2025

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UNIVERSITY *of* PENNSYLVANIA
LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

VOL. 173 JANUARY 2025 NO. 2

ARTICLE

CONSTITUTIONAL THEORY AND THE PROBLEM OF DISAGREEMENT

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For decades, constitutional theory has been haunted by the problem of disagreement: the reality that we are deeply divided on fundamental questions of

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justice and the good society. Theorists have generally responded to the problem of disagreement in one of two ways. One approach minimizes the extent to which constitutional theories rely on controversial moral premises and instead grounds constitutional theories in widely endorsed social practices. The other generally discards any social practices that reflect disagreement with the moral views that the theorist holds.

Neither approach is sound. Constitutional theory requires both controversial moral claims and attention to social practices; it requires both ideal and practical theory. Indeed, we can see how to address the seemingly modern problem of disagreement by attending to the work of an ancient constitutional theorist: Cicero. Despite being the subject of intense scholarly interest outside the legal academy over the last few decades, Cicero's work has been almost entirely overlooked by American constitutional theorists. But if we examine, refine, and revise his arguments about ideal and practical constitutional theory, we will find that the two dominant approaches to the problem of disagreement proposed by American constitutional theorists are mistaken.

Because constitutional theory necessarily makes strong moral claims, it is not well-suited to mitigating the effects of disagreement, even as it must take into account non-ideal social practices. Rather, the task of ameliorating the problems stemming from disagreement falls to constitutional design: the enterprise of constructing a constitution that can channel disagreements productively, forge consensus, and produce a stable constitutional order. The failure to distinguish between constitutional theory and constitutional design when addressing the problem of disagreement has led to deep confusion within constitutional theory. Mitigating the problem of disagreement is a task of constitutional design, and whether that task succeeds depends on our role acting within that design as citizens, not as theorists.

INTRODUCTION

Perhaps the most salient fact about American politics is that we are deeply divided.[1] Our disagreements are not just prudential; they are disagreements about foundational questions of justice and the good society. Indeed, one of the few things we *can* agree on is that our disagreements are profound and seemingly intractable. As both the majority[2] and dissenting Justices in *Dobbs v. Jackson Women's Health Organization* observed in the abortion context, ours is a society in which people "deeply disagree."[3] The same could be said about many other issues that have made their way to the Court's docket recently, such as affirmative action,[4] the right to keep and bear arms,[5] and the relationship between free speech principles and antidiscrimination laws.[6] Disagreements of this kind have existed since the nation's founding,[7] which is why, from the start, a key question—maybe *the* key question—confronting the American constitutional system has been whether a nation marked by such profound disagreement can endure.[8]

In the realm of constitutional theory, that question was given renewed relevance thirty years ago with the publication of John Rawls's *Political*

1 Keith E. Whittington, *Practice-Based Constitutional Law in an Era of Polarized Politics*, 18 GEO. J.L. PUB. POL'Y 227, 234-35 (2020) (summarizing data demonstrating that American discourse is increasingly polarized).

2 *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277-79 (2022).

3 *Id.* at 2348 (Breyer, Sotomayor & Kagan, JJ., dissenting).

4 *See* Students for Fair Admissions v. President and Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).

5 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).

6 *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023).

7 *See, e.g.*, MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 257-304 (2016) (describing the ratification-era debate over slavery).

8 *See* THE FEDERALIST NO. 10 (James Madison) (describing regulation of disagreement as a "principal task" of republican government); *see also* Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) ("Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived, and so dedicated, can long endure.").

Liberalism.[9] Although Rawls's book was addressed primarily to political philosophers, it had the effect of placing "the fact of reasonable pluralism"[10]—the idea that, in a free society, there will inevitably be a pluralism of reasonable opposing moral doctrines—at the center of constitutional-theory discourse.[11] How can we build a stable, just society when it is characterized by deep disagreement about fundamental matters of political morality? It is a question that feels even more urgent in the midst of today's highly polarized social and political environment.

Constitutional theorists have offered two primary responses to the problem of disagreement. One response has been to try to avoid—as much as possible—constructing constitutional theories on the basis of controversial moral truth claims. Instead, these theorists have sought to ground their constitutional theories in social practices that are broadly shared within American society,[12] such as the idea that clear constitutional text is binding on judges.[13] We might say that these theorists reject "ideal constitutional theories"—constitutional theories based on moral truth claims about the nature of the human person, the nature of justice, etc. As Rawls observed, such truth claims must ultimately be rooted in moral frameworks (such as Thomism or Kantianism), which are necessarily controversial.[14] The other approach takes the opposite tack. These theorists place little, if any, weight on the practical consideration of whether their ideal theories are compatible with our pluralistic social practices.[15] They are quite content to override any social practices that conflict with their ideal theories.[16] Thus, broadly speaking, one response to the problem of disagreement is to avoid ideal constitutional theory, while the other approach is to spurn practical constitutional theory. These two approaches have been part of the general landscape of constitutional theory for thirty years.

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9 JOHN RAWLS, POLITICAL LIBERALISM (1993).

10 *Id.* at xix. The problems associated with reasonable pluralism are what I mean by "the problem of disagreement" throughout this Article.

11 *See, e.g.*, J. Joel Alicea, *Practice-Based Constitutional Theories*, 133 YALE L.J. 568, 607-15 (2023).

12 *See infra* Section I.A. By "social practice," I mean something like "an activity constituted by the normative understandings, behaviors, and expectations of its participants." Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1112 (2008).

13 *See, e.g.*, DAVID A. STRAUSS, THE LIVING CONSTITUTION 102-05 (2010) (stating that judges should adhere to the text of the Constitution because it serves as "common ground" for disputed constitutional questions).

14 RAWLS, *supra* note 9, at 94, 126-27; *see also infra* Part I. My definition of "ideal" theory differs from the way Rawls and many theorists writing in his wake use the term, as I will discuss in more detail below. *See infra* Part I. I ask the reader to keep my definition in mind throughout the Article.

15 *See infra* Section I.A.

16 *See infra* Section I.A.

Respected constitutional theorists can be found in both camps, and the choice of camp does not depend on traditional dividing lines. There are examples of originalists and non-originalists, as well as conservatives and progressives, in each group. Theorists rejecting ideal constitutional theory include originalists like William Baude and Stephen Sachs,[17] as well as non-originalists like David Strauss.[18] Theorists rejecting practical constitutional theory include those on the political right like Adrian Vermeule[19] as well as those on the political left like Louis Michael Seidman.[20]

Neither response to the problem of disagreement is sound. Constitutional theory requires both moral truth claims and attention to social practices; it requires both ideal and practical theory. And precisely because constitutional theory has to make moral truth claims that are controversial, it is ill-suited to mitigating the problem of disagreement. Rather, the task of mitigating the problem of disagreement falls to *constitutional design*: the practical enterprise of constructing a constitution that can channel disagreements productively, forge consensus among fractious citizens, and produce a stable constitutional order. Thus, my argument is not just that the two dominant responses to the problem of disagreement among constitutional theorists have been wrong; I am arguing that the effort by constitutional theorists to mitigate our disagreements through constitutional theory is fundamentally misconceived. It is not the job of constitutional theory to mitigate our disagreements because the nature of constitutional theory *necessarily* implicates our deepest disagreements.

In making this argument, I want to suggest that one of the major reasons why American constitutional theorists have gone astray is that they have overlooked a constitutional theorist who helps us think more clearly about the problems posed by reasonable pluralism: Cicero. That might sound strange. We (perhaps wrongly) do not often think of ancient societies as characterized by reasonable pluralism,[21] so why would a Roman consul, lawyer, and

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17 *See* Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 827 (2015) (arguing that originalism should not be based on contested theories of legitimacy); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2351-53 (2015) (arguing that originalism should minimize contested normative claims).

18 *See* David A. Strauss, *What Is Constitutional Theory?*, 87 CALIF. L. REV. 581, 582-84 (1999) (arguing that constitutional theories must be based on areas of agreement within a society).

19 *See* Adrian Vermeule, *Beyond Originalism*, THE ATL. (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037 [https://perma.cc/2FPK-VU7K] (arguing for a constitutional theory significantly at odds with current social practices).

20 *See* LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 16-21 (2013) (arguing that Americans do not owe obedience to the Constitution).

21 *See* RAWLS, *supra* note 9, at xxiii-xxv (tracing the origins of political liberalism and religious pluralism to the Protestant Reformation of the sixteenth century).

philosopher who lived more than 2,000 years ago be helpful in thinking through such a seemingly modern problem?

Cicero was deeply interested in the relationship between the ideal and the practical, and his two most important works on constitutional theory—the *Republic* and the *Laws*—explore that relationship.[22] Cicero's concern with ideal and practical constitutional theory stemmed, in part, from his own life; he was one of the very few political philosophers who was also a great lawyer and statesman enmeshed in practical politics.[23] But his concern was also due to the social and political tumult of the era in which he lived: the end of the Roman Republic. Cicero perceived the crises of his day as constitutional crises, and he believed that those crises were partly the result of a failure to appreciate the proper relationship between social practices and moral truth.[24] The haunting specter of the failure of the Roman Republic has long been part of what has motivated American constitutional theorists to think through the problems posed by deep disagreement.[25] Why not, then, consult the writings of the preeminent constitutional theorist of the ancient world who lived and thought through the problems that led to the Roman Republic's fall? After all, that is partly why so many of the Founders looked to Cicero in constructing our Constitution, which makes Cicero particularly relevant to thinking about American constitutional theory.[26]

Indeed, within the broader academy, American constitutional theory scholarship is an outlier in its almost complete lack of engagement with Cicero's work. Cicero's thought "has been enjoying a renaissance in the last two decades" outside the legal academy.[27] Several important recent books by classicists and political theorists have examined Cicero's constitutional

22 *See* JED W. ATKINS, CICERO ON POLITICS AND THE LIMITS OF REASON 4-6 (2013) ("The *Republic* and *Laws* are shaped by attention to the following two sets of contrary concepts: the rational, natural, divine, eternal, and ideally best on one hand, and the human, customary, contingent, historical, particular, and practicable on the other.").

23 *See* WALTER NICGORSKI, CICERO'S SKEPTICISM AND HIS RECOVERY OF POLITICAL PHILOSOPHY 248 (2016) ("It is artificial and wrong . . . to sever Cicero's life as a struggling statesman in the late Republic from his thought.").

24 *See* BENJAMIN STRAUMANN, CRISIS AND CONSTITUTIONALISM: ROMAN POLITICAL THOUGHT FROM THE FALL OF THE REPUBLIC TO THE AGE OF REVOLUTION 57, 150 (2016).

25 *See* YUVAL LEVIN, AMERICAN COVENANT: HOW THE CONSTITUTION UNIFIED OUR NATION—AND COULD AGAIN 79-80 (2024).

26 *See* MICHAEL C. HAWLEY, NATURAL LAW REPUBLICANISM: CICERO'S LIBERAL LEGACY 187-219 (2022); MALCOLM SCHOFIELD, CICERO 2 (2021).

27 JONATHAN ZARECKI, CICERO'S IDEAL STATESMAN IN THEORY AND PRACTICE 2 (2014); *accord* Daniel J. Kapust & Gary Remer, *Introduction*, *in* THE CICERONIAN TRADITION IN POLITICAL THEORY 3, 3 (Daniel J. Kapust & Gary Remer eds., 2021).

theory.[28] Yet, Cicero has been almost entirely neglected by American constitutional scholars.[29]

Thus, my aim is not just to challenge the dominant approaches to thinking about constitutional theory and the problem of disagreement; I also aim to bring Cicero into conversation with American constitutional theorists. These are two independently valuable contributions, and neither should be lost sight of as the Article progresses.

I will make use of Cicero's arguments throughout this Article to challenge the two dominant responses to the problem of disagreement outlined above. In doing so, I will proceed dialectically by first summarizing the view I mean to criticize (Sections I.A and II.A), laying out Cicero's contrary view (Sections I.B and II.B), and then speaking in my own voice to revise and expand on Cicero's arguments and show why his positions are more persuasive than those I critique (Sections I.C and II.C). While Cicero's arguments are the bases for my criticisms of the two positions outlined above, I will supplement and modify his arguments to make them stronger, and I will adapt them to the specific context of American constitutional theory discourse.

I should make clear at the outset that, though I agree with Cicero's core arguments defending ideal and practical constitutional theory, I do not endorse all of Cicero's views,[30] and the reader need not either. For example, Cicero's argument in favor of the ideal leads him to propose natural law as the moral framework for constitutional theory.[31] What matters for my purposes here are his arguments that such a moral framework is *necessary* for constitutional theory, not the particular moral framework he adopts. Readers who have a different understanding of law (such as legal positivists) or a different moral framework (such as consequentialists) can, I believe, accept Cicero's core arguments (as I have elaborated them) in favor of ideal and practical theory.[32]

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28 *See, e.g.*, HAWLEY, *supra* note 26; STRAUMANN, *supra* note 24; ATKINS, *supra* note 22.

29 There are a few exceptions. *See, e.g.*, Jack Ferguson, *The Ciceronian Origins of American Law and Constitutionalism*, 48 HARV. J.L. & PUB. POL'Y (forthcoming 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4892494 [https://perma.cc/29CP-JVAA]; Robert S. Walker, *The Stoic Ethos of Law & Equity: Good Faith, Legal Benefaction and Judicial Temperament*, 22 RUTGERS J.L. & RELIGION 346 (2022); Jeremy N. Sheff, *Jefferson's Taper*, 73 SMU L. REV. 299 (2020); Patrick McKinley Brennan, *An Essay on Christian Constitutionalism: Building in the Divine Style, for the Common Good(s)*, 16 RUTGERS J.L. & RELIGION 478, 485-89 (2015); MARY ANN GLENDON, THE FORUM AND THE TOWER 23-41 (2011).

30 *See infra* notes 143 & 151.

31 *See infra* Section I.B; ATKINS, *supra* note 22, at 11.

32 Richard Fallon, for instance, is a Hartian legal positivist who also defends the need for ideal theory. *See* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 24-35 (2018).

Nor does a reader have to adopt a particular constitutional methodology (such as originalism or living constitutionalism) to accept my arguments. As discussed below, the problem of disagreement arises primarily in *choosing* a methodology because the choice of methodology is a moral one.[33] My goal in this Article is to correct what I see as errors in thinking about *how* to choose a constitutional methodology;[34] I do not argue here in favor of any particular methodology.

Rather, like Cicero, I argue that a plausible constitutional theory needs to have both ideal and practical dimensions. In Part I, I contend that constitutional theory needs moral frameworks because constitutional theories make moral claims about how judges ought to resolve constitutional disputes, which means we need some standard for moral evaluation.[35] But that standard cannot be drawn from our social practices without either creating an is/ought problem (by deriving a normative conclusion from descriptive premises)[36] or presupposing controversial moral premises—that is, without presupposing the kind of moral framework that the practice-based theory was designed to avoid.[37] If we accept that constitutional theories are based on moral principles, and if we acknowledge that we need an objective moral standard (rather than contingent social practices) by which to distinguish better from worse moral principles, then we need to know what the best—the ideal—moral principles undergirding a constitutional theory would be.[38]

At the same time, as I argue in Part II, a plausible constitutional theory must attend to practical considerations. Insofar as an ideal constitutional theory seeks to achieve what is good for a society, it must take into account the harm done by wiping away non-ideal social practices.[39] Otherwise, the effort to attain the ideal could undercut the very good that the ideal aims to achieve. A plausible constitutional theory must, therefore, rely on a moral framework that can justify and account for situations in which non-ideal

33 *See infra* Part I.

34 *See, e.g.*, CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 8-9 (2023) (arguing that judges should choose the theory of constitutional interpretation "that would make the American constitutional order better rather than worse"); Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 538-39 (1999) (arguing that judges should choose a constitutional theory that "yield[s] the best outcomes" based "at least partly on considerations that are external to the constitutional text").

35 *See infra* Part I; *see also* J. Joel Alicea, *The Moral Authority of Original Meaning*, 98 NOTRE DAME L. REV. 1, 10-13 (2022); Fallon, *supra* note 34, at 545-49.

36 *Cf.* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 134 (1993) (making a similar point about Rawls's theory). Although the is/ought distinction remains controversial in ethics, there is good reason to think it is valid in this context. *See* Alicea, *supra* note 11, at 581 n.85.

37 *Cf.* GEORGE, *supra* note 36, at 137-39 (making a similar point about Rawls's theory).

38 *See infra* Section I.C; subsection I.D.1.

39 *See infra* Section I.C; subsection I.D.1.

social practices should be tolerated.[40] Social practices are ultimately accountable to ideal constitutional theories and to the moral frameworks undergirding those theories, but social practices are a relevant input to the moral calculus.[41]

If constitutional theory should neither dispense with moral frameworks nor run roughshod over non-ideal social practices, how is it to mitigate the problems posed by reasonable pluralism? The answer, as I will suggest in Part III, is that it cannot do so effectively. Because constitutional theory needs moral truth claims, it is not suited to the task of ameliorating the problems caused by disagreement about moral truth claims. Rather, that is the task of *constitutional design*: the practical enterprise of constructing a constitution that can channel disagreements productively, forge consensus among fractious citizens, and produce a stable constitutional order.[42] A paradigmatic example of constitutional design is the Constitutional Convention, and our Constitution was expressly designed to mitigate the problem of disagreement.[43] By contrast, constitutional theory (at least the branch of theory on which I focus in this Article) is the enterprise of justifying a methodology for resolving constitutional disputes. I will make the distinction between constitutional theory and constitutional design clearer in Part III. For now, suffice it to say that a principal reason why so many constitutional theorists have gone awry in responding to the problem of disagreement is that they have attempted to give a constitutional-theory answer to what is primarily a constitutional-design problem, which can only cause confusion.

If I am right, then a great deal of constitutional theorizing since the publication of *Political Liberalism* has rested on a mistaken understanding of what a sound constitutional theory requires and of the role of constitutional theory in responding to the problem of disagreement. Our profound disagreements about justice and the good society are a significant threat to the continuity of our constitutional order, but constitutional theory cannot save us. Only by acting within our constitutional design can we as citizens—not as theorists—potentially mitigate the problem of disagreement.

I. IDEAL CONSTITUTIONAL THEORY

Constitutional theory has to reckon with the fact of reasonable pluralism because the main branch of constitutional theory—normative constitutional theory—proposes methodologies for resolving constitutional disputes (such as originalism or common-law constitutionalism) and offers justifications for

40 *See infra* Section I.C; subsection I.D.1.

41 *See* Alicea, *supra* note 11, at 607-15.

42 *See* LEVIN, *supra* note 25, at 1-4.

43 *Id.*

why we ought to adopt such methodologies.[44] We might call a theory that proposes a methodology and offers a justification for that methodology a theory of constitutional adjudication.[45] By arguing that a particular theory of constitutional adjudication *ought* to be adopted, a constitutional theorist makes a normative claim, which means the theorist has to provide a moral argument to justify that claim.[46]

To be clear, I am not saying that constitutional theories necessarily require bringing a judge's moral views to bear *in deciding cases* (a proposition that I reject); I am saying that constitutional theories necessarily require bringing a judge's moral views to bear *in choosing a methodology* for deciding cases.[47] For example, originalists tend to argue that their methodology does not require judges to bring their moral views to bear in deciding cases, but even if that is true, originalists *do* have to bring their moral views to bear *in choosing originalism* over its competitor methodologies.[48] And given the fact of reasonable pluralism,[49] any moral argument that requires accepting controversial premises will run into deep disagreement.

Ideal constitutional theory requires accepting such premises. Ideal constitutional theory makes truth claims about questions like the nature of the human person, what is good for human beings, and, thus, what political and legal principles are *most* conducive to human flourishing. Such truth claims require a moral framework, such as natural-law theory, that allows the claims to be justified and internally consistent. These frameworks aim at a moral ideal, which is why I call constitutional theories premised on moral frameworks "ideal constitutional theories."[50] Rawls called such moral frameworks "comprehensive doctrines"[51] and acknowledged that moral truth claims require moral frameworks.[52] Natural-law theory, for example, is a

44 *See* FALLON, *supra* note 34, at 545-49; Strauss, *supra* note 18, at 586-88. As I will discuss in Section I.C, some constitutional theories are purely descriptive, not normative, and I do not address those in this Article.

45 *See* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1823-25 (1997) (defining constitutional adjudication as a theory that determines what role the Constitution's meaning should play in decision making).

46 *See* FALLON, *supra* note 34, at 545-49; Strauss, *supra* note 18, at 586-88.

47 *See* J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1771 (2021).

48 Andrew Coan, *What Is the Matter with* Dobbs*?*, 26 U. PA. J. CONST. L. 282, 285 & n.14 (2024); Alicea, *supra* note 35 at 10-13.

49 Of course, what counts as reasonable—as opposed to unreasonable—disagreement is itself a source of reasonable disagreement. *See* Abner S. Greene, *The Fit Dimension*, 75 FORDHAM L. REV. 2921, 2933-34 (2007).

50 *See* FALLON, *supra* note 32, at 24-35.

51 RAWLS, *supra* note 9, at xviii.

52 *Id.* at 9, 126-27.

moral framework that some constitutional theorists adopt.[53] It is a moral framework because it makes truth claims about what is good for human beings and how they ought to decide what to do when confronted with alternative courses of action. Because the claims made by moral frameworks like natural-law theory are controversial, they implicate reasonable pluralism.

I should clarify here that I am using "ideal theory" and "ideal constitutional theory" differently than many (though not all)[54] political and constitutional theorists do today. My understanding of these terms tracks the way ancient political theorists like Plato (or, as we will see, Cicero) might have understood the terms had they described "ideal theory": as an attempt to discern what is *true*. Like Plato's *Republic*, ideal theory is concerned with questions like the nature of justice and the most just regime.[55] By contrast, Rawls and many others use "ideal theory" to refer to "a moral or political theory that satisfies a condition of 'full compliance' or 'strict compliance.'"[56] While there is obviously overlap between a theory that is concerned only with what is true and a theory that assumes full compliance with the dictates of the theory, the two definitions are not coterminous,[57] and I would ask the reader to keep my usage in mind below.

With that understanding of ideal theory in mind, we can see why, since the advent of modern constitutional theory, many theorists from across the jurisprudential and ideological spectrum have sought to avoid it. As shown in Section I.A below, originalists and non-originalists—as well as those on the political right and the political left—have tried to construct theories of constitutional adjudication that are rooted in broadly shared moral views imbedded in our social practices, without having to make controversial truth claims (or at least in ways that seek to minimize such claims).[58]

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53 *See generally, e.g.*, LEE J. STRANG, ORIGINALISM'S PROMISE: A NATURAL LAW ACCOUNT OF THE AMERICAN CONSTITUTION (2019) (using natural-law theory to justify originalism).

54 For example, my usage tracks the way Atkins uses "ideal theory." *See* ATKINS, *supra* note 22, at 61-64.

55 *Id.* at 96-99.

56 Lawrence B. Solum, *Constitutional Possibilities*, 83 IND. L.J. 307, 309 (2008); *see also* JOHN RAWLS, A THEORY OF JUSTICE 7-8, 215-16 (rev. ed. 1999).

57 For example, Rawls is clearly an ideal theorist under his definition of ideal theory. *See* RAWLS, *supra* note 56, at 7-8, 215-16. But he occupies an ambiguous position under my definition. While Rawls is like Plato and Cicero in affirming the need for a theory that can serve as a model to which our practices can aspire, *id.* at 216, he is unlike Plato and Cicero (and placed outside of my definition of ideal theory) in his effort—unique in the history of political thought—to construct a model theory of justice without making moral truth claims, *see* RAWLS, *supra* note 9, at xxii, 48-54, 94, 394-95.

58 I do not claim that all the theorists described below or those discussed in Part II think of themselves as responding to the fact of reasonable pluralism or as adopting one of the approaches outlined below. Michael Stokes Paulsen, for instance, does not seem to think of his theory as having any relationship to the problem of disagreement, even though it does. *See infra* Section II.A; Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 296-

That approach to the problem of disagreement is mistaken. As Cicero demonstrates, once we acknowledge that constitutional theory requires making normative claims (as the theorists discussed in this Part do), we need a moral framework—an *ideal*—to distinguish between better and worse normative claims. Any plausible constitutional theory must include ideal constitutional theory.

A. *The Flight from Ideal Constitutional Theory*

Robert Bork was one of the first modern constitutional theorists,[59] and his work reflects the flight from ideal theory among many modern theorists. Bork saw the task of constitutional theory as resolving what he called the "Madisonian dilemma."[60] The dilemma is that the Constitution neither sanctions pure majority rule nor deprives majorities of their right to rule. Instead, it marks off "some areas of life a majority should not control" while empowering the majority to set policy in others.[61] The Supreme Court, in resolving constitutional disputes, is placed in the position of "defin[ing] both majority and minority freedom."[62] To carry out this task, the Court needs "a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom."[63] Such a theory would, of necessity, make normative choices, but Bork thought it was crucial that those normative choices come from the Constitution itself, be defined in a morally neutral manner, and be applied in a morally neutral manner.[64] Bork contended that only originalism could satisfy these criteria.[65]

But what justified this tripartite neutrality requirement? Bork asserted that the neutrality requirement was necessary to maintain the legitimacy of the Constitution and of judicial review,[66] yet he refused to draw his legitimacy arguments from a moral framework. With respect to such "fundamental

97 (2005) (rejecting stare decisis without considering the effect that such a radical approach would have on our social practices in light of our disagreements).

59 *See* Stephen M. Griffin, *What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 493-94, 494 n.4 (1989) (listing Bork among legal scholars who began to develop new methods of constitutional interpretation in the late 1970s and early 1980s).

60 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (1990).

61 Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

62 *Id.*

63 *Id.*

64 *Id.* at 7; BORK, *supra* note 60, at 146-53.

65 BORK, *supra* note 60, at 143.

66 Bork, *supra* note 61, at 4-6.

values,"[67] he argued that "[t]here is no way of deciding these matters other than by reference to some system of moral or ethical values that has no objective or intrinsic validity of its own and about which men can and do differ."[68] In the face of such reasonable pluralism, Bork rejected theories that require "settl[ing] the ultimate questions of the basis of political obligation, the merits of contractarianism, rule or act utilitarianism, the nature of the just society, and the like."[69] Rather, he sought to ground constitutional theory in "history and long custom" that was the product of "consensus."[70] Bork asked, in other words, which theory of constitutional adjudication our longstanding social practices selected *for* us.[71] The result was a constitutional theory that advocated an ostensibly morally neutral methodology grounded in widely shared traditions and customs, without the need to appeal to contested claims of ideal moral theory.

A similar response to the problem of disagreement can be found in the more recent originalist theory of William Baude and Stephen Sachs. Across various writings, Baude and Sachs have shown that, like Bork, their theory is motivated by a desire to avoid having to "solv[e] the problem of political obligation"[72] and other "first-order normative justifications"[73] that have "been debated since long before the Constitution was written."[74] Instead, they seek to rely on "much thinner and more broadly accepted" normative justifications for originalism.[75] Accordingly, they start from the premises that "what counts as law in any society is fundamentally a matter of social fact"[76] and that theories of legal interpretation can *themselves* be "part of our law."[77] They then

67 *Id.* at 8; *see also* ROBERT H. BORK, *Styles in Constitutional Theory*, *in* A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 223, 227 (2008) (arguing that it is not plausible to construct a normative theory that could be generally accepted, so the result will be "the imposition of the judge's merely personal values on the rest of us").

68 Bork, *supra* note 61, at 10.

69 ROBERT H. BORK, *Tradition and Morality in Constitutional Law*, *in* A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 402 (2008).

70 BORK, *supra* note 67, at 235.

71 Alicea, *supra* note 47, at 1763.

72 Sachs, *supra* note 17, at 827.

73 Baude, *supra* note 17, at 2392.

74 Sachs, *supra* note 17, at 827.

75 Baude, *supra* note 17, at 2392.

76 William Baude & Stephen E. Sachs, *Grounding Originalism*, 113 NW. UNIV. L. REV. 1455, 1459 (2019) (quoting Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO *THE CONCEPT OF LAW* 355, 356 (Jules Coleman ed., 2001)).

77 Sachs, *supra* note 17, at 835; *see also* Baude, *supra* note 17, at 2351-52 (arguing that originalism is part of American constitutional law).

argue that our social practices treat originalism as the law.[78] Thus, "so long as we agree that government officials should obey the law"[79]—itself a relatively uncontroversial social fact—government officials must be originalists.

Sachs has not, as I understand him, provided a normative argument for government officials to obey the law,[80] but Baude has suggested that the fact that government officials take an oath to support the Constitution supplies the necessary normative premise for legal obligation.[81] Baude does not consider *why* a government official takes the oath or whether the Constitution is worthy of the oath.[82] All that matters is that the officials have taken the oath.[83] In his view, this fact permits him to bypass deep disagreements about moral frameworks while providing a normative argument in favor of obeying the law.[84] Baude and Sachs, therefore, proceed from a "positivist premise [that] fits within an overlapping consensus among American legal scholars," a consensus "that appeals to the broadest possible audience without requiring too many controversial assumptions."[85]

This desire to avoid relying on moral frameworks is not limited to originalists or theorists on the political right.[86] The same disposition can be seen in David Strauss's non-originalist common-law constitutionalism, often associated with the political left. Like the originalist theorists described above, Strauss observes the pluralism of belief on "ultimate questions about the bases of the authority of the state"[87] and tries to "justify a set of prescriptions about how certain controversial constitutional issues should be decided . . . by drawing on the bases of agreement that exist within the legal culture and trying to extend those agreed-upon principles to decide the cases

78 *See* Sachs, *supra* note 17, at 844-64 (arguing that our legal system accepts the Founders' legal rules as law); Baude, *supra* note 17, at 2365-86 (explaining that the history of higher-order and lower-order American practices together "point toward inclusive originalism").

79 Baude, *supra* note 17, at 2352.

80 Alicea, *supra* note 11, at 578 n.62; Evan D. Bernick, *Eliminating Constitutional Law*, 67 S.D. L. REV. 1, 4-5 (2022). That is not a criticism of Sachs. I am merely pointing out that my critique below does not apply to him if my understanding of his work as being purely descriptive is correct.

81 Baude, *supra* note 17, at 2392-95.

82 *Id.* at 2394-95.

83 *Id.*

84 *Id.* at 2352.

85 Baude & Sachs, *supra* note 76, at 1459.

86 I should note that, although Bork, Baude, and Sachs exemplify the flight from ideal theory, many originalists writing today base their theories on moral frameworks. *See, e.g.*, STRANG, *supra* note 53 (natural-law theory); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 53-86 (2004) (libertarianism).

87 Strauss, *supra* note 18, at 589; *see also* David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L.J. 1717, 1720 (2003) ("The key idea here is Rawls's famous notion of an overlapping consensus.").

or issues on which people disagree."[88] The way to accomplish this task is by "track[ing] existing practices to a significant degree."[89]

Strauss does this by treating the constitutional text and canonical Supreme Court precedents as fixed points around which he builds his theory.[90] First, Strauss argues that judges ought to evolve constitutional meaning over time through a process of common-law, precedent-based adjudication, which Strauss presents as a form of traditionalism.[91] The precedents that acquire widespread acceptance are generally held constant,[92] and future cases are resolved by extending the reasoning of those canonical precedents to new contexts.[93] Second, Strauss argues that the text of the Constitution must constrain judges—at least insofar as the text contains specific rules rather than general standards—because the text provides common ground for resolving otherwise-contestable questions.[94] These practices—respect for canonical cases and adherence to specific constitutional text—provide "common ground among people who otherwise disagree,"[95] and it is that consensus that justifies adherence to them.[96] Like Baude's oath theory, Strauss's consensus-based approach relies on each citizen "fully endors[ing] the common ground arguments" from within their own normative perspectives, rather than taking sides on which normative perspective is correct.[97]

Of course, this summary oversimplifies things. For example, this sketch (and my description of these theorists as responding, consciously or not, to the fact of reasonable pluralism) could lead the reader to equate these theories with Rawls's position. But as I have argued elsewhere, that would be a mistake, since constitutional theorists like Strauss, while inspired by Rawls, deploy Rawlsian concepts and arguments in ways that differ significantly

88 Strauss, *supra* note 18, at 582; *see also* Strauss, *supra* note 87, at 1738-40 ("People who adhere to widely and fundamentally different belief systems, such as different religions, can nonetheless all embrace certain common principles . . . .").

89 Strauss, *supra* note 18, at 586.

90 *Id.* at 584.

91 David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891-97 (1996).

92 *See* Strauss, *supra* note 18, at 584 (explaining that a constitutional theory "cannot contradict any of the points of agreement within the legal culture that are absolutely rock solid"); Strauss, *supra* note 87, at 1733-35 (arguing that the text of the Constitution is a fixed point).

93 Strauss, *supra* note 18, at 584-85.

94 *See* Strauss, *supra* note 87, at 1733-35 ("[H]aving the text of the clauses as the shared starting point at least narrows the range of disagreement."); STRAUSS, *supra* note 13, at 102-04 ("Even if the rules the Constitution prescribes are not the best possible rules, they give us good enough answers to important issues, so that we do not have to keep reopening those issues all the time.").

95 Strauss, *supra* note 87, at 1725.

96 Alicea, *supra* note 11, at 613-22.

97 Strauss, *supra* note 87, at 1739; *see also id.* at 1720 (explaining how Americans with disparate views on the Constitution and the American tradition can accept the common-law approach).

from the way Rawls deployed them, which makes their theories open to criticisms that Rawls could avoid.[98] It also bears emphasizing that all of these theorists acknowledge the necessity of normative arguments in constitutional theory, and none of them can wholly avoid making controversial normative claims. For instance, Bork and Strauss's traditionalism, grounded in epistemological humility, makes a contestable claim about rationalism,[99] and Baude's oath argument, while based on broadly accepted social practices, implicates philosophically controversial moral claims.[100] But in broad terms, the above sketch is accurate; in the face of reasonable pluralism, each theorist seeks to minimize resort to moral frameworks in justifying their constitutional theories, drawing instead on ostensibly widely held beliefs or practices. There is a conventional, socially contingent quality to their normative claims, drawing from the moral commitments of American society rather than grounding their theories in the moral ideal.

B. *Cicero on Ideal Constitutional Theory*

Cicero rejected this conventionalist approach to constitutional theory.[101] He sought to ground constitutional theory in a moral framework, using the ideal as a standard by which to measure the conventional. In this Section, I will describe Cicero's defense of ideal constitutional theory. My goal is primarily expositional. In Section I.C, I will elaborate on and refine Cicero's arguments and apply them to critique the claims of the American constitutional theorists I described in Section I.A.

Before proceeding, it is important to address a few methodological challenges that come with exposition of Cicero's arguments.[102] To begin with,

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98 Alicea, *supra* note 11, at 615-23. It is possible, for example, that a theorist might try to sketch a constitutional theory that is closer to Rawls's views and that could avoid some of the criticisms I offer here. Lawrence Solum has made moves in that direction. *See, e.g.*, Lawrence B. Solum, *Public Legal Reason*, 92 VA. L. REV. 1449, 1450 n.1, 1454 n.6–7 (2006) (arguing that normative legal theory should begin with Rawlsian public reason). Addressing such hypothetical theories is beyond the scope of this Article.

99 Alicea, *supra* note 47, at 1745-50, 1762-63 (grouping Strauss and Bork as anti-rationalist constitutional theorists).

100 *See* Alicea, *supra* note 35, at 12 ("[T]aking and obeying the oath presupposes some prior moral evaluation of the object of one's oath.").

101 Although Cicero did not propose a theory of constitutional adjudication for judges, his arguments are rightly considered constitutional-theory arguments. They advocate a particular way of thinking about the moral legitimacy of a constitution and draw out implications from that legitimacy theory to resolve conflicts between competing constitutional interpretations. *See* STRAUMANN, *supra* note 24, at 46 ("Cicero . . . formulated a set of constitutional norms that . . . were supposed to be . . . superior in case of conflict.").

102 Partly due to these challenges, scholars disagree about how to interpret various aspects of Cicero's thought, and some may disagree with the interpretations I adopt below. But even if I am wrong in how I interpret Cicero, that would not affect whether the constitutional-theory arguments

Cicero's two most important works of constitutional theory[103]—the *Republic*[104] and the *Laws*[105]—are in the style of Platonic dialogues. This makes it more difficult to interpret what Cicero wants the reader to take away from his works.[106] For instance, although Cicero is a character in the *Laws*—which might suggest that his character speaks for him[107]—the same is not true of the *Republic*, where we cannot assume (without further evidence) that any particular character always or usually speaks for Cicero.[108] My approach, following the lead of Jed W. Atkins, will be to attribute views to Cicero only when, after "all relevant factors are considered, the dialogue as a whole endorses the argument in question."[109]

Another challenge is that Cicero was deeply influenced by Plato.[110] To what extent does an interpretation of Cicero depend on analyzing Plato's dialogues as well as other potential influences on Cicero, such as Polybius?[111] We could quickly find ourselves overwhelmed with interpretive problems stemming from the intersection of such complex philosophical works. Because I am interested in the soundness of Cicero's arguments, not their provenance, I will align myself with "the overall direction of Ciceronian scholarship in the last twenty years" by "interpret[ing] Cicero on his own terms," rather than "attempting to unravel the sources of Cicero's ideas."[112]

Finally, and relatedly, Cicero wrote his major works of constitutional theory towards the end of the Roman Republic, and he was clearly responding to some of the constitutional crises that took place during his lifetime,[113] crises

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I make in this Article are correct. It would simply mean that I was wrong to derive them, in part, from Cicero's work.

103 ATKINS, *supra* note 22, at 1.

104 CICERO, *On the Commonwealth*, *reprinted in* ON THE COMMONWEALTH AND ON THE LAWS (James E.G. Zetzel ed., Cambridge Univ. Press 1999) [hereinafter CICERO, *Republic*]. For all classical works, I will employ the standard classical citation method of citing the book within the work and the paragraph number(s).

105 CICERO, *On the Laws*, *reprinted in* ON THE COMMONWEALTH AND ON THE LAWS (James E.G. Zetzel ed., Cambridge Univ. Press 1999) [hereinafter CICERO, *Laws*].

106 ATKINS, *supra* note 22, at 8.

107 *Id.* at 15 & n.7.

108 *Id.* at 33-42.

109 *Id.* at 44.

110 *See* JULIA ANNAS, VIRTUE AND LAW IN PLATO AND BEYOND 167-72 (2017) (describing how Cicero followed Plato's literary model and organization of ideas).

111 *See generally* STRAUMANN, *supra* note 24, at 154-61 (noting similarities between Cicero and Polybius's conceptions of ideal constitutional order); ATKINS, *supra* note 22, at 99-119 (describing how Cicero's writings respond to Plato and Polybius's rationalism).

112 J.G.F. Powell, *Cicero's* De Re Publica *and the Virtues of the Statesman*, *in* CICERO'S PRACTICAL PHILOSOPHY 14, 14-15 (Walter Nicgorski ed., 2012).

113 STRAUMANN, *supra* note 24, at 57, 150 ("What Cicero sought to remedy was the decline of the Republic; the solution he put forward was of a constitutional nature.").

in which he was an important political player.[114] There is a question, then, about the extent to which historical context should figure into our interpretation of Cicero's thought. This is and has long been a major debate in political theory,[115] and I do not take sides on whether works of political philosophy always or usually should be contextualized historically. I do, however, think that there are aspects of Cicero's writings, in particular, that would remain obscure to us without historical context. It would, for example, be hard to understand Cicero's exploration of constitutional theory without knowing something about the Roman constitution, which figures prominently in his writings. While I will not spend significant time situating Cicero in his historical moment, I will incorporate historical context where necessary.

Indeed, historical context is where I will begin. As just noted, Cicero's constitutional theory emerges out of the crisis of the late Republic. This crisis was, at least in part, a constitutional crisis.[116] It was a crisis in which "there existed two rival, mutually exclusive and at least prima facie equally plausible interpretations of the republican constitution, one popular, and one from the senatorial [or optimate] viewpoint."[117]

By "constitution," Cicero had in mind something broader than positive law. A constitution, to the Romans, encompassed not only law but what "we may call political culture": the "established social, legal, and political customs . . . that shape[d] the Roman way of life."[118] These included concepts like "*auctoritas* (authority, influence, guidance), *dignitas* (standing or esteem), *honos* (honor), [and] *gloria* (glory)."[119] So we have to be careful when discussing the Roman constitution to keep in mind that "constitution" connotes something broader than we usually understand that term to mean.

Nonetheless, as Benjamin Straumann has shown, the Roman concept of a constitution *did* include a notion of constitutional law similar to ours today, insofar as Romans acknowledged higher positive laws that were "less malleable than other rules."[120] This is the understanding of a constitution that

114 *See, e.g.*, DAVID SHOTTER, THE FALL OF THE ROMAN REPUBLIC 56-63 (2d ed. 2005) (describing Cicero's response as consul to the Catiline conspiracy).

115 *See* James Hankins, *The Past as Enemy Country: Why Teachers of Great Books Should Be Teaching History, Too*, PUB. DISCOURSE (Aug. 3, 2023), https://www.thepublicdiscourse.com/2023/08/89635 [https://perma.cc/Q6PG-FB6Q] (emphasizing that knowing historical context is critical to understanding Cicero's writings).

116 STRAUMANN, *supra* note 24, at 18.

117 *Id.* at 23 (emphasis omitted).

118 JED W. ATKINS, ROMAN POLITICAL THOUGHT 11-12 (2018).

119 *Id.* at 12.

120 STRAUMANN, *supra* note 24, at 18; *id.* at 36; *see also* HAWLEY, *supra* note 26, at 16 (agreeing with Straumann that Cicero developed a constitution composed of "higher-order" law); ZARECKI, *supra* note 27, at 8 ("[W]e would be correct to speak of a constitution, at least in terms of Roman thought.").

will be of primary interest to us in this Section. Roman constitutional rules (in this narrower, legal sense of a "constitution") were generally the result of gradual, unplanned historical development, and there was no written constitution.[121] Both because of their unwritten character and their historical nature, there was a contingent quality to these constitutional rules, which Cicero believed made them potentially unstable as social convulsions gave rise to competing visions of how the Republic should be constituted.[122] Cicero "appraised the crises and civil wars of the late Republic as conflicts over constitutional interpretation," and believed the source of the problem was the entirely contingent nature of the Roman constitution (both broadly and more legalistically conceived), devoid as it was of any firm grounding.[123] "What Cicero provided, not only in the *Republic* and the *Laws*, but also in *On Duties* (*De officiis*), was a constitutional solution to the fall of the Roman Republic, and this constitutional solution depended on a normative criterion from which politics and ordinary legislation could be judged."[124] It was this need for normative criteria by which traditions, conventions, and contingent constitutional developments could be measured that supplied the rationale for Cicero's defense of moral frameworks in constitutional theory.[125]

We see this clearly in Cicero's famous definition of a *res publica*, or a commonwealth.[126] In the *Republic*, the character Laelius asks his interlocutor, Scipio, to "explain [his] ideas about the commonwealth" and "the best condition of the state."[127] Scipio agrees to take up this task and insists on starting the discussion by defining the thing that will be its subject.[128] But Scipio does not proceed by surveying various commonwealths and seeing

121 T. Corey Brennan, *Power and Process Under the Republican "Constitution*," *in* THE CAMBRIDGE COMPANION TO THE ROMAN REPUBLIC 19, 19 (Harriet I. Flower, ed., 2d ed. 2014); *accord* Jürgen von Ungern-Sternberg, *The Crisis of the Republic*, *in* THE CAMBRIDGE COMPANION TO THE ROMAN REPUBLIC 78, 79-80 (Harriet I. Flower, ed., 2d ed. 2014); TOM HOLLAND, RUBICON 24 (2003).

122 *See* STRAUMANN, *supra* note 24, at 57 ("At least from Sulla onward, Cicero maintains, political struggles tended to find expression in two rival, mutually exclusive interpretations of the constitution, one popular, as in the case of Sulpicius, Cinna, Marius, and Carbo, the other senatorial or optimate, as in the case of Sulla and Octavius.").

123 *Id.*

124 *Id.* at 150.

125 *See* HAWLEY, *supra* note 26, at 16-17 ("The goodness of any political community can be evaluated by the correspondence of its laws and institutions to this universal standard of the natural law."); ZARECKI, *supra* note 27, at 42 ("[Cicero was] concerned with the methods by which this new philosophical morality can be safely combined with traditional Roman customs and values.").

126 "*Res publica*" can be translated in different ways, but it is common to translate it as "commonwealth." SCHOFIELD, *supra* note 26, at 47; ATKINS, *supra* note 22, at 139; CICERO, *Republic*, *supra* note 104, at 1.34.

127 CICERO, *Republic*, *supra* note 104, at 1.34.

128 *Id.* at 1.35.

what they all have in common, in the manner of a sociologist.[129] This point does not escape Laelius's notice, who expresses frustration with Scipio's method.[130] Scipio instead offers a *normative* definition, an ideal conception of a *res publica*: "the commonwealth is the concern of a people, but a people is not any group of men assembled in any way, but an assemblage of some size associated with one another through agreement on law and community of interest."[131] Scipio uses this definition in his subsequent analysis as a standard by which various regimes are measured.

In defining a commonwealth, Scipio actually gives us two definitions: one for a *res publica* and another for "a people."[132] *Res publica* means something like "'the people's business' or 'the affairs and interests of the people,'" so that it "is not far removed in sense from talk in Greek political philosophy of 'the common good/advantage' (as in Aristotle), and still closer to the expression 'the common affairs of the multitude'" (as in Polybius).[133] The word *res* evokes notions of property, such that one way of understanding Scipio's definition of *res publica* is as a claim that the people *own* or have *rights with respect to* their common affairs or common good.[134] In this sense, Cicero[135] wants his definition of *res publica* to "register the claim that sovereignty in a *res publica* is vested in the people," regardless of whether the form of government is democratic.[136]

Scipio's definition of a *res publica* presupposes a "people," and Scipio is clear that a people is not merely "any group of men assembled in any way" but, rather, "an assemblage of some size associated with one another through agreement on law and community of interest."[137] It is not enough that a group of people happen to live in the same place or share a common history; there must be an *agreement* among them on certain basic principles if they are truly to be united in a common enterprise.[138] "Cicero's definition entails . . . that

129 *Id.*

130 *See, e.g.*, *id.* at 1.31, 1.57b.

131 *Id.* at 1.39a.

132 *Id.*

133 SCHOFIELD, *supra* note 26, at 49.

134 *Id.* at 51-52; ATKINS, *supra* note 22, at 131-33; CICERO, *Republic*, *supra* note 104, at 3.45 n.57. This point did not escape the Founders. *See* JOHN ADAMS, *Defence of the Constitutions*, *in* 5 THE WORKS OF JOHN ADAMS 297 (1856), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2103/Adams_1431-05_EBk_v6.0.pdf [https://perma.cc/XX87-F4YT] ("*[R]es publica*, therefore, was public res, the wealth, riches, or property of the people.").

135 It is commonly understood that Scipio's definition of a *res publica* is Cicero's own definition. *See, e.g.*, SCHOFIELD, *supra* note 26, at 49.

136 *Id.*; *accord id.* at 51-52, 57 n.68, 65; HAWLEY, *supra* note 26, at 41-43.

137 CICERO, *Republic*, *supra* note 104, at 1.39a.

138 Scipio's definition is describing a people as a political community (like the nation of France), not a people as a social group (like the French people). Social groups (like friendships) can exist apart from agreement on (and even in the absence of) law.

citizens do not form a true *populus* in possession of their *res* unless they are united in *consensus* and shared benefit."[139] And the object of their consensus is critical. They are to have a "*iuris consensus*," which is susceptible to translation as a consensus on, variously, "law/justice/rights."[140]

These three understandings of *ius* can be reconciled in the following way. *Ius* as understood in the late Republic meant "a body of (often non-statutory) law more firmly entrenched and of a higher order than mere legislation."[141] So let us begin by translating *ius* in this context as "law," which is common among Cicero scholars,[142] and more specifically, let us, like Straumann, interpret *ius* as a form of higher-order and entrenched law, what we would recognize as constitutional law. If this understanding of *ius* is what Cicero intended,[143] then agreement on *ius* is "agreement about a body of constitutional rules."[144] Seeing *ius* as a form of constitutional law in this context accords with Scipio's project. Scipio conceives of a commonwealth as "a type of partnership or enterprise and, as such, governed by law which serves as its bond."[145] So *ius* here means a more fundamental kind of law that unites the people, regardless of whether that law is written or unwritten. "Without the unifying constitutional agreement, the *vinculum iuris*, the people are but a multitude, a crowd, and there can consequently be no *res publica*. Without an agreed upon body of constitutional norms, without *ius*, there cannot exist a state in the proper sense."[146]

But if the commonwealth is a partnership, then "members of any such partnership must possess something in the same degree if the association is to be secure and enduring,"[147] which means that—insofar as constitutional law is the shared thing—it must be enjoyed equally by all. "[W]hat members of the partnership share equally" is "their status under the law," which is to say

139 SCHOFIELD, *supra* note 26, at 58 n.77.

140 ATKINS, *supra* note 22, at 134; *see also* Elizabeth Asmis, *The State as a Partnership: Cicero's Definition of "Res Publica" in His Work "On the State,"* 25 HIST. POL. THOUGHT 569, 578 (2004) (describing "ius" as "accommodat[ing] many subdivisions of meaning," including "a contrast between natural and conventional justice" and "right/law").

141 STRAUMANN, *supra* note 24, at 171.

142 SCHOFIELD, *supra* note 26, at 66-67; CICERO, *Republic*, *supra* note 104, at 3.45; Asmis, *supra* note 140, at 575, 579.

143 I am relying here on Straumann's account of the historical meaning of *ius* in the Roman Republic to understand what Cicero meant. I take no position on the way in which *ius* has been understood philosophically in the natural-law tradition, especially post-Aquinas, or how it *should* properly be understood. *See* Jeffrey A. Pojanowski & Kevin C. Walsh, *Recovering Classical Legal Constitutionalism: A Critique of Professor Vermeule's New Theory*, 98 NOTRE DAME L. REV. 403, 411-13 (2022) (critiquing Vermeule's conception of *ius*).

144 STRAUMANN, *supra* note 24, at 171.

145 ATKINS, *supra* note 22, at 137; Asmis, *supra* note 140, at 580-82.

146 STRAUMANN, *supra* note 24, at 178.

147 ATKINS, *supra* note 22, at 137; *accord* Asmis, *supra* note 140, at 580-82.

"their rights as citizens."[148] Scipio makes this connection explicit, stating that "law is the bond of civil society, and rights under law are equal."[149] The rule of law, therefore, becomes central to Scipio's understanding of a people and, further, of a commonwealth: there must be equal rights under law if a true *res publica* is to form, rather than a mere assemblage of individuals subject to the commands of a superior. The rights Scipio describes "attach to the individuals as citizens and reflect their status as lawful members of the partnership, that is, of the *res publica*."[150] Agreement on constitutional law thus means agreement on rights as an implication of shared subordination of the people to the same fundamental law.[151]

Yet, as Cicero makes especially clear in the *Laws*, the constitution that serves as the basis for the people's agreement (and for their rights as citizens) cannot merely be the product of convention or stipulation. If the definition of a commonwealth is to serve its purpose as a measure of regimes, agreement on constitutional principles cannot mean agreement on *unreasonable* or *morally wrong* constitutional principles. The constitution must be founded on the *best* principles. When, in the *Laws*, Atticus asks Cicero's character (as the central character of the dialogue) to expound on the best laws, Cicero responds by framing his inquiry as aiming to "preserve and protect that form of commonwealth which Scipio showed was the best."[152]

Just as he began his investigation into the best commonwealth by defining a commonwealth, Cicero begins his investigation into the best laws by defining law: "law is the highest reason, rooted in nature, which commands things that must be done and prohibits the opposite."[153] Elaborating a bit farther on, he says: "law is a power of nature, it is the mind and reason of the prudent man, it distinguishes justice and injustice."[154] Because law "distinguishes justice and injustice," Cicero has to inquire further into the nature of justice, and his argument aims to prove that "we are born for justice and that justice is established not by opinion but by nature."[155] The specifics of that (rather important) argument need not detain us given our limited

148 ATKINS, *supra* note 22, at 137.

149 CICERO, *Republic*, *supra* note 104, at 1.48.

150 ATKINS, *supra* note 22, at 137; *accord* Asmis, *supra* note 140, at 590.

151 *See* STRAUMANN, *supra* note 24, at 172 & n.88. Cicero has a "somewhat ambiguous" understanding of the grounds for rights. HAWLEY, *supra* note 26, at 49. He rejects the view that they are entirely conventional, but he also arguably rejects the view that they are derived directly from natural law. *Id.* In any event, if my interpretation is correct and Cicero sees rights as flowing from a polity's constitution but requires that the constitution be consistent with natural law, it would seem that a constitution could not reject or recognize rights in a way that is inconsistent with natural law. *See* STRAUMANN, *supra* note 24, at 172 & n.88; ATKINS, *supra* note 22, at 138-44.

152 CICERO, *Laws*, *supra* note 105, at 1.20, 1.37, 2.23.

153 *Id.* at 1.18.

154 *Id.* at 1.19.

155 *Id.*; *id.* at 1.28.

purpose here. What matters is that after developing his argument regarding the nature of justice, Cicero concludes:

> Those who have been given reason by nature have also been given right reason, and therefore law too, which is right reason in commands and prohibitions; and if they have been given law, then they have been given justice too. All people have reason, and therefore justice has been given to all . . . .[156]

Put another way: law is right reason;[157] right reason identifies what is just; reason is part of our nature; therefore, both law and justice are rooted in human nature.[158] That is, Cicero grounds the concept of law in an account of natural law.[159]

Cicero then turns to "resist[ing] the conventionalist suggestion that agreement by itself makes something just and that any agreement about justice can form a commonwealth."[160] Instead, he argues that "[t]he laws of the commonwealth have to be evaluated by the just standard of natural law; they are not themselves the standard."[161] In Cicero's view, "[t]he most stupid thing of all . . . is to consider all things just which have been ratified by a people's institutions or laws."[162] Indeed, "[i]f justice were determined by popular vote or by the decrees of princes or the decisions of judges, then it would be just to commit highway robbery."[163] Rather, "[t]here is only one justice, which constitutes the bond among humans, and which was established by the one law, which is right reason in commands and prohibitions."[164] This

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156 *Id.* at 1.33.

157 *See* HAWLEY, *supra* note 26, at 24.

158 *See* CICERO, *Laws*, *supra* note 105, at 1.35 ("[H]ow could we separate laws and justice from nature?"); *id.* at 2.13 ("Law, therefore, is the distinction between just and unjust things, produced in accordance with nature . . . .").

159 ATKINS, *supra* note 22, at 11. On the relationship between Cicero's account of natural law and the natural-law theories of later thinkers, such as Aquinas, see HAWLEY, *supra* note 26, at 23 (claiming that Cicero's writings are the "most complete extant classical account of the natural law doctrine and perhaps the most influential in the history of political thought"); NICGORSKI, *supra* note 23, at 135 n.37, 139 n.51 (similar).

160 HAWLEY, *supra* note 26, at 29; *see also id.* at 44 ("[T]he people must agree about what justice is . . . . But it is not enough to consent to just any set of laws and institutions."); NICGORSKI, *supra* note 23, at 108 (describing Cicero's view that "nature's way," rather than agreement, defines what is just).

161 HAWLEY, *supra* note 26, at 29; *see also* NICGORSKI, *supra* note 23, at 107; STRAUMANN, *supra* note 24, at 52-53, 168 (arguing that "natural law, not mere custom or the 'way things happened to be done,' provides the ultimate criterion" for laws developing "normative force").

162 CICERO, *Laws*, *supra* note 105, at 1.42; *see also* Jill Harries, *The Law in Cicero's Writings*, *in* THE CAMBRIDGE COMPANION TO CICERO 107, 116 (Catherine Steel ed., 2013) (describing Cicero's view that human law could be incompatible with justice).

163 CICERO, *Laws*, *supra* note 105, at 1.43.

164 *Id.* at 1.42.

understanding of law resonates with—while still refining—the understanding of "[t]rue law" that Laelius describes in the *Republic* as "right reason, consonant with nature, spread through all people."[165] Like Cicero in the *Laws*, Laelius rejects a conventionalist approach to the basis of law, arguing that "[t]here will not be one law at Rome and another at Athens, one now and another later; but all nations at all times will be bound by this one eternal and unchangeable law."[166]

Thus, Cicero proposes a definition of a "people" united in agreement on constitutional law, from which we determine the rights of citizens, and proposes that constitutional law, in order to be law in the fullest sense of that word, must accord with reason and justice.[167] That does not mean that the people must agree on what justice *is*, only that the constitutional law on which they agree must *accord with* justice rightly understood.[168] In this sense, the *ius* in *iuris consensus* refers directly or indirectly to law, rights, and justice simultaneously. A people united on *ius* will have a commonwealth aiming at justice and guided by right reason. Their laws as well as their commonwealth will be directed towards the common good.

Cicero, then, sees moral frameworks as necessary "for judging the legitimacy of different forms of government" and for resolving constitutional disputes,[169] and he constructs his definition of a *res publica* to achieve this adjudicatory purpose.[170] To divorce constitutional law (and the rights attendant to it) from reason and justice would be to sanction a regime that has no objective moral foundation, and that leaves it with no standard apart from convention by which to adjudicate among constitutions and competing understandings of a constitution.[171] In response to the crisis of the late Republic, Cicero put forward "the concept of a constitution founded, in the last resort, on objective natural law,"[172] and by doing so, "formulated a set of constitutional norms" that were "more firmly entrenched than mere normal legislation and superior in case of conflict."[173]

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165 CICERO, *Republic*, *supra* note 104, at 3.33.

166 *Id.*

167 Asmis, *supra* note 140, at 588-89 (defining *res publica* and *res populi*).

168 Here, I agree with Schofield and Atkins, who do not regard Cicero as requiring agreement on justice, rather than with Hawley, who could be interpreted as taking the opposite view. *Compare* SCHOFIELD, *supra* note 26, at 67-68 (explaining that "the emphasis" in Cicero's writings "is on the *existence* of justice as binding force, not agreement about it"), *and* ATKINS, *supra* note 22, at 128-52 (similar), *with* HAWLEY, *supra* note 26, at 16-17 (stating that Cicero believed "people are bound together by a common acceptance of the principles of justice").

169 SCHOFIELD, *supra* note 26, at 49.

170 *See* STRAUMANN, *supra* note 24, at 46, 57; *see also* NICGORSKI, *supra* note 23, at 107.

171 *See* STRAUMANN, *supra* note 24, at 149-51 ("[Cicero's] constitutional order implies a pre-political moral order, which gives the constitutional rules their validity.").

172 *Id.* at 53.

173 *Id.* at 46.

C. *Elaboration and Application*

Cicero's argument begins with an inquiry into the best constitution, and once we are asking what is "best," we need some standard by which to distinguish and order various alternatives. That is why he constructs his definition of a *res publica*.

American constitutional theory is likewise concerned with what is "best" (i.e., the most sound, most correct, most true).[174] As noted above, in normative constitutional theory, in which a theorist proposes a method for resolving constitutional disputes and a justification for that method, the standard for distinguishing among and judging various theories is a moral one.[175] We could not use a descriptive standard to judge among various theories and derive a normative conclusion about how judges ought to decide cases, since that would lose sight of the is/ought distinction.[176] For example, we could not make the descriptive claim that a particular constitutional theory best accords with our social practices and—absent some normative premise(s)—derive the normative conclusion that judges ought to adhere to that theory.[177] Insofar as American constitutional theorists are engaged in an argument about the constitutional theory that judges ought to adopt because it is the "best" theory, they need some normative standard for evaluating competing theories.[178]

That is, of course, if one accepts my framing of the purpose of constitutional theory; some theorists might not. One might, for instance, argue that the purpose of constitutional theory is purely descriptive: it seeks to describe the American constitutional order's actual operation, rather than prescribe how the American constitutional order should function.[179] Or it might simply be aimed at identifying what the law is, without prescribing how constitutional disputes ought to be resolved.[180] Many constitutional

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174 Alicea, *supra* note 47, at 1719-20; *see also* Strauss, *supra* note 18, at 582-83 (suggesting that constitutional theory is "an exercise in justification").

175 Alicea, *supra* note 35, at 10-13. *See generally* Francisco J. Urbina, *Reasons for Interpretation*, 124 COLUM. L. REV. 1661 (2024).

176 Alicea, *supra* note 11, at 579-82.

177 *Id.* at 581-82.

178 *See, e.g.*, FALLON, *supra* note 32, at 27-29 (evaluating constitutional theories by whether they are "just," "fair," and have "moral and political legitimacy").

179 *See, e.g.*, Mitchell N. Berman & David Peters, *Kennedy's Legacy: A Principled Justice*, 46 HASTINGS CONST. L.Q. 311, 322-39 (2019) (offering a descriptive account of constitutional law); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 243-49 (1982) (disclaiming the need for normative theory and instead grounding constitutional theory in an accurate description of modalities of constitutional argument). *But see* Fallon, *supra* note 34, at 541 n.13 (arguing that Bobbitt intends to offer a normative theory).

180 *See, e.g.*, Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J.L. & PUB. POL'Y 485, 490-91 (2008) ("[Originalism] should not be

theorists pursue such projects, and I do not diminish their importance. But I think it is fair to say that most constitutional theorists make arguments about how judges *ought* to approach cases, not just arguments about how judges *do* approach cases or about what the law is without regard to whether or how it should be applied.[181] And that "ought" requires a moral argument.[182]

Another objection would be to deny the possibility of moral truth or of our ability to discern it, such that a normative inquiry into the "best" constitutional theory would be either nonsensical or fruitless. Moral relativism has seen a decline in the academy,[183] but for my limited purposes here, we can bracket the relativistic position in our discussion, since most constitutional theorists (including those who reject ideal constitutional theory) are not moral relativists.[184] Take the three theorists discussed above as examples. Strauss argues that judges should reject some precedents when they are "quite confident" that the precedent "is morally wrong."[185] Baude and Sachs seem to disclaim moral relativism.[186] Bork likewise disclaimed moral relativism and affirmed the existence of natural law, even though he saw little or no role for it in constitutional theory.[187] At the very least, then, those theorists with whom I am engaging appear to agree that moral truth exists and is identifiable in some circumstances.

That does not mean, however, that they agree that moral truth should be the standard by which we judge the best constitutional theory. Rather, as described above, these theorists propose a conventionalist approach to evaluating constitutional theories. Cicero explains why we should reject the conventionalist approach. We cannot make the social practices of our society the normative standard by which we judge constitutional theories because we

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tied to controversial normative arguments that have more to do with whether we ought to adhere to the rules found in the original Constitution.").

181 *See* Alicea, *supra* note 47, at 1730-31 ("[T]he overall goal of constitutional theory [is] describing and justifying the correct methodology of constitutional adjudication.").

182 *See* Alicea, *supra* note 35, at 10-13 ("[M]oral arguments are necessary to support constitutional theories."). *See generally* Urbina, *supra* note 175 (discussing why normative and moral reasoning matters in evaluating constitutional theories).

183 GEORGE, *supra* note 36, at 3.

184 *See, e.g.*, FALLON, *supra* note 32, at 29-30 (rejecting relativism). The ultimate success of my argument would require showing moral relativism to be incorrect, but that is a much larger task than I can undertake here. It is, in any event, one that many others have already undertaken. *See, e.g.*, JAMES RACHELS, *The Challenge of Cultural Relativism*, *in* THE ELEMENTS OF MORAL PHILOSOPHY 20, 23 (3d ed. 1999) (arguing against moral relativism).

185 Strauss, *supra* note 91, at 894-95.

186 *See* William Baude & Stephen E. Sachs, *The "Common-Good" Manifesto*, 136 HARV. L. REV. 861, 883 (2023).

187 *See* ROBERT H. BORK, *Natural Law and the Constitution*, *in* A TIME TO SPEAK: SELECTED WRITINGS AND ARGUMENTS 305, 305-14 (2008) ("It is quite possible, indeed quite sensible, to think that there are moral truths but that statutes and constitutions have standing as law, law to be applied by judges and enforced by the police, only because the authorities have said so.").

have no reason, in principle, for believing that those social practices are *true* or *just*. They might very well be deeply *unjust*. "If justice were determined by popular vote or by the decrees of princes or the decisions of judges, then it would be just to commit highway robbery."[188] It is not enough that certain moral principles are *our* moral principles; they must also be *correct* moral principles.[189] It is possible, for instance, that *Plessy v. Ferguson* was at one point in our history deeply embedded in our social practices,[190] but to base our normative standard on such a social practice *simply because* it was our social practice would have led to a deeply unjust constitutional theory.[191]

If we are going to make moral truth—rather than social convention—the normative standard for judging among constitutional theories,[192] then the remaining question becomes how to identify moral truth. Baude's oath argument suggests one possibility: identify a moral principle that almost all people have a firm conviction is true (i.e., we ought to obey our oaths), such that we can both (a) have great confidence in its truth and (b) avoid implicating disagreements about deeper moral premises.[193] In this way, perhaps we can bypass controversial moral propositions while still supplying a moral truth claim that can serve as the normative basis for a constitutional theory.[194]

I agree that it is possible to identify some moral principles as true based on widely shared pre-theoretical convictions. Indeed, moral reasoning would

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188 CICERO, *Laws*, *supra* note 105, at 1.43.

189 *See* GEORGE, *supra* note 36, at 134 ("Rational people in the real world care about their beliefs not because their beliefs are *theirs*, but rather because their beliefs are (they suppose) *true* . . . ."). On Cicero's reconciliation of what is *ours* and what is *true*, see Jed W. Atkins, *Patriotism and Cosmopolitanism in Cicero's* De Officiis, *in* CICERO'S *DE OFFICIIS*: A CRITICAL GUIDE 203, 205-10 (Raphael Woolf ed., 2023).

190 Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 412-17 (2011) ("[S]egregated public accommodations were considered by many, including seven of the eight *Plessy* Justices, to be a feature of the *social* order."); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 302-08 (2004) (describing the *Brown* Justices' internal struggles with legal arguments condemning segregation given its apparent roots in social practices relating to law); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 169 (1999) (discussing the "deeply embedded political practice[s]" underpinning *Plessy*).

191 Alicea, *supra* note 11, at 604, 619.

192 One might dispute my implicit assertion that acting morally means acting rationally, but that would require adopting a highly contestable understanding of the human person. CICERO, *Laws*, *supra* note 105, at 1.38–39 (contrasting the Epicurean and Stoic approaches to moral questions). Since these theorists aim to avoid controversial premises, such a move would be self-defeating. *Cf.* GEORGE, *supra* note 36, at 137-39 (making a closely related argument against Rawls's theory).

193 *See generally* William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2352-53 (2015).

194 I thank Charles Capps for raising this counterargument and many of the others I address in the next several paragraphs.

not be possible otherwise.[195] The problem, in the realm of constitutional theory, is that there are some questions that *must* be answered on which people have widely divergent moral intuitions.

Take, for example, Baude's oath argument. It is true that we can be confident in the moral proposition that, as a general matter, we ought to obey our oaths, and we can assert that claim without fear of provoking much controversy. But we cannot know whether to take that oath without first knowing whether the Constitution is morally legitimate.[196] We should not, for example, take an oath to obey a substantively immoral constitution or a constitution imposed on us through morally illegitimate means.[197]

Here, Baude might respond that the moral soundness of the Constitution is *itself* a widely shared moral intuition in our society in which we can have great confidence, without having to delve deeper into controversial moral premises explaining why the Constitution is legitimate. But the problem, as I have argued elsewhere, is that there is a strong connection in constitutional theory between (a) why we should obey the Constitution and (b) how we should adjudicate constitutional disputes.[198] In Michael McConnell's words, "the 'why' question has implications for the 'how' question," which means that "[w]e can determine the method to interpret the Constitution only if we are first clear about why the Constitution is authoritative."[199] We cannot bypass the argument in favor of the Constitution's legitimacy because that argument has implications for the methodological questions at the heart of constitutional theory—precisely the questions that Baude attempts to answer.

Take, for example, the view that the Constitution is morally tainted because of the exclusion of women and enslaved black people from the ratification process.[200] Under that view, the moral legitimacy of the Constitution would have to derive from something other than the act of ratification. Often, jurists or scholars argue that the Constitution's moral legitimacy hinges on its ability to reflect the more enlightened moral views

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195 THOMAS AQUINAS, SUMMA THEOLOGIAE at pt. I-II, q. 94, art. 2 (Fathers of the Eng. Dominican Province trans., Burns Oates & Washbourne Ltd. 2d rev. ed. 1920).

196 *See* Alicea, *supra* note 35, at 12.

197 *See id.*

198 *See id.* at 11-13; *see also* Alicea, *supra* note 47, at 1750-67.

199 Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1128 (1998).

200 *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2324 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) ("But, of course, 'people' did not ratify the Fourteenth Amendment. Men did."); Mark S. Stein, *Originalism and Original Exclusions*, 98 KY. L.J. 397, 406-20, 448-52 (2010) (arguing that the existence of slavery at the time of ratification undermines the moral legitimacy of the Constitution); Thurgood Marshall, Essay, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987) (asserting that the Constitution was defective from its ratification in part because "We the People" excluded enslaved black people and women).

of those living today, and judicial evolution of the Constitution's meaning is necessary to accomplish that end.[201] Thus, for these jurists or scholars, their theory of constitutional legitimacy has a direct connection to their theory of constitutional adjudication, leading them to reject originalism and embrace living constitutionalism. While they and Baude might agree that the Constitution is morally legitimate and that a judge should be willing to take the oath, they would only agree insofar as, once in office, the judge would be free to adopt a living constitutionalist method of adjudication. The originalism/non-originalism debate is, at least in part, a debate about the authority of the Founders,[202] which is why McConnell rightly says that "[t]he dead hand problem thus raises the first question for constitutional theory."[203]

If constitutional theory requires us to explain why the Constitution is morally legitimate, then it is impossible to avoid controversial moral truth claims. Constitutional legitimacy implicates contested questions like the moral justification for political authority,[204] whether the dead have authority to bind the living,[205] and whether the exclusion of women and enslaved black people at the Founding defeats the Constitution's moral legitimacy.[206] These questions can only be answered within a moral framework.

Any number of frameworks—whether they be Kantianism, Thomism, or (some varieties of) consequentialism—purport to guide human conduct according to moral truth. Although it matters a great deal which moral framework is right, my limited purpose here is simply to show that we need such a framework. That is why Cicero, when developing his constitutional theory, insists that we have to "go back to the beginning, to the source of justice itself,"[207] and wrestle with the relationship between constitutional theory and justice.[208] This might strike us, as it does Atticus, as "a distant starting point" from our immediate task, but as Atticus recognizes, these deep questions of political philosophy "serve[] as a preface" to identifying the best constitutional theory.[209] We cannot address foundational questions of

201 *See, e.g.*, *Dobbs*, 142 S. Ct. at 2324-27 (Breyer, Sotomayor & Kagan, JJ., dissenting) (advancing a theory of constitutional interpretation that accommodates evolving moral values); JACK M. BALKIN, LIVING ORIGINALISM 29-34, 59-73 (2011) (arguing that the Constitution must reflect the views of the people living today for it to remain "our law"); Marshall, *supra* note 200, at 1341-42 (asserting that the Constitution is a living document).

202 Alicea, *supra* note 47, at 1752-58.

203 McConnell, *supra* note 199, at 1128.

204 *See* Alicea, *supra* note 35, at 16-24.

205 *See id.* at 41-43.

206 *See id.* at 33-41.

207 CICERO, *Laws*, *supra* note 105, at 1.20.

208 *Id.* at 1.22–23.

209 *Id.* at 1.28.

constitutional theory without addressing foundational questions of political theory.

That is what makes the flight from ideal theory mistaken. Neither Baude and Sachs's originalism nor Strauss's living constitutionalism supplies an objective moral framework by which we can judge the moral soundness of our Constitution or their proposed constitutional theories.[210] For Strauss, the text of the Constitution binds us because it serves as a point of common ground in the midst of moral pluralism; he does not evaluate whether that common ground is morally justifiable apart from its commonness.[211] For Baude, government officials have a moral obligation to adhere to originalism because it is our law (in a sociological sense) and they take an oath to obey the law; he does not evaluate whether the law that they pledged to obey is worthy of obedience.[212] For Bork, judges should be originalist because originalism is the theory that emerges from our history and tradition, not because it is the most just or morally defensible theory.[213] The result of these attempts to avoid moral frameworks is the inability to supply a standard for judging the best constitutional theory.

D. *Responses to Counterarguments*

1. Ideal Constitutional Theory as a Standard of Evaluation

Amartya Sen challenges a version of this claim. Sen argues that an ideal theory of justice (what he calls "transcendental" theory) is not necessary "to rank any two alternatives in terms of justice."[214] He gives this example to illustrate his point:

> [W]e may indeed be willing to accept, with great certainty, that Mount Everest is the tallest mountain in the world, completely unbeatable in terms of stature by any other peak, but that understanding is neither needed, nor particularly helpful, in comparing the peak heights of, say, Mount Kilimanjaro and Mount McKinley. There would be something deeply odd in a general belief that a comparison of any two alternatives cannot be sensibly

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210 *See* Alicea, *supra* note 11, at 615-23 (arguing that Baude and Strauss misuse Rawls's concept of an overlapping consensus in a way that leaves them without a normative basis for their theories). Nor do I think that Baude and Sachs can respond "by proposing a division of labor between descriptions of what the law is and normative claims about whether and how to apply the law," for reasons I have described elsewhere. *See id.* at 596-97.

211 *See id.* at 615-22.

212 *See id.* at 622-23.

213 *See* Alicea, *supra* note 47, at 1762-63.

214 AMARTYA SEN, THE IDEA OF JUSTICE 101 (2009).

> made without a prior identification of a supreme alternative. There is no analytical connection there at all.[215]

The example is superficially plausible, but Sen has lost sight of the ideal on which his height-based example implicitly relies: a standard of measurement. It is true that we can say that one mountain is taller than another without reference to a third, still taller, mountain. But we cannot say that one mountain is taller than another without reference to the concept of height, and height is just another way of describing distance—i.e., the distance between the surface of a rigid body (say, the Earth) and what we might call the "top" (from our Earth-centric viewpoint) of the thing whose height we are measuring. Distance between two points (*A* and *B*), in turn, can only be understood by reference to some measuring rod (*S*), "which we employ as a standard measure," with the measuring rod being placed on a straight line connecting the two points.[216] "[S]tarting from *A*, we can mark off the distance *S* time after time until we reach *B*. The number of these operations required is the numerical measure of the distance *AB*. This is the basis of all measurement of length."[217] Thus, the ideal of a standard measure of distance is required to assess the relative heights (i.e., distances) of two mountains.

Or consider Sen's other example: "if we are trying to choose between a Picasso and a Dali, it is of no help to invoke a diagnosis (even if such a transcendental diagnosis could be made) that the ideal picture in the world is the *Mona Lisa*."[218] This is not a particularly helpful example because many readers will think of one's choice of artwork as a matter of taste rather than something objective. But as Sen's parenthetical acknowledges, the only way his example is analogous to the debate over the need for ideal theory is if it is, in fact, possible to identify an ideal painting, so we should proceed on that assumption.

It is true that one need not identify the *Mona Lisa*, specifically, as the ideal painting to be able to choose between a Picasso and a Dali. But assuming that the art of painting can be objectively assessed, one can only choose between a Picasso and a Dali based on objective criteria relating to excellence in painting, such as brushwork or use of color. Those objective criteria can only be understood, in turn, insofar as one has an ideal for each criterion in mind, ideals against which to measure the particular Picasso and Dali in question.

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215 *Id.* at 102.

216 ALBERT EINSTEIN, RELATIVITY: THE SPECIAL AND GENERAL THEORY (Robert W. Lawson trans., 3d ed. 1920), https://www.gutenberg.org/cache/epub/5001/pg5001-images.html#ch2 [https://perma.cc/B7JE-SKFW].

217 *Id.*

218 SEN, *supra* note 214, at 16.

For instance, one can only understand degrees of excellence in brushwork by reference to the highest degree of excellence in brushwork—if not in a real painting, then at least as one imagines ideal brushwork in one's mind. Whether explicitly or implicitly, the choice between the Picasso and the Dali relies on an ideal standard.

By the same token, perhaps to know whether Lee Strang's originalism[219] is normatively superior to Ronald Dworkin's non-originalism,[220] we need not necessarily know anything about Richard Fallon's non-originalism.[221] But whatever reasons we provide for choosing between Strang and Dworkin will implicitly rely on some standard of evaluation—an ideal constitutional theory whose features allow us to judge the proximity of Strang and Dworkin's theories to the ideal. Thus, we evaluate or measure something "by means of higher [terms], and these have to be defined by ever higher ones until it arrives at the highest and most general ones, ignorance of which will make understanding the lower ones definitely impossible."[222]

2. Ideal Constitutional Theory and the Fact of Reasonable Pluralism

Perhaps the most obvious response to Cicero's argument is that it overlooks the fact of reasonable pluralism.[223] If we cannot agree on a moral framework to use in evaluating constitutional theories, what is the point of basing a constitutional theory on a contested ideal? Doing so would seem to lead to intractable disagreement about the moral authority of our Constitution and competing interpretations of it, thereby destabilizing our Constitution's sociological legitimacy.[224] It would also likely be a waste of time since it would result in people talking past one another from within their divergent moral frameworks. In light of these concerns, it might seem better to "justify a set of prescriptions about how certain controversial constitutional issues should be decided . . . . by drawing on the bases of agreement that exist within the legal culture and trying to extend those agreed-upon principles to decide the cases or issues on which people disagree."[225]

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219 *See generally* STRANG, *supra* note 53.

220 *See generally* RONALD DWORKIN, LAW'S EMPIRE (1986).

221 *See generally* FALLON, *supra* note 32.

222 BONAVENTURE, *ITINERARIUM MENTIS IN DEUM*, *reprinted in* INTO GOD: *ITINERARIUM MENTIS IN DEUM* OF SAINT BONAVENTURE 3.3 (Regis J. Armstrong trans., 2020).

223 I should reiterate that, although the constitutional theorists whose views I criticize here make similar analytical moves and employ similar language to Rawls, their views should not be equated with Rawls's. *See supra* Section I.A.

224 *See* FALLON, *supra* note 32, at 22-24 (explaining the related but distinct concepts of moral and sociological legitimacy).

225 Strauss, *supra* note 18, at 582; *see also* Strauss, *supra* note 87, at 1738-40 (drawing on Rawls's concept of an overlapping consensus to justify his theory).

Although the arguments described in the preceding paragraph are rooted in the fact of reasonable pluralism, they are distinct arguments, each requiring a different response. The first argument—that we ought not base constitutional theory on moral frameworks because doing so will cause intractable disagreement and instability—presupposes that we ought to prioritize stable agreement over the truth of the principles that are the object of the stable agreement. It requires us to exclude from constitutional theory—because they are contested—"certain principles and other propositions even though they are, or may well be, true."[226] The flip side of this prioritization of stability over truth is that it requires endorsing principles and propositions that are broadly accepted even though they might very well turn out to be *false*.[227] But the assertion that the stability of a constitutional system should cause us to embrace potentially false principles is itself a highly contestable proposition subject to reasonable disagreement.[228] It implicitly relies on some moral theory that ranks stability above other moral considerations, such as the truth or falsity of the principles constituting a regime. Thus, the argument that ideal constitutional theory should be rejected because it involves contestable moral truth claims is self-defeating, since the argument itself relies on contestable moral truth claims.[229]

One might object that I have conflated "moral frameworks" with "truth" and that there is conceptual space in which a moral claim can be true without purporting to embody the ideal. Fallon, for instance, has pointed out that some constitutional theorists rely on "minimal theories" of constitutional legitimacy in which "[t]he test for legitimacy . . . is not whether a constitution is 'perfectly just' but whether it is 'sufficiently just' or 'just enough in view of the circumstances and social conditions.'"[230] Could a theorist base their arguments on truth claims of this more modest sort? Yes, but as shown in subsection I.D.1 above, in doing so, they would be implicitly relying on some ideal moral theory. To know that something is minimally just requires knowing what it means for something to have at least some features of justice,

226 ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 201 (1999).

227 Joseph Raz, *Facing Diversity: The Case of Epistemic Abstinence*, 19 PHIL. & PUB. AFFS. 3, 17 (1990) (arguing that Rawls's theory of justice requires accepting "beliefs which command general consent in our culture" even if those beliefs are false); GEORGE, *supra* note 36, at 134-35 (similar).

228 The position I adopt below with respect to tolerating some false ideas embedded in social practices does not run afoul of what I am saying here. *See infra* subsection II.D.1. It is one thing to say that we ought to avoid controversial truth claims in the name of stability; it is another to say—*on the basis of a controversial truth claim*—that we ought to tolerate (but not endorse) false claims in some circumstances. Only the former is self-defeating.

229 *Cf.* GEORGE, *supra* note 36, at 137-39 (making a closely related argument that Rawls's theory relies on individualistic and contestable moral truth claims rather than on a neutral theory of the good); Raz, *supra* note 227, at 15 & n.34 (arguing, similarly, that Rawls's theory of justice presupposes a moral framework that makes justice depend on consensus and stability).

230 FALLON, *supra* note 32, at 27-28.

and to know that some characteristic is a feature of justice, one has to know what justice is—the ideal of justice.

From what I have said, it should be clear that the second version of the argument-from-pluralism—that ideal constitutional theory is a waste of time—cannot be right. If the argument-from-pluralism presupposes the same kind of contestable truth claims that it purports to avoid, then it cannot be justified as a way out of cutting through interminable and fruitless disagreements about morality. What the argument-from-pluralism really does is shift the ground of disagreement from a transparent clash of ideal theories to a hidden clash of implicit controversial moral claims. This saves no time or effort; it just causes confusion.

3. Total Delegitimization

Even if moral frameworks are necessary in principle, there remains the concern that ideal constitutional theory is unachievable in practice, and if we make the ideal our standard, we will find that no constitutional system can live up to it.[231] For example, several constitutional theories rely on normative arguments drawn from popular sovereignty,[232] and it is common for critics of popular sovereignty theories to point out that no real government satisfies the criteria that popular sovereignty imposes for a morally legitimate government. Such critics point to the exclusion of women and enslaved black people during ratification of the Constitution, for instance, as a dispositive reason why our Constitution fails under popular sovereignty theory, and they contend that ideal theory cannot be employed in constitutional theory if we are to avoid delegitimizing our Constitution.[233] How are we to avoid having ideal constitutional theory act as a "solvent of human customs and conventions" that fall short of the ideal?[234]

As I argue in Section II.C below and will only preview here, the answer is that a plausible moral framework would take into account the inevitable gap that exists between the ideal and our actual social practices. Such a

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231 *Id.* at 25, 28-29.

232 *See, e.g.*, Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1440 (2007) (identifying popular sovereignty as the most common normative basis for originalism); WHITTINGTON, *supra* note 190, at 110-59 (arguing for popular sovereignty as the basis for originalism).

233 *See, e.g.*, FALLON, *supra* note 32, at 24-35 (pointing to slavery and other "grounds for objection" as undercutting ideal theories of the Constitution's legitimate authority); Stein, *supra* note 200, at 448-49 (denying, on the basis of the exclusion of women and enslaved black people from ratification, that "the Constitution can derive much moral legitimacy from anything that happened in the antebellum period, including the Founding"); *see also* Marshall, *supra* note 200, at 1338 (criticizing the Constitution as defective based on the Framers' intentional exclusion of enslaved black people and women).

234 ATKINS, *supra* note 22, at 39.

framework would acknowledge that to dissolve all social practices that fall short of the ideal would do great harm to the good of society that the moral framework is attempting to achieve. The ideal must yield to the practical at the point at which insistence on the ideal undermines the very thing the ideal has as its object: the good of the people of a society.[235]

To put this in more specific terms, consider the popular sovereignty example. In other work, I have argued that political authority can only be justified insofar as it is used to achieve the common good, and because all individuals in society have an obligation to seek the common good, all of them are vested with the means to achieve that end—namely, political authority.[236] In that sense, the theory of popular sovereignty—that ultimate political authority resides in the people of a society—is true. But because a direct democracy is highly unlikely to secure the common good, the imperative to achieve the common good requires the people of a society to transmit a portion of their authority to some subgroup within the society, which is the process of constituting a government.[237] Here we encounter the objections posed above: the exclusion of various groups from the process of constituting a government and transmitting authority seems to undermine the ideal theory of popular sovereignty, since it means that some people within a society did not agree to transmit their political authority.[238]

A sound theory of popular sovereignty takes this reality into account and avoids dissolving the legitimacy of the Constitution. If political authority only exists to secure the common good, and if the transmission of that authority is necessary to secure the common good, then it cannot be a feature of the people's political authority to insist on universal participation in the transmission process and/or unanimous approval of the transmission, since such a feature would itself be contrary to the common good by making the transmission impossible.[239] That is, the ideal moral principle undergirding popular sovereignty theory (i.e., the need to secure the common good) supplies the reason why the ideal cannot be permitted to dissolve social practices that seem inconsistent with the ideal (e.g., lack of universal participation in the ratification of our Constitution): such a dissolution of social practices would defeat the ideal.[240] Obviously, much more would need to be said about this specific example, but the general point holds:

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235 *See* FALLON, *supra* note 32, at 28 ("[O]ur practical, moral concern in inquiring into legitimacy is likely to be whether a particular regime is minimally good enough to deserve support or respect . . . .").

236 *See* Alicea, *supra* note 35, at 16-33.

237 *See id.* at 27-28.

238 *See id.* at 33-34.

239 *See id.* at 39-40.

240 *See id.* at 40.

constitutional theorists need not fear ideal constitutional theory's potential to dissolve the authority of the Constitution because any plausible ideal constitutional theory must take into account the gap that inevitably exists between the ideal and our fallible social practices. But this general point about ideal theory's relationship to social practices requires further exploration, and it is to that topic that I now turn.

II. PRACTICAL CONSTITUTIONAL THEORY

Although the dominant tendency in American constitutional theory is the rejection of ideal theory, there is a smaller—but prominent—group of theorists that adopts the opposite tack. These theorists not only advance ideal constitutional theories, but they also make little, if any, room for deviations from the ideal in our social practices, even though deviations from the ideal are to be expected given the fact of reasonable pluralism. These theorists reject what we might call "practical" constitutional theories—theories that give weight to the social practices of a given society even if those practices fall short of the ideal. Once again, we find a theoretical strain that transcends the right/left and originalist/non-originalist divides: there are theorists of all stripes who insist on the ideal without significant concern for social practices. It would be fair to describe such theorists as radical in the true meaning of that word: generally unconcerned about the implications of *uprooting* those practices that are inconsistent with the ideal even if the practices are deeply rooted. Of course, even these theorists usually make some minimal effort to show that their theories are not completely alien to our social practices,[241] but in general, these theorists accord little weight to those practices.[242]

Cicero thought any viable constitutional theory had to incorporate both the ideal *and* the practical.[243] It had to be grounded in a moral framework, but it also had to acknowledge the reality that human institutions frequently fall short of the moral ideal in their practices. Indeed, Cicero's attention to the fallibility of human institutions is one of his defining traits as a constitutional theorist.[244]

In this Part, I will make use of Cicero's work to argue for the necessity of attending to social practices in constructing a constitutional theory. As in the

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241 *See, e.g.*, ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM 4-12 (2022) (asserting that his theory is grounded in our legal practices at a high level of generality).

242 *See infra* Section I.A.

243 *See* ATKINS, *supra* note 22, at 6 ("[Cicero] ultimately tries to work out a way to bring the natural, ideal, and rational to bear on the customary, contingent, and practicable without completely collapsing these different categories.").

244 *See id.* at 65-80 (illustrating Cicero's belief in the fallibility of political structures through his description of the solar system as an unattainably ideal political structure which humans have, at best, imperfectly imitated).

previous Part, I will begin with a few examples of American constitutional theorists whose views exemplify the tendency against which I am arguing. I will then turn to Cicero's arguments regarding the practical in constitutional theory, and after describing them, expand on and refine his claims. I will conclude by addressing counterarguments.

A. *Radical Constitutional Theories*

Radical constitutional theories manifest their radicalism in different ways, depending on their moral framework. But all radical constitutional theories perceive a deep contradiction between our current social practices and ideal constitutional theory, and they seek to discard those practices to achieve their ideal.

Sometimes, this radicalism takes the form of a "Constitution in Exile" approach to constitutional theory.[245] In using this somewhat charged expression, I do not intend it pejoratively. Like Sachs, I find it a useful phrase to refer to the idea that there is a "real" Constitution that is dramatically different from our current constitutional order.[246] Radical constitutional theories advocate the restoration of this lost Constitution irrespective of, or with only minimal attention to, the implications for our current practices. Although there are non-originalist theories that can plausibly be understood as forms of the Constitution-in-Exile,[247] originalist theories are usually "the main target of the 'exile' label" in constitutional-theory discourse.[248] After all, originalist theories generally understand the original meaning to be the true "law" and non-originalist precedents to be deviations from that law.[249] That understanding of our Constitution and its relationship to precedent does not necessarily entail radicalism, since most originalists believe that a relatively robust theory of stare decisis is compatible with originalism.[250] But a handful

245 Stephen E. Sachs, *The "Constitution in Exile" as a Problem for Legal Theory*, 89 NOTRE DAME L. REV. 2253, 2254 (2014).

246 *Id.* at 2254-55.

247 *See, e.g.*, *id.* at 2255 (offering the "'welfare-rights' constitution" and "'human dignity' constitution" as examples of Constitutions-in-Exile); Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 357-58 (1981) (describing "due substance" constitutional theorists as another example).

248 Sachs, *supra* note 245, at 2255.

249 *See generally* Edwin Meese III, *"The Law of the Constitution," in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 99, 99-109 (Steven G. Calabresi ed., 2007); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777, 789-90 (2022).

250 *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. UNIV. L. REV. 803, 834-44 (2009) (advocating for a doctrine of precedent that "allow[s] significant room for both original meaning and precedent"); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 472-79 (2006) (arguing that an originalist reading of the Constitution demands respect for precedent); ANTONIN SCALIA, A MATTER OF INTERPRETATION 138-39 (Amy Gutmann ed., 1997)

of originalists—most prominently Michael Stokes Paulsen and Gary Lawson—have argued that stare decisis is generally irreconcilable with originalism and should be rejected.[251] In Paulsen's words, "*stare decisis* corrupts the otherwise 'pure' constitutional decision-making process."[252] I will focus on Paulsen's theory because his position is more far-reaching than Lawson's, both in the sense that Paulsen (unlike Lawson) argues against stare decisis for *any* constitutional theory (not just originalism)[253] and that Lawson (unlike Paulsen) limits his argument to acts of constitutional interpretation while leaving room for stare decisis as a matter of constitutional adjudication.[254]

Because much, if not most, of constitutional doctrine is inconsistent with the original meaning of the Constitution, the Paulsen version of originalism would have sweeping implications if adopted. Not only would it require discarding the theory of stare decisis that the Court has employed for a long time, but it would also require discarding many important precedents.[255] My point at the moment is not to say that overruling such precedents would be good or bad; I am simply pointing out that the implications of the Paulsen version of originalism would be radical. True, as Sachs has argued, one might contend that adherence to the original meaning of the Constitution is a *deeper* social practice than individual precedents,[256] such that the Paulsen proposal would actually be a vindication of our social practices in this more fundamental way. But even if that were true (and it is debatable whether it is true[257]), there is no avoiding the many (ostensibly) shallower social practices that would be uprooted by the Paulsen theory, and such a result can properly be called radical.

Other radical constitutional theories are, if anything, more ambitious. Rather than seeking the restoration of a Constitution-in-exile, they seek to supplant our constitutional culture with a very different regime, sometimes going so far as to deny the legitimacy of the Constitution altogether. For

("Originalism . . . must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."); *see also* Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 86-87 (Apr. 3, 2019) (unpublished manuscript) (arguing that there need not be an originalist "big bang" disrupting the law), https://ssrn.com/abstract=2940215.

251 Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 2-4 (2007); Paulsen, *supra* note 58, at 289.

252 Paulsen, *supra* note 58, at 290.

253 *See id.* at 290-91.

254 *See* Lawson, *supra* note 251, at 16-18.

255 Fallon, *supra* note 12, at 1129-31 (listing several examples of important areas of constitutional law that he believes are inconsistent with originalism).

256 Sachs, *supra* note 245, at 2268-78.

257 *See* Matthew D. Adler, *Social Facts, Constitutional Interpretation, and the Rule of Recognition*, *in* THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 193, 227 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (noting that no method of constitutional interpretation is sufficiently favored as to be a "'deep' rule" within the legal system).

example, Seidman forthrightly argues that we ought not consider ourselves bound by the Constitution because "[w]e should give up on the pernicious myth that we are bound in conscience to obey the commands of people who died several hundred years ago."[258] Due to the exclusion from the ratification process of women, enslaved black people, and others—as well as several other defects—Seidman argues that the Constitution does not deserve our obedience.[259] We should, in his view, "read [the Constitution] as a work of art, designed to evoke a mood or emotion, rather than as a legal document commanding specific outcomes."[260] Seidman attempts to show that there are historical precedents in our culture for what he advocates.[261] But his evidence for this claim is thin,[262] and he does not purport to show that our *current* social practices support his constitutional theory. Our social practice of regarding the Constitution as generally morally legitimate and binding on us—and our constitutional culture's notion that this legitimacy rests on the people's act of ratification[263]—would be discarded.

While Seidman's radicalism is associated with the political left, there are similar theories associated with the political right. Vermeule, for instance, has argued for a non-originalist constitutional theory grounded in "an illiberal legalism" that would "read into the majestic generalities and ambiguities of the written Constitution" "substantive moral principles" ostensibly drawn from the natural-law tradition.[264] Under Vermeule's approach, current doctrine regarding "free speech," "property rights and economic rights," and other areas would "have to go."[265] The judiciary would adopt a deferential posture toward the executive branch's exercise of broad administrative power[266] so that such power could be "turned to new ends, becoming the great instrument with which to restore a substantive politics of the good."[267] The "good" that he has in mind could plausibly be described as "a restoration of

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258 SEIDMAN, *supra* note 20, at 9.

259 *Id.* at 16-21.

260 *Id.* at 8.

261 *See* LOUIS MICHAEL SEIDMAN, FROM PARCHMENT TO DUST: THE CASE FOR CONSTITUTIONAL SKEPTICISM 178-242 (2021).

262 *See* J. Joel Alicea, *The Role of Emotion in Constitutional Theory*, 97 NOTRE DAME L. REV. 1145, 1202 n.402 (2022) (criticizing Seidman's theory for failing to identify historical precedents in our culture that would support his theory while ensuring the stability of our Constitution).

263 *Id.* at 1189-91 (identifying popular sovereignty as the theory of constitutional legitimacy adopted by our constitutional culture).

264 Vermeule, *supra* note 19.

265 *Id.*

266 VERMEULE, *supra* note 241, at 136-54.

267 Adrian Vermeule, *Integration from Within*, 2 AM. AFFS. 202 (2018) (reviewing PATRICK J. DENEEN, WHY LIBERALISM FAILED (2018)).

an integrally Catholic state,"[268] one that would "sear the liberal faith with hot irons"[269] as its "rulers" exercised "political domination" that might "possibly [be] experienced at first as coercive."[270] True, Vermeule points out that use of natural-law principles was common in American courts around the time of the Founding,[271] but he explicitly disclaims reliance on this history as a reason for adopting his view.[272] This is important, as it shows that he would advocate his theory even if it were radically *inconsistent* with our social practices. And though he argues that courts today rely on unacknowledged moral premises in making their decisions in a way that is compatible with his theory,[273] he does not claim that our *current* social practices reflect his views, especially the moral framework that motivates his approach to constitutional adjudication. Rather, his theory, if carried out, would be a radical change from our current constitutional culture—which is Vermeule's stated purpose.[274]

Thus, radical constitutional theories come from the political right and the political left and from originalist and non-originalist sources. They adopt different postures toward the Constitution's legitimacy, the ideal scope of governmental power, and the substantive principles they seek to have our constitutional culture adopt. But they are united in according little, if any, weight to our social practices.

B. *Cicero on Practical Constitutional Theory*

Cicero took a different view of the relevance of social practices. While defending the necessity of ideal constitutional theory, Cicero sought "to bring

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268 Adrian Vermeule, *Ralliement: Two Distinctions*, THE JOSIAS (Mar. 16, 2018), https://thejosias.com/2018/03/16/ralliement-two-distinctions (quoting Pater Edmund Waldstein, *Ralliement! Ralliement! Ralliement!*, SANCRUCENSIS (July 31, 2017), https://sancrucensis.wordpress.com/2017/07/31/ralliement-ralliement-ralliement [https://perma.cc/LAM6-NGEX]. I say "could plausibly" because I am aware of no place in which Vermeule has expressly endorsed integralism. But it is fair to conclude, based on the blog post cited here and other writings, that some version of integralism is the ideal to which his theory aspires. *See* Micah Schwartzman & Jocelyn Wilson, *The Unreasonableness of Catholic Integralism*, 56 SAN DIEGO L. REV. 1039, 1048-53 (2019) (exploring Catholic integralist arguments with reference to Vermeule's work).

269 Vermeule, *supra* note 267.

270 Vermeule, *supra* note 19.

271 *See* VERMEULE, *supra* note 241, at 52-60.

272 *See id.* at 214 n.290.

273 *See id.* at 60-90.

274 *See* Vermeule, *supra* note 19 (describing his theory as a "new and more robust alternative[] to both originalism and left-liberal constitutionalism"). *See generally* Vermeule, *supra* note 241. Sometimes, Vermeule casts his theory as aligned with our current social practices. *See* VERMEULE, *supra* note 241, at 4-12. But given his other radical statements about his theory and the structure of his argument, it is fair to doubt whether his theory puts any real weight on social practices. *See* Baude & Sachs, *supra* note 186, at 870-71 (criticizing Vermeule on this basis).

Socratic philosophy yet further down from the heavens and into the lives of human beings as they are commonly known."[275]

This comes out in both the *Republic* and the *Laws*. At several points in the *Republic*, Cicero references the cosmos as a way of setting up a contrast between their perfect rationality and order and the irrationality and contingency of human affairs,[276] drawing our attention to the unlikelihood that any human regime will achieve the ideal constitution.[277] The theme is most clearly seen in the famous Dream of Scipio,[278] where Scipio relates a dream in which he converses with his adoptive grandfather, Scipio Africanus (like Cicero, I will refer to the latter as "Africanus"). Scipio finds himself speaking with Africanus "from a spot high up and filled with stars, that was bright and glorious."[279] Africanus tells Scipio that he will be elected consul and will "encounter the commonwealth in a state of disorder."[280]

Africanus describes the "precinct into which [Scipio] ha[s] come," noting the "eternal revolving courses of the stars" and the Sun as "the ruler, leader, and guide" of the planets,[281] immediately calling to mind the parallel with human rulers governing their societies.[282] The "sound that is caused by the action and motion of the spheres themselves" is said to be "harmony," with intervals in the sound "proportional and based on reason," such that "blending high notes with low itself causes balanced music."[283] Despite this image of a celestial constitution of perfect order, harmony, and reason in which "everything is eternal,"[284] Scipio "kept bringing [his] eyes back to earth,"[285] where "there is nothing that is not mortal and perishable except the souls given to the human race."[286] Thus, "Africanus provides a cosmological explanation for the seemingly constant movements of the various simple

275 NICGORSKI, *supra* note 23, at 247.

276 *See* ATKINS, *supra* note 22, at 48-49 (exploring this contrast in the Dream of Scipio); HAWLEY, *supra* note 26, at 23 (stating that the dream sequence "allows us to locate the place of human political life in relationship to the whole"). Besides the Dream of Scipio, see CICERO, *Republic*, *supra* note 104, at 1.15–16, 1.21–22, 1.26–29, 1.31.

277 *See* ATKINS, *supra* note 22, at 49 ("At the heart of the dialogue lies a political psychology complemented by a cosmology that simultaneously prescribes rational rule while questioning the possibility of its realization.").

278 *See id.* at 47.

279 CICERO, *Republic*, *supra* note 104, at 6.11.

280 *Id.*

281 *Id.* at 6.17.

282 *See* HAWLEY, *supra* note 26, at 28 (summarizing the depiction of the cosmos in the Dream of Scipio as "the supreme deity as the sovereign over the earth and the rest of the celestial bodies"); ATKINS, *supra* note 22, at 66-67 (drawing parallels between Africanus's description of the sun and Scipio's description of the ideal statesman).

283 CICERO, *Republic*, *supra* note 104, at 6.18; *id.* at 2.69a.

284 *Id.* at 6.17.

285 *Id.* at 6.20.

286 *Id.* at 6.17; *id.* at 6.20–25.

constitutions described by Scipio earlier in the dialogue. Like practically everything else beneath the moon, constitutions suffer change and decay."[287]

We can better understand the dialogue through this prism. Earlier, Scipio speaks in cosmological terms when describing the "paths and turns of commonwealths" and observes that this is "the topic of our entire discussion."[288] "[E]xploring the possibility of such a scientific analysis of constitutions" is thus a key issue in the dialogue,[289] and in light of the Dream, we can say that "political science can never be as exact as the natural science of astronomy."[290] Rather, "[t]he very order of the cosmos suggests that human affairs, including forms of political organization, are inherently unstable and in flux," never reaching the perfect rationality and harmony of the cosmos.[291] In the *Laws*, Cicero makes clear that this is, in part, due to the fact of reasonable pluralism. He observes that it would be "impossible" "that everyone should agree" with the principles that he tries to show undergird a just constitution, noting the different moral frameworks that various theorists bring to bear on the subject.[292] Thus, part of Cicero's argument for taking into account the practical is the fallibility of human beings and the inevitable failure of human institutions to achieve the ideal in light of disagreement.[293]

But Cicero is not just making a brute-fact argument about the impossibility of achieving the ideal. When Cicero describes the best constitutional provisions in the *Laws*, he explicitly makes room for provisions that he considers suboptimal on the ground that doing so is actually better for the commonwealth. For example, Cicero proposes the creation of the office of tribune, an office representing the plebeians.[294] The tribunate had evolved into a powerful office by the time of the late Republic, with tribunes able to veto legislation and the office serving as a major platform for more populist-minded politicians.[295] Tribunes like the Gracchi brothers (Tiberius and Gaius Gracchus) represented the popularist interpretation of the Roman constitution[296] and had (rightly or not) precipitated some of the greatest

287 ATKINS, *supra* note 22, at 69; CICERO, *Republic*, *supra* note 104, at 1.68.

288 CICERO, *Republic*, *supra* note 104, at 2.45.

289 ATKINS, *supra* note 22, at 55.

290 *Id.* at 69.

291 *Id.*

292 CICERO, *Laws*, *supra* note 105, at 1.37–39.

293 *See* Jed W. Atkins, *Natural Law and Civil Religion:* De legibus *Book II*, *in* CICEROS STAATSPHILOSOPHIE 167, 180-81 (Otfried Höffe ed., 2017) (asserting that Cicero described the Roman mixed constitution as "the best" because it was practicable for human beings).

294 *See* CICERO, *Laws*, *supra* note 105, at 3.9; SCHOFIELD, *supra* note 26, at 113.

295 SHOTTER, *supra* note 114, at 10-11.

296 STRAUMANN, *supra* note 24, at 57.

crises of the late Republic.[297] That is partly why Sulla, who represented the optimate interpretation of the constitution,[298] "emasculated the tribunate" of much of its power and political importance when he became dictator[299]—reforms that Pompey reversed when he became consul.[300]

Thus, when the character Quintus describes the tribunate as "truly pestilent" and a danger to an ideal commonwealth, he is echoing the optimate view.[301] Cicero's character admits that "there is something bad in the tribunician power," but he points out that having a tribune can sometimes moderate "the violence of the people."[302] He defends Pompey's restoration of the tribunate (and, by extension, the inclusion of the tribunate in Cicero's proposed constitution) by pointing out that Pompey "had to pay attention not only to what was best, but to what was necessary."[303] Cicero thus defends taking into account the practical because failure to do so could result in greater harm than toleration of the non-ideal. As Atkins summarizes the disagreement between the two characters: "For Quintus, the laws should aspire to what is ideal under ideal conditions, or the best conceivable ideal. For [Cicero], the laws should aspire to the ideal given (present) non-ideal conditions, or the best practicable ideal."[304]

Part of the reason Cicero sees the elimination of all non-ideal social practices as harmful is that those social practices are part of the Roman "constitution" broadly understood to include Rome's political culture.[305] To override such practices is to endanger "the order or defining principles of Roman political society."[306] The tribunate might not be part of an ideal constitutional *law*, but it is part of the actual Roman *constitution* in the sense of being an institution embedded in Roman political culture (i.e., a social practice).[307] To ignore that would be to harm the society in the name of ideal constitutional theory.

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297 SHOTTER, *supra* note 114, at 30-37 (describing the Gracchi brothers' attempts at populist reforms inciting political violence); HOLLAND, *supra* note 121, at 26-30, 64-74 (detailing instances of political violence following the emergence of populist leaders in the late Republic, including the Gracchi brothers).

298 STRAUMANN, *supra* note 24, at 57.

299 HOLLAND, *supra* note 121, at 104.

300 *Id.* at 148.

301 CICERO, *Laws*, *supra* note 105, at 3.19–22.

302 *Id.* at 3.23.

303 *Id.* at 3.26; *see also id.* at 3.33 (preferring voting aloud to the secret ballot, Cicero nonetheless notes that "we have to consider whether that is practicable or not").

304 ATKINS, *supra* note 22, at 211-12.

305 ATKINS, *supra* note 118, at 11 (explaining Cicero's definition of the Roman "constitution" as a combination of "established social, legal, and political customs").

306 *Id.*

307 I thank Jed Atkins for this point.

A major theme of Cicero's constitutional theory, then, is that the theorist must sometimes make concessions to non-ideal social practices in the context of a particular society at a particular point in time. In Rawlsian terms, Cicero contends that non-ideal social practices result from reasonable pluralism, which results from the "burdens of judgment" that stem from our fallible nature.[308] Given these realities, "what is best must yield to what is practicable."[309]

C. *Elaboration and Application*

In one sense, radical constitutional theorists and Cicero agree on the fallibility of human beings and the fact of reasonable pluralism. After all, what unites radical constitutional theorists is the minimal role they accord to social practices, and the reason they accord such a minimal role to those practices is precisely because the practices fall short of the ideal. Paulsen, Seidman, and Vermeule would all agree that our current social practices regarding the Constitution are seriously defective; they would just disagree about the nature of the defect.[310] So it would appear that radical constitutional theorists would accept Cicero's argument to that extent.

But Cicero's point is not just that human social practices inevitably fall short of ideal constitutional theory. His point is that ideal constitutional theory must sometimes give way to those practices *in the name of the ideal*. That is, insofar as ideal theory aims to achieve what is good for human beings, it must account for the harm done to human beings when attempts to impose an ideal would sweep away deeply embedded (though erroneous) social practices. That is why Cicero allows for the office of tribune in the *Laws* despite considering it suboptimal. Radical constitutional theories, by contrast, give little weight to the harm done by overturning non-ideal social practices that result from reasonable pluralism.

Aquinas provides a fuller exploration of the potential harm of radicalism when explaining why it is not the function of human law to prohibit all vices. Aquinas's answer presupposes (as Cicero does) that human law should be consistent with objective moral standards as a measure of human action.[311] Despite arguing for that ideal, Aquinas also argues that the ideal cannot be used to upend all social practices that fall short of the ideal. He points out that law, as a "measure of human acts," should be "homogenous with that which it measures . . . since different things are measured by different

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308 RAWLS, *supra* note 9, at 54-58.

309 ATKINS, *supra* note 22, at 231.

310 *See supra* Section II.A.

311 *See* AQUINAS, *supra* note 195, at pt. I-II, q. 95, art. 2 ("[T]he force of a law depends on the extent of its justice.").

measures."[312] For example, the standard by which one measures a child's conduct is not the same as the standard by which one measures an adult's conduct.[313] Accordingly, "laws imposed on men should also be in keeping with their condition."[314] As J. Budziszewski summarizes this part of Aquinas's argument, "[s]ince most people are to some degree deficient in virtue, law adapts itself to people who are to some degree deficient in virtue, laying on them only such demands as they can obey."[315] If a lawmaker nonetheless attempts to impose an ideal legal regime on fallible human beings contrary to "the customs of the country," those fallible human beings will "break out into yet greater evils."[316]

What would those greater evils be? Aquinas answers: "*[T]he precepts are despised*, and those men, from contempt, break into evils worse still."[317] If an ideal legal regime is imposed in a way that clashes too much with social practices, people will come to despise the legal regime—and cease to obey it. Imposition of the ideal in such circumstances "will produce a negative attitude toward the law in general, and lead to resentment and hardening of hearts, and possibly even rebellion."[318] The result is a breakdown in sociological legitimacy and, therefore, in obedience to the rule of law, with all the attendant harms such a result entails.[319]

We can explain the deeper causes of this social breakdown through the philosophy and science of emotions.[320] Modern science has largely vindicated the way in which Aquinas understood the relationship between reason and emotion in the human person.[321] Aquinas's model shows that emotions operate under their own form of lower-order reasoning (i.e., "particular reason") distinct from the higher-order reasoning (i.e., "universal reason") we associate with the unadorned word "reason."[322] Because our emotions have their own form of reasoning, they cannot be forced to conform to universal

312 *Id.* I-II, Q. 96 art. 2.

313 *Id.*

314 *Id.*

315 J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S TREATISE ON LAW 366 (2014).

316 AQUINAS, *supra* note 195, at pt. I-II, q. 96, art. 2.

317 *Id.* (emphasis added).

318 GEORGE, *supra* note 36, at 32.

319 *See* FALLON, *supra* note 32, at 22-23, 158-59 (describing the risk of anarchy stemming from the collapse of sociological legitimacy).

320 I lay out this argument in greater detail in Alicea, *supra* note 262, at 1153-82. What follows in the next few paragraphs is a brief synopsis of the core of the argument, including some passages taken verbatim from Alicea, *supra* note 262.

321 Alicea, *supra* note 262, at 1169; *see also* Carlo Leget, *Martha Nussbaum and Thomas Aquinas on the Emotions*, 64 THEOLOGICAL STUD. 558, 576 (2003) (comparing modern theories of emotions to Aquinas's model of emotion).

322 Alicea, *supra* note 262, at 1156-68.

reason, though they are inclined to follow universal reason.[323] To borrow from an example employed by Aristotle in a related context, our emotions have "reason in the sense that a person who listens to the reason of his father and his friends is said to have reason."[324] When reason and emotion are aligned—that is, when our emotional response to a situation reinforces what we believe to be true through reason—we form a stable disposition or character trait.[325] So, for example, if we witness someone being discriminated against on the basis of race, a person well-formed in the virtue of justice will both know as a matter of reason that the discrimination is wrong and experience the proper emotional reaction (e.g., anger or indignation). Of course, it is also possible for someone to create a stable character trait towards *vice* by reinforcing an incorrect conclusion (reached through reason) with an emotional response.[326] In any event, because emotions have their own lower form of reasoning and cannot be forced (rather than persuaded) to conform to universal reason, if universal reason and emotion are not aligned and "reason attempts to rule the passions [despotically]," then "the passions will erupt in rebellion."[327]

Because society is composed of human beings, what is true about the relationship between reason and emotion within the individual is also true at a broader, societal level: societies can form stable dispositions (i.e., alignments of reason and emotion).[328] With respect to constitutional theory, this insight is important because the sociological legitimacy of a constitution hinges on forming a stable disposition within a society in support of its constitution.

The most sophisticated account of the role of emotion in sustaining a constitution comes from Edmund Burke. Burke uses the term "prejudices"—a word with a fraught connotation even at the time that Burke used it—to describe stable societal dispositions that unite reason and emotion. Burke argues that a prejudice has "its reason" or "latent wisdom," but a prejudice also has "an affection which will give it permanence."[329] Thus, a prejudice, in Burke's view, is the union of reason and emotion.[330] Like Aquinas, Burke argues that the result of prejudice is the formation of habits or character traits that (when properly formed) are virtues: "Prejudice renders a man's virtue his habit, and not a series of unconnected acts. Through just prejudice, his

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323 *Id.* at 1164-67.

324 ARISTOTLE, NICOMACHEAN ETHICS 22 (Roger Crisp ed. & trans., Cambridge Univ. Press rev. ed. 2014).

325 Alicea, *supra* note 262, at 1167-68.

326 *Id.*

327 NICHOLAS E. LOMBARDO, THE LOGIC OF DESIRE: AQUINAS ON EMOTION 100 (2011).

328 Alicea, *supra* note 262, at 1149-51.

329 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 76 (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1790).

330 Alicea, *supra* note 262, at 1174-76.

duty becomes a part of his nature."[331] And just as Aquinas believes that the alignment of reason and emotion is essential to the formation of individual character, Burke believes that the same alignment, which he calls "prejudice," is essential to the formation of "our *national* character."[332] One could recharacterize deeply embedded social practices as forms of prejudice in this sense, and those social practices—considered in aggregate and in relation to our Constitution—create our constitutional culture.

Of course, a prejudice can also form a stable disposition toward something evil, as our history with racial discrimination demonstrates.[333] Burke, while acknowledging the possibility of evil prejudices,[334] nonetheless praises prejudice in a way that likely strikes us as too optimistic in light of that history. But Burke's general point is simply that, just as reason and emotion can form stable character traits for good *or* for evil in the individual, the same is true at a societal level.[335] Accordingly, a constitutional theorist has to attend to the formation of prejudices within a society.

What happens, then, when some person or group attempts to sweep away those social practices in the name of an ideal constitutional theory? Burke answers this question in his criticism of the French revolutionaries, whom he accuses of attempting to substitute ideal constitutional theory for a constitution founded in the prejudices (i.e., stable dispositions of character) of the French people: "Nothing is left which engages the affections on the part of the commonwealth."[336] The resulting regime would be precarious because rational arguments, by themselves, are insufficient to generate popular allegiance to a constitution over time; obedience to the law requires a disposition or character composed, in part, by the emotions formed through constitutional culture.[337] "But that sort of reason which banishes the affections is incapable of filling their place. These public affections, combined with manners, are required sometimes as supplements, sometimes as correctives, always as aids to law."[338] Burke draws the conclusion that, because the revolutionaries would not be able to rely on a constitutional culture (with its emotional reinforcement) to support their theories, their regime would ultimately have to rely on fear and violence: "In the groves of *their* academy, at the end of every vista, you see nothing but the gallows."[339]

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331 BURKE, *supra* note 329, at 76-77.

332 *Id.* at 75-76 (emphasis added).

333 *See generally* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

334 *See* BURKE, *supra* note 329, at 76-77.

335 Alicea, *supra* note 262, at 1149-51.

336 *Id.* at 68.

337 Alicea, *supra* note 262, at 1177-80.

338 BURKE, *supra* note 329, at 68.

339 *Id.*

Just as Aquinas sees that when reason attempts to force (rather than persuade) emotions to comply with what reason believes to be true, "the passions will erupt in rebellion,"[340] Burke sees that when constitutional theorists attempt to force a society to comply with ideal theory in contravention of deeply rooted social practices, this could "lead to resentment and hardening of hearts, and possibly even rebellion."[341] This understanding of the relationship between ideal constitutional theory and social practices explains why Aquinas is right to conclude that legal regimes cannot, with indifference, sweep away all contrary social practices.[342] To ignore or minimize the importance of those social practices is to risk the breakdown of the sociological legitimacy of law and, in the worst case, the overthrow of the law. Or, as Aquinas says, "the precepts are despised, and those men, from contempt, break out into evils worse still."[343]

Indeed, Cicero's concern for social practices is explicable, in part, by reference to his ideal definition of a *res publica*. Because agreement on constitutional law is what makes a commonwealth's actions truly "the people's business"[344] rather than the actions of one or a few individuals,[345] to the extent ideal constitutional theory sweeps away all contrary social practices and leads to a breakdown in agreement on constitutional law, we are left without a *res publica*—or at least a form of polity far removed from the focal meaning of a commonwealth.[346] Thus, it is precisely because of Cicero's devotion to his ideal constitutional theory that he makes room for social practices that deviate from that theory in light of the fact of reasonable pluralism and human fallibility. To ignore the practical and focus only on the ideal is to risk harming the ideal.

D. *Responses to Counterarguments*

1. Social Practices and the Noble Lie

From the perspective of radical constitutional theory, the foregoing argument for practical theory seems to make an unreasonable demand. If the ideal specifies what is true, and a social practice deviates from what is true,

340 LOMBARDO, *supra* note 327, at 100.

341 GEORGE, *supra* note 36, at 32.

342 *See* AQUINAS, *supra* note 195, at pt. I-II, q. 96, art. 2 ("[H]uman law does not prohibit everything that is forbidden by the natural law.").

343 *Id.*

344 SCHOFIELD, *supra* note 26, at 49; CICERO, *Republic*, *supra* note 104, at 1.39a.

345 CICERO, *Republic*, *supra* note 104, at 1.39a (defining a commonwealth as "an assemblage of some size associated with one another through agreement on law and community of interest").

346 JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9-11 (2d ed. 2011) (elaborating on the Aristotelian idea of a focal meaning).

then the social practice reflects what is false. Why should we permit the falsity to stand? Would doing so be tantamount to asserting that something is true when it is in fact false? In the stare decisis context, for example, one might think that applying a precedent that attributes a rule to the Constitution—when in fact the Constitution contains no such rule—is to speak a lie. Are the arguments in favor of practical theory, at bottom, attempted justifications for perpetuating a lie? After all, there is a tradition of thought in political theory that is comfortable asserting lies for the sake of some other good, such as social unity and stability. Most famously, Plato's *Republic* includes a description of "one noble falsehood" that would bind the polity together.[347] Is the argument in favor of practical constitutional theory part of this tradition?

It certainly can be, but that is not the type of argument I am making here. I disclaim any argument that depends on lying.[348] But there is a distinction between declining to correct a falsehood and asserting that the falsehood is true. To take a trivial example: if, in conversation with a friend, the friend says that the Fourteenth Amendment was ratified in 1870, and I allow that remark to go uncorrected, I am not necessarily endorsing his false statement as true. I am, rather, declining to correct his error and state that the Amendment was ratified in 1868—probably because doing so is unnecessary in the context of the conversation and would come across as pedantic and condescending (especially if I am confident that my friend does, in fact, know the correct year and has simply misspoken). There can, in other words, be good reason not to correct a falsehood, and declining to correct the falsehood does not necessarily entail asserting that the falsehood is true.

The same applies to social practices. Consider, for instance, stare decisis from Paulsen's originalist perspective. Saying that a particular precedent should not be overruled is not to say that the precedent is correct. Indeed, stare decisis only has bite when it assumes that a precedent is likely *incorrect* and yet requires retaining the precedent.[349] Insofar as the Court acknowledges that the precedent was wrong but proceeds to give reasons for retaining the precedent, the Court is not involved in a lie.

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347 PLATO, *The Republic*, *reprinted in* PLATO: COMPLETE WORKS 414b8 (John M. Cooper ed., G.M.A. Grube & C.D.C. Reeve trans., Hackett Publ'g Co. 1997). For further discussion, see MALCOLM SCHOFIELD, PLATO: POLITICAL PHILOSOPHY 284-308 (2006).

348 For arguments against lying, see generally AUGUSTINE, TO CONSENTIUS, AGAINST LYING, *reprinted in* 3 NICENE AND POST-NICENE FATHERS, FIRST SERIES (Philip Schaff ed., H. Browne trans., Buffalo, Christian Literature Publ'g Co. 1887); AUGUSTINE, ON LYING, *reprinted in* 3 NICENE AND POST-NICENE FATHERS, FIRST SERIES, *supra*.

349 *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part) ("[T]he doctrine of *stare decisis* always requires reasons that go beyond mere demonstration that the overruled opinion was wrong, for otherwise the doctrine would be no doctrine at all.") (internal citations omitted).

Here, Paulsen and other radical theorists would likely argue that there is an important distinction between the two examples above. Refraining from correcting my friend's false statement during our conversation has no consequence for my or anyone else's future actions. Refraining from overruling an erroneous precedent does. We treat a Supreme Court precedent *as if it were law* and, therefore, as a reason for or against acting in certain ways.[350] If (to adopt Paulsen's view for the sake of the argument) we recognize a distinction between the "real" originalist Constitution and the Court's non-originalist precedents, does treating a non-originalist precedent like the "real" Constitution implicitly assert a falsehood?

No, it is instead upholding a fiction, and as Steven D. Smith has argued, fictions are not the same as lies:

> The special character of a 'fiction,' it seems, is that while containing implicit or sometimes explicit indications that it is not factual in a conventional sense, the fiction does offer something that listeners or readers are invited to treat *as if* it were factual, at least within a limited context or for particular purposes.[351]

As a humorous example, Smith posits: "Suppose that after listening to a reading of *Moby Dick* or *The Brothers Karamazov* someone asks, 'Did all of that *really* happen?,' and, upon being told that it didn't, exclaims, 'So then it was all just a pack of lies?'"[352] It is of course inaccurate to say that *Moby Dick* is a "pack of lies." The novel—as a genre—makes no pretense of being true, even though it invites us *to respond as though it were true* to achieve a limited purpose: providing us with a reading experience that would be impossible without suspension of disbelief.

In the same way, if we assume Paulsen's originalist perspective, refusing to overrule a non-originalist precedent is *not* an assertion that the non-originalist precedent is an accurate representation of the "real" Constitution. Rather, it is an assertion that we must treat the non-originalist precedent *as if it were* the "real" Constitution to achieve a limited purpose: such as to avoid upsetting significant reliance interests or to maintain the stability of the constitutional order.[353] In this sense (again, from the perspective of Paulsen's

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350 *See* JOSEPH RAZ, *Legitimate Authority*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 3, 17-18 (2d ed. 2009) (defining exclusionary reasons); FINNIS, *supra* note 346, at 234 (importing Raz's concept of exclusionary reasons to define authority).

351 STEVEN D. SMITH, FICTIONS, LIES, AND THE AUTHORITY OF LAW 20 (2021).

352 *Id.* at 19.

353 *See Ramos*, 140 S. Ct. at 1414-15 (Kavanaugh, J., concurring in part) (listing these and additional factors that must be considered before overturning precedent). Sachs makes a similar argument about precedent being "merely a semblance of law." Stephen E. Sachs, *Precedent and the Semblance of Law*, 33 CONST. COMMENT. 417, 431 (2018).

originalism), incorrect precedents that are retained on the basis of stare decisis are fictions: they ask us to treat as law what we acknowledge is not law.[354] But as Smith notes, there is a limit to how detached from reality a novel or other work of fiction can be before the audience can no longer suspend disbelief.[355] In the same way, there is a limit to how wrong a social practice (such as a judicial precedent) can be before we can no longer treat it as law.[356]

Even so, how is such a fiction morally permissible? Recall that I (relying on Cicero and Aquinas) have not been arguing that practicability is some sort of brute exception to ideal constitutional theory. If the mere fact of a social practice's existence took priority over ideal constitutional theory, we would be left in precisely the position I rejected in Part I.[357] Rather, I have been arguing that any sound ideal constitutional theory *itself* requires taking practicability into account and, accordingly, acknowledges the limits of ideal theory. That is, a sound ideal constitutional theory has to reckon with the harm done by wiping out social practices that fall short of the ideal. Strang, for instance, has offered an ideal moral theory based in natural law that he argues allows for stare decisis, and he further argues that originalism—because the original meaning of Article III likewise authorizes stare decisis—accords with his ideal moral principles.[358] So from Strang's perspective, the ideal moral principles undergirding originalism recognize their own limitations when confronted with the significant harm that overruling a non-originalist precedent might pose.

But let us assume that Paulsen's theory of originalism is based on a moral framework and an interpretation of the original meaning of the Constitution that provides no ground for accommodating non-originalist social practices,

354 It is thus essential, when retaining a precedent for stare decisis reasons, to acknowledge the wrongness of the precedent if a court is to avoid falling into a lie. As *Dobbs* pointed out, this was a major problem with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), which never analyzed whether *Roe v. Wade*, 410 U.S. 113 (1973), was rightly decided. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2271-72 (2022).

355 *See* SMITH, *supra* note 351, at 20-23.

356 *See Ramos*, 140 S. Ct. at 1414-15 (Kavanaugh, J., concurring in part) (arguing that a precedent that is "egregiously wrong" can be overruled and citing *Plessy* as an example). *Dobbs*, in my view, rightly regarded *Roe* as so "far outside the bounds of any reasonable interpretation of the various constitutional provisions to which it vaguely pointed" that it could never be tolerated, even as a fiction. *Dobbs*, 142 S. Ct. at 2264-65.

357 *See supra* Sections I.B & I.C.

358 Strang, *supra* note 250, at 437-47. As I note below, I agree with Strang that both natural law and originalism allow for stare decisis. Which principles ought to guide the stare decisis inquiry is a separate question I do not address here, though I acknowledge that there is a good argument that current stare decisis doctrine strays from the conception of stare decisis at the Founding. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 22-37 (2001) (describing the conception of common law at the Founding and its implications for stare decisis).

even if sweeping away those practices would do great harm.[359] In that case, the proper response would not be to make some brute fact exception to originalism, which would be self-defeating by undermining the moral framework of Paulsen's originalism.[360] The proper response would be one of three possibilities: (1) rejecting as flawed the moral theory undergirding Paulsen's specific brand of originalism, which might permit a different version of originalism that is less radical in nature, (2) rejecting originalism in general (if no sound, alternative ideal moral theory could justify a less radical version of originalism and originalism was not required by a sound ideal moral theory), or (3) if neither (1) nor (2) is possible (such that Paulsen's ideal moral theory and his version of originalism are the only logically sound options), concluding that the Constitution is morally deficient due to the great harm it would do under the hypothetical just posited. In other words, if originalism is required by ideal moral theory, and if neither the ideal moral theory justifying originalism nor the original meaning of the Constitution makes room for non-ideal social practices, then the Constitution itself is morally deficient. That is not my view, since I agree with Strang that the Constitution *does* permit a version of stare decisis, but analyzing Paulsen's argument is useful in teasing out the implications of my argument in Sections II.B and II.C.

Although I have been focusing on Paulsen's originalist case against stare decisis in the foregoing discussion, the same points apply to other radical constitutional theories. For instance, Vermeule's common-good constitutionalism argues that, insofar as the original meaning of the Constitution conflicts with what natural-law principles would require if directly applied to the facts of a case, the natural-law principles must prevail,[361] since the natural-law tradition teaches that unjust positive laws "are acts of violence rather than laws" and "do not bind in conscience."[362] So Vermeule might think that treating as "law" a positive law whose original meaning conflicts with the natural law is to engage in a sort of lie or dishonesty.[363] But in the very sentence just quoted, Aquinas goes on to qualify his statement that unjust laws do not bind in conscience "except perhaps in

359 This appears to be Paulsen's view of his own theory. *See* Paulsen, *supra* note 58, at 289 & n.2.

360 *See id*.

361 Adrian Vermeule, *On "Common-Good Originalism*," MIRROR OF JUST. (May 9, 2020), https://mirrorofjustice.blogs.com/mirrorofjustice/2020/05/common-good-originalism.html [https://perma.cc/9XLA-WB5F].

362 AQUINAS, *supra* note 195, at pt. I-II, q. 96, art. 4.

363 I am not claiming that Vermeule thinks this. I am simply using his theory as an example to show that what I am advocating need not necessarily require radical theorists to engage in a Noble Lie.

order to avoid scandal or disturbance."[364] Aquinas is not urging that we assert that an unjust law meets the focal definition of law, which would be a lie from a Thomistic perspective. He is urging that in some circumstances we *treat* the unjust law *as if it were law* to avoid a still-worse outcome,[365] demonstrating that his ideal legal theory makes room for the practical and acknowledges the limits of ideal theory in a fallible world.

2. The Need for Radicalism

Even accepting the foregoing, are there not some circumstances in which the practical must yield to the ideal, necessitating potentially radical changes to social practices? Surely, a society whose practices are steeped in deeply immoral acts requires radical change—the uprooting of such social practices. Does my argument foreclose such radicalism, demanding conformity to unjust social practices?

No. The entirety of Part I argues against such conformity. A constitutional theory must be grounded in ideal moral theory. It must have, as its foundation, objective claims about moral truth that are not derived from contingent social facts or practices (though such social facts might be relevant to the objective moral calculus). There are some social practices that one cannot, under any circumstances, countenance in law (even as fictions),[366] and there comes a point at which immoral social practices are so pervasive that a radical change to a society's practices through the force of law is necessary. The deeply embedded social practices constituting Jim Crow presented just such an example.[367] Ideal constitutional theory remains the standard by which we judge competing constitutional theories and legal regimes, which means that social practices are ultimately accountable to moral frameworks.[368]

But the harm done by radical changes to our social practices is an important moral consideration that any ideal theory must take into account.

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364 AQUINAS, *supra* note 195, at pt. I-II, q. 96, art. 4.

365 I am not arguing that the original meaning should be sustained through Aquinas's prudential exception for obeying unjust laws in order to avoid worse evils. Again, my point here is simply that if Vermeule were to accept my argument for practicability, it need not require dishonesty on his part.

366 *See, e.g.*, AQUINAS, *supra* note 195, at pt. I-II, q. 96, art. 4 ("[L]aws may be unjust through being opposed to the Divine good: such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law: and laws of this kind must nowise be observed, because . . . *we ought to obey God rather than men*.").

367 *See, e.g.*, Shelby Cnty. v. Holder, 570 U.S. 529, 534-35 (2013) (discussing the Court's decision to uphold the Voting Rights Act of 1965 in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), despite the Act's departure from principles of federalism, because of the extraordinary circumstances presented by the need to root out racial discrimination in voting).

368 Alicea, *supra* note 11, at 623-27; *see also* Urbina, *supra* note 175, at 37 (arguing that social practices are ultimately judged by moral standards).

The problem with radical constitutional theories is that they pay little, if any, heed to this moral consideration, leading to distortions of the moral calculus. In short, social practices are relevant—but ultimately answerable—to the normative justifications that undergird a sound constitutional theory.

III. AT THE LIMITS OF CONSTITUTIONAL THEORY

A. *Constitutional Theory and Constitutional Design*

If what I have said is correct, a sound constitutional theory requires incorporating both the ideal and the practical. It must be grounded in a framework of objective moral truths, but that framework must also accommodate the reality that our social practices will fall short of the ideal. The moral principles undergirding a constitutional theory must be able to justify their own limitations in the face of non-ideal social practices, yet the social practices must remain ultimately accountable to the moral principles.

Given the problem of disagreement, the tendency of constitutional theorists has been to cashier one or the other of these essential ingredients.[369] One approach is to dispense with moral frameworks and ground constitutional theory in contingent social facts. The other is to run roughshod over social practices resulting from pluralism that seem to stand in the way of those ideals. For all the reasons I have laid out, both approaches lead to serious flaws in the resulting constitutional theory. It follows that, because constitutional theory necessarily makes controversial truth claims, it is not

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369 I should note that some theorists do not adopt either of the approaches criticized above. For example, both Richard Fallon and Marc DeGirolami offer practice-based constitutional theories like those in the first camp. *See* Alicea, *supra* note 11, at 582-84, 587-89, 594-95, 601-02. Yet Fallon and DeGirolami also affirm the need for ideal theory, like those in the second camp. *See* Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 39-49 (2024) (proposing various ideal theories to justify traditionalism); FALLON, *supra* note 32, at 24-35 (arguing that moral legitimacy requires ideal theory). Thus, the theories that reject moral frameworks tend to be practice-based theories, but not all practice-based theories reject moral frameworks. *See* Alicea, *supra* note 11, at 582-84.

Similarly, Solum's recent, ambitious attempt to reframe normative constitutional theory discourse acknowledges the importance of both normative claims and the limits imposed on normative theory by practical constraints, such as political feasibility. *See generally* Lawrence B. Solum, *Outcome Reasons and Process Reasons in Normative Constitutional Theory*, 172 U. PA. L. REV. 913 (2024).

Other theorists have a more ambiguous relationship to the two camps described above. Cass Sunstein, for example, could be interpreted as rejecting ideal theory when he adopts judicial minimalism and requires any theory to adhere to "fixed points" in our social practices. *See* SUNSTEIN, *supra* note 34, at 11-16. Yet he could also be said to adopt ideal theory when he advocates for choosing a constitutional theory based on its net benefits, which implicitly presupposes a moral framework. *See id.*

well-suited to mitigating the problem of disagreement. Indeed, it calls forth such disagreement.

But that still leaves us with the question: how do we address the threat to our constitutional system caused by the fact of reasonable pluralism?[370] If constitutional theory is not suited to that task, what is? While I can only sketch the answer here, the primary response to the problem of disagreement is constitutional *design*. Constitutional design is the practical task of constructing a governmental system suited to a particular people with a particular history and set of social practices. The Constitutional Convention, for example, was a paradigmatic act of constitutional design. Constitutional design is concerned with questions like how should we arrange the distribution of power within our government, how should those who hold power be selected, and how do we minimize the potential for abuses of power by those holding office? And, crucially, it is also concerned with the question: how do we construct a constitution that forges consensus, permits us to take united action, and habituates us to mutual accommodation despite our disagreements? In other words, a key task of constitutional design is to ensure the stability and unity of a polity in the face of reasonable pluralism by channeling their disagreements into constructive action.

As Yuval Levin reminds us, the Founders designed our Constitution with this task in mind.[371] In *Federalist No. 10*, James Madison observed the fact of reasonable pluralism in strikingly Rawlsian terms: "As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed."[372] Levin points out: "Throughout the deliberations over the Constitution, a dark cloud of disunity hung in the air—disunity among the states, and among the people."[373] Perhaps for that reason, "[t]he first twenty-three of the eighty-five Federalist Papers were explicitly devoted to the need to preserve the union, and almost all the rest touch upon that subject too."[374] The Constitution was therefore "built with a keen awareness of the plurality and fractiousness of the American nation. It was offered as a way to live with the reality of our diversity and divisions, aiming to mitigate their downsides without harboring the utopian illusion of eliminating them."[375] It accomplishes this task "by compelling Americans with different views and

370 Rawls was concerned with the threat that reasonable pluralism posed to the stability of the principles of justice; the constitutional theorists I critiqued above, however, are primarily concerned with the stability of our constitutional system. *See* Alicea, *supra* note 11, at 576-77.

371 LEVIN, *supra* note 25, at 1-4 (arguing that the Founders were concerned about disagreement and designed the Constitution to forge consensus).

372 *Compare* THE FEDERALIST NO. 10, *supra* note 8, *with* RAWLS, *supra* note 9, at 54-58 (describing the "burdens of judgment" that lead to reasonable disagreement).

373 LEVIN, *supra* note 25, at 34.

374 *Id.*

375 *Id.* at 35.

priorities to deal with one another—to compete, negotiate, and build coalitions in ways that drag us into common action even (indeed, especially) when we disagree."[376]

Given the inevitable pluralism that a free society produces, the question is whether we can design a framework for politics that mitigates pluralism's destabilizing effects. "Our politics does not exist to extinguish [a] multiplicity [of deeply held beliefs] but to allow us to live together, seek the good, and address public problems in the midst of [such disagreement]."[377] But for this to work, we need a constitutional system that, "rather than [enabling] simple majority rule . . . seeks something closer to consensus rule [on issues of the day] through a variety of counter-majoritarian requirements and mechanisms."[378]

The Electoral College, for instance, incentivizes presidential candidates to "compete for a band of persuadable voters who [will] ultimately determine the outcomes of close elections" in key swing states, rather than—in a national popular vote system—"focus[ing] on getting out [their] most devoted voters in the least politically competitive parts of the country."[379] These dynamics force political parties to moderate their ideological aims and establish broader coalitions among citizens.[380] Different electorates for selecting the House, Senate, and President, staggered terms, and multiple veto points in the legislative process further create incentives for building broad, long-term coalitions to achieve policy goals without resolving underlying disagreements about the principles of justice.[381]

Thus, "[b]y embracing conflicting aims together, by compelling political combatants into negotiation, and by putting differing interests into competition, our system drives us to engage with one another precisely where we disagree, and so to build common ground through common action at the very heart of our disputes."[382] This can be frustrating, leaving "our political system always feeling unsettled—like no cause is ever truly won or lost."[383] For that reason, the constitutional mechanisms described above—and many others—have become controversial on both the political right and the political left,[384] but the unsettled politics created by our Constitution is "why [our]

376 *Id.* at 2-3.

377 *Id.* at 42.

378 *Id.* at 51.

379 *Id.* at 46.

380 *Id.* at 46-47.

381 *Id.* at 68-73.

382 *Id.* at 62; *see also* JAY COST, DEMOCRACY OR REPUBLIC? THE PEOPLE AND THE CONSTITUTION 64-77 (2023) (arguing that a political structure requiring consensus building is essential to governing a country as "large and diverse" as the United States).

383 LEVIN, *supra* note 25, at 42.

384 *Id.* at 39.

system is often able to create more winners than losers in divisive struggles. Because almost no victory is ever complete, almost no defeat is ever total either."[385]

With respect to the problem of disagreement, the key difference between constitutional theory and constitutional design is that, whereas the goal of constitutional theory is to arrive at the correct constitutional theory, the goal of constitutional design is to enable a people to act together to achieve common ends. The former is necessarily concerned with what is *true*; the latter is necessarily concerned with what is *prudent*.[386] To be sure, there are moral principles that limit the kind of constitution that is permissible, and those moral principles depend on moral truth claims.[387] But within the expansive area created by those moral parameters, stability can be prioritized over all manner of other considerations without creating any logical or moral contradictions.[388] Constitutional theory asks questions like what true moral principles justify adherence to a constitution, what implications those principles have for judicial role morality in light of our Constitution, and what method of constitutional adjudication follows from that role morality.[389] These are all questions that implicate controversial moral truth claims, which is why they do not lend themselves to pursuing unity and stability. By contrast, the best arrangement of powers within a regime, the terms of office for public officials, and other constitutional-design questions do not (or do not usually) require making moral truth claims. Whether a judge is obligated to be an originalist is a moral question of constitutional theory; whether the President should serve for four versus six years is a prudential question of constitutional design. This means that, within broad parameters, constitutional design can quite explicitly pursue goals like stability and consensus without contradicting what is true,[390] a point that comes through

385 *Id.* at 42.

386 This is not to say that prudence has no relation to moral truth claims. Rather, it is to say that prudence is about determining the means of achieving good ends. AQUINAS, *supra* note 195, at pt. II-II, q. 47, art. 2. The space within which prudence operates, in other words, presupposes that we have already determined the truth about whether the ends we aim to achieve are good. *Id.* Constitutional theory is concerned with whether the principles or ends are good; constitutional design is concerned with the best means of achieving those ends. That is why constitutional theory necessarily implicates disagreements over moral truth, whereas constitutional design generally need not.

387 Alicea, *supra* note 35, at 28-29.

388 *See* LEVIN, *supra* note 25, at 44 (describing the Founders' constitutional design as intended to "hold[] together disparate social interests and forces by keeping them engaged in . . . contention").

389 *See generally* Alicea, *supra* note 35.

390 This is why a constitutional-design response to the problem of disagreement does not fall prey to the problems with the theories I critiqued in Part I, which subordinate truth to stability.

in Cicero's *Laws*.[391] Constitutional theory and constitutional design—as I have defined them—are thus distinct enterprises with different sets of questions that make them differently situated with respect to addressing the problem of disagreement.[392] In this sense, constitutional theorists have been attempting to give a constitutional-theory answer to a constitutional-design question, which can only cause confusion.[393]

Nonetheless, the enterprises and sets of questions interact with each other. We see this in Cicero's writings. When Cicero insists that, before identifying the best form of the commonwealth (in the *Republic*) and the best constitutional laws (in the *Laws*), he must first identify the ideal nature of a commonwealth[394] and of law,[395] he is recognizing that a constitutional-theory question—what true moral principles justify adherence to a constitution—precedes constitutional design. Cicero answers this constitutional-theory question in the *Republic* with his normative definition of a *res publica*[396] and in the *Laws* with his argument for grounding positive law in natural law.[397] Having done so, he then argues in the *Republic* that the Roman mixed constitution best approximates the ideal *res publica* and proposes specific constitutional rules in the *Laws* to "suit the laws to the form of the state which we approve."[398] In this way, constitutional theory precedes constitutional design because constitutional design must "preserve and protect that form of commonwealth which [we] showed was the best."[399] Indeed, as Michael

391 *See* CICERO, *Laws*, *supra* note 105, at 2.11. *See also* ATKINS, *supra* note 22, at 204-08 (interpreting Cicero to suggest that human law can be valid even when it is not identical to the natural law because of the contingency of human affairs).

392 One might disagree with my stipulated definitions. The labels do not matter much, though I believe my description of constitutional theory generally accords with how scholars understand the term. *See, e.g.*, Fallon, *supra* note 34, at 545-49 (arguing that constitutional theory requires making normative arguments about the best theory); Strauss, *supra* note 18, at 586-88 (describing constitutional theory as "prescrib[ing] something about the results a legal system should reach in controversial cases" that must be both prescriptive and descriptive). What matters are my substantive points: (1) designing a constitution is a distinct enterprise from justifying obedience to it or adducing a theory of adjudication under it, and (2) the former is better suited than the latter to mitigating the problem of disagreement.

393 *Cf.* Raz, *supra* note 227, at 14-15 (making a similar point regarding Rawls's theory); *see also* Stephanie Barclay, *Constitutional Rights as Protected Reasons*, 92 U. CHI. L. REV. (forthcoming 2025) (manuscript at 69-78), https://ssrn.com/abstract=4740989 (distinguishing between constitutional design and constitutional interpretation). The distinction I draw between constitutional theory and constitutional design is similar to the distinction that Jeremy Waldron draws between "theorizing about justice" and "theorizing about politics," which he regards as "distinct agenda[s]." JEREMY WALDRON, LAW AND DISAGREEMENT 3 (1999).

394 *See* CICERO, *Republic*, *supra* note 104, at 1.38.

395 *See* CICERO, *Laws*, *supra* note 105, at 1.18–20, 1.28.

396 *See* CICERO, *Republic*, *supra* note 104, at 1.39a.

397 *See* CICERO, *Laws*, *supra* note 105, at 1.18–34.

398 *Id.* at 3.5.

399 *Id.* at 1.20.

Hawley has argued, the Founders—taking their cue from Cicero—understood this aspect of the relationship between constitutional theory and constitutional design.[400]

In other contexts, however, constitutional design precedes constitutional theory. If our question is what method of constitutional adjudication American judges should follow—a quintessential question of constitutional theory[401]—we cannot answer the question without first knowing facts about the American Constitution.[402] For example, suppose that the Constitution did not contain the amendment procedure under Article V or declare the Constitution to be the supreme law of the land under Article VI. Those omissions might have significant implications for how one thought about competing theories of constitutional adjudication.[403] This kind of constitutional-theory question, in other words, presupposes an already-designed Constitution that serves as a key descriptive input into our moral reasoning. This is why constitutional theorists often say that constitutional theories have both descriptive and normative components: we need to know facts about our current constitutional system (the descriptive component) if we are to reason correctly about judicial role morality under that system (the normative component).[404] Because of the intersecting nature of constitutional theory and constitutional design, it can be easy to lose sight of what kinds of considerations are relevant to each set of questions.

To be clear, I am not saying that constitutional design can *solve* the problem of disagreement; it can only mitigate it. Nor am I saying that constitutional design can be successful in the absence of some minimal level of agreement on what the political community should be trying to achieve. Without some basic level of commonality among the people, it would be impossible for them to act in concert through constitutional procedures toward common ends, which (as Cicero said and as I will further elaborate in the next Section) is the common action that constitutes their unity as a political community. I am only saying that, taking for granted that reasonable pluralism will continue to exist and that constitutional theory is ill-suited to mitigating the effects of disagreement, constitutional design *can* mitigate

400 HAWLEY, *supra* note 26, at 188-89, 192.

401 *See* Fallon, *supra* note 34, at 537 (defining constitutional theories as "theories about . . . how judges should interpret and apply" the Constitution); Strauss, *supra* note 18, at 582 (defining the same as "an effort to justify a set of prescriptions about how certain controversial constitutional issues should be decided").

402 Alicea, *supra* note 11, at 581.

403 Alicea, *supra* note 35, at 44-52.

404 Alicea, *supra* note 11, at 581-82; *see also* Fallon, *supra* note 34, at 540 (characterizing most constitutional theories as both normative and descriptive).

such effects by channeling *some reasonable range* of disagreement into constructive political action.

B. *The Line Between Theory and Design*

Although my sketch of the distinction between constitutional theory and constitutional design is preliminary, several objections immediately come to mind that require responses.

The first objection denies that there is any significant distinction between constitutional theory and constitutional design. Consider, for instance, constitutional theories that permit judicial evolution of constitutional meaning over time. When the Supreme Court upheld dramatic expansions of federal power during the New Deal[405] or announced the one-person-one-vote standard during the Warren-Court era,[406] were these not significant changes to our constitutional system (one might say our constitutional design) achieved through constitutional adjudication? And if so, does that not demonstrate that the line between constitutional theory and constitutional design is illusory? Strauss, for instance, agrees with both the New-Deal-era and Warren-Court-era changes described above.[407] Does that make his theory a constitutional theory, a theory of constitutional design, or both?

I do not deny that some constitutional theories purport to authorize judges to engage in what could be described as constitutional design,[408] but this does not disprove the distinction between theory and design. My point is not that it is impossible for the same actor to engage in both activities; my point is that the two activities are conceptually distinct.[409] Further, they are distinct in a way that makes constitutional theory a poor fit for mitigating moral disagreements, whereas the same is not true of constitutional design. As argued above, a constitutional theory like Strauss's cannot avoid making

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405 *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941) (holding that Congress may regulate labor standards involved in the manufacture of goods for interstate commerce).

406 *See* Reynolds v. Sims, 377 U.S. 533 (1964).

407 STRAUSS, *supra* note 13, at 15-18 (arguing in favor of several New-Deal-era and Warren-Court-era changes in constitutional law).

408 Many theorists who advance such theories would resist the notion that they are openly engaged in redesigning our Constitution and would instead argue that they are *implementing* our constitutional design, under which judges are permitted to evolve aspects of our constitutional system over time. *See, e.g.*, BALKIN, *supra* note 201, at 21-34 (describing "framework originalism"); Strauss, *supra* note 87, 1735-37 (arguing that the Constitution only resolves specific points and otherwise allows a good deal of room for judicial evolution of doctrine). But this just amounts to a claim that our original constitutional design authorizes judicial acts of further constitutional design.

409 In this limited respect, the theory/design distinction is analogous to the interpretation/construction distinction as understood by Solum. In Solum's view, a judge engages in both interpretation and construction without thereby disproving that the distinction exists. *See* Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 469 (2013).

controversial moral truth claims if it is to be logically sound, and his attempts to avoid such claims in light of the problem of disagreement cannot succeed. That he might be able to mitigate the problem of disagreement through judicial acts of constitutional design authorized by his constitutional theory in no way contradicts my argument. In other words, although Strauss cannot mitigate disagreement by avoiding making controversial moral truth claims in the justification for his constitutional theory, he might be able to mitigate disagreement by proposing specific judicially crafted changes to our constitutional design as authorized by his constitutional theory.[410]

Another version of the no-distinction objection would argue that constitutional design is just as infused with controversial questions as constitutional theory, such that it is no better or worse than constitutional theory at mitigating disagreement. Even if one accepts my earlier argument that there is a broad scope of permissible constitutional designs and that constitutional theory identifies the moral boundaries within which design takes place,[411] there will still be controversy over constitutional-design choices. For example, the choice of whether to require broad consensus in lawmaking (which advantages political minorities and is more likely to produce stable political outcomes) or to empower majority rule (which allows a society to respond more quickly and decisively to social problems and better comports with some conceptions of democracy) will be controversial and require prioritizing some goods over others (e.g., prioritizing stability over efficiency).

But I am not arguing that constitutional design can avoid controversy. The robust debate over ratification of our Constitution attests to the fact that controversy attends constitutional design. My point, rather, is that because the questions implicated by constitutional design are prudential in nature (i.e., they are about how to achieve morally good ends), they lend themselves to compromises and half-measures in a way that the questions implicated by constitutional theory do not. It is possible, without logical error, to compromise on the stability versus efficiency debate in constitutional design by, for instance, creating a majoritarian House and a non-majoritarian Senate, as our Constitution does.[412] But in constitutional theory, it is not possible, without logical error, to assert (absent some further normative premise) that judges should decide cases in *X* manner because *Y* social practice tells them

410 I think such judicially crafted changes in constitutional design raise significant legitimacy problems, but those problems are not my focus here. *See* Alicea, *supra* note 35, at 43-59.

411 *See supra* notes 386–387 and accompanying text.

412 *See* LEVIN, *supra* note 25, at 137-40 (noting that Congress's bicameral structure is designed to encourage negotiation and consensus).

to do so, since this illicitly draws a normative conclusion from a descriptive premise.[413]

Finally, one might grant that there is a distinction between constitutional theory and constitutional design but argue that it is a matter of degree, rather than a binary distinction. Perhaps we should see constitutional issues as resting on a continuum, with some having a more obvious constitutional-theory valence, others a more obvious constitutional-design valence, and most falling somewhere between those two poles.

While I suspect that most constitutional issues fit cleanly into either the theory or design category, I acknowledge that there are some issues that might not. Some questions of constitutional construction strike me as potentially straddling the line between the two activities. By "constitutional construction," I have in mind Keith Whittington's original conception of it as the process of "elucidat[ing] the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdetermined as to be incapable of faithful but exhaustive reduction to legal rules."[414] For example, Whittington asserts that Congress's incorporation of the Bank of the United States was an act of constitutional construction.[415] Assuming he is correct (that is, that the constitutional text was underdeterminate on this question), then it is not obvious whether the Supreme Court's endorsement of the political branches' constitutional construction in *McCulloch v. Maryland*[416] was an act of constitutional theory or of constitutional design. As an act of constitutional adjudication that drew upon a more general constitutional methodology, *McCulloch* could be seen as an example of constitutional theory in practice. But as a "essentially creative"[417] act that determined the contours of federal power not otherwise specified in the constitutional text, *McCulloch* could be seen as an act of constitutional design, analogous to a mini constitutional convention. It was precisely because of this ambiguous character of constitutional constructions that Whittington argued that they were "essentially political" in character and better suited to the

413 *See supra* Section I.C.

414 KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 5 (1999). This definition is narrower than Solum's definition, encompassing only those situations of textual underdeterminacy, rather than (as Solum defines it) any "activity that determines the content of constitutional doctrine and the legal effect of the constitutional text," even where the text's meaning is quite clear. Solum, *supra* note 409, at 457, 469. My discussion of constitutional construction as potentially straddling the line between theory and design is limited to Whittington's understanding of construction.

415 WHITTINGTON, supra note 414, at 12.

416 17 U.S. (4 Wheat.) 316, 405-06 (1819).

417 WHITTINGTON, *supra* note 414, at 1.

political process (like the drafting and ratification of the Constitution and subsequent amendments) than to judicial resolution.[418]

In any event, this example suggests that, while the distinction between constitutional theory and constitutional design is real and meaningful, it would be a mistake to assume that the boundary between the two activities is always clear. But I can happily concede this point without doing violence to my overall argument—for the same reasons given above regarding constitutional theories that authorize judicial constitutional design. The sometimes-fuzzy line between constitutional theory and constitutional design does not detract from my argument that the core questions of constitutional theory (e.g., is the Constitution morally legitimate?) necessarily require making moral truth claims ill suited to mitigating disagreement, whereas the core questions of constitutional design (e.g., should we have a unicameral or bicameral legislature?) generally do not involve such claims and are better suited to channeling disagreements towards fruitful consensus. Rather, it shows that there are peripheral cases my argument might not reach or to which my argument is only partially applicable.

C. *Constituting a Political Community*

But even assuming that the distinction between constitutional theory and constitutional design is sound, and even assuming that constitutional design is better suited to addressing the problem of disagreement, one might pose a further challenge to my claim that constitutional theory must remain an arena of moral disagreement and that the problem of disagreement is better addressed through constitutional design. That challenge can be formulated as follows: can a political community exist notwithstanding pluralism about the kinds of moral questions implicated by constitutional theory? My answer to such a big question is tentative, but let us assume for the sake of the argument Scipio's view in the *Republic*: what is necessary for a *res publica* is agreement by the people on constitutional law "and community of interest."[419] There must be commitment to the Constitution and some basic level of agreement on the ends we are trying to pursue through constitutional action. That does not mean, however, that we have to agree on the nature of justice itself.[420]

Richard Ekins, in his analysis of group action and its application to politics, shows how a political community could potentially exist through agreement on constitutional law and basic ends, even if it disagrees on the

418 WHITTINGTON, *supra* note 190, at 7, 158.

419 CICERO, *Republic*, *supra* note 104, at 1.39a.

420 *See supra* Section I.B. *But see* Brian M. McCall, *Can a Pluralistic Commonwealth Endure?*, 11 GEO. J.L. & PUB. POL'Y 45, 46 (2013) (arguing that Cicero's description of a consensus on justice refers to a consensus on the nature and purpose of law and its relation to justice).

nature of justice. These are philosophically complex questions, so I can only outline Ekins's account here and refer the reader to his body of work for further discussion and responses to counterarguments.

At its most fundamental level, "[a] group is an association of two or more persons who unite in the coordinated pursuit of a common purpose."[421] In the case of a political community, the group "is formed by, and consists of persons who intend to secure their common good together . . . ."[422] In Michael Bratman's account, as described by Ekins, a jointly accepted plan of action—or group intention—is possible given the following state of affairs:

> We intend to J [a joint action defined in cooperatively neutral terms] if and only if:
>
> (1) (a) I intend that we J and (b) you intend that we J.
>
> (2) I intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b; you intend that we J in accordance with and because of 1a, 1b, and meshing subplans of 1a and 1b.
>
> (3) 1 and 2 are common knowledge between us.[423]

Our intentions "interlock" in the sense that they are "caused by and are contingent on one another . . . ."[424] The interlocking nature of our intentions is necessary for the group action to be possible, since the joint action *J* requires subplans *1a* and *1b* to carry it into effect. "If those subplans were inconsistent, and neither of us was prepared to revise them in the event of conflict, then our joint intention would not be capable of fulfilment."[425]

But in a large group undertaking complex actions—such as a political community attempting to achieve its common good—there is a need for the group to act *through* the interlocking intentions of some smaller subgroup capable of forming and executing a joint intention.[426] As Ekins explains, authority procedures are the means by which the action of some subgroup

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421 RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 52 (2012). The purposive nature of the group is key to its differentiation from a mere collection of individuals sharing a common trait. Richard Ekins, *The State and Its People*, 66 AM. J. JURIS. 49, 52-53 (2021); *see also* CICERO, *Republic*, *supra* note 104, at 1.39a (defining "a people" as "an assemblage of some size associated with one another through agreement on law and community of interest").

422 Richard Ekins, *How to Be a Free People*, 58 AM. J. JURIS. 163, 170 (2013).

423 EKINS, *supra* note 421, at 54 (quoting MICHAEL BRATMAN, FACES OF INTENTION 121 (1999) (alteration in original)). Ekins relaxes this third requirement to some extent in the context of complex group action. *See id.* at 63-64 ("In Bratman's account, the group plan must be common knowledge. My account loosens that stricture. It is plain that complex group action is not always action on a plan known by all members.").

424 *Id.* at 55.

425 *Id.*

426 Alicea, *supra* note 35, at 27-28.

becomes the action of the larger group: "A group uses an authority procedure to select the plan of action on which it is to act when the group intends the application of the procedure to count as its act."[427] The group shares what we might call a "standing intention": "the group's general intention to use certain procedures to determine its particular intentions . . . ."[428] So, for example, we can think of the American people as having a standing intention that the procedures outlined in Article I, Section 7 determine our particular intentions with respect to any given problem that requires national group action, such as determining income tax rates. By following those procedures, the action of the subgroup (the President and Congress) becomes the action of the whole group (the American people) in a true sense, since the whole group shares the standing intention that the procedures be used to determine their group action. In this way, the standing agreement on authority procedures—that is, on our constitutional law—is what enables our group action toward common ends.

Cicero's definition of a *res publica* and its subsidiary definition of a people are, therefore, consistent with the philosophy of group action: an assemblage of individuals becomes a people (in the sense of political community) by pursuing common ends ("community of interest") through agreement on a common means ("agreement on law").[429] And this explains the property-based implications of the *res* in *res publica*: the actions of the commonwealth really are *the people's*.[430] They act jointly through agreement on the authority procedures of their constitution.

Yet, "neither the plan [of group action] nor the purpose [of the group] need be accepted by all members *for the same reasons*. Fulfillment of the group purpose will often be a means to different ends for the various members, and *this is not fatal to group action*."[431] Rather:

> "[T]o cooperate, the members must act on one proposal and they therefore need to know only that the proposal stands in the practical reasoning of each member as a means to the shared end that defines the group. The further reasons that the members have for acting are irrelevant to group action."[432]

So, for instance, we as a people can act jointly to defend another country from invasion, even if some of us do so because we believe we have a moral obligation to defend our ally and others do so solely because defeating the

427 EKINS, *supra* note 421, at 58.

428 *Id*.

429 CICERO, *Republic*, *supra* note 104, at 1.39a.

430 *See* SCHOFIELD, *supra* note 26, at 49 (characterizing Cicero's description of "a people" as having ownership over "the public interest and the conduct of public affairs").

431 EKINS, *supra* note 421, at 62 (emphases added).

432 *Id*.

invading force will reap economic gains for us.[433] That is, irrespective of disagreement on the nature of justice, "what constitutes a people is at root this continuing joint intention to secure one's common good. This unity, this disposition to act jointly, is itself an object of intelligible public action . . . ."[434] Our common end and coordinated action unite us as a people.

This does not take away from Cicero's (correct) insistence that our constitutional law must be rooted in justice, but the justice or injustice of our constitutional law is an objective truth, quite apart from our disagreements about why it is just or unjust. Provided that our Constitution is, in fact, morally sound, our disagreements about the basis for its soundness are not primarily the concern of constitutional theory. Constitutional theory, in other words, can and must be a forum for controversial and robust moral truth claims, provided that there is, in general terms, a shared commitment to the Constitution and basic ends of government. At that point, constitutional design takes over, and the politics enabled by our Constitution become the mechanism for mitigating the problem of disagreement.

But as I said above, the capacity of constitutional design to ameliorate the problem of disagreement should not be overstated. A well-designed constitution will channel our disagreements about moral frameworks into consensus about particular matters, but because the law inevitably reflects our moral views,[435] there is a limit to how divergent a society's moral views can be while still forging consensus about law.[436] Our Civil War is a testament to that fact.

What happens if constitutional design fails to channel our disagreements successfully? What if we are too riven with disagreements on foundational questions of justice for a successful politics within the framework of the Constitution? The temptation among constitutional theorists would be to try to shoehorn these problems into constitutional theory. But as I have argued, that would only produce conceptual confusion. The real answer, sobering though it may be, is that if constitutional design cannot mitigate the problem of disagreement, neither can constitutional theory. Constitutional theory can

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433 In this sense, agreements produced through constitutional design are similar to incompletely theorized agreements. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995) (explaining that agreements on particular levels of analysis often sacrifice the resolution of abstract disagreement). But, unlike incompletely theorized agreements, constitutional-design agreements need not involve any agreement on a rationale for joint action. *See id.* at 1737-38, 1740 (providing the example of judges, who may agree on the details of a rule but not on its foundation). *But see id.* at 1154-57 (noting areas where reasoning is not necessary).

434 Ekins, *supra* note 422, at 171.

435 GEORGE, *supra* note 36, at 7-8 (rejecting a sharp distinction between personal and political morality).

436 Whittington, *supra* note 1, at 233 ("[T]he shared constitutional project might fail because there is not enough held in common to continue.").

tell us whether a constitutional design is morally legitimate. It can tell us how to resolve constitutional disputes consistent with the moral claims undergirding the Constitution's legitimacy. But it cannot do what constitutional design is supposed to do: create a politics aiming at the good despite political polarization and reasonable pluralism.

Here, we have reached the limits of constitutional theory. If the Constitution as designed cannot mitigate the problem of disagreement in our society, nothing in constitutional theory will save us. Addressing the problem of disagreement is primarily a task of constitutional design, but that task can only succeed based on how much we already have in common and how we choose to respond to our disagreements as citizens operating within our constitutional design.

Conclusion

Can a constitutional system endure in the face of deep disagreement? This question has motivated much of constitutional theory over the last thirty years. Scholars have generally responded by either trying to avoid disagreements and eschew ideal constitutional theory, or they have ignored the problem of disagreement by rejecting practical constitutional theory. But as Cicero saw, a plausible constitutional theory needs both the ideal and the practical. Rather, the task of mitigating the effects of reasonable pluralism falls primarily to constitutional design, and if the design of our Constitution cannot successfully channel our disagreements into constructive outcomes, our Republic might share the fate of its predecessors. Whether it will share that fate is a question for us as citizens, not as theorists.