Judge Bork "is wrong in his reading of the legislative history" as evidenced by the fact that "[n]eoclassical price theory and its concept of efficiency were unknown when the major federal antitrust laws were adopted"); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HAST. L.J. 65, 68 (1982) (reading the historical record, contra Bork, to show "that Congress passed the antitrust laws to further economic objectives, but primarily objectives of a distributive rather than of an efficiency nature"); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 836 n.3 (2014) (collecting the foregoing and additional sources).

[127] Crane, *supra* note 126, at 836.

[128] *See id.* at 842.

[129] Crane writes:

> With the emergence of textualism and "objective" approaches to statutory interpretation and the continued discussion about the value and meaning of judicial restraint, Bork's arguments should be understood as significantly broader than the legislative history claims that have figured almost exclusively in the criticisms of his arguments in favor [of] reading the antitrust laws to advance a consumer welfare objective.

Id. at 844.

Crane describes Bork's argumentative strategy thus: "Bork's arguments about the purposes of the antitrust laws were primarily grounded in a conventional suite of interpretive methodologies, including textual analysis, a 'whole code' reading of the antitrust laws, critical analysis of leading judicial expositors, and arguments about judicial restraint."[130] It is hardly clear to us that this approach is what Scalia, Easterbrook, and others would describe as textualism rather than its rival purposivism,[131] but whatever one calls Bork's approach, it appears better suited to reading L&E *into* a statute than to deriving L&E *from* a statute. Crane rescues Bork from the charge of inaccurately characterizing the subjective intentions of Congress only at the steep cost of characterizing Bork as adopting an interpretive methodology that is so vague as to license anything. Interestingly, that is also the very charge that Bork's critics leveled at him when he appeared to undergo a "confirmation conversion" that permitted him to say that *Brown v. Board of Education*, which contradicted the subjective understanding of the framers and ratifiers of the Fourteenth Amendment, nonetheless conformed to the Amendment's original understanding defined at a suitably high level of generality.[132]

To be clear, in arguing that Bork manipulated (his version of) O&T to produce results he sought on other grounds—here, antitrust *laissez-faire* and a politically acceptable outcome in *Brown*—we take no position on whether he did so intentionally or even knowingly. Cognitive biases are powerful instruments. If one's ideological priors are broadly libertarian, one will see the Founding and thus the Constitution in Lockean terms.[133] If they are broadly communitarian, one will read the Founding as a period of civic republicanism.[134] In citing *Brown* as an example, we mean to acknowledge that contemporary progressives and liberals, like conservatives, might also mistake what they seek for what they find.[135]

Yet we also want to disavow a false equivalence. For roughly the last half century, conservatives have been much more insistent than progressives and liberals that they are applying the law objectively to derive results that simply happen to align with their ideological priors. Accordingly, in

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[130] Id.

[131] *See* Dorf, *supra* note 50, at 7 (describing the difference between purposivism and textualism). *See also* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006).

[132] *See* DWORKIN, *supra* note 74, at 263–305.

[133] See Trevor W. Morrison, *Lamenting Lochner's Loss: Randy Burnett's Case for a Libertarian Constitution*, 90 CORNELL L. REV. 839, 861 (2005).

[134] *See* Frank I. Michelman, *Law's Republic,* 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

[135] *But see* Part V, *infra*.

acknowledging universal human tendencies like confirmation bias and other cognitive distortions as the reason why Bork and other conservatives could be unaware that they are not actually deriving L&E from O&T, we do not thereby concede that progressives and liberals do so too or to the same degree. At least in the current era, progressives and liberals are much more likely than conservatives to call for open acknowledgment and acceptance of the role of a judge's values and experience in deciding cases.

B. An Alternative Reconciliation: Antitrust Exceptionalism

But wait. Maybe we have generalized too much from Bork's approach to antitrust. In a 2005 article, Daniel Farber and Brett McDonnell characterize the willingness of textualists to embrace a judge-empowering common-law methodology in antitrust cases as exceptional.[136] Perhaps the likes of Judge Bork, Justice Scalia, and Judge Easterbrook treat antitrust as a *sui generis* exception to a background rule of textualism that is not so friendly to L&E. If so, then Farber and McDonnell would be right that "antitrust exceptionalism is unwarranted" and so the otherwise textualist jurists who embrace it ought to "either rethink their textualism or seriously consider jettisoning their approach to antitrust law."[137]

We agree with Farber and McDonnell that the dominant approach to antitrust—fully embraced by ostensibly conservative jurists—cannot readily be reconciled with O&T. However, we disagree with the further contention that this fact renders antitrust unique or even unusual. Wherever it applies, if not expressly authorized by statute or other authoritative source, L&E sits in tension with the claims of O&T. Some conservatives recognize the tension. Thus, Bork himself and Ginsburg in praising Bork recognize at least the *prima facie* need to ground L&E in a statutory source. As we observed in the previous sub-Part, the overwhelming scholarly consensus decries Bork's effort to do so as a failure, but the important point here is that Bork saw the need to try. He did not claim some unique status for antitrust that exempted it from general jurisprudential principles.

Meanwhile, Judge Easterbrook, who is a major player in the story that Farber and McDonnell tell,[138] hardly restricts his employment of L&E to antitrust cases. Along with Judges Guido Calabresi and Richard Posner, Easterbrook can be considered one of the founders of the modern school of

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[136] *See* Daniel A. Farber & Brett H. McDonnell, *"Is there a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619 (2005).

[137] *Id.* at 622.

[138] Easterbrook's name appears in text (that is, not footnotes) eight times in the Farber and McDonnell article. *See id.* at 620; 621; 622; 628; 631; 657 (twice); 668.

L&E.[139] Yet far from confining his observations to antitrust, Easterbrook is best known for his work in corporate law[140] and for his broader claim that L&E is not just a tool that authoritative text sometimes empowers judges to use, but that L&E is *inevitable*.[141]

What about Scalia? We said above that Scalia's perch on the Supreme Court led observers to focus on him to a greater extent than on scholars and other judges whose output is at least as important. Nonetheless, we do not deny that Scalia was *a*, if not *the*, central figure in conservative jurisprudence over the last generation. And Farber and McDonnell prominently cite Scalia as a textualist who engaged in antitrust exceptionalism.[142] Accordingly, we should consider whether Scalia's seeming departure from O&T was mere antitrust exceptionalism.

Unlike Bork and Easterbrook, Scalia was not generally a champion of L&E. We therefore agree with Farber and McDonnell that when Scalia praised the capacity of antitrust law to develop in common-law fashion over time,[143] he was articulating a view in tension with his customary praise for textualism. Still, we resist the conclusion that antitrust was special for Scalia.

We resist that conclusion partly for reasons we laid out in Part III and to which we have adverted in this Part with respect to Bork. To find that the use of L&E actually contradicts the instructions of O&T, one would have to think that O&T is a sufficiently objective and determinate methodology to produce results of any sort—as opposed to merely masking judges' priors. Yet as we explained above, O&T, at least as practiced by every jurist ever to profess it, lacks such determinacy in most of the cases likely to reach appellate courts.

Moreover, we can find specific examples of Scalia applying something very much like L&E based on an inadequate basis in the authoritative text. Although Justice Scalia lacked a strong commitment to L&E, his ideological priors were anti-regulatory, which, in practice, often led to results that looked indistinguishable from those that a more expressly L&E-friendly conservative

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[139] *See, e.g.*, GUIDO CALABRESI, THE COST OF ACCIDENTS—A LEGAL AND ECONOMIC ANALYSIS (1970); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1ST ED. 1973); FRANK H. EASTERBROOK AND DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). Rounding out the roster of L&E pioneers who served on the federal appellate bench, we would include Judge Learned Hand, whose decision in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), used cost-benefit analysis to define negligence and thus presaged the modern L&E movement. *See id.* at 173.

[140] *See* EASTERBROOK AND FISCHEL, *supra* note 139, *passim*.

[141] *See* Frank H. Easterbrook, *The Inevitability of Law and Economics*, 1(1) LEGAL EDUC. REV. 3 (1989).

[142] *See* Farber and McDonnell, *supra* note 136, at 620–21.

[143] *See id.* at 620 (quoting *Business Electronics v. Sharp Electronics*, 485 U.S. 717, 732 (1988) (Scalia, J., for the Court)).

would endorse, even outside the context of antitrust. Environmental law cases can serve as illustrations.

In *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[144] the Supreme Court faced the question whether one who modifies or degrades habitat for an endangered or threatened species in a way that has the effect of killing or injuring wildlife "takes" that species within the meaning, and thus in violation, of the Endangered Species Act (ESA).[145] The plain text pointed in favor of the affirmative answer that the majority opinion of Justice John Paul Stevens gave. Then, as now, the ESA itself defined "take" to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[146] Destroying habitat for an endangered or threatened species will rather straightforwardly "harm" or "kill" members of that species.

True, one might think that because most of the words in the definition of "take" involve intentional damage, "harm" and "kill" should likewise be limited. However, Justice Stevens and the majority had two excellent reasons for declining to read an intentionality requirement into the ESA. First, another provision of the ESA allowed the Secretary of the Interior to grant a permit for "incidental" takings of endangered species;[147] if the primary prohibition on taking an endangered or threatened species only applied to intentional harm or death inflicted on such species members, there would be no need for an exception for incidental, i.e., unintentional, takings.[148] Thus, the exception sheds light on the general definition.

Second, *Sweet Home* arose by way of a challenge to a federal regulation.[149] Hence, pursuant to longstanding principles of administrative law, the issue was not whether the *best* reading of the statute encompasses

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[144] 515 U.S. 687 (1995).

[145] 16 U.S.C. § 1538(a)(1)(B).

[146] 16 U.S.C. § 1532(19).

[147] *See Sweet Home*, 515 U.S. at 691 (quoting 16 U.S.C. § 1539(a)(1)(B)).

[148] *See id.* at 700 (permitting provision "strongly suggests that Congress understood [take] to prohibit indirect as well as deliberate takings"). In dissent, Justice Scalia argued that the permitting provision did not bear on habitat modification, because other kinds of activities—such as fishing for an unprotected species—might incidentally result in harming or killing a protected species. *See id.* at 729–30 (Scalia, J., dissenting). We do not understand why Justice Scalia thought this rejoinder responsive to the majority's broader point that an act that does not aim to harm or kill protected species could nonetheless be deemed a taking of that species if it in fact has the incidental effect of harming or killing that species.

[149] 50 CFR § 17.3 (1994).

habitat destruction but whether that is a *reasonable* reading to which the courts owe deference.[150]

And yet Justice Scalia dissented. We quote his first paragraph in full, because we think it betrays an anti-regulatory sensibility, hostility to the goals of the ESA relative to traditional economic activity, and a conflation of those personal attitudes with the statute's text. Justice Scalia wrote:

> I think it unmistakably clear that the legislation at issue here (1) forbade the hunting and killing of endangered animals, and (2) provided federal lands and federal funds *for the acquisition of private lands,* to preserve the habitat of endangered animals. The Court's holding that the hunting and killing prohibition incidentally preserves habitat on private lands imposes unfairness to the point of financial ruin—not just upon the rich, but upon the simplest farmer who finds his land conscripted to national zoological use. I respectfully dissent.[151]

Note the extreme confidence. Justice Scalia did not say that the best reading of the ESA excludes habitat destruction. He found the legislation "unmistakably clear." Whether he sincerely believed that or whether he overstated the point in order to be able to avoid deferring to an agency construction of unclear language, we do not know. Either explanation, however, rather strongly damns Scalia's brand of O&T.

Justice Scalia's dissent in *Sweet Home* shows that a professed commitment to textualism produces unwarranted confidence in the determinacy and meaning of language. His rhetoric also belittles environmental policy, dismissively describing the ESA as conscripting land to "national zoological use," rather than describing the legislative objective as, say, preserving vital biodiversity.

In other contexts, Justice Scalia was likewise dismissive of environmentalism. For example, in his majority opinion in *Lujan v. Defenders of Wildlife*,[152] he mocked the notion that harm to endangered animals could be, *ipso facto*, harm to people concerned about those animals, conceptualizing humans' only real interest in endangered species as exploitation or entertainment.[153] In his dissent in *Massachusetts v. EPA*,[154] he flirted with

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[150] *See Sweet Home*, 515 U.S. at 697 ("The text of the Act provides three reasons for concluding that the Secretary's interpretation is reasonable.")

[151] *Id.* at 714 (Scalia, J., dissenting).

[152] 504 U.S. 555 (1992).

[153] *See id.* at 566 (respondents' theory is "called, alas, the 'animal nexus' approach");

[154] 549 U.S. 497 (2007).

climate change denialism, describing "the buildup of CO_2 and other greenhouse gases in the upper reaches of the atmosphere" as "alleged to be causing global climate change."[155] In each of those cases, he concluded that environmental plaintiffs lacked constitutional standing to bring suit in federal court. That alone shows either the malleability of O&T or the priority Scalia gave to his ideological druthers over his ostensible jurisprudential commitments. Although modern standing doctrine purports to construe the words "cases" and "controversies" in Article III, it is essentially a twentieth century invention that arose alongside the rise of the administrative state.[156]

While Scalia's pro-industry/anti-environmental/anti-regulatory priors were evident just below the surface in *Sweet Home* and the environmental standing cases, he did not expressly endorse L&E in those cases. He did that in an environmental regulation case involving the Clean Air Act.

In *Michigan v. EPA*,[157] the Supreme Court reviewed an EPA regulation of power plants pursuant to a provision of the Clean Air Act Amendments of 1990 authorizing regulation as "appropriate and necessary" based on a mandated study.[158] Writing for the Court, Justice Scalia condemned the agency—and thus refused to defer to its judgment—for failing to employ cost-benefit analysis. That refusal, Justice Scalia said, was unreasonable, even though the statutory authorization did not require cost-benefit analysis. Nonetheless, Scalia found such a requirement to be implicit in the statute: "Read naturally in the present context, the phrase 'appropriate and necessary' requires at least some attention to cost."[159] Regulation, Scalia opined, could not be appropriate where annual benefits on the order of $5 million were offset by costs of nearly $10 billion.[160]

Well, that sounds right, does it not? It does, and therefore it should come as no surprise that Scalia's description of the EPA's action was grossly misleading. Just after expressing incredulity that the agency would impose "costs to power plants . . . between 1,600 and 2,400 times as great as the quantifiable benefits from reduced emissions of hazardous air pollutants,"[161] Scalia's majority opinion acknowledges that the EPA also estimated

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[155] *Id.* at 559 (Scalia, J., dissenting).

[156] *See* William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 224–28 (1988) (describing, *inter alia*, the substantially looser restrictions on permissible lawsuits prior to the twentieth century); *id.* at 224 ("no general doctrine of standing existed" before modern times).

[157] 135 S.Ct. 2699 (2015).

[158] 42 U.S.C. § 7412(n)(1)(A).

[159] 135 S.Ct at 2707.

[160] *Id.* at 2705–06.

[161] *Id.* at 2706.

quantifiable ancillary benefits of $37 billion to $90 billion per year."[162] He deemed those benefits ineligible for inclusion in an L&E-style cost-benefit computation, however, because the EPA did not take account of them "in its appropriate-and-necessary finding."[163]

In dissent, Justice Kagan criticized the majority for nit-picking. The EPA did take costs into account, finding "that the quantifiable benefits of its regulation would exceed the costs up to nine times over."[164] Kagan questioned why the majority thought that EPA was required to "explicitly analyze costs at the very first stage of the regulatory process," given that it "later took costs into account again and again."[165]

Scalia's majority opinion in *Michigan v. EPA* illustrates two critical points, one about O&T, the other about L&E. First, to the extent that an O&T-oriented judge thinks it is almost always easy to reconcile O&T with L&E by pointing to enacted language that can somehow be read to authorize or command L&E, the claim undermines the supposed objectivity, determinacy, and neutrality of O&T. Statutory language like "appropriate and necessary" does not rule out cost-benefit analysis, but it hardly commands such analysis. And yet Scalia nonetheless saw in the text a clear mandate for cost-benefit analysis.

Second, and as we demonstrated as a theoretical matter in Part II, L&E itself—including cost-benefit analysis—is often indeterminate.[166] What counts as a cost that must be included in the analysis? Which costs can be ignored, and how do we draw the line? And how should we account for the same open-ended vagueness on the benefits side of the ledger? In *Michigan*, the ancillary benefits that EPA considered after the initial stage of its regulatory process included reductions in emissions of harmful pollutants that were not themselves the legal basis for regulation.[167] Does that render them ineligible? The statute—which we do well to recall did not expressly require cost-benefit analysis at all—was silent on what benefits count, leaving the Justices to fall back on the sorts of contestable and contested intuitions about what counts (and, perhaps equally importantly, what does not) that bedevil economists' efforts to measure costs and benefits more broadly.

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[162] *Id.*

[163] *Id.*

[164] *Id.* at 2714 (Kagan, J., dissenting).

[165] *Id.*

[166] We develop this point further in Part V.

[167] *See id.* at 2706 (opinion of the Court) (noting that the EPA claimed its "regulations would have ancillary benefits—including cutting power plants' emissions of particulate matter and sulfur dioxide, substances that are not covered by the hazardous-air-pollutants program.").

Accordingly, we are happy to cite *Michigan v. EPA* as vindicating our concerns about both O&T and L&E. However, we have included this case and the other environmental cases in our discussion here chiefly for a simpler and more limited purpose: to show that even Scalia—who was much less closely associated with L&E than Bork or Easterbrook—nonetheless was happy to apply at least a crude form of economics without an express statutory mandate to do so. Antitrust was not a special exception to textualism for Scalia any more than it was for other, more expressly L&E-driven jurists.

C. Another Alternative Reconciliation: Public Choice Theory

To recap the argument of this Part to this point, if O&T and L&E were as neutral, objective, and determinate as their proponents claim, then: (1) we ought to see much more intra-conservative open conflict between O&T and L&E than we in fact observe; (2) given that O&T, as the interpretive methodology, is more fundamental than L&E, O&T ought to win in such conflicts; (3) to be sure, O&T could command the application of L&E principles in particular circumstances, and under such circumstances the application of L&E would be consistent with O&T; (4) but we see jurists who are ostensibly committed to O&T routinely applying L&E principles based on very weak to nonexistent evidence that O&T authorizes L&E; and so we are left to conclude either that (5) jurists who claim fealty to O&T are dissembling (perhaps even to themselves); or that (6) O&T lacks anything like the constraining force that its proponents claim.

Perhaps, however, we have overstated the case. Maybe there is an alternative means of resolving or suppressing the potential conflict between O&T and L&E. What if step (3) of the foregoing summary states only one such means? Could there be another, more effective means for avoiding the conflict?

Consider a 2014 speech[168] by Todd Zywicki, who began by remarking on the fact that most of his fellow conservatives assume that L&E and O&T are not just compatible but complementary. He then challenged that assumption. It is "kind of taken for granted within the Federalist Society coalition that there is a natural alliance between constitutional originalism and law and economics," Zywicki said, "but it's not obvious that that necessarily is the case."[169] Rather than explain that his audience might have to forgo one or the other commitment, however, Zywicki went on to try to reconcile them. He did not do so in the manner we have been discussing so far, that is, by arguing that through some happy coincidence O&T typically directs judges to apply L&E.

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[168] *See* Todd J. Zywicki, *Is There a George Mason School of Law and Economics?*, 10 J. L., ECON. & POL'Y 543 (2014).

[169] *Id.* at 551.

Instead, Zywicki argued that the L&E and O&T are "sympathetic intellectual traditions" by formulating institutional arguments thought to justify O&T as an application of economic analysis to politics. He said "that taking economics and applying it to everyone in the political system makes much more prominent the potential for agency costs with judges, and that they're using their powers to read their views into law."[170]

Zywicki hardly pioneered the notion of conceptualizing politics as a subset of economics. In modern times, that idea is most closely associated with James Buchanan[171] and the field of public choice theory his work spawned. Accordingly, Zywicki favorably cites Buchanan's critical 1974 review of Richard Posner's landmark L&E book, *Economic Analysis of Law*.[172] There, Buchanan lauded Posner for his generally competent application of economic analysis to particular legal questions but questioned the methodology writ large. A conventional economist, Buchanan accepted that efficiency is an objective concept, but he did question Posner's assumption that the law requires efficiency. Buchanan offered a thought experiment in which no antitrust legislation exists. He then said that a Posnerian judge would have warrant to "outlaw monopoly" as inefficient but that this result is plainly wrong because in so doing "he would be explicitly abandoning his role of jurist for that of legislator."[173]

Yet far from reconciling L&E with O&T, Buchanan's critique of Posner sharpens the conflict. We can see the point most clearly by noting how public choice theory figures into the argument for textualism. Easterbrook pithily put the point in a short but influential essay.[174] Claiming to draw lessons "from the

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[170] *Id.*

[171] So far as we are aware, James Buchanan is not a relative of the co-author of this article with the same surname.

[172] *See* Zywicki, *supra* note 168, at 552 (citing James M. Buchanan, *Good Economics-Bad Law*, 60 VA. L. REV. 483 (1974) (reviewing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1st ed. 1973)). For his part, Posner is a lone exception to the proposition that conservative jurists have either failed even to recognize or failed to successfully reconcile the conflict between O&T and L&E. As he matured, Posner's commitment to L&E broadened into a general commitment to pragmatism and he became less conservative, but he never endorsed O&T. On the contrary, he critiqued it relentlessly. *See*, *e.g.*, Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUB. (Aug. 24, 2012), available at https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism (reviewing SCALIA & GARNER, *supra* note 12) (offering numerous criticisms, including the observation that despite its claims to objectivity, determinacy, and neutrality, "textual originalism" as defended by Scalia and Garner, "provide[s] them with all the room needed to generate the outcome that favors Justice Scalia's strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights, the death penalty, and guns.")

[173] Buchanan, *supra* note 172, at 490.

[174] Easterbrook, *supra* note 57.

discoveries of public choice theory,"[175] he disclaimed a gap-filling role for judges: "The legislature ordinarily would rebuff any suggestion that judges be authorized to fill in blanks in the 'spirit' of the compromise. Most compromises lack 'spirit,' and in any event one part of the deal is to limit the number of blanks to be filled in."[176]

The upshot of public choice theory is not L&E. If judges lack authority to fill gaps, they lack authority to fill gaps with L&E. True, Easterbrook's prescription is anti-regulatory; he argues that in many circumstances, statutory silence should be treated as meaning that the law has no application, leaving the parties to resort to a form of potentially chaotic behavior that has come to be justified by dubbing it "market ordering."[177] But while Easterbrook's proposal may reflect his anti-regulatory priors, it still does not purport to derive L&E from O&T. As Buchanan's critique of Posner indicates, application of economic analysis to the legislature itself—that is, public choice theory—can be used to derive textualism; it does not in any way mitigate the potential for conflict between L&E and O&T.

V. Why Do Liberal Scholars and Judges Not Exploit the Open-Ended Nature of O&T or L&E for Their Own Purposes?

Thus far, we have argued that there is no objective, non-normative, or scientific basis on which neoclassical economists can base their analyses; our argument necessarily undermines similar claims by Law & Economics scholars, who rely on the neoclassical approach. Similarly, having reviewed arguments that are somewhat more widely known among legal scholars than the critique of L&E, we have shown that the Originalism & Textualism approach to constitutional and statutory interpretation is fundamentally manipulable and does not live up to the claims of those who insist that O&T meaningfully constrains the subjective choices of jurists and scholars in ways that Living Constitutionalism and purposivism supposedly do not.

This, in turn means that both the L&E and O&T approaches to legal and policy analysis inherently embody (usually unstated) moral and

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[175] *Id.* at 547.

[176] *Id.* at 540.

[177] *See id.* at 542 (proposing a "rule of no-application" where a statute leaves a blank). We acknowledge that those who use the term *market ordering* rely on Adam Smith's metaphor of the invisible hand to defend themselves against the claim that market interactions are ad hoc and not reliably stable. Even that is probably an overstatement. In any event, "market ordering" cannot mean that whatever happens in a market—a market that, per our discussion in Part II above, facilitates transactions using whatever baseline of laws that happen to exist at any given moment—is the best we can do in the absence of laws to the contrary. There *are* laws, just not the ones that Easterbrook thinks should exist. There is no statutory silence.

philosophical priors that are no less contestable than the competing priors that the adherents to those approaches disparage as being based on mere opinion or sentiment.

Our goal here, however, is not merely to point out that these two jurisprudential approaches make similar claims to objectivity that do not withstand scrutiny. We argued further in Part IV that there is nothing within the L&E and O&T approaches that would lead one to expect those two traditions to lead to similar results in concrete cases. L&E and O&T are both formalistic in the sense that they purport to produce results without reference to normative considerations, but they rest on very different foundations: some version of consequentialism underlies L&E; democratic political theory that is often hostile to consequentialism (in, for example, its protection of individual rights) underwrites O&T; thus, one would expect them to reach similar conclusions on any particular question only by occasional happenstance.

Instead, conservative legal elites have adopted both of these approaches and use them in ways that surprisingly—even suspiciously—lead to consistent conclusions. We believe that this fact confirms the suspicion that both approaches are manipulable and that the scholars who use them manipulate their analyses in ways that support—and strategically obscure—their own political agendas.

If we are right, we are left with a mystery: why is this a one-sided game? If both economic analysis and legal interpretation are in deeply similar ways open to motivated manipulation, why do we not see a mirror image of that strategy among the opponents of the conservative movement?

After all, what counts as the American left[178] is, like any political coalition, composed of groups whose interests are often at odds. Just as the conservative movement papers over an uneasy truce between, on one hand, religiously inspired social conservatives opposed to legal abortion, LGBTQ rights, and changing gender roles more broadly, and, on the other hand, libertarians who believe the government should leave personal moral decisions in the hands of individuals, so American liberals and progressives must navigate cleavages between, on one hand, environmentalists concerned about global warming and local pollution, and, on the other hand, workers who side with their employers in worrying that "excessive" regulation will reduce job opportunities, among many other examples of uneasy truces within their coalition.

Given that the left, like the right, might feel the need to find ways to square certain circles, the availability of fully manipulable theories—theories that, notwithstanding their open-ended natures, can usefully be promoted for

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[178] We follow the left-right convention here, although we note that by the standard of countries to which the U.S. can meaningfully be compared politically, what counts as "left" here is at the center of those other countries' political spectrums.

their supposed objectivity (after having been manipulated as needed) —would seem to create an irresistible temptation for the political left to copy the right's strategy and construct an impressive-looking edifice that just so happens to reach politically pleasing conclusions on a consistent basis.

To be clear, one of the current authors has indeed publicly suggested that the left should follow just this course, at least on economic issues. At a conference in 2014,[179] and in a legal analysis essay[180] in 2019, that author suggested that left-leaning scholars should no longer resist the right's use of the term *efficiency* and should instead embrace its open-endedness for their own ends. Rather than arguing that, say, the non-efficiency values promoted by minimum wage laws are worth the supposed efficiency cost, it would be "true" (in the same sense that standard efficiency analysis is true, which means true under some assumptions but not others) simply to say that minimum wages enhance efficiency.

In both cases, however, this idea was presented not as a serious assertion that the left has developed a truly objective approach to put up against the right's objective (but substantively unappealing) approach. Instead, the suggestion was tongue in cheek, with the idea that the connotative appeal of the word "efficiency" is so strong that liberals might as well embrace the incoherence of the efficiency analysis and very consciously mock the idea of adapting it to their own uses.

Yet the American left has not gone even so far as to embrace that kind of playful nihilism. Moreover, the left here in the United States (and, as far as we are aware, the left elsewhere) has certainly not adopted a serious strategy to recast their analyses as being inherently objective and based on certitudes untainted by the politics of the moment. Rather than saying, "No, your purportedly scientific theory should be replaced by our truly scientific theory," we see opponents of the conservative movement saying something more like this: "We should all simply admit that there is no absolutely objective way to avoid normative analysis, which will allow us to have an honest conversation about what amounts to different ideological commitments." As we elaborate more fully below, when liberals deploy their own versions of L&E or O&T, they typically deny that the results are objective, neutral, and fully determinative.[181]

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[179] Neil H. Buchanan, Discussant's Comments at Conference on Human Rights and Tax Law, McGill University, (June 18-20, 2014).

[180] Neil H. Buchanan, *Everything Is Both Efficient and Inefficient as a Matter of Economics*, DORF ON LAW (Jun. 6, 2019), http://www.dorfonlaw.org/2019/06/everything-is-both-efficient-and.html.

[181] As we acknowledged earlier, the so-called Behavioral Law & Economics (BLE) movement is arguably in tension with this claim, because there is at least some pretense of objectivity to much of the work in that genre. *See supra*, note 45. Most of the useful substance of BLE, however, can be embraced while rejecting claims to objectivity. For

All of which brings us back to our question. Why have we not seen the left adopt this mirror-image approach, saying that everything can be efficient if we make the necessary assumptions to get to the conclusions of our choice, and then to defend those assumptions as if they are the one and true baseline against which efficiency and inefficiency must be measured?[182]

Why do we also not see something like that in the left's response to O&T? To be sure, in 2015, Justice Kagan declared "that we're all textualists now," [183] but she did so in the course of a colloquy at Harvard Law School named for and in honor of Justice Scalia, and while she was clearly contrasting the newer approach to statutory interpretation with the more broadly policy-based approach that prevailed prior to Scalia's appointment to the Supreme Court, she essentially made the same point that, as we observed in Part III, Molot had made nearly a decade earlier—namely, that there no longer is a distinctive textualist position.[184] Indeed, that is exactly what Kagan said, for if we are *all* textualists, then textualism as a distinctive methodology does not exist. More importantly for present purposes, Justice Kagan did not claim for textualism the sort of objectivity and determinacy that its strongest proponents do. She seemed to have in mind the much more modest view of "second-generation textualism" defended by Manning (who, as it happened, was interviewing her for the colloquy).

So much for the possibility of result-oriented liberal judging disguised as textualism and pretending to objectivity. What about originalism? As we

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example, noting that people are myopic in many situations that require long-term planning need not be paired with a claim that such decisions are inefficient, only that those decisions differ from what people would choose if they did not discount the future so strongly.

[182] To reiterate, we do not deny that many liberals and progressive judges and legal scholars employ what we might call economic tools to advance particular claims—for example, that minimum wage laws do not necessarily increase unemployment or that insurance markets will collapse if insurers are legally forbidden from screening out clients with pre-existing conditions absent compensating mechanisms like government subsidies or coverage mandates. We also acknowledge that one can use the term "law and economics" sufficiently capaciously to encompass scholarly and judicial output making such claims. However, as we are using the term—and consistent with its origins and canonical form—L&E makes the further, distinctive, claim that certain outcomes are not simply more likely than others to occur given various pre-conditions, but are "efficient" and thus preferred, all the while hiding the assumptions that go into specifying the baseline against which to measure efficiency.

[183] Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg. The statement occurs at 8:30 in the video.

[184] *See supra*, text accompanying notes 80-81.

observed in Part III, some noted liberal constitutional scholars have argued that semantic originalism is, in Ronald Dworkin's phrase, "innocuous," or, as David Strauss and Jack Balkin (each separately) argued, indistinguishable from Living Constitutionalism.[185] But none of these scholars was engaged in an effort to develop an originalism of the left in the sense of a methodology that claims objectivity and determinacy for left/liberal results. On the contrary, by equating semantic originalism with Living Constitutionalism, the left/liberal scholars were following the nearly opposite course that typifies left/liberal scholarship about both L&E and O&T: characterizing the authoritative text as open-ended and thus an invitation to engage in frankly normative reasoning.

Perhaps the closest thing one sees to liberal originalism are dissents by liberal-leaning justices responding to originalist arguments by conservatives. The dissent of Justice Stevens in *District of Columbia v. Heller*[186] falls into this category.[187] So do the key dissents of Justice Souter from the Rehnquist Court's state sovereign immunity rulings.[188] But these are essentially exercises in counter-punching. The conservative majority claims a historical mandate for its result, so the liberal justices offer an alternative historical account that undercuts the majority's narrative. One does not come away from such dissents thinking that the liberal justices are committed originalists. Indeed, the last justice to sit on the Court who could be said to be a liberal originalist was Hugo Black,[189] who died nearly five decades ago.

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[185] *See supra*, text accompanying notes 86-88.

[186] 554 U.S. 570 (2008).

[187] *See id.* at 637 (Stevens, J., dissenting) ("Neither the text of the [Second] Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms. Specifically, there is no indication that the Framers of the Amendment intended to enshrine the common-law right of self-defense in the Constitution.").

[188] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 100 (1996) (Souter, J., dissenting); *Alden v. Maine*, 527 U.S. 706, 760 (1999) (Souter, J., dissenting).

[189] *See* Michael Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994). By today's standards, Black is not clearly a liberal. *See Griswold v. Connecticut*, 381 U.S. 479, 508 (1965) (Black, J., dissenting).

A. Is the Baseline Problem Too Abstract?

Why do scholars and jurists who are not slavishly committed to either of the two formalisms discussed above not copy their opponents' approach and claim objectivity—objectivity that is, to restate our fundamental starting point, an illusion? The influence of O&T and L&E cannot be denied, and even if imitation is not the highest form of flattery, nothing succeeds like success. Learning from successful strategies and acting accordingly would seem to be a wise response. Let us consider some possibilities with respect to both O&T and L&E, beginning with the latter.

Perhaps liberals have (consciously or not) avoided the if-you-can't-beat-'em-join-'em approach because it would simply be too difficult to tear down conservatives' intellectual L&E infrastructure and rebuild to serve their own purposes. Constructing economic models based on different baselines is neither simple nor easy, and given that any such model would not truly be any more objective than the current approach (but again, no less objective, either), maybe it is simply not worth it.

After all, in this Article we needed more than six thousand words simply to *describe* the baseline problem in economics. Explaining why it is legitimate to use a different baseline and then building a model based on one among an infinite number of possible baselines (and justifying that baseline) would be a daunting task indeed.

That explanation, however, seems to us not to capture the nature of the scholarly enterprise. It is true that any particular piece of scholarship must be written by making choices about what to include and exclude, taking into account the intended audience, the permitted length, and so on. However, the L&E movement, like all successful academic enterprises, gains strength from the fact that so many scholars have become engaged with it. It is not literally true that there is an unlimited supply of scholars' time available to devote to any particular project, but there is surely no shortage of people who could happily build successful careers pursuing the various paths onto which something called "objective liberalism"[190] might guide them. Liberal judges and justices could then cite whatever subset of the voluminous scholarly literature assisted in giving their work a patina of objectivity.

It is in some sense even more surprising, then, that this alternative path has not become popular among jurists or up-and-coming academics with training in economics. It is true that some fields (such as economics itself) have seen the dominant theorists "lock up" the top journals and deny prestigious placements to scholarship that challenges the orthodoxy, but that is currently

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[190] We coin this term here simply to demonstrate that there would be a banner behind which a supposedly objective anti-L&E movement could march. So far as we know, this term does not exist in the literature.

not a problem for judges or even in legal scholarship, or at least it is less of a problem than elsewhere.

More plausibly, because the alternative that we are describing—but not endorsing, even though this hypothetical alternative would by assumption be built to comport with our own policy and philosophical views—can lead scholars to rely upon advanced mathematics, there might be a mismatch of expertise among the editors of the journals that dominate the legal field. Although the students who edit the top legal journals are quite talented, it is hardly a secret that many of them openly disparage mathematical and economic approaches.

But some law students are, in fact, quite well trained in advanced economics and mathematics. True, those students who do have some economics or L&E education have generally been trained in the neoclassical orthodoxy that we are critiquing here, which might cause those students to resist engaging with articles that challenge that orthodoxy, especially if such a challenge could be seen to undermine their feeling that such training was useful.

Note, however, that this phenomenon might cut in the other direction; that is, it suggests that law journals could be particularly welcoming places in which to publish liberal arguments that purport to be objective. After all, if the only move necessary when switching from a conservative to a liberal faux-objective economic model is to change the assumptions regarding the positions of supply and demand curves that constitute the efficient baseline, much of the existing mathematical superstructure would be transferable to the newfangled liberal alternative.

Far from making law students with economics training feel that their college years were misspent, then, a supposedly objective category of liberal economic modeling could make such students feel empowered. It is actually the pragmatic approach we endorse that might leave students worried that they must throw out the impressive methodological baby with the surreptitiously ideological bathwater

Even though it seems clear that the peer-reviewed top economics journals are ideologically unwelcoming to baseline-challenging approaches, then, we might expect the top law journals to be particularly comfortable with, and perhaps even enthusiastic about, hosting such scholarship. Yet we see few if any examples of legal scholars claiming to undermine neoclassical efficiency by arguing for different baselines, with most liberals merely content to argue (as we noted in Part II) that equity is important, too.

B. The Manipulability of Utility Functions

Accordingly, there could be demand (in the law journals) for objective liberalism in L&E. What about supply (from scholars)? We assumed above that it is a formidable task to build and publish a new economic model from the

ground up using a full set of legal rules that constitute a new baseline. While that is true, it falls short of explaining why liberals have not responded to conservatives' pseudo-objective theories in a more targeted way that does not require a fully worked-out alternative model.

Our discussion in Part II above cast the analysis in terms of the familiar supply and demand curves seen in basic undergraduate economics courses. The neoclassical approach to economics, however, derives those supply and demand curves mathematically from utility functions, which might be easier to manipulate and thus use opportunistically.[191]

Utility functions are general mathematical expressions that describe how much happiness, wellbeing, or other generalized good described somewhat delphically as "utility" an individual derives from various inputs.[192] The standard approach to deriving demand curves posits that individuals try to maximize their utility by buying quantities of some good in response to the good's price, to the prices of other goods (substitutes and complements), to one's income, and to one's subjective taste for the good. Making basic assumptions about whether each variable increases or decreases utility,[193] such as the standard belief that people will want to buy smaller quantities of the good (or none at all) when the price rises and that increases in the prices of substitute goods will increase the quantity demanded of the good in question, economists can derive not only where the curve lies on a price-versus-quantity graph but how the demand curve will move on that graph when other variables change.

One standard challenge to the utility-based approach, however, involves observing situations in which a person's behavior does not comport with what we thought we knew about rationally maximizing behavior. For example, the renowned conservative economist Milton Friedman long ago argued that a laissez-faire approach even to the existence of racial and gender discrimination would be better than supposedly heavy-handed (and *inefficient*) laws guaranteeing civil rights, because a profit-maximizing business owner would shrewdly see that her bigoted competitors were under-demanding talented

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[191] Utility maximization underlies both supply and demand curves, but supply curves are often described as having been derived from "production functions." That relabeling is based on the idea that businesses are trying to maximize profits rather than utility itself. As we discuss below, however, this is ultimately a utility-based analysis, and it is no less subject to manipulation than any other kind of utility analysis.

[192] Although there is much to say about the prospect of measuring utility (or even defining the unit of measurement), we are satisfied here to accept the standard approach in which utility curves could be useful to describe *ordinal*, rather than *cardinal*, comparison. That is, even if it might mean nothing to describe a person as enjoying "6 utils of happiness" in one situation and "4 utils of happiness" in another, there is analytical power in saying that the first is preferable to the other, without quantifying the difference.

[193] Mathematically, this involves making assumptions about whether partial derivatives of the utility function are positive or negative.

workers.[194] This would allow the enlightened owner to drive unenlightened owners out of business.

If Friedman's analysis were correct, however, one would have to ask how long it takes for markets to work their sleight of (invisible) hand, with the raw pursuit of profit among capitalists making bigotry in the workplace a thing of the past. After all, when Friedman was making these arguments, it had been a century since emancipation and decades since women had gained the right to vote, yet Jim Crow showed no signs of weakening and even Harvard Law School's dean was asking female students to justify why they were taking seats away from men with families to feed.[195]

One possibility is that unregulated labor markets would eventually lead to the end of invidious discrimination, but one must be patient. That explanation, however, runs up against a practical objection along with a theoretical one. The practical objection is simply that, if a process can take literally decades to end a social ill, then that is no solution at all (or at least, any other objections to government intervention would need to be even stronger to overcome the accumulation of years of harm while the market works its magic).

The theoretical objection is internal to Friedman's theory: if one takes his approach seriously, there is nothing to explain even a short time lag. Indeed, what is now known among economists as "super-neutrality" holds not just that markets should reach equilibrium at some point but that they will do so all but instantaneously. This is because every moment of delay is an unexploited profit-maximizing opportunity. If employers had no other reason to discriminate, they would aggressively recruit the best talent immediately, not after years or even decades of waiting for something to happen.

In response to this problem, another prominent conservative economist offered what can be thought of as a friendly amendment to Friedman's theory—friendly in intent, that is, but actually fatal. The amendment is Gary Becker's notion of the "taste for discrimination."[196] Becker explained that employers have utility functions (because they are human beings), and just as people have a taste for vanilla versus chocolate (about which the government should have no opinion, and should certainly take no action), they might also find a

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[194] Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, THE NEW YORK TIMES MAGAZINE 32 (Sept. 13, 1970). Richard Epstein later made the same point. *See* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

[195] *See* Ira E. Stoll, *Ginsburg Blasts Harvard Law*, The Harvard Crimson (Jul. 23, 1993), https://www.thecrimson.com/article/1993/7/23/ginsburg-blasts-harvard-law-pin-testimony/.

[196] *See, e.g.*, David H. Autor, *The Economics of Discrimination-Theory*, ECONOMICS.MIT.EDU (Nov. 24, 2003), https://economics.mit.edu/files/553.

"disamenity value"[197] to employing people whom they find unpleasant to be around for any reason (including race or sex).

The point of Becker's exercise was to show that the model of profit-maximization and efficient competition can withstand the objection that employers choose to reduce their profits below what they might earn, simply because the employers' utility functions apparently include tastes that are (we hope) nonstandard. They are still maximizing, this explanation tells us, but they are maximizing over a different set of variables than a less realistic version of the model might have predicted.[198]

Becker's bottom line, then, is not that there is no such thing as efficiency (or that markets do not reach efficient outcomes) but that efficiency is a more complicated optimizing process than we might initially believe.[199] Becker (in an article co-authored with Judge Richard Posner) later even went so far as to prove (as a mathematical proposition) that suicide is rational and efficient,[200] demonstrating that he was willing to push his framework to the limit of plausibility or decency.

More generally, however, the very power of the utility-based approach—in particular, the claim that one can respond to any objection to utility-based conclusions simply by reimagining what people include in their utility functions—is in fact its Achilles heel. If every objection can be overcome by adding explanatory variables ex post, then this is not a scientific enterprise, because the theory is not falsifiable.

How do we explain, for example, why people who are trying to maximize utility (generally thought of as at least a rough synonym for happiness) nonetheless engage in activities that are grueling, painful, and difficult—such as running marathons? The tautological response is obvious. Such people (and thus their utility functions) must clearly derive value from being physically fit

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[197] *Id.* at 3.

[198] *See, e.g.*, Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 STAN. L. REV. 1577, 1583 (1998) (arguing that "rational choice theorists [coextensive here with believers in the neoclassical utility-based approach] will inevitably be perfectly reasonable in believing that many [modifications of utility functions] can be interpreted as consistent with their paradigm.").

[199] Some levels of complexity are welcome into the theory, but others are not. In the latter category, even the most sophisticated models generally rule out "interdependent utility functions," in which one of the variables that Person A takes into account in maximizing her utility is Person B's utility. Even though it is entirely imaginable, even normal, for people to care about each other's wellbeing, modeling such interactions has proven an insurmountable mathematical obstacle to making the approach realistic in this way.

[200] *See* Gary S. Becker & Richard A. Posner, *Suicide: An Economic Approach* 9 (Aug. 24, 2004), *available at* https://www.gwern.net/docs/psychology/2004-becker.pdf (describing suicide as rational for "people who are depressed and are highly inefficient at extracting utility from their situations").

or even simply from the satisfaction of having engaged in demanding activities. Per Becker, they might even be masochists, whose subjective pleasures a neutral science should not judge.

The problem, however, is not merely that this method of defending utility theory is unbounded. It is that believers in neoclassical economics (including L&E scholars) appear not truly to believe that their theory is as open-ended as they claim when they are obligated to talk their way around its inconvenient implications.

Consider a somewhat unusual example. For nearly a century, Finland has issued "day-fines" keyed not only to the severity of the offense but also to ability to pay. Day-fines can be justified on fairness as well as deterrence grounds. A very wealthy Finn would disregard a fine for speeding on the highway if subject only to the same size fine as a middle-class Finn. Finland's day-fines for traffic offenses gained notoriety in the early 2000s when the disparities grew due to the sudden riches of some employees of Nokia, leading to a traffic ticket for over $100,000.[201]

One of the authors of the present paper witnessed an exchange between a neoclassical economist and a law student. The economist said that Finland's system of fines was inefficient, because the disutility that speeding caused (dangers to others, damage to roads, and so on) was related to specific speeds and not to the income or wealth of the speeders. The law student responded that Finns apparently had a "taste for equality"—at least on the roads—and thus the new system of fines accurately reflected the Finnish social utility function.

If one were to take seriously the claims that utility theory is powerful because utility functions can include anything at all among their explanatory variables, this student's response would seem to be unobjectionable, albeit a bit counterintuitive. Indeed, the student might have been commended for applying the insight that utility functions can take any form. Instead, the economist firmly rejected the very idea that the Finnish fines could be rationalized in this way. The *real cost to society*, he insisted, was still unrelated to income. But this insistence, of course, merely meant that he rejected the idea—as a normative matter—that inequality matters, at least in this context.

We need not venture a guess as to whether that particular economist is in any way typical of all economists. Instead, we need only point out that his fundamental objection—that utility maximization must have boundaries in order to be useful—is exactly the point. He might or might not be able to make a good case to exclude wealth or income when setting speeding fines, but any

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[201] *See* Joe Pinsker, *Finland, Home of the $103,000 Speeding Ticket*, THE ATLANTIC (Mar. 12, 2015), https://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484.

such case must perforce involve arbitrary, normative, and thus unscientific decisions about the scope of the inquiry.

Beyond the particulars of the examples above, our point is that utility theory is typically held out to make neoclassical theory infinitely adaptable. We stipulated above that the supply-and-demand approach and the utility-maximization approach are mathematically identical, which means that the utility-based approach is equally incoherent due to the baseline problem. We have taken the time here to explain the utility-based approach, however, to demonstrate that one need not rebuild an entire theoretical infrastructure to reverse the seemingly inexorable conservative results of neoclassical analysis.

C. Beyond the Manipulability of Originalism and Textualism

The foregoing conclusion implies that our summary in Part III of the manipulability of originalism and textualism is analogous to this critique of utility theory in precisely the way that it is analogous to the baseline problem. In all cases, a move toward generality at first seems to open up space for the theory to have more explanatory and policy-relevant power; yet that move ultimately proves too much, and the only way to save the theory is to retreat to a less general fallback (a fallback that had been rejected previously when the narrower approach became inconvenient).

Thus, for example, we find neoclassical economists switching back and forth from the capacious version of a utility function (for example, including "justice" in the utility function) and the crabbed version (objecting that justice or wealth are insufficiently important to include in a utility function), depending on what they wish to prove.

Similarly, we find O&T theorists claiming to embrace original meaning at a high level of generality (rejecting intentions-and-expectations originalism in favor of the substantially less determinate public-meaning version) in order to disavow results that are beyond the pale politically, such as the conclusion that *de jure* racial segregation is constitutional, but then saying the equivalent of abortion is not a fundamental right because James Madison would have not have thought it to be one or that the members of Congress that approved the Fourteenth Amendment would never have imagined that they were giving equal protection to LGBTQ individuals.[202] Just as there is a similarity in the way that O&T and L&E theorists move fluidly between unbounded generality and arbitrary specificity, there is more than a bit of overlap in the way that these theorists often respond to objections to their fundamental methods.

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[202] One of the current authors previously gave the example of Justice Thomas's dissent in *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786 (2011), explaining that despite purporting to engage in semantic originalism, the only evidence Thomas provided concerned the "practices and beliefs held by the Founders," which is a form of intentions-and-expectations originalism. Dorf, *supra* note 92, at 2023.

When confronted with objections to the idea of modeling people as rationally maximizing their utility functions (responding to prices and other facts about the world to reach an objectively efficient outcome), neoclassical economists might disparage any such objection by saying, "so you don't think that people respond to prices?" This response, of course, misses the point. The shortcoming in efficiency analysis is not in believing that people respond to relevant information but in calling the results of people's decisions efficient or inefficient. Describing whether and how people respond to incentives poses a predictive question, and it need have nothing to do with assessing efficiency.

The analogous move in the O&T realm might be to ask incredulously: "are you saying that you don't think the text matters?" Of course the text matters, and one might even go so far as to say, as Justice Kagan said in the colloquy we described above, that Justice Scalia and other self-described textualists deserve credit for reminding us all of that fact. But in the contested cases in which the choice of interpretive method might be thought to matter, neither originalism nor textualism derives objective meaning unmediated by the interpreter's priors, just as describing people as rational cannot overcome the inherent subjectivity of how efficiency is defined.

So why don't liberals play this game too? As we noted above, one occasionally sees a liberal-leaning justice making historical arguments to counter conservatives' originalist claims, but that is hardly the same thing as saying something like "the original meaning of the Fourteenth Amendment, properly understood, clearly requires recognition of a constitutional right to abortion, and anyone who disagrees is not actually engaged in interpretation." Only such a claim to objectivity and determinacy would be a parallel move to the sorts of claims that originalists and textualists make.

Just as we acknowledge that there are liberal scholars and judges who deploy economic tools but do not brand their results objective in the way that conservative practitioners of L&E do, so we acknowledge that there is a substantial body of what might be considered liberal originalist scholarship. However, like the liberal originalist judging we described above, liberal originalist scholarship is mostly a form of counterpunching—or worse. What might be called liberal originalist scholarship falls into four broad categories, each problematic in its own way.

First, as we noted above, scholars like Balkin, Dworkin, and Strauss sometimes argue that originalism conceived as original public meaning is no different from Living Constitutionalism and then proceed to make arguments that thus could be understood as consistent with original meaning. However, by framing public meaning originalism as indistinguishable from Living Constitutionalism, such scholars essentially advertise that they do not claim to have discovered the single objective truth.

Second, historians who write about legal issues and happen to be left/liberal often discuss questions that concern original meaning. This

category includes excellent work by Mary Bilder,[203] Jack Rakove,[204] Saul Cornell,[205] and many others. Yet because even non-originalists care about original meaning as *a factor* in constitutional interpretation,[206] historical scholarship that bears on original meaning is not necessarily original*ist*. Moreover, good historians try to avoid *presentism*; they acknowledge that one can never encounter the past directly and unmediated by our knowledge of the present but do not look to the past to answer questions that reflect our own concerns rather than those of the earlier period;[207] and more often than not they find that a finer grained understanding of the past yields *greater* complexity and ambiguity, not certainty. Accordingly, historical scholarship that is not simply law office history[208] actually undercuts the case for originalism; it is not a species of originalism, liberal or otherwise.

Third, some generally *conservative* self-styled originalists engage in what might be described as intermittently or opportunistic liberal originalism. Michael McConnell's well-known article purporting to show that *Brown v. Board of Education* was consistent with equal protection not only in a semantic sense but in accordance with the intentions and expectations of the Fourteenth Amendment's framers[209] is perhaps the leading example of this genre. The effort by Steven Calabresi and Julia Rickert to reconcile the modern sex discrimination case law with the original understanding of the Fourteenth Amendment[210] (which, we do well to recall, *introduced* a sex line into the

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[203] *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (detailing how James Madison repeatedly revised his notes of the Constitutional Convention).

[204] *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

[205] *See* SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA (2008).

[206] See Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J 1766, 1767 (1997).

[207] *See* RAKOVE, *supra* note 204, at xv (seeking to avoid "a presentist skewing" as the framers and ratifiers "would not have denied themselves the benefit of testing their original ideas and hopes against the intervening experience . . . since 1789.").

[208] See Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 554 (1995) ("legal scholars, in what in its worst form is dubbed 'law office history,' notoriously pick and choose facts and incidents ripped out of context that serve their purposes.").

[209] *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

[210] *See* Steven G. Calabresi and Julia Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

Constitution for the first time[211]) is another example. Whatever the merits of these and similar articles,[212] they do not practice liberal originalism in the sense of harnessing originalism's spurious claims to objectivity and neutrality to liberal ends. On the contrary, conservatives like McConnell, Calabresi, and others try to derive canonical liberal results in an apparent effort to prove the supposed apoliticism—and thus bolster the credibility—of originalism so that it can be invoked more commonly for conservative results. These are ultimately just more sophisticated examples of Bork's "confirmation conversion."

Fourth and finally, there may be a few true believers in the relative determinacy and objectivity of original meaning who use it to produce whatever results it happens to produce, including liberal ones on occasion. Akhil Amar is probably the leading exemplar of this approach,[213] which uses history and what Amar calls intratextualism[214] to derive more determinate meaning from the constitutional text than most other scholars find. Perhaps if there were a great many more scholars like Amar who appear to be ideologically eclectic, he could serve as a model of, if not exactly liberal originalism, then perhaps something like neutral originalism. However, because the text and original understanding in fact lack the kind of constraining force that Amar seems to think they have (for the reasons we

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[211] *See* U.S. CONST. amend. XIV, §2 (imposing representation penalty for disenfranchisement of "male citizens").

[212] McConnell's article, being the best known in this genre, has received the most scrutiny. It does not withstand that scrutiny. *See* Michael J. Klarman, Brown, *Originalism, and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1882 (1995) (arguing that despite making "an important contribution to our understanding of congressional attitudes toward school segregation in the 1870s," McConnell "fails to show either that *Brown* is correct on originalist grounds, or even, as he more modestly claims, that *Brown* is within the legitimate range of interpretations of the Fourteenth Amendment.") (internal quotation marks omitted); Raoul Berger, *The "Original Intent"—As Perceived by Michael McConnell*, 91 NW. U. L. REV. 242, 248–59 (1996) recounting the legislative history of the Civil Rights Act of 1866 and the Fourteenth Amendment); Herbert Hovenkamp, *The Cultural Crises of the Fuller Court*, 104 YALE L.J. 2309, 2342 (1995) (reviewing OWEN M. FISS, TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993) (arguing that the prevailing view in 1868 or even considerably later was that segregation was legally permissible)); Earl M. Maltz, *Originalism and the Desegregation Decisions—A Response to Professor McConnell*, 13 CONST. COMMENT. 223, 228 (1996) (concluding that "a direct constitutional attack on segregated schools was unthinkable in the period in which the Fourteenth Amendment was drafted, passed, and ratified.").

[213] *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2006).

[214] *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 757 (1999) (describing intratextualism as a method in which the reader infers meaning from how repeated words and phrases in the Constitution are used in different contexts).

discussed in Part III), we think that the eclecticism one sees in Amar's work reflects the fact that his priors are eclectic. In any event, even if we are mistaken (or uncharitable) in characterizing Amar in this way, he is not a liberal originalist.

Thus, none of the seeming candidates for a liberal originalism satisfies our search for a mirror image of conservative originalism. We reach the same conclusion with respect to textualism in statutory interpretation, despite the existence of a school of self-styled "progressive textualism."[215] As we saw in our discussion of Justice Kagan's praise for Justice Scalia, the sort of textualism that liberal judges embrace is at best the "second-generation" sort that will not fool anyone as an exercise in objectivity and determinacy except in the kinds of cases in which it is not needed.[216] True liberal O&T—in the sense of a methodology that claims for itself the ability to neutrally, objectively, and determinately produce liberal results—is as scarce as true liberal L&E.

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To return to the question with which we began this Part, we still have not offered a full explanation for the notable absence of left-leaning scholars or judges adopting a strategy to mirror conservative O&T and L&E theorists' unjustifiable claims to objective neutrality. We have, however, at least tried to rule out some possible explanations.

To draw an analogy from employment discrimination law, a plaintiff can support her claim that her employer acted with discriminatory intent if she is able to eliminate explanations other than "I was discriminated against," even if she cannot provide a recording of her employer saying that he fired her because he hates women. Ruling out competing explanations narrows the field of possible alternatives to the plaintiff's claimed explanation.

Here, one possible explanation for liberals' failure to adopt an approach that mirrors (but, again, is actually no better than) that of their ideological counterparts—who, to be clear, have had enormous success in advancing their ideological agenda—is that liberals are simply unwilling to take up an

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[215] *See* Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, (2019). Professor Kovacs uses "textualism" to refer both to what we call originalism in constitutional interpretation and to what we call textualism in statutory interpretation. *See id.* at 135-37.

[216] And sure enough, the chief example of progressive statutory textualism cited by Professor Kovacs is Katie R. Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63, (2019). *See* Kovacs, *supra* note 215 at 135 n.8; *id.* at 136. Yet Eyer falls squarely within the counterpunching camp—warning of the "deceptively neutral—but practically pernicious" brand of statutory originalism on offer by conservatives, Eyer, *supra*, at 69, and promotes the version of textualism that is functionally a version of rebranded purposivism, as she favorably quotes Justice Kagan's proclamation that "we're all textualists now." *Id.* at 85.

approach that is fundamentally dishonest.[217] We are, however, aware of no way to measure or even compare scholars' respective honesty, and even if we could, we should be quite hesitant to say that one group of scholars is more intellectually forthright than another.

In addition, because we identify with the left side of the spectrum on both of these areas of scholarship, we are keenly aware that we are ill suited to assess our own degrees of honesty. Like everyone who falls victim to motivated thinking, we might well delude ourselves into believing ourselves to be uniquely intellectually honest.

We have, however, considered and tentatively ruled out two alternative explanations for liberals' collective decision not to fight fire with fire. It is not that doing so would be too difficult or complicated, nor does it seem likely that such scholarship would not "place well" in journals. That does not mean that there might not be other innocuous explanations, so it would of course be premature to say that liberals as a group are unwilling to be intellectually dishonest in these ways.

After all, liberal scholars and judges are not exactly above opportunistic or disingenuous invocation of *all* ostensibly neutral frameworks. For example, during the brief period of liberal ascendancy under the Warren Court, liberal judges and scholars tended to dismiss conservatives' objections to judicial activism and disregard for precedent. In recent decades, however, liberal judges and scholars have repeatedly lamented conservatives' disrespect for *stare decisis*. It is difficult to see this turn as reflecting a commitment to precedent for its own sake rather than an effort to preserve liberal precedents based on their outcome.

If liberal scholars and judges are not necessarily purer of heart than conservatives, why are the former unwilling to make the particular false claims of objectivity that L&E and O&T make? The best explanation may be a kind of tribalism.

In a fascinating article presenting the results of an empirical study, Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere showed that support for originalism was highest among whites, males, older Americans, and especially born-again or evangelical Christians.[218] Not to put too fine a point on it, but originalism coded as "Tea Party voter" during the period the data were collected and would code as "Trump supporter" now. We do not know of parallel empirical data for "law and economics" or its equivalent, but we

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[217] For a powerful statement of the dangers of overstating the degree to which external authority rather than the judge's own views decide hard cases, see Maggie Gardner, *Dangerous Citations*, ___ N.Y.U. L. REV. ___, ___ (forthcoming 2020) ("Insisting on certainty or constraint where there is in fact ambiguity, uncertainty, and subjective induction dangerously obscures judicial choice and the inherently subjective nature of judging.").

[218] *See* Jamal Greene et al, *Profiling Originalism*, 111 COLUM. L. REV. 356, 373 (2011).

have reason to think that it too codes as politically conservative in a way that rules out a full embrace by liberal scholars, judges, and citizens more broadly.

Whatever the explanation, O&T and L&E scholars reach non-objective conclusions using methods that their ideological opponents reject, even though those methods are more than pliable enough to be used to reach other conclusions. By contrast, scholars and judges who do not subscribe to O&T or L&E typically argue that it would be better for everyone to admit the fundamentally subjective nature of the inquiry.

VI. Conclusion

The two schools of legal thought most readily identified in the United States as "conservative" are the Law and Economics and the Originalism and Textualism approaches. Adherents to both claim that their analyses are objective, substantially determinate, and apolitical.

In this Article, we have shown that the economic theory underlying L&E is inherently subjective. That is, the intellectual apparatus that purports to determine whether a policy or set of market interactions is *efficient* or *inefficient* is based on a usually hidden set of assumptions that is no more objective than any other set of assumptions. Put starkly, anything and everything can be described as both efficient and inefficient, depending upon what one determines to be the proper legal baselines that govern and enable market interactions. Although this inherent indeterminacy is known among some economists and a few legal scholars, the reality that efficiency is not an objective concept is surprising to most scholars.

Less surprising, we suspect, is the very substantial under-determinacy of the O&T methodology, which has been the subject of intense criticism for decades. In response, O&T scholars have modified their approach to the point that they have lost what little claim to greater determinacy than their rivals they might have once possessed.

We also explained that, given their very different underpinnings and prescriptions, L&E and O&T should only randomly reach similar conclusions; yet both approaches have been used consistently to advance the goals of the American conservative movement. That seems an unlikely coincidence and thus provides further evidence of the manipulability of each methodology.

Finally, we observed that non-conservative scholars and jurists have not in general indulged in an intellectual move that could have been quite effective for them. Because L&E and O&T provide objective-looking approaches that can in fact be adapted to any subjective priors that a scholar or judge might have, it would be possible for liberals and progressives to purport to have discovered objective theories that quite reliably produce left-leaning results. Instead, left-leaning scholars and judges have typically eschewed the opportunity to advance pseudo-objective approaches, instead conceding that in contested cases that reach appellate courts, there is no fully determinate and

objective approach to reaching any conclusion, liberal or otherwise. After ruling out alternatives, we concluded by offering a tentative sociological explanation for liberals' collective decision to fight fire with water, not fire.