Forensic Constitutional Interpretation

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The gist of constitutional interpretation should be an amenable-ability to competing and even complementary schools of hermeneu-otic endeavor. This ideal collides with an intellectual seduction, nurtured within the legal academy, of monotheism—a belief in the possibility of one true theory of constitutional interpreta-

2 Scholarly argument notwithstanding, it is unlikely—and empirically unprecedented—that a judge would pivot the entire outcome of a constitutional dispute on, let us say, the presence or absence of a comma in the Exceptions and Regulations Clause of Article III (the Judiciary Article), the repetition of the word
“in” in the Vesting Clause of Article III, or the sudden caesura in the litany of “alls” in the Cases and Controversies Clause of Article III. It is also unquestionably hard to (re)build accurately a putative original intent of the Framers; the historical trails are manifestly incomplete, dismayingly tenuous, and probably distorted by the relativism of modern exegeses. Furthermore, practical American lawyers are usually edgy in the face of high formalism; if the text becomes hostage to anarchic and unpredictable meanings, the holy grail of deconstructionist ideology, it may not yield any sensible explanations at all.

These and other theories may prove separately inconclusive or overambitious, but each is merely a facet of an eclectic discourse that judges in the United States use to interpret the Constitution. Eclecticism, at the root of the common law, means a rea-

4. See Julian Velasco, Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View, 46 CATH. U. L. REV. 671, 700-02 (1997) (interpreting the repetition of the word “in” in Article III, Section 1 of the Constitution, which states that the judicial power of the United States shall be vested “in” one Supreme Court and “in” inferior courts established by Congress, to mean that the entire judicial power is vested in the Supreme Court, and also in the inferior courts; and that this separate vesting allows a permissive reading under Article III of Congress’s power to curtail or even eliminate most of the appellate jurisdiction of the Supreme Court).

5. See Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 242-45 (1985) (arguing that the use of the word “all” before only some of the cases and controversies that define the scope of the judicial power in Article III, Section 2, Clause 1, could not have been unintentional; this differentiation must mean that the first three categories—preceded by “all”—necessarily implicate the federal appellate power, while the remaining six categories may be excluded by Congress from any federal review).

6. See Walter Sinnott-Armstrong & Susan J. Brison, A Philosophical Introduction to Constitutional Interpretation, in CONTEMPORARY PERSPECTIVES ON CONSTITUTIONAL INTERPRETATION 1, 10 (Susan J. Brison & Walter Sinnott-Armstrong eds., 1993).

7. See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution at xv n. (1996) (criticizing the search for original intent as an undemocratic subjugation “of present generations to the wisdom of their distant (political) ancestors”). Rakove adds mordantly that he likes originalist arguments “when the weight of the evidence seems to support the constitutional outcomes I favor,” a position that “may be as good a clue as to the appeal of originalism as any other.” Id.; see also infra notes 62-89 and accompanying text (discussing originalism’s shortcomings as a monotheistic theory).


9. See infra note 33 (discussing deconstructionist methodology).
soned integration of many different sources.\textsuperscript{10} This Article introduces a “construct” of constitutional interpretation,\textsuperscript{11} which I dub forensic constitutional interpretation,\textsuperscript{12} that repudiates monotheism and relies explicitly upon common law methodology. The construct has three deeply linked components. First, it seeks well-reasoned and persuasive opinions that fit beneath the eclectic methodological canopy of the common law.\textsuperscript{13} Second, by embracing eclecticism it recognizes that interpretation should not beguile the interpreter into the fallacy of monotheism. Third, confident in its methodology, it avoids any pretense that judges are discovering, as opposed to constructing, constitutional meaning.\textsuperscript{14} Whatever courts may do in other contexts, forensic interpretation expects that when judges interpret the Constitution they are well aware of the intended outcome of their exercise. By force of the first and second components of the construct, however, those outcomes will acquire coherence and endurance only through the rigor of the common law method and tolerance for polytheism in constitutional interpretation.

This Article has three Parts. Part I examines a select class of representative constitutional theories in order to reveal the conceptual inadequacies of interpretive monotheism. The theories comprise virtually the entire bandwidth of modern constitutional analysis, from rigidly formalistic to unabashedly outcome-driven. Then, Parts II and III explain the nature of forensic constitu-

\textsuperscript{10} See \textit{Webster’s New Twentieth Century Dictionary of the English Language: Unabridged} 574 (2d ed. 1983).

\textsuperscript{11} I use the word construct deliberately. A construct is the complex product of many more specific and necessarily simpler components. This Article, then, offers a process of constitutional analysis that integrates existing constitutional theories within the conventional eclecticism of the common law. Its purpose is to encourage interpretive coherence; it does not itself present a set of new general propositions that will uncover or guide constitutional meaning.

\textsuperscript{12} “Forensic” means related to the process of courtroom reasoning and analysis. See \textit{The Random House Unabridged Dictionary of the English Language} 750 (2d ed. 1993). In the somewhat enlarged usage claimed here, the word “forensic” encompasses also the epistemological traditions of common law advocacy, shared by lawyers and judges alike. See \textit{infra} note 132 (discussing the legal profession’s reliance on a shared epistemological tradition).

\textsuperscript{13} See \textit{infra} notes 131-32 and accompanying text (discussing applicable common law methodology).

tional interpretation. The argument develops in three phases. Part II.A organizes forensic interpretation around interlocking acts of eclectic reasoning: the institutional methodology of the common law itself and (as a conceptual ramification of the common law method) a polytheistic integration of different interpretive theories. Part II.B makes an intimate connection between the outcome sensitivity of judges and the art of interpretation, and pairs this insight with the common law's instinct for forensic rationalization. Finally, Part III is an applied demonstration of forensic methodology. It uses two Supreme Court judgments delivered more than twenty years apart, in 1978 and 1999, both of which rebuffed federal encroachments into areas of retained state prerogative. These opinions manifest the Court's quiet but persistent allegiance, despite the tumult of theory, to the eclectic practices of forensic constitutional interpretation.

I. INTERPRETIVE MONOTHEISM: A CRITIQUE OF THEORIES

Despite, or maybe because of, two centuries of explicating the Constitution, there is still no hegemonic school of interpretive scholarship. The Supreme Court has never endorsed a preferred theory, ranked constitutional theories, articulated a canonical interpretive system, or collapsed the fourth wall and admitted that it was using any particular theory. In *Thornburgh v. American College of Obstetricians & Gynecologists*, Justice White, in a dissent joined by Chief Justice Rehnquist, delivered a startling verdict on textualism and originalism—two voguish theories of the past decade—when he described as simplistic the view that constitutional interpretation could possibly be confined to the plain meaning of the Constitution's text or to the subjective in-

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15. This reluctance to commit has been true, also, of the Justices in their individual capacities. See SUNSTEIN, supra note 8, at 9 (asserting, with respect to the five Justices who make up the "analytical heart" of the present Court—Justices Ginsburg, Souter, O'Connor, Breyer, and Kennedy—that they do not adopt theories, "they decide cases"); see also STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 147 (1996); Martin A. Rogoff, Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court, 11 AM. U. J. INT'L L. & POL'Y 559, 612 (1996).

intentions of the Framers. This Part of the Article amplifies Justice White's bruising critique, for which his predicate was surely not the inherent heresy or error of these theoretical methods but rather their monotheistic vanity.

Formalistic theories—notably textualism, structuralism, and originalism—are sometimes thought to be solely descriptive in the sense that judges who apply them will merely discover or report an immanent, preexisting meaning. This supposition is understandable because formalistic theories are so preoccupied with acts of conceptual manipulation. These theories are also positivist in the sense that they purportedly offer a value-free, externally conditioned set of interpretive procedures. Formalistic theories, however, are also prescriptive, or outcome sensitive, in that they direct attention to the text, or to the structure, or to original intent. They make an implicit normative judgment—a prescriptivist judgment, in fact—that text, structure, or original intent ought to predominate in constitutional analysis. By embracing prescriptivism, even in this narrow sense, formalistic theories open the door to discretionary outcomes, and, as a result, cannot guarantee to inoculate judges against a predisposition toward construction, rather than discovery, of meaning.
this Part shows, outcome sensitivity pervades formalistic theories as naturally as it does the overtly prescriptivist theories—the pragmatism of Richard Posner, or Ronald Dworkin's rights jurisprudence. This second set of theories typically is not concerned with recommending interpretive tactics or techniques. Instead, these theories urge judges to aspire to qualitative outcomes that may have very abstract appeal. Among these outcomes are economic efficiency or social utility, or social justice and the enhancement of individual rights.

Thus, the spectrum of constitutional theories in this Part reflects two prescriptivist outlooks. Formalistic theories are methodologically prescriptive, directing attention to text, or to history, or to structure. On the other hand, substantive prescriptivism directs judges toward explicit outcomes. As a construct, forensic interpretation appears closest to methodological prescriptivism. Thus, it expects that outcomes, whatever their putative ideological coloring, will be the product of a reasoned eclecticism. Given this apparent close association, my critique begins by focusing on the principal constitutional theories in the category of formalism.

A. Methodological Prescriptivist Theories

1. Textualism: Formalism's Vanguard

The quintessence of textualism, as Justice Antonin Scalia describes it, is the respect for democratic government that is assured by examining only what the lawgiver—here, the Framers of the Constitution—promulgated, and the avoidance of open-ended hypothesizing about what the lawgiver meant. In taking this view, Justice Scalia demonstrates immediately the prescriptive potential of a formalistic theory: in purporting to confine the interpreter to the written words of the Constitution, it fulfills a broader normative strategy of reining in judicial discretion.

22. See infra notes 90-97 and accompanying text.
23. See infra notes 90-97 and accompanying text.
Textualism as formalism might hold the promise of reliable and predictable analysis, until the conceptual instability of the textual matter itself is understood. In a textualist analysis of the reach of federal jurisdiction under Article III of the Constitution, for example, Professor Akhil Reed Amar seems close to an apology for what he calls "the sort of precise and technical parsing" that permeates his essay.\textsuperscript{25} In a commentary on the Fourteenth Amendment, offered in the same essay, he exposes his own ambivalence about the promise of this kind of textualism. Amar argues that, in contrast to Article III, the Fourteenth Amendment has a "different rhythm and feel: it speaks in terms more lofty, general, and open-ended."\textsuperscript{26} Faithfulness to the text of the Amendment, he reasons from this premise, apparently invites "a higher level of interpretive generality and a different mode of legal analysis."\textsuperscript{27} Though appreciating the plausibility of Amar's exegetical distinction, it is nonetheless unsettling (even if he might be a\textit{rueful} textualist) to read his confident solipsistic reflections on the "rhythm and feel" of one provision of the Constitution versus another, as though that kind of warp-and-weave subjectivity could itself become the metric that decides the choice of outcomes in constitutional analysis.

The truth is more centered. Technical readings do have a high place in our legal system; it would be inept for an interpreter to overlook the complex interweavings of a text like Article III that was manifestly written with the quotidian operations of government in mind.\textsuperscript{28} Amar's self-reproach should not be for an earnest textual exegesis, therefore, but rather for allowing an implicit assumption that the words themselves might complete the interpretive inquiry. As Amar acknowledges implicitly, the linguistic imprecision of the Exceptions and Regulations Clause in Article III, for example, makes it capable of inaccessibility, and this is at least as troubling as the supernal phrases of the Due Process Clause of the Fourteenth Amendment.\textsuperscript{29}

\textsuperscript{25} Amar, supra note 5, at 258 n.169.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} See JUDICIAL CONFERENCE OF THE U.S., COMM. ON LONG RANGE PLANNING, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 10 (1994) (acknowledging the adaptability of Article III's structure to meet changing conditions of governance).
\textsuperscript{29} See Amar, supra note 5, at 214-16.
In fact, Amar's interpretive hesitations reveal something rather interesting about the enterprise of interpretation: it is deeply contextualized, and hence necessarily subjective, and the interpreter is likely to reach for whatever tools—textualist or metatextualist—that unlock the context. Justice Scalia stoutly defends textualism by drawing a flattering comparison between textualism and what he calls the “degraded” formalist technique of strict constructionism. Justice Scalia's purported distinction, however, is tendentious and merely illustrates how textualism cannot escape context and subjectivity.

30. Lief Carter declares in a recent essay that “[c]ontext—both the pragmatic elements of specific problems and the moods and expectations which surround them—powers all discourse, including constitutional discourse.” Lief H. Carter, “Clause and Effect: An Imagined Conversation with Sanford Levinson, in CONSTITUTIONAL STUPIDITIES, supra note 20, at 28, 28. Carter deliberately analogizes constitutional texts to steering wheels rather than engines, believing that an interpreter hopes to turn the discourse in desired directions, and that individuals (particularly judges) have their own desired directions. See id.

31. And where will those tools be found? If one wants to understand, for example, the meaning of the constitutional phrase “Commerce . . . among the several States,” a complete answer will hardly be found in other enumerating clauses of Article I. As Steven Calabresi emphasizes, the sources available—historical, linguistic, economic, sociopolitical—lie predominantly, though Calabresi argues necessarily, outside the frame of the Constitution itself. See Steven G. Calabresi, The Vesting Clauses as Power Grants, 88 NW. U. L. REV. 1377, 1389 & n.42 (1994); see also RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 278 (1990) (noting that textualism seeks to avoid interpretive indeterminacy through the “high price” of discounting the “communicative intent” and “broader purposes” of the text). But see infra notes 48-61 and accompanying text (describing a possible rejoinder to Calabresi enabled by Amar's newly crafted “intratextualist” theory).

32. See Scalia, supra note 24, at 23.

33. As Lawrence Lessig and Cass Sunstein astutely observe, the text cannot interpret itself. See Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 94 COLUM. L. REV. 1, 12 (1994). Judicial presuppositions, as this Article maintains, are an expected element of constitutional discourse. Certainly, this would also be true—if judges actually embraced its methodology—of textualism's most combustive expression, namely, deconstructionist analysis. See, e.g., J.M. Balkin, Tradition, Betrayal, and the Politics of Deconstruction, 11 CARDOZO L. REV. 1613 (1990). In the setting of a Supreme Court review of a bitter parental custody dispute, Balkin seeks to expose Justice Scalia's attachment to the word “tradition” as encrypting a particular set of conservative family values. See id. at 1615-17. In doing so, however, Balkin acknowledges that he needs an ultimate moral principle that decides when the regressive exploration of meaning must stop. See id. at 1629. In an unsatisfying conclusion, Balkin claims that he chooses to deconstruct Justice Scalia's opinion, rather than Justice Brennan's, on the disturbingly thin critical premise that Justice Scalia's view is "misguided." See id. at 1627. Balkin freely ad-
is merely degraded textualism, what benchmark signals to the strict constructionist that her reading is no longer, as Justice Scalia demands, strict or lenient, but has now become "reasonable?" The siren song of the solipsist is heard once again.

2. Structuralism: Transcending the Text

Structuralism takes its intellectual inheritance from textualism. It reflects the ideas of Professor Charles Black, who inspired this school of interpretation in a compact lecture series published thirty years ago. Blackian structuralism transcends text through the process of inference; it mulls constitutional structure and relationships in search of postulates about the underlying design of the Constitution. The design is then preserved—or, in a dynamic application, enhanced—by the interpretive analysis. Black emphasizes that structural reasoning above all has to "make sense—current, practical sense." I doubt that any theory of interpretation could prudently reach for a lower standard than that, but Black argues pointedly that the

mits that he is grinding a particular ideological axe. Even the supposedly neutral practice of deconstruction, it would appear, cannot "alleviate the need for the existence of a set of political commitments that preexist the deconstructive act." Id. at 1628. As I will discuss, constitutional interpretation typically involves preinterpretive contemplation of a desired outcome. See infra text accompanying notes 155, 159.

34. See Scalia, supra note 24, at 23.

35. Richard Posner's critique of textualist, formalist theory stresses an underlying problem with the enterprise of interpretation. In Posner's view, the bounds of interpretation could be so inherently elastic (because the process applies also to dreams, texts in foreign languages, and musical compositions) that the results would always be doubtful. See Posner, supra note 18, at 400. Posner's skepticism calls to mind Robert Nagel's exquisitely ironic suggestion that those most entrusted with the meaning of our fundamental document—the lawyers—are "by training, role, and instinct inclined to think that it is difficult to discover meaning." Robert F. Nagel, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 8 (1989).


37. See, e.g., id. at 23 ("How might our federal constitutional law use the method of reasoning from structure and relation?").

38. See id. at 7-8.

"textual-explication method" (his term for textualism), operating on the general language of the Constitution, contains within itself no guarantee of making sense, "for a court may always present itself or even see itself as being bound by the stated intent, however nonsensical, of somebody else."\textsuperscript{40}

As an avowed structuralist, having analyzed Article III of the Constitution using the deep structure/surface structure bipolarity of Noam Chomsky's structural linguistics,\textsuperscript{41} I offer only a mild (but, I believe, telling) reproof of Black's methodology. In the first place, and despite Black's specific warning, structuralism carries the high risk of detaching itself too quickly from its textual supports and yielding to the desires of the interpreter's political imagination.\textsuperscript{42} For example, Black himself infers a First Amendment right of free expression on matters of national political interest from the ecumenical, and demonstrably nontexual premise of "the political relations which bind all the people who are a part of the intercommunicating polity that is the United States."\textsuperscript{43}

\begin{itemize}
\item \textsuperscript{40}BLACK, supra note 36, at 22. Black also believes, however, that textual and structural methods would work together, "for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text." \textit{Id.} at 29.
\item \textsuperscript{41}See Brian F. Havel, \textit{The Constitution in an Era of Supranational Adjudication,} 78 N.C. L. Rev. 257 (2000).
\item \textsuperscript{42}See BLACK, supra note 36, at 29 (expressing concern that the precision he hoped for could "be supplanted by wide-open speculation").
\item \textsuperscript{43}Id. at 50. Black's discussion concerns the Supreme Court's analysis in \textit{New York Times Co. v. Sullivan}, 376 U.S. 254 (1964). There, the Court required a finding of actual malice before a publication could be sued for libel by a state public official for criticism of his official conduct. \textit{See id.} at 279-80. The stated grounds for decision were the "coaction," in Black's words, of the First and Fourteenth Amendments. \textit{See BLACK, supra} note 36, at 46-47. Black proposes an alternative, structuralist rationale for the outcome. In his view, a newspaper's criticism of an official for disobeying the federal constitutional guarantee of racial equality is "an episode in a struggle of the highest possible national political interest." \textit{Id.} at 47. As such, it makes sense to say that no local, that is, state, judge or jury could penalize free expression with respect to matters of such surpassing national political interest. \textit{See id.} Despite its tenuous anchors in the text of the Constitution, Black feels his rationale to be at least as satisfying as the due process ground actually invoked by the Court. \textit{See id.}
\item I am grateful to my colleague, Mark Weber, for another pithy illustration of the "detachment" problem. The underlying structure of the requirement in Article II that the President be at least 35 years old has to do with expectations about maturity. \textit{See U.S. CONST. art. II, § 1, cl. 5.} By elevating the structural/political value over the
\end{itemize}
This potentially extravagant approach prompts a second observation. No more than other formalistic theories, structuralism cannot escape the dialectical necessity for some motivating idea.44 In Black's case, his belief without any supporting text (as he himself explicitly recognizes)45 is that state proscription of speech, on a broad range of topics associated with national political activity, should be prudentially forbidden in the name of federalism.46 Ultimately, however, Black seems to take his theory in the way I introduced it, as consolidating rather than replacing the work of textual exegesis.47

3. Intratextualism: Structuralism Redivivus?

New or refurbished interpretive theories are the glass of fashion in constitutional scholarship.48 For example, Amar fuses textualist and structuralist theory into a new interpretive technique in which the Constitution becomes a kind of self-referential dictionary. Words or phrases that recur in the text provide a controlling "intratextualist" gloss on their likely meanings in otherwise unrelated textual settings.49 Intratextualism aims to be holistic, manipulating more than one isolated word or phrase or clause at the same time in a directed quest for more profound explicit text of the Constitution, this reasoning might generate the outcome that a 15-year-old who is really mature is suddenly qualified to take office as president.

44. See infra note 155 and accompanying text.
45. See BLACK, supra note 36, at 95.
46. See id.
47. See id. at 94 (contending that textual analysis can be "firmed up" by structuralist ideas).
48. As well as Amar's intratextualism, for example, Cass Sunstein recently has proposed a theory of constitutional minimalism. See infra notes 114-20 and accompanying text; see also 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (presenting a theory of constitutional moments to explain how the Constitution might be deemed to have adopted the administrative state solely by command of the electoral will or vox populi). See generally Gary Rosen, Triangulating the Constitution, COMMENTARY, July-Aug. 1999, at 59, 60 (deconstructing Ackerman's theory as a Damascene conversion to conservative thinking). For a directory of recent theoretical activity, see Richard H. Fallon, Jr., How to Choose a Constitutional Theory, 87 CAL. L. REV. 535, 537 n.1 (1999).
49. See generally Amar, supra note 39 (coining the term "intratextualism," an "interpretive technique" whereby "a word or phrase [is read] in a given [constitutional] clause by self-consciously comparing and contrasting it to identical or similar words or phrases elsewhere in the Constitution").
meaning. It gives primacy to implicitness, which therefore casts it as both inferential and, unsurprisingly, structuralist. Indeed, Amar’s portrayal of intratextualism as a three-dimensional reading of a “two-dimensional parchment” suggests that intratextualism is structuralism, a subset of Blackian theory that creates implicit relations among apparently related textual occurrences.

Anticipating a charge of mere replication, Amar differentiates his focus on the words of the Constitution from what he calls the classical structuralist attention to institutional arrangements. There is an intriguing conceptual byplay at work here. Amar seems to suggest that structuralism, properly speaking, preoccupies itself with the “structural” aspects of the Constitution—theories of separate powers or of federalism, for example. Amar’s intratextualism, in contrast, allegedly transcends structuralism’s preoccupations with implicit relations and with governmental structure. Amar implies that intratextualism is always fully text-driven and applicable to all provisions of the Constitution, not just the governmental structure. But Amar is inaccurate in both of these arguments. First, it is hardly plausible that classical structuralism could have developed into a useful theory without paying careful attention to its textual moorings. Second, his confinement of structuralism to governmental arrangements

50. See generally id. at 749-88, 802-27 (examining landmark judicial opinions and commentaries for “traces of [intratextualism]”).
51. Id. at 788.
52. See id. at 790. As examples of institutional arrangements, Amar suggests the relationship among the political branches, or among the states. See id.
53. See id.
54. See id.
55. I am at a loss to understand Amar’s insistence that Blackian structuralists will revert always to “institutional patterns rather than the organization of constitutional text.” Id. at 797 n.197. As I argue in the main text, structuralists cannot provide useful analytical models if they never consult the small pieces of the constitutional language. For example, a structuralist reads the Vesting Clauses contained in Articles I and II of the Constitution, which refer respectively to the legislative and executive power “of the United States,” and the Vesting Clause in Article III, which simply mentions “the judicial Power,” and infers from this inconsistency (at the very least) that the judicial power may vest in courts that are not established explicitly under Article III (for example, state courts, administrative tribunals, or even the more controversial species of supranational tribunals). See Havel, supra note 41, at 305-06; supra notes 2-4 and accompanying text. The structural principle advanced here is that the Constitution, in its deep design, envisages a potential
theory overlooks Black's own use of structuralism in interpreting the Bill of Rights. In fact, intratextualism would be no more than a modestly enriched textualism were it not for its structuralist pretensions. Thus, in unconscious homage to Chomsky's structural linguistics, Amar notes how intratextual word links could act as a "surface sign of a much deeper thematic connection, a sympathetic vibration evidencing a rich harmony at work." For example, the final words of the Tenth Amendment, which reserve residual governmental powers to "the people," in Amar's view resonate intratextually with the first words of the Preamble—"We the People"—and the two passages arguably evince "a deep pattern, embroidering the fundamental constitutional principle of popular sovereignty." Classical structuralism would generate from precisely the same linkage a fundamental postulate of popular dominion over the constitutional order.

In fairness, Amar is not promoting intratextualist analysis as the New Kingdom for interpretation. Surrendering himself to multiplicity of systems invested with judicial authority under Article III. This reading is ostensibly a text-driven structuralist premise, however. Indeed, to the extent that it reads meaning into a contrast between textual lacunae and a textual insertion, it is also arguably intratextualist. As it happens, Amar is not opposed to reading implicit meanings into textual lacunae. See Amar, supra note 39, at 788.

As Black demonstrates himself, see supra text accompanying note 43, structuralists are just as prepared to locate their field of inquiry within the Bill of Rights. See Black, supra note 36, at 50-51.

Amar, supra note 39, at 793. Simplifying, Noam Chomsky's original structure-dependent language theory posits a surface structure—everyday written and spoken language—that is generated from underlying paradigmatic phrase forms, the deep structure of language, which each writer or speaker understands tacitly and uses to generate potentially infinite language performances in the surface structure. See Havel, supra note 41, at 275-77. Amar revisits his Chomskyan insight later in his article when he remarks that "similar wording will quite often be a surface marker of a deeper analytic insight waiting to be found upon close inspection." Amar, supra note 39, at 798. Later still, Amar mentions that the "textual interlock" between the First Amendment and the Necessary and Proper Clause—created by the words "Congress," "shall," "make," and "law" in the same order in two places—could not be coincidental, especially in light of the drafting history, and is in fact "part of a deep design." Id. at 814.

Amar, supra note 39, at 793.

See, e.g., Alden v. Maine, 119 S. Ct. 2240, 2254 (1999) (demarcating the scope of state sovereign immunity not by constitutional text alone "but by fundamental postulates implicit in the constitutional design"). For a full analysis of Alden, see infra notes 214-56 and accompanying text.
forensic interpretation, he concludes diffidently that he is providing only "another set of clues" in the search for constitutional meaning, another "standard tool in the kitbag of the capable constitutional lawyer."  

4. Originalism: The Framers Still Speak

a. Proto-originalism (The Framers' Actual Words)

In its pure form, originalism treats constitutional meaning as ascertainably fixed, either by the original understanding of the constitutional language or the "intent" of the Framers in drafting that language, which arguably may be the same thing. Indeed, "[t]o an [authentic] originalist, only 'This Constitution' is supreme law, and not what the Supreme Court has said about it." This theory probably deserves its reputation for oracular overreaching. It assumes that the clauses of the Constitution were inscribed with lapidary precision, even though the histori-

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60. Amar, supra note 39, at 748. In the spirit of eclecticism, Amar finds it unsurprising that different interpretive techniques should "overlap and converge:" "The various types of argument are not sealed off from each other, and ultimately they are all mere tools to help us draw meaning from the same source—the American Constitution in word and deed." Id. at 755 n.31. But Amar does not see this "forensic" insight as itself an interpretive methodology, even though he views the techniques as the foundations of conventional constitutional argument. See id. at 754.  

61. Id. at 788. Curiously, Amar eventually turns on his own theoretical creation and accuses it of being possibly "too self-referential, even autistic." Id. at 799. In making this admission, Amar opens up a realm of what he calls "intratextualism," the use of other documents, such as the English Bill of Rights, state constitutions, the Declaration of Independence, and the Articles of Confederation, in the search for meaning. See id. No tool of interpretation, Amar reminds us, "is a magic bullet." Id. at 801. For a new critique of Amar's theory, see Adrian Vermeule & Ernest A. Young, Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113 HARV. L. REV. 730 (2000) (treating skeptically Amar's evident confidence that there is a coherence and holism in the Constitution that responds to an interpretive theory based upon intratextualism rather than conventional clause-bound analysis).  

62. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 12 (1997) (providing an account of the links between originalism and the "historicism" ideal of the rule of law, or rule by norms laid down by legitimate lawmaking authorities prior to their application to particular cases).  


64. For a very recent, calmly paced critique that picks up the most common arguments against originalism in its strict form, see SUNSTEIN, supra note 8, at 234-41.
cal record, to the extent that it exists, reveals the perplexity and fractiousness that lie behind much of the adopted language.\textsuperscript{55} Thus, originalism relies on the gross simplification that it is possible to divine a single authoritative meaning from texts that are the collective product of large assemblies.\textsuperscript{66} Were the process so straightforward, we would not have any difficulty, for example, in determining whether Congress believed, as recently as 1994, that the World Trade Organization would challenge Congress’s legislative supremacy, or the independence of the federal courts, under the Constitution. As it turns out, the congressional debates repeatedly confused the separate ideas of sovereignty and constitutionality and provided little more than rhetorical heat about America’s readiness to accommodate supranational institutions within its constitutional system.\textsuperscript{67} Still

\textsuperscript{55} See Jack N. Rakove, \textit{Solving a Constitutional Puzzle: The Treatymaking Clause as a Case Study}, I 	extsc{Persp. Am. Hist.} (n.s.) 233, 281 (1984). Richard Posner, agreeing, dismisses intentionalism, particularly the extraction of a “single unifying intention or theme,” as fantasy, the belief of denizens of “cloud-cuckoo-land.” \textit{Posner, supra} note 18, at 179. None of this is to disparage Robert Clinton’s argument that a clear original understanding, if it can be demonstrated, should bind the discretion of later courts. \textit{See} Clinton, \textit{supra} note 3, at 748 n.11. \textit{But see} Richard H. Fallon, Jr., \textit{Of Legislative Courts, Administrative Agencies, and Article III}, 101 \textit{Harv. L. Rev.} 916, 944-45 & n.176 (1988) (arguing that a “specific intent” of the Framers, a relatively precise identification of intent, could control the outcomes of particular kinds of cases, but that an “abstract intent,” defined at a higher generality—such as the Supreme Court’s equal protection jurisprudence—might entail consequences that the drafters scarcely considered and might even have rejected). Even granting the soundness of Clinton’s premise that originally intended meaning should not be shifted arbitrarily, his argument goes more to the persuasiveness of originalism in specific contexts rather than to its potency as a general theory of interpretation.

\textsuperscript{66} Jack Rakove launches his study of the Constitution’s history with a comprehensive assault on the originalist pretense of uniformity. Rakove draws special attention to the Constitution’s array of iconic words and brief phrases that lack any “explanatory footnotes or midrashic columns.” \textit{Rakove, supra} note 7, at 11-12. Thus, in contrast to the juristic bias that sees the Constitution as “an advanced seminar in constitutional theory, historians and many political scientists [see a] cumulative process of bargaining and compromise in which a rigid adherence to principle yield[s] to the pragmatic tests of reaching agreement and building coalitions.” \textit{Id.} at 15; \textit{see infra} note 68 (giving an example of the difficulty of clear readings of the Framers’ intent); \textit{see also} \textit{Posner, supra} note 31, at 295 (maintaining that the idea of a “group mind” is a fiction, so that there can be “no ‘legislative intent’ in a literal sense”); Sinnott-Armstrong & Brison, \textit{supra} note 6, at 1, 9 (discussing the complicated task of fixing meaning when intention is so diffuse).

\textsuperscript{67} \textit{See}, \textit{e.g.}, 140 \textit{Cong. Rec.} S19,488 (daily ed. Aug. 4, 1994) (statement of Sen.
less can we posit the shared corporate view of a body of men meeting in a conclave over two hundred years ago. The enterprise of originalism may not even be much good as history, if one compares it to the exacting standards of professional historians. As processed through our court system, originalist history tends to be, in Stephen Griffin’s adroit phrase, “law-office history,” compiled to meet the very different selectivity standards of common law advocacy. The Supreme Court itself, by the candid admission of one of its current Justices, has not fared any better in the scrupulousness of its historical analysis.

For all of this powerful criticism, originalism, in its hunt for a discoverable “Ur-Constitution” (the original understanding), continues to inspire some legal theorists in the way that reconstruction of a proto-Indo-European language still inspires some historical linguists. But the linguists’ project is self-contained;
in rebuilding the common source language of the Indo-European peoples, they seek neither to describe the many descendent languages nor prescriptively to reform them. In contrast, strict originalists look upon the Ur-Constitution as normatively more authentic and more binding than today's evolved constitutional culture.\textsuperscript{72} Linguists are also using objective pieces of linguistic evidence in their task; centuries of consonant-shifting patterns and related vocabulary choices can be traced and documented without ideological predisposition.\textsuperscript{73} Can the originalists, in their interpretive task, lay claim to a comparable scientific detachment? Given the fragile historical record, can they be sure, as Richard Fallon asks, that they have excluded their "assumptions, values, and goals," or the "assumptions, values, and goals of an interpretive community?"\textsuperscript{74} For historical linguistics, retrospection defines the field of inquiry. For originalism, as a method of historical interpretation, retrospection may be a serious disadvantage. When a document is designed for futurity, as the Constitution evidently was designed,\textsuperscript{75} unyielding reversion to historical experience could even be condemned as interpretive solecism.\textsuperscript{76}

\textsuperscript{72} Cf. Scalia, supra note 24, at 3, 17, 21.

\textsuperscript{73} See LINGUISTICS, supra note 71, at 307-09 (describing, inter alia, Grimm's Law of consonantal correspondences).

\textsuperscript{74} Fallon, supra note 62, at 13; see also NAGEL, supra note 35, at 8 (noting the dangers of relativism and solipsism in originalist analysis); Lessig & Sunstein, supra note 33, at 12 (observing that "the presuppositions with which we begin will color our reading of the words, possibly more than they illuminate the world the words were meant to construct"); David A. Strauss, Tragedies Under the Common Law Constitution, in CONSTITUTIONAL STUPIDITIES, supra note 20, at 235, 235 (emphasizing the danger of attributing the modern interpreter's political, moral, or ideological assumptions to the Framers).

\textsuperscript{75} See THE FEDERALIST NO. 34, at 207 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (anticipating that the Constitution would have to serve the unknowable needs of a "remote futurity").

\textsuperscript{76} See Michael L. Wells & Edward J. Larson, Original Intent and Article III, 70 TUL. L. REV. 75, 94 (1995) (concluding that "originalism is less attractive when changes in society render the decisions made, and the considerations that contributed to those decisions, irrelevant to modern conditions").
b. Neo-originalism (The Framers' Actual Words, Translated)

A currently prominent neo-originalist theory shows Fallon's skepticism to have been warranted. In a recent article, Lawrence Lessig and Cass Sunstein seem to be hiding their essentially purposive reading behind an originalist scrim. These authors argue that constitutional interpretation must be preeminently a matter of "fidelity" to the commitments of the Framers. That is surely an originalist premise, but begs the usual normative question about why courts should practice fidelity to a diffuse and questionably relevant history. Recognizing, therefore, that fidelity may be context insensitive, Lessig and Sunstein propose "a practice of translation" that purports to respect the "values" of the Framers' original design but would also track changes in context. Reading the Commerce Clause, for example, they would "translate" the Framers' vision of a narrow national commerce power into a twentieth-century economic context. Fidelity, in this conversion process, would not require the Supreme Court to understand the twentieth-century Commerce Clause "to extend no further than the framers believed in the eighteenth century." The original purpose of the clause was to ensure that the national government could reach all interstate commerce, as it then existed; "[i]n these circumstances, fidelity to the original design entitle[s] the Court to understand the clause quite differently from the way the framing generation had understood it." As Lessig and Sunstein appear to concede, however, sometimes translation fails to meld quite so expediently with the text. For example, the First Amendment applies literally only to Congress. Its modern application to the executive is a function of the executive's role as a principal national lawmaker. The eighteenth century saw Congress in that role exclusively; therefore, Lessig and Sunstein deduce, to maintain fidelity to the original design of ensuring against intrusion on speech by na-

77. See Lessig & Sunstein, supra note 33, at 86.
78. See id. at 88.
79. Id. at 89.
80. Id. at 90.
81. See id. at 91.
tional institutions endowed with lawmaking power, the First Amendment must be translated to include the modern executive. Unlike the Commerce Clause example, however, the translation here does not infuse the literal text with an enriched meaning derived from changed circumstances external to the Constitution. Rather, Lessig and Sunstein are superimposing a metatext that (I can suppose) would be expressed in a requirement that "the term Congress shall mean any national institution endowed with lawmaking power, including the executive." The authors recognize the potential for abuse and for capricious interpretation in this methodology. Their only controlling device is the duty of fidelity, the assumption that the Constitution would not take on "values that are not fairly traceable to founding commitments." Given the common law's institutional bias toward selective evidence, and the relativistic biases of modern interpreters, however, one might question whether Lessig and Sunstein's formula could be anything more than a clever semantic reconfiguration of existing nonoriginalist interpretive practice.

In another article, for example, I attempt what Lessig and Sunstein might describe as a "translation" of the Foreign Commerce Clause that relies pivotally on the "value" the Framers ascribed to centralized regulation of the nation's external trade. That article has no explicitly originalist ambitions, however; it is a frank exercise in interpreting the Constitution for the era of global commerce, using originalist/historicist ideas as one part of a larger interpretive composition. Nevertheless, my approach seems broadly consistent with Lessig's and Sunstein's formulation that "[a]pplications of the constitutional requirements may change, not because [some] underlying values change, but because our understanding of how best to implement those values changes, making mechanical adherence to old

82. See id.
83. See id. at 93.
84. See id. at 106.
85. Id. at 93.
86. See Havel, supra note 41.
87. Thus, the article also reflects structuralist ideas. See id.
understandings inconsistent with fidelity.” 88 Fidelity is what “we” say it is, in other words. 89

B. Substantive Prescriptivism

1. Vaulting Ambition: Dworkin and Posner

It has been suggested that the formalistic theories “pride themselves on reaching results that the interpreter laments, often strongly.” 90 The decision-making process is thought to be external to the interpreter, so that judges with different value systems will reason inexorably to the same result. 91 It is illusory, however, to assume that any of these theories combined—let alone on their own—could bend the will of a reluctant interpreter. The availability of multiple interpretive methodologies—forensic interpretation—protects judges from being forced into what they might perceive as suboptimal outcomes. Moreover, as discussed further in Part II, judges in constitutional law cases are never engaged in outcome-blind formalism. Their readings, however

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88. Lessig & Sunstein, supra note 33, at 93.
89. Terrance Sandalow would likely count the translation conceit as another instance of how present values come to “dominate those of the past.” Terrance Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033, 1048 (1981). In particular, the narrow view that the Framers had of federal power under the Commerce Clause leads Sandalow to conclude—without originalist contumely, it should be noted—that “[w]hen the [F]ramers' intentions are placed in perspective, it is apparent that attribution of the contemporary law of the [C]ommerce [C]lause to them is chimerical.” Id. at 1049. In a similar critical vein, Griffin argues that “counterfactual speculation,” which the translation method inevitably requires, “does not change the fact that we, not the Framers, are carrying out the translation.” Griffin, supra note 15, at 185; see also Posner, supra note 31, at 275 (accusing originalists of making absurdly large assumptions about the minds of the Framers, educated and experienced in vastly different times, and their capacity to decide a question arising today “if they knew what we know;” historic situations made the exercise “impossible not only in practice but in theory”). Mark Tushnet holds just as skeptical a view of originalist ambitions, commenting that he has “little doubt that an ingenious analyst could almost always come up with a clever account of [the Framers'] intentions . . . that demonstrated how any constitutional provision that hung in for long enough was successful.” Mark Tushnet, Returning with Interest: Observations on Some Putative Benefits of Studying Comparative Constitutional Law, 1 U. Pa. J. Const. L. 325, 329 (1998).
90. Eskridge & Levinson, supra note 20, at 6.
91. See id. at 6; see also supra text accompanying note 19 (discussing “positivist” methodology).
veiled in methodology, are typically purposive. It is hardly surprising, therefore, that some scholars have sought to transcend formalistic hermeneutic devices and to influence the judges toward an outcome that is conditioned overtly and explicitly by political or moral theory. These theories of "substantive transformation," as Richard Epstein might call them, encroach on perilous jurisprudential territory. They aim to reorient the judge's primary discourse from the purportedly interpretive task at hand to the metalegal factors that help frame the judge's initial sense of outcome. In Epstein's estimation, open-ended invocations of justice and social policy "create the greatest sense of unease."

Substantive prescriptivist theories are also awkward for judges to apply. To dwell obsessively on one's desired moral or political result will serve only to drain potency from a judicial opinion. The judge becomes caught once again in the trap of solipsism. As Richard Posner has himself coyly observed, it is an easy

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92. See Fallon, supra note 48, at 538.
93. See, e.g., Richard A. Epstein, A Common Lawyer Looks at Constitutional Interpretation, 72 B.U. L. Rev. 699, 703 (1992) (disparaging theories that are, in effect, front-loaded to "win through interpretation what was lost in the initial drafting").
94. John Hart Ely believes that the values adopted would normally be those "of the upper-middle, professional class from which most lawyers and judges, and for that matter most philosophers, are drawn." JOHN HART ELY, DEMOCRACY AND TRUST: A THEORY OF JUDICIAL REVIEW 59 (1980). But see Richard A. Posner, Pragmatic Adjudication, 18 CARDOZO L. Rev. 1, 11-12 (1996) (describing judges of federal courts, precisely because of their social standing and educational attainments, as "councils of wise elders" in whom it is not "insane to entrust . . . responsibility for deciding cases").
95. For example, Ronald Dworkin's theory of law as integrity comes to mind. See RONALD DWORFIN, LAW’S EMPIRE 164-66 (1986) (explaining integrity in constitutional interpretation, inter alia, as a political ideal that a government must “act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are”).
96. Epstein, supra note 93, at 700. One branch of theoretical scholarship, which can be identified broadly as constitutional skepticism, treats the Constitution as normatively contingent, a reflection of a particular societal tradition that excludes certain liberal, progressive, or even conservative perspectives. The Constitution's apparent exaltation of an atomistic, individualistic right to vote, for example, has been challenged by scholars seeking a more transcendent collective protection for wider group interests. See Pamela S. Karlan, Still Hazy After All These Years: Voting Rights in the Post-Shaw Era, 26 CUMB. L. Rev. 287 (1996). For a powerful feminist critique of the Bill of Rights, see Mary E. Becker, The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective, 59 U. CHI. L. Rev. 453 (1992).
matter "to confuse one's strong policy preferences with the law." 97


Dworkin may be the most influential transformational jurist/philosopher, but I confess to a certain wariness of his self-conscious search for determinative moral precepts of adjudication. When Dworkin imagines an "abstract egalitarian principle," for example, and uses it to suggest that citizens are entitled to equal treatment and concern on the part of the political decision makers in the government, 98 is he interpreting the actual Constitution of the United States or projecting the outline of a shadow Constitution, an unrealized reticulation of rights and duties that the Constitution would have explicitly contained, had the Framers been prescient enough to conceive of it? 99 Dworkin's most arresting interpretive figure—a surrogate of surpassing judicial insight and intellectual power he names Hercules—can reason with the complacency of Pangloss that the Constitution must yield "the best available interpretation of American constitutional text and practice as a whole," but with an acute sensitivity to "the great complexity of political virtues bearing on that issue." 100 One has the uneasy sense that Dworkin wants to build a grand stage for constitutional analysis, while engaged in a futile quest for worthy judicial players to occupy it. After all, Hercules is an overwrought figure—maybe even a buccaneer, as Dworkin himself admits. 101 But what of the poorer players, the

97. POSNER, supra note 18, at 402; see also Tribe, supra note 14, at 71-72 (warning against descending into personal preferences in the guise of constitutional exegesis, while advocating a "forthright account, incomplete and inconclusive though it might be, of why one deems his or her proposed construction of the text to be worthy of acceptance, in light of the Constitution as a whole and the history of its interpretation").
98. DWORKIN, supra note 95, at 382.
99. See Larry Alexander, Constitutional Tragedies and Giving Refuge to the Devil, in CONSTITUTIONAL STUPIDITIES, supra note 20, at 115, 117 (accusing Dworkinian strategies of "cut[ting] a great road through the law," so that what might appear as a "forest of rules"—the Constitution—is actually "an open field" (quoting ROBERT BOLT, A MAN FOR ALL SEASONS: A PLAY IN TWO ACTS 66 (1962))).
100. DWORKIN, supra note 95, at 398.
101. See id. at 397.
less cosmically gifted judges, who must strut and fret their hour upon Dworkin's stage?\textsuperscript{102}

b. Posner's New Pragmatism

Despite Richard Posner's disdain for solipsistic interpretation,\textsuperscript{103} he proposes a normative theory—pragmatism—that tries to incite judges, instead of submitting obediently "to the framers' every metronome marking," to treat the interpretive process as "the empathic projection of the judge's mind and talent into the creative souls of the framers."\textsuperscript{104} Posnerian pragmatism, however, is not solely an attempt to be more honest about retrospective mutations of the Framers' design than formalist tactics like originalism or neo-originalism. Posner also seeks candor concerning the purposiveness of judicial decision making.\textsuperscript{105} Instead of sneak peeks at consequences, a pragmatist judge would place the consequences of her decision at the core of her enterprise.\textsuperscript{106} For Posner, that means judges ought to use the process of law pragmatically, as "an instrument for social ends."\textsuperscript{107}

Posner's dislike of formalist conceptualism is troubling, because it tends to regard all legal concepts—even mundane dogmas like contract—as inherently contingent and subservient to the practices of the nonlegal community and susceptible to being discarded almost at will.\textsuperscript{108} Posner seems to assume, therefore, that formal legal categories are almost always, in some ontological

\begin{footnotesize}
\textsuperscript{102.} For the source of the metaphor, see WILLIAM SHAKESPEARE, MACBETH act 5, sc. 5. Nevertheless, the search for integrity in reasoning that Dworkin champions—whether that is a moral postulate or more prosaically a warning that precedent must not be overthrown lightly on dogmatic political premises—is a salutary one if the judicial power is to be respected. See supra note 95 (explaining the notion of integrity in constitutional analysis).

\textsuperscript{103.} Posner's distrust of the solipsism that grounds his pragmatic theory should be understood as an ironic commentary on the whole hermeneutic enterprise, whatever its methodologies. Indeed, Posner uses pragmatism primarily to subvert what he sees as the habitual bias of lawyers, but also of academics, that interpretation can masquerade as a truly objective technique, and that "demonstrably correct rather than merely plausible or reasonable answers to most legal questions" are to be found in authoritative texts. POSNER, supra note 18, at 20.

\textsuperscript{104.} Id. at 253.

\textsuperscript{105.} See id.

\textsuperscript{106.} See id.

\textsuperscript{107.} Id. at 405.

\textsuperscript{108.} See id. at 399.
\end{footnotesize}
cal way, a bad fit. He does not want to consider why the re-
quired activist outcome could not be achieved more congenially
—and with the virtue of stability—within conventional legal
discourse. Pragmatism, in other words, is an excuse for naked
judicial creativity, but is coded as empathic projection. 109 Posner
is not oblivious to the importance of forensic technique, however.
He recognizes the ever-present possibility that “some strand of
formalist legal discourse,” whether textualism or simple reliance
on precedent, could be justified pragmatically as “the best guide
to judicial decision-making.” 110 In an oil and gas controversy, for
example, he would have judges inquire into the “right,” “sensi-
ble,” “socially apt,” “reasonable,” and “efficient” rule for oil and
gas. 111 Thereafter, Hercules having spoken, the institutional
conventions of the common law—cases, statutes, doctrine—could
be adjusted to fit the judge’s sense of empirical rightness. 112

If Posner is saying that judges are, or should be, inspired by
an initiating idea or desired outcome, then his theory is surely
correct, but hardly subversive. Posner, like Dworkin, undoubtedly
hopes for a more ambitious view of the law’s normative capa-
bility. In fact, both of these transformativists seek to make ex-
plicit what might otherwise be implicit in the practice of consti-
tutional law. They would expect judges to self-consciously and
explicitly apply a preference for a socially ameliorative or rights-
enhancing rule, a political or moral taking of sides that in con-
stitutional analysis has traditionally outpaced the ambition of
the unelected branch.

109. See id. To emphasize the tentativeness of interpretive practice, Posner claims
also to regard all of the constitutional text, with its overlay of judicial exposition, as
“not a directive but a resource [for] further interpretive ventures.” Id. at 207. Thus,
he discounts any clairvoyance on the part of the Framers, despite much civic piety
driving the contrary view, and declares their work product “inscrutable with respect
to most modern problems,” and, moreover, “overlaid by hundreds of thousands of
pages of judicial interpretation.” Id.
110. Id. at 401.
111. Id. at 399.
112. See id. at 398-99. This, no doubt, is what Posner means when he writes that
pragmatism “reverses the sequence” of formalism, which typically inquires into the
relation between concepts, with only a “superficial examination of their relation to
the world of fact.” Id.
2. Restraining Ambition: Sunstein's Prescriptivist Minimalism

The great aspiration of Dworkin and Posner—to install a value-based normativeness at the center of constitutional method\footnote{113. See Dworkin, supra note 95; Posner, supra note 18.}—runs the risk of politicizing the judiciary beyond its inherently confined role of interpretation. In this sense, interpretation is not the pastime of empyrean tribunals; its persuasiveness and authority are not radiated from the sun-god luminosity of our judges, but from the ordinary judicial skill needed to articulate reasoned opinions within the boundaries of convention and precedent. To deepen this critical understanding of the forensic method, and to prepare for its theoretical articulation in Parts II and III, this Part closes with what I perceive to be a construct, rather than a full-blown theory of interpretation, that recently has been the subject of a book-length treatment by Cass Sunstein.\footnote{114. See Sunstein, supra note 8.} As a substantive prescriptivist,\footnote{115. Sunstein's theory, which is steeped in the methodology of the common law, straddles a line between methodological and substantive prescriptivism—as does the forensic method considered in this Article. I classify Sunstein as a substantive prescriptivist because of the primacy of the "theorizing" function in his assessment of judicial interpretation of the Constitution. Admittedly, his view of theorizing is intended to be limited and incremental, but it is no less present in Sunstein's construct as a judicial activity than in the more substantively ambitious systems of Dworkin and Posner. Indeed, Sunstein explicitly identifies an agreed core of value-based ideals in the American constitutional culture, arguing that their existence facilitates the kind of unambitious theorizing he favors. See infra note 120 (summarizing Sunstein's core ideals).} Sunstein might be said to advocate a certain kind of judicial humility, a perception that judges ought themselves to be aware (and, in Sunstein's experience, are aware) that they are poorly suited to, or trained for, the art of grandiloquent theorizing.\footnote{116. A court that observes Sunstein's theory "is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions." Sunstein, supra note 8, at ix. Most significantly, perhaps, "[t]o the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments." Id. at x.} Furthermore, Sunstein...
imposes this theoretical restraint on both methodological and substantive prescriptivism. For example, strict originalism would be entirely too excessive—too buccaneering, in fact—for judges who might share Sunstein's ideal of self-suppression.  

Consequently, the work of judges should proceed according to what Sunstein cleverly labels "incompletely theorized agreements," marked by a cautious incrementalism—minimalism is Sunstein's buzzword—rooted in the case at hand and leery of enunciations of high principle.

If minimalism seems like yet another abstract reformulation of the common law method, it probably is. In closing out this discussion of monotheistic theorizing, however, Sunstein's approach is instructive for two reasons. First, it supplies an important prescriptive rationale for the idea that no theory should acquire supervening importance; because judges lack complete information on outcomes and consequences, a "general ap-
approach to constitutional law," whether methodological or substantive, is unlikely to command enduring relevance or success. Second, Sunstein's construct recognizes important limits to the theoretical ambition of the substantive prescriptivists, who have had an implicit tendency to see the Supreme Court as the *summum bonum* in American life and government. Lower-level reasoning, like the “insistently analogical . . . character” of the common law, requires much less ambition but is more likely to garner broader acceptance. Occasionally, the Supreme Court will make what Sunstein styles a “conceptual ascent,” stabilizing haphazard doctrinal developments in the form of a bellwether principle. That is simply not the stuff of daily law, however, either in the Supreme Court or among less august franchises.

II. RATIONALIZING CONSTITUTIONAL INTERPRETATION: THE FORENSIC METHOD

A. The Power of Eclecticism

If one assumes the validity of the critiques of methodological and substantive theory in Part I, the terrain of constitutional analysis begins to look quite bleak. But think of how judges actually behave. One need not employ a theory of interpretive

against the President during his incumbency; in fact, testimony offered in the underlying lawsuit contributed directly to the impeachment and trial of the President in 1998 and 1999).  
123. SUNSTEIN, supra note 8, at 40.  
124. See id. at 245-47 (describing how prescriptivists like Ronald Dworkin perceive the Supreme Court as the “forum of principle” among American institutions).  
125. Id. at 249. Thus, Sunstein provides several alternative, more tightly drawn, rationales for the majority's strained opinion in *Roe v. Wade*, 410 U.S. 113 (1973). See id. at 251-52.  
126. Id. at 250, 257-58.  
127. First-year civil procedure students experience this atypical conceptual spectacle when they read Justice Stone's opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the canonical reading of modern personal jurisdiction. Justice Stone's integrative analysis undoubtedly satisfies David Strauss's postulate that, under the common law method, “an innovation in doctrine is permissible if it is the product of an evolutionary trend and is supported by good arguments of policy or fairness.” David A. Strauss, *What Is Constitutional Theory?*, 87 CAL. L. REV. 581, 585 (1999).
absolutism, for example, in order to accept that a proper object of Congress's commerce power might include authorizing supranational tribunals, constituted outside the Judiciary Article of the Constitution, to adjudicate certain kinds of international trade disputes. An objective as specifically drawn as this might well be a plausible fit within the range of general objectives contemplated expressly by the Constitution, here the objective of furthering foreign commerce. If a general objective has been clarified, therefore, the interpretive task becomes one of marshaling enough jurisprudential support to explain the deduction of the specific from the general. To achieve that purpose, a judge need not feel trammeled by an authoritarian interpretive theory. Indeed, it is surprising how theoretical absolutists, particularly formalists, fail to understand constitutional interpretation as part of the common law tradition, a tradition that prizes eclecticism as the governing rubric of its legal analysis.

In defining forensic interpretation through eclecticism, two different, but ultimately convergent meanings come to mind. The first is the meaning that David Strauss and Richard Epstein choose as the premise of their theories of common law constitutional interpretation, namely, that the exposition of the Constitution has a tortlike or contract-like history, the composite product of precedent, analogy, canons of construction, long-settled principles, selective overruling, and respect for the work of one's predecessors. As Richard Fallon argues, the rule of law in con-

128. See Havel, supra note 41, at 260. An example would be the trade tribunals established under the auspices of the World Trade Organization, particularly if access to those tribunals were opened up to nongovernmental organizations and private litigants. See id. at 271 n.42.

129. Thus, there is a specific congressional power in Article I of the Constitution "[t]o regulate Commerce with foreign Nations." U.S. CONST. art. I, § 8, cl. 3.

130. In the case of supranational tribunals, for example, forensic interpretation would also rely on a structuralist argument drawn from the Judiciary Article's failure to privilege an exclusive forum for federal lawsuits, and the Supreme Court's extensive public rights jurisprudence. See Havel, supra note 41, at 290, 313.


132. On the role of precedent and analogy in constitutional law reasoning, see SUNSTEIN, supra note 8, at 42-45 (arguing that, in the absence of a "comprehensive rationality," judges, like humans generally, are more likely to gravitate toward reasoning by reference to prototypical cases). For a comprehensive exposition of common
stitutional analysis demands that courts exhibit a "reasoned elaboration of the connection between recognized, preexisting sources of legal authority and the determination of rights and responsibilities in particular cases."\textsuperscript{133} The text, structure, and history of the Constitution may "stand in the deep background" in these circumstances, with the central argument focused on the interpretation of judicial precedent and doctrinal principle, "within the conventions of constitutional [common law] discourse."\textsuperscript{134} The rule of law, in this setting, "demand[s] respect for precedent."\textsuperscript{135} As Bruce Ackerman emphasizes, the doctrinal patterns formed by specific cases eventually acquire an impor-
tance that may exceed the abstractness of the original constitutional expression. Moreover, respect for all of the canons of common law reasoning is entirely rational; the system of legislative and administrative courts, to take an important example, could be undone under the letter of Article III were it not for "[t]he massive weight of two hundred years of legislative and judicial precedent."

Eclecticism also explains how forensic interpretation treats the hermeneutic methodologies considered in Part I. In this second iteration, forensic method comprises a kind of common law sweep of all of the various interpretive methodologies in search of a meaning that legitimately contains and accommodates a desired outcome. This is the polytheistic approach to constitutional analysis, a method that uses multiple interpretive techniques—textual parsing, historical sources, precedent, pragmatic functionalism, divination of the structural implications of the constitutional design, arguments of public policy, and

136. See 1 ACKERMAN, supra note 48, at 290.
137. See Amar, supra note 5, at 207 n.7 (arguing that, if the pressure of the past is hard enough, it does and must have the power to shape the Constitution; some such rules exist in every mature and efficient legal system and have an acknowledged core of power); see also Casey, 505 U.S. at 854 (recognizing that "no judicial system could do society's work if it eyed each issue afresh in every case that raised it. . . . [T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable"). Still, articles are written that seem to treat the interpretive work of the Framers' successors, judicial and scholarly, as misbegotten. See John Harrison, The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III, 64 U. CHI. L. REV. 203, 204 (1997) ("Focusing on the language of the Constitution, and ignoring as much as possible the gloss that has developed, this article defends the traditional view that Congress's authority is substantial."). But see Michael C. Dorf, Create Your Own Constitutional Theory, 87 CAL. L. REV. 593, 611 (1999) (suggesting that even "the most reactionary" members of the present Supreme Court would not challenge Marshall Court decisions—such as the legitimacy of a federal bank—that read the Commerce Clause more expansively than the Framers might have expected; no reason external to constitutional practice would explain this bow to precedent, yet the result is "incontestable" to any participant in the practice).
138. Paul M. Bator, The Constitution as Architecture: Legislative and Administrative Courts Under Article III, 65 IND. L.J. 233, 239, 262 (1990) (commenting that the Supreme Court has been unable to develop a coherent theory to explain the existence of legislative and administrative courts, revealing a discrepancy between the existing institutional architecture and the constitutional design).
139. For an explanation of pragmatic functionalism, see infra note 183.
arguments of American ethical and legal tradition—all pressed into service either as complements of, or substitutes for, one another in a generous forensic method. Charles Black might have called this "the heart-method" of the Anglo-American common law. In a Posnerian sense, forensic interpretation avoids a purely formalistic response to the difficult questions of the Constitution, while recognizing, pace Posner, that there are iconic conceptualizations in the Constitution—for example, foreign commerce, judicial power, the treaty—that make formalistic analysis, including inquiry into "the relation between concepts," a critical element of any coherent, even instrumental, analysis. Finally, from a pragmatic functionalist or purposive

140. See Amar, supra note 39, at 748 (listing interpretive methodologies).
141. Thus, forensic interpretation allows for what Robert Nagel calls "the simultaneous utilization of various sources." Nagel, supra note 35, at 130. It is, accordingly, consensus-oriented. As David Strauss has emphasized recently, a constitutional theory is "an exercise in justification," and the forensic method extracts from each theory the propositions that command the most "justificatory" agreement in the legal culture. In this light, of course, "the Framers' intentions count for something," but so, too, does precedent and textual explication. Strauss, supra note 127, at 592-83; see also Griffin, supra note 15, at 146-47, 151 (describing the Supreme Court's preferred use of multiple methods as a "pluralistic" method of constitutional interpretation, while noting that an obsessive attention to the impact of specific theories on the Due Process and Equal Protection Clauses of the Fourteenth Amendment has prevented a more broadly engineered approach from receiving much scholarly attention).

142. See, e.g., Black, supra note 36, at 4 (writing specifically about the Anglo-American system of legal reasoning based on precedent). Richard Epstein regards the "rich profusion" of interpretive devices as a weakness, not a strength, because it gives the judge "freedom to reach virtually any result by stressing that single factor that points most clearly to the outcome that the judge desires." Epstein, supra note 93, at 702. The common law, however, controls for this alleged excess—if that is how Epstein would have it—through mechanisms such as distinguishing earlier cases, identification and separation of dicta, outright reversal, and other well-understood devices for modulating doctrinal history. Moreover, as discussed in the main text, decisions must not only have rationality—they must persuade.

143. Justice Frankfurter, for example, saw a useful distinction between "broad standards of fairness written into the Constitution (e.g., 'due process,' 'equal protection of the laws,' 'just compensation'), and the division of power as between States and Nation ... [which] allow[s] a relatively wide play for individual legal judgement," and "very specific provisions of the Constitution" whose "meaning was so settled by history that definition was superfluous." United States v. Lovett, 328 U.S. 303, 321 (1946) (Frankfurter, J., concurring).


145. See id. The conceptual ideography of the Constitution, in other words, invites
perspective, forensic interpretation likewise comprehends that an overly rigid formalism, for example an idée fixe about the historical lines of division of powers, will make it difficult to maintain “a Nation capable of governing itself effectively.”

Forensic interpretation, as discussed in Part I, is methodologically prescriptive. It uses the “values of lawyering”—the eclectic use of common law conventions and multiple strands of interpretive theory—to guide the judiciary toward reasoned outcomes in the setting of a written Constitution. It encourages judges to navigate every case and issue without a pre-set methodological compass. In other words, forensic interpretation is formalism. See supra note 66 and accompanying text (discussing Jack Rakove’s observation that interpretation of the Constitution often requires deep analysis of undefined key words and brief phrases); see also Richard S. Kay, American Constitutionalism, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 16, 29 (Larry Alexander ed., 1998) (noting the interpretive “play” invited by such iconic phrases as “necessary and proper,” “faithfully execute,” “freedom of speech,” “due process,” and “equal protection”).

146. Buckley v. Valeo, 424 U.S. 1, 121 (1976) (noting that “a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively”); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (expecting “that practice will integrate the dispersed powers into a workable government”).

147. See supra text accompanying note 20.

148. GRIFFIN, supra note 15, at 158.

149. In Griffin’s analysis, even a formalistic theory makes an implicit normative assumption that it is preferable not only to have a written constitution, but also a written constitution that becomes “legalized” as the object of forensic scrutiny—through the ordinary course of litigation, for example—in the same way as a statute or a principle of the common law. See id. at 17, 148. Moreover, forensic interpretation safeguards the primacy of interpretation over the complex and difficult process of amendment. For the United States, a deep practice of interpretation has been, as Louis Henkin observes, a more congenial method of assuring a “dynamic, flexible, hospitable Constitution.” LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 273 (Oxford Univ. Press 1996) (1972); see also Sandalow, supra note 89, at 1046 (concluding that “[t]he amendment process established by article V simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government”).

150. In a recent article, Richard Fallon suggests that proponents of formal theories “must rely at least in part on predictions about the results that judges would reach under their approaches.” Fallon, supra note 48, at 562. Perhaps this is true; what it better reveals, however, is Fallon’s implicit fear that formalist theorizing (originalism, for example) will accept unconscionable outcomes in the name of consistency. As this Article argues, however, the nature of constitutional interpretation, and of common law reasoning, means that no single theory can secure the preeminence that
valuable because it both reflects an eclectic process that actually occurs, and favors that process normatively.\(^{151}\)

When originalists complain, for example, that purposive reasoning lacks external standards, they are ignoring deliberately the power of the forensic method. Certainly, one can strive for an interpretive method of absolute neutrality, where a theory is chosen irrespective of its potential outcomes. That is positivism of the most virulent sort; indifference to consequences, as opposed to an inability to foresee all the consequences, has never been the method of constitutional interpretation in the United States, however much Justice Scalia and others may rail against lodging undemocratic discretionary power in the federal judiciary.\(^{162}\) To the extent it exists, that power is constrained not by the artifices of formalism, but by recurring adherence to the eclectic reasoning of the forensic method. As Cass Sunstein concludes in his recent study, "common law thinking lies at the heart of

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\(^{151}\) Naturally, one could imagine alternative jurisprudential universes where a forensic constitutional interpretation would be supererogatory, and even anomalous. For example, constitutional questions could be decided a priori by a commission of experts on referrals from members of Congress, in a fashion not dissimilar to the Framers' abandoned project of a council of revision. \textit{See Rako\-\textsuperscript{e}, supra note 7, at 261-62.} The commission might be charged to apply a rigid, positivistic textualism, stripped of exception, equity, or subtlety, and presumably the populace gradually would accept this form of centrally planned adjudication as conventional. The Supreme Court, however, does not operate in that way; it plucks its docket from the hopper of ordinary litigation, and has no institutional capacity to give the kind of pre-enactment advisory opinion that high courts enjoy under some European constitutions. \textit{See} Allan Randolph Brewer-Carias, General Report on the Domestic Constitutional Implications of Participation in a Regional Integration Process 75 (July 30, 1998) (unpublished manuscript, on file with author). For further ruminations on alternative systems of constitutional review, see Mark Tush\-\textsuperscript{net}, \textit{Taking the Constitution Away From the Courts} (1999) (viewing judicial review as elitist, and advocating congressional majoritarianism in its place).

\(^{162}\) For an interesting examination of how Justice Scalia, an advocate of originalism, nonetheless has practiced forensic interpretation in his decision making, \textit{see} Nichol, \textit{supra} note 68, at 971-73 (analyzing Justice Scalia's counterhistorical reliance on structure and precedent).
American constitutional law."\textsuperscript{153} Sunstein, however, takes the common law method to be a "plausible competitor to the popular forms of originalism."\textsuperscript{154} Forensic constitutional interpretation shows that Sunstein is too effacing in his embrace of the common law. Under the principles considered in this Article, originalism \textit{cannot} compete with the common law method. As Part III of this Article demonstrates using a paradigmatic pair of Supreme Court cases, originalism, like all of the interpretive methodologies discussed in Part I, is considered properly an organic element of that eclectic method.

\textbf{B. Outcome Sensitive Judicial Interpretation}

The idea that the working judiciary would believe in the totemic interpretive properties of any one of the methodological or substantive theories discussed in Part I is fanciful. If a clear decision \textit{could} be obtained through application of a strict version of any of these theories, interpretation itself would be superfluous.\textsuperscript{155} As Martin Rogoff suggests, however, interpretation is a work of art,\textsuperscript{156} and like all true art it must have its afflatus, its creative moment of inspiration. In fact, the interpretive inspiration is imbued deeply with political considerations. In the common law, the judge who interprets the Constitution is never simply "\textit{la bouche qui prononce les paroles de la loi.}"\textsuperscript{157} Legal rules and theories of interpretation are, as Akhil Amar states,

\begin{footnotesize}
\footnote{153. SUNSTEIN, supra note 8, at 240.}
\footnote{154. Id. at 241.}
\footnote{155. In Posnerian terms, interpretive "isms" create a false sense of objectivity and axiomatic accuracy. Posner himself condemns a mistaken impression that interpretation resembles cryptography or translation—ironically, the very word used by Lessig and Sunstein to describe their neo-originalist theory, see supra text accompanying note 78—whereas, in Posner's view, the comparison is more realistically with the "reading of palms and the interpretation of dreams." POSNER, supra note 18, at 199.

156. See Rogoff, supra note 15, at 612.

157. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS bk. 11, ch. 6 (1748). Translated, it reads: "[t]he mouth which speaks the words of the law." See John Henry Merryman, The French Deviation, 44 AM. J. COMP. L. 109, 111-12 (1996). In contrast, the civil law tradition gravitates, at least theoretically, toward the idea that judges are merely the mouthpieces of a preordained statutory code. See generally VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 457-87 (1999) (contrasting the training and outlook of common law and civil law judges).}
\end{footnotesize}
the tools in the kitbag of the interpreter,158 but each interpreter
comes to the task with a (not necessarily unique) political tem-
perament or inclination, and that perspective is expressed
through the methods of interpretation, not generated by them.159

This notion that judges are sensitive to outcomes is well-

 canvassed in the literature.160 To take one example, Joseph
Hutcheson imputes to judges an initial "hunching out," to be
followed by "the logomachy, the effusion of the judge by which
that decree is explained or excused."161 Uncovering the political
animus of the judiciary—what Richard Fallon would call the
"pre-interpretive" understanding that launches the work of anal-

ysis162—is a principal task, and merit, of legal scholarship;163 it
causes Justices like Antonin Scalia and Ruth Bader Ginsburg to
be celebrated as avatars of the right or left.164

158. See supra text accompanying notes 60-61. Thus, Laurence Tribe postulates
that there is unlikely to be any "defensible set of ultimate 'rules'" of interpretation.
Tribe, supra note 14, at 73. Insights and perspectives would exist, but not rules. See id.
159. On the centrality of value judgments to the interpretive process, see Sinnott-
Armstrong & Brison, supra note 6, at 12. Richard Posner writes of "reasoning from
the top-down," which requires judges to invent a theory and then to "use[ ] it to
organize, criticize, accept or reject . . . cases to make them conform to the theory."
POSNER, supra note 18, at 172. I do not suggest that anything so ample as a theory
is required; a defined outcome (for example, that sovereign immunity will prevent
states being sued on federal claims in their own courts) will be facilitated by the
dialectical organization of the opinion. See infra text accompanying note 215.
160. In a recent essay, Michael Dorf finds it impossible to believe that judges
might not be outcome sensitive. In Dorf's understanding, the formulation of answers
in particular cases will always precede the generation of a constitutional theory. See
Dorf, supra note 137, at 594.
161. Joseph C. Hutcheson, Jr., The Judgment Intuitive: The Function of the
162. See Fallon, supra note 48, at 540-41.
163. See Steven D. Smith, Rationalizing the Constitution, 67 U. COLO. L. REV. 597,
164. No doubt this approach is the heritage of the legal realist school, lately recast
as the "attitudinal" model of judicial behavior. See GRIFFIN, supra note 15, at 132. In
this context, I am not troubled by so-called insider perspectives on how the Supreme
Court actually operates behind its impassive public façade. Human frailty being
what it is, it surely never occurs to most outsiders that the nine Justices would, or
ever could, each behave like Dworkin's stalwart Hercules. The memoirs of one recent
law clerk, published in apparent disregard of the Court's ethics of confidentiality,
suggest that the interpretive work of the Rehnquist Court is driven almost exclu-
sively by "personality and politics rather than considered judgment." EDWARD LAZ-
ARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES
INSIDE THE SUPREME COURT 287 (1998). Surely the high place of politics in the
But outcome sensitivity cannot mean that judges hand down their decisions using only vatic insight, or by sheer force of office. The common law system is deeply rational; it demands reasons, and judges cannot, and ought not, shirk from every mechanism of ratiocination that their intellections, and the legal academy’s, can provide. Though it is true that the reasoning process, the selection and ordering of argument, is the epiphenomenon (the initial inspiration is the phenomenon), it is also the case that the reasoning process must persuade. Precisely Justices’ preopinion deliberations will come as no surprise more than eight decades after the insights of legal realism. But Lazarus, in the midst of a searingly critical narrative, makes a cogent point about the conversion of raw power into acceptable legal discourse—a conversion that is supposed to separate ordinary politics from the higher function of impartial, deliberative decision making by an independent judiciary. Lazarus argues that the Justices must defy the efforts of journalists and academics to bracket them politically and ideologically; their work must show more than “five votes supported by doctrines of convenience.” In this light, judging must provide “a tense engagement between the competing arguments in a case—an honest statement of the most powerful theories underlying each side’s view.” Whether the present Court meets these ideals—Lazarus believes that the Justices’ alleged lack of serious collective deliberation means that it does not, see id. at 286. Lazarus’s critique surely goes more to the durability of its jurisprudence than to its normative compliance with the principles of the forensic method.

One aspect of what the current Justices do on the record is troubling. Who could not be dismayed by the petulant and captious characterizations that discordant justices increasingly level at their opposing colleagues’s reasoning? This occurred most notably in the Court’s recent decision in Alden v. Maine, 119 S. Ct. 2240 (1999). The reader can pick through the expressions of mutual pique without my assistance; I am content to pose the question of why any of the Justices tolerate this gratuitous institutional self-abasement. True, lawyers lambaste one another all the time in their submissions to the courts; but this is one taint of common law advocacy that the judges need not mimic and that diminishes the force and durability of their reasoning.


166. As Steven Smith writes in a tight critique of academic constitutional exegesis, legal scholarship does not make the law more determinate. It multiplies the number of approaches and perspectives, and greatly extends the spectrum of arguments and reasons that can be used to justify or criticize those arguments. See Smith, supra note 163, at 612. Smith attacks the “Constitution of the law reviews,” an ethereal plane of pure reason where the mocking realities of everyday life are imagined away. Id. at 621.

167. To borrow Stephen Griffin’s conceptualization, judicial reason-giving is a “second-order inquiry” into the validity of “first-order judgments” that have been reached before the opinions are written. GRIFFIN, supra note 15, at 3.

168. In fact, this is a powerful normative statement that goes to the heart of our
for this purpose, the professional habits of the judiciary reproduce the advocacy habits—including eclecticism—of the common law. Individual Justices have been unable to preach a philosophy within the Supreme Court that will mesmerize colleagues across a wide portfolio of cases and issues, and hence face the perpetual task of assembling coalitions, and of projecting coherence and principle in the midst of compromise. Whether an opinion is persuasive ultimately is also the work of later benches and of scholars, but it is decidedly not the product of any judge's choice to become an unshakeable textualist, structuralist, or originalist (or, for that matter, a Posnerian pragmatist).

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constitutional culture. Sometimes, opinions do not persuade within the conventional legal discourse, and extraordinary controversy explodes. The thinly reasoned, conclusory premises of Roe v. Wade, 410 U.S. 113 (1973), have been thought to fall into this category. See generally Lazarus, supra note 164, at 364 (noting that a right to abortion was not fundamental in 1973). Cass Sunstein expresses it well: "Opinions of this sort [very thinly reasoned or overly conclusory] violate norms associated with legal craft." Sunstein, supra note 8, at 16. 169. Laurence Tribe betrays some annoyance with this fact of legal life, but it is hardly to be expected that judges will not try to "sweep aside all aspects of... text, history, and structure that do not quite fit [their] preferred grand design." Laurence H. Tribe & Michael C. Dorf, On Reading the Constitution 25 (1991). If the forensic method works at all, it works precisely to validate successful demonstrations of this partisan methodology.

169. See Griffin, supra note 15, at 138.

170. See Fallon, supra note 62, at 16 (asserting that in a judicial act, what makes one answer seem right will be external to the rule applied, culturally contingent, politically biased, or otherwise contestable). Mark Tushnet also rejects the idea that a choice of a particular constitutional theory could truly constrain judges; at most, a theory would provide "a set of rhetorical devices" that judges could use as they thought effective. Mark Tushnet, Constitutional Interpretation, Character, and Experience, 72 B.U. L. Rev. 747, 751 (1992). For those reasons, in fact, Tushnet stresses the importance of having people capable of reasoned judgment in judicial office. See id. at 761-62. In the absence of compelling theory, Tushnet maintains, "judgment is all that remains." Id. at 762. For Tushnet, the Warren Court was composed of Justices who (like Dworkin's Hercules) had the prior political formation to make them supremely confident in the rectitude of their judgments. See id. at 761. In contrast, the present Supreme Court does not share that kind of experience in the political marketplace, and as a result, the Justices' personal ethical formation must rank of higher importance in their judicial work. See id. at 762-63. Performance, informed by character, may substitute for the lack of prior public experience, or so Tushnet would hope to discover. See id.; see also Fallon, supra note 48, at 566-67 (noting that "probabilistic knowledge" about judges' personal values and backgrounds may allow prediction of judicial decisions under formalistic and substantive interpretive theories). Other jurists, too, have been struck by a lack of fealty among the present
III. AN APPLIED DEMONSTRATION: FORENSIC INTERPRETATION AND THE NEW FEDERALISM

Forensic interpretation calls to mind the shrewd taxonomy of Dutch law professor Filip De Ly, who speaks of believers and nonbelievers, and a great third class of pragmatists and realists. If the naming of De Ly's first two categories hints at the furies that sometimes stir the textualists and the originalists, it is the holders of the third—and by no means residual—position among whom forensic methodology will find most appeal. For reasons that become apparent in this final Part, I include in De Ly's third class the current Supreme Court. As noted earlier, the Court shares the academy's collective unwillingness to privilege any particular school of constitutional hermeneutics, but sotto voce the present Justices have endorsed forensic interpretation.

To advance this assessment, I have selected two cases, separated by a period of more than two decades, in which the Court was asked to bridle some of the national governmental power using principles of federalism—known, in one brand of populist political discourse, as "States' rights." The cases are the 1978 ruling in United States Steel Corp. v. Multistate Tax Commission, and its controversial close-of-term—and virtually close-of-century—opinion in Alden v. Maine, handed down in June 1999. Incidentally, both cases illustrate that a particular theoretical approach can rise to forensic prominence even after a cycle of disuse. As shown below, structuralist arguments, so recently eclipsed among scholars by textualism and origin-

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172. In a recent study, Professor De Ly classifies scholars who are debating the value of a commercial jus commune in the European Union into optimists, skeptics, and pragmatic realists. See Filip De Ly, Lex Mercatoria and Unification of Law in the European Union, in TOWARDS A EUROPEAN CIVIL CODE 41, 43 (1998). De Ly believes that analogous scholarly encampments flourish in the arena of an emerging uniform law of international commercial contracts, and deployed the taxonomy mentioned in the main text in an address at the XVth International Congress of Comparative Law at Bristol, England on July 30, 1998. (Transcript on file with author.)
173. See supra text accompanying notes 16-17.
alism,\textsuperscript{177} were conspicuous when the Supreme Court wanted to scrutinize federalism as a principle of limited, rather than relentlessly expansive, central government.

A. Harmonious Federalism: The Multistate Tax Compact Controversy

1. Justice Powell's Majority: Overcoming Literalism

The Compact Clause in Article I, in relevant part, provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power."\textsuperscript{178} In \textit{United States Steel}, the Court examined whether this constitutional prohibition on interstate compacts without congressional approval acted as a flat prohibition on \textit{all} such agreements unless Congress first granted its sanction.\textsuperscript{179} Writing for the majority, Justice Powell conceded immediately that the clause, "[r]ead literally," says exactly that.\textsuperscript{180} Briefed fully on the implications of a literal reading,\textsuperscript{181} the Court nevertheless found, "[a]t this late date," that it could not "circumscribe modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy."\textsuperscript{182} In so stating, the Court placed a signal, at the very head of the opinion, that it planned to approve state action that does not encroach on federal lawmaking powers. The Court therefore ac-

\begin{itemize}
\item \textsuperscript{177} See \textit{Griffin}, supra note 15, at 150-51.
\item \textsuperscript{178} U.S. CONST. art. I, § 10, cl. 3.
\item \textsuperscript{179} See \textit{United States Steel}, 434 U.S. at 454. Appellants were a group of corporate taxpayers threatened with audits by the allegedly unconstitutional Multistate Tax Commission, an interstate authority eventually involving 21 states. \textit{See id.} Among the Commission's purposes were to facilitate determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes, and the avoidance of duplicative taxation. \textit{See id.} at 456. Despite its interstate characteristics, the Commission was required to resort to the compulsory process of the separate states in order to punish failures to comply with its reporting requirements. \textit{See id.} at 475.
\item \textsuperscript{180} \textit{Id.} at 459.
\item \textsuperscript{181} The appellant taxpayers had urged the Court to adopt a literal reading of the text. \textit{See id.} at 460.
\item \textsuperscript{182} \textit{Id.} In making this assertion, the Court relied on its own precedents establishing a functional, rather than literal, reading of the Compact Clause. \textit{See infra} text accompanying notes 183-84.
\end{itemize}
cepted as a threshold matter that only *some* forms of unapproved interstate cooperation must be within the contemplation of the Constitution's prohibition—a pragmatic functionalist view\(^{183}\) that would overcome the "difficulties" implicit in a literalist interpretation.\(^{184}\) And Justice Powell's functionalism could draw some support from the Court's own precedents. A prior Court ruled in 1893, for example, that the Compact Clause could *not* be read literally, a position approved in later dicta.\(^{185}\) Otherwise, presumably, the business of the people—in this case, a multistate agreement on tax administration—could not get done.\(^{186}\)

As forensic interpretation would anticipate, the Court's opinion had twin methodological dimensions. The first, mentioned above, was the doctrinal support of precedents. The Court quickly used these earlier rulings to overcome the implications of strict construction.\(^{187}\) Because its strongest precedent dated from 1893, the Court felt moved evidently to provide further interpretive reasoning in a case filed on behalf of seventeen major interstate

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183. In this sense, functionalism means utilitarianism. It is an interpretive practice, fitting broadly under the rubric of pragmatism, that examines the context in which a particular constitutional provision appears and seeks to ensure that the provision "functions" in harmony with that context. To mention the word pragmatic in constitutional analysis, at least latterly, may be to threaten an unbounded Posnerism. This is not the intention of this otherwise quite ordinary (and not pejorative!) usage in the present Article, where it appears as a broad synonym for utilitarian or functionalist (as in pragmatic functionalism). For example, a pragmatic functionalist reading of the Treaty Clause in Article II of the Constitution might accept that certain kinds of treaty instruments could *be* adopted efficiently by the President alone without the cumbersome procedures of formal Senate consent—and this is precisely what has happened in our constitutional practice, through the convention of so-called "executive agreements." *See* HENKIN, *supra* note 149, at 215, 221-24.

184. *See United States Steel*, 434 U.S. at 459 (describing the Compact Clause as covering all agreements "irrespective of form, subject, duration, or interest to the United States" (emphasis added)). Notice the practice of "translation" in Justice Powell's imputation of a *national* concern to the Framers. *See supra* notes 77-89 and accompanying text (explaining translation as a neo-originalist interpretive method).

185. *See United States Steel*, 434 U.S. at 459-60 (citing Virginia v. Tennessee, 148 U.S. 503 (1893)).

186. The Court opened its opinion with a recitation of the tax agreement's purpose and history. *See id.* at 454-56.

Corporate taxpayers\textsuperscript{188} that refurbished the reasoning of its pre-
cedents for a modern administrative setting. The second dimen-
sion of its opinion selected a number of interpretive theories that
would allow the Court to make its own transition from the abso-
lutism of the literal Compact Clause to toleration of a congress-
ionally unapproved agreement, even one that arguably did not
intrude on the powers of the central government.\textsuperscript{189}

In fact, the Court moved \textit{explicitly} from precedent to history;\textsuperscript{190}
but originalist ideas proved scarcely helpful to its analysis. The
Framers lacked any documented understanding of what "agree-
ments" and "compacts" might have meant at the founding (in
juxtaposition, for instance, with treaties).\textsuperscript{191} Unfortunately, con-
cluded the Court, "[t]he records of the Constitutional Conven-
tion . . . are barren of any clue as to the precise contours of the
agreements and compacts governed by the Compact Clause,"\textsuperscript{192}
but just as obviously the Framers meant \textit{something} by these
different usages. In the Court's view, the absence of recorded
commentary suggested that agreements and compacts were un-
derstood as contemporary terms of art, "for which no explanation
was required and with which we are unfamiliar."\textsuperscript{193}

\begin{thebibliography}{99}
\bibitem{188} See \textit{id.} at 458 n.7.
\bibitem{189} See \textit{id.} at 472-79.
\bibitem{190} In particular, the Court considered whether "history" might cause it to recon-
sider the earlier cases. \textit{Id.} at 460.
\bibitem{191} The Treaty Clause declares that "[n]o State shall enter into any Treaty, Alli-
ance, or Confederation." U.S. CONST. art. I, \S 10, cl. 1. Yet the Compact Clause per-
mits the States to enter into "agreements" or "compacts" provided congressional con-
sent is obtained. "The Framers clearly perceived compacts and agreements as differ-
ing from treaties." \textit{United States Steel}, 434 U.S. at 460 (footnote omitted).
\bibitem{192} \textit{United States Steel}, 434 U.S. at 460-61.
\bibitem{193} \textit{Id.} at 462 (footnote omitted). Before abandoning its attempt to reconstruct the
Framers' understanding, the Court also discussed inconclusive authority from inter-
national law publicists like Emmerich de Vattel. See \textit{id.} at 462-63 n.12. By 1833, Justice Story was taking the view that no categorical definitions explained the dif-
fferences among the terms agreements, compacts, and treaties. He therefore pro-
ceeded to develop his own theory, distinguishing treaties and alliances (forbidden to
the States because of military and political implications) from mere compacts and
agreements, which embraced private rights of sovereignty such as boundary ques-
tions and other issues of convenience in the relationships of states. See 3 \textit{JOSEPH
STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES} \S 1397, at 271-
72 (Da Capo Press, reprint 1970) (1833). After that point, the Court's own precedential
history began to take shape. \textit{See United States Steel}, 434 U.S. at 463-64.
\end{thebibliography}
If neither text nor history yielded enough explanatory power, what was left? Returning to its earlier prediction of outcome, the Court raised the possibility of a decidedly non-Posnerian pragmatic resolution.\(^\text{194}\) As intimated by Justice Powell, a "functional view" of the Compact Clause now presented itself.\(^\text{195}\) The Court no longer trawled for meaning in the textual opposition of agreements, compacts, and treaties. Rather, it treated the Compact Clause in more broadly contextualized terms, as a pillar of the Constitution's temple of harmonious federalism. As such, the Clause could be understood to concede to the states an area of unchained cooperative action beyond the domain of federal lawmaking supremacy.\(^\text{196}\) It is compelling to note the Court's insistence on a structuralist principle—the underlying principle of harmonious federalism—to justify its apparent textual apostasy.\(^\text{197}\) In this light, if the interstate agreement, whatever it was called,\(^\text{198}\) respected the underlying federal structure of the government, it would pass muster under the Constitution notwithstanding whether Congress had conferred its prior approval.\(^\text{199}\) The mere form of the interstate arrangement—an agreement, a compact, or simply an understanding to adopt reciprocal legislation—would never be dispositive.\(^\text{200}\) Thus considered, it would be an "evasion of the constitution to place the question upon the formality with which the agreement [was] made."\(^\text{201}\) In sum, the

\(194\). See supra note 183 (discussing the distinction between Posnerian theory and ordinary pragmatism in constitutional interpretation).

\(195\). United States Steel, 434 U.S. at 468.

\(196\). The notion of a harmonious federalism appeared in the Court's earlier opinion in New York v. O'Neill, 359 U.S. 1 (1959), a case that involved reciprocal state legislation rather than compacts, but where the Court spoke of a constitutional tolerance of "fruitful interstate relationships" designed with "a view to increasing harmony within the federalism created by the Constitution." Id. at 6.

\(197\). See United States Steel, 434 U.S. at 470. The idea of an underlying principle—a deep structure principle—is Chomskyan. See supra note 57 and accompanying text.

\(198\). For example, some forms of interstate arrangements simply called for reciprocal legislation rather than more formalized compacts or agreements. See United States Steel, 434 U.S. at 470.

\(199\). See id. at 470-71.

\(200\). See id. at 470. Thus, the Court honored the structuralist precept that "[t]he Constitution looked to the essence and substance of things, and not to mere form." Id. (citation omitted).

\(201\). Id. The majority used conventional common law reasoning to explain that Court precedents approving only certain bilateral interstate agreements did not nec-
Court regarded the only relevant test as being whether the tax compact enhanced the power of the states "quoad the National Government."  

2. Justice White's Dissent: The Counterfunctionalist Response

A signature of the forensic method is that it is methodologically, not substantively, prescriptive; accordingly, it anticipates that the common law convention of dissent will also supply firepower for gauging persuasiveness and for later transforming acts of reinterpretation. To demonstrate, I single out only one aspect of Justice White's complex dissent in United States Steel, his counterfunctionalist reply to the majority's reading of the Compact Clause. If one views federal control over interstate commerce as virtually plenary, as the Supreme Court typically has done, then a multilateral state tax agreement that would apportion "revenues, sales, and income of multistate and multinational corporations for taxation purposes is an area over which the Congress could exert authority, ousting the efforts of any States in the field." Under the Commerce Clause, Justice White reasoned that states individually "may legislate in interstate commerce until an actual impact upon federal supremacy occurs." For individual states, the harm of potential impact was insufficiently dis-

essarily constrain its acceptance of broader forms of agreement involving more than two states. See id. at 472 (finding that "the precise interstate mechanism involved in this case has not been presented to this Court before").

202. Id. at 473. The Court examined the elements of the proposed tax agreement and found that its terms did not intrude upon Congress's powers in interstate commerce. In particular, it found that the States had power to do separately what they proposed to do collectively under the agreement. See id. at 473-78.

203. See, e.g., Printz v. United States, 521 U.S. 898, 949 (1997) (Stevens, J., dissenting) (noting that the Court has "never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against [the] existence" of that power or authority; that assertion, if followed, "would undermine most of our post-New Deal Commerce Clause jurisprudence").

204. United States Steel, 434 U.S. at 481 (White, J., dissenting). In Justice White's view, therefore, it was the province of the federal government "to oversee conduct of a greater effect than a single State could accomplish, to protect both its own prerogative and that of the excluded States." Id. at 488.

205. Id. at 484.
quieting to require advance congressional sanction.\textsuperscript{206} For states that choose to act in concert, however, "'potential ... impact upon federal supremacy' [was] enough to invoke the requirement of congressional approval."\textsuperscript{207} In this circumstance, to require Congress actually to pass a statute preempting the field (for example, by fixing a federal tax apportionment formula) would accord no force to the Compact Clause independent of the Commerce Clause.\textsuperscript{208} If congressional approval was unnecessary because there was no \textit{actual} encroachment, then what would be the autonomous "function" of the Compact Clause? "The Clause must mean that some actions which would be permissible for individual States to undertake [would] not [be] permissible for a group of States to \textit{agree} to undertake."\textsuperscript{209} To put it another way, "[i]f the way to show a 'potential federal interest' require[d] an exercise of the actual federal commerce power, then the purposes of the Compact Clause, and the Framers' deep-seated and special fear of agreements between states, would be accorded absolutely no respect."\textsuperscript{210} Justice White was unwilling, therefore, to read the need for congressional approval out of the Constitution, although he did accept that it may be granted tacitly.\textsuperscript{211}

Justice White chided the majority, in a closing coda, for seeing to it that there was "very little life" left in the Compact Clause.\textsuperscript{212} The majority's functionalist interpretation was supported by an abstract structuralist principle—harmonious federalism—that Justice White thought had become too detached from the underlying text of the Compact Clause. As noted in Part I, rapid textual disconnection is a hazard of structural analysis.\textsuperscript{213} As it turned out, the detachment inspired a powerful

\textsuperscript{206} See id.
\textsuperscript{207} Id.
\textsuperscript{208} See id. at 489.
\textsuperscript{209} Id. at 482.
\textsuperscript{210} Id. at 489.
\textsuperscript{211} See id. at 485-86. Justice White took this position, which on its face seemed an awkward fit with his apparent preference for a literalist reading of the Compact Clause, on the pragmatic ground that he viewed the Clause as functionally "conciliatory" rather than "prohibitive." Id. at 496. In other words, Congress would apply its political judgment to each agreement, and on occasion might not choose to express consent formally. See id. at 486.
\textsuperscript{212} Id. at 496.
\textsuperscript{213} See supra text accompanying note 42.
counterfunctionalist dissent—and, not without irony, a literalist argument for a balancing of federal and state power that certainly could further the majority's avowed purpose of harmonious federalism.

B. Disharmonious Federalism?: Alden and State Sovereign Immunity

1. Justice Kennedy's Majority: Another Foray Against Literalism

The United States Steel ruling, delivered at approximately the midpoint of the Carter presidency, might now be seen as a harbinger of the present Court's return to what a thin majority of its Justices regard as authentic protofederalism. Thus, Alden v. Maine214 arrived, more than twenty years after United States Steel, in a much more ideologically charged atmosphere, where federalism—the balance that the Constitution strikes between national and state powers and privileges—has become a major jurisprudential battleground.215 Moreover, whereas United States Steel probed a specific textual provision of the Constitution,

215. The immediate backdrop to Alden was a series of cases beginning with United States v. Lopez, 514 U.S. 549 (1995), the first Supreme Court decision since the New Deal to strike down a statute as lying beyond the congressional authority under the Commerce Clause. See Sunstein, supra note 8, at 31. Sunstein read Lopez as a "signaling device" to Congress, but also to judges and the legal profession, that the Constitution is one of "enumerated rather than plenary powers," so that a recalibration of the balance of power between the national government and the states could be expected. Id. at 31-32. Two years later, in Printz, the Supreme Court intensified its earlier signal, holding that Congress lacked authority to impose on state enforcement officials an obligation to make background checks on potential gun buyers. See Printz v. United States, 521 U.S. 898, 933 (1997). The Court found that that requirement would be inconsistent with the dual sovereignty foundation of the federalist system. See id. at 932-33.

Incidentally, Alden was one of a trio of cases decided on the same day, all of which expressed an expansive view of State sovereign immunity. In the other two related cases, Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S. Ct. 2199 (1999), and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S. Ct. 2219 (1999), the Supreme Court rejected attempts to justify, as legitimate exercises of Congress's remedial power under Section 5 of the Fourteenth Amendment, explicit congressional abrogation of the Eleventh Amendment immunity of the States from suits for violation of the federal Patent Act and the false advertising provisions of the federal Lanham Act.
Alden involved a more difficult—and more intellectually compelling—inquiry into a purported "fundamental postulate" of the constitutional design, the sovereign immunity of the states in their own courts, that is nowhere mentioned in the Constitution's text. In this setting, the majority's opinion was self-consciously a performance of forensic constitutional interpretation. The opinion, delivered by Justice Anthony Kennedy, canvassed "history, practice, precedent, and the structure of the Constitution" to assert that the states do enjoy an immunity from private federal claims in state courts. This immunity could not be abridged by Congress even in aid of federal schemes of regulation adopted under its immense legislative powers in Article I.

Alden concerned the jurisdiction of the state courts of Maine to entertain a private lawsuit by a group of probation officers against their employer, the State of Maine, alleging violation of the overtime provisions of the federal Fair Labor Standards Act of 1938 (FLSA). The statute expressly authorized private actions against states in their own courts without regard to state consent, but the Supreme Court acknowledged an apparent split between two state supreme courts—Maine and Arkansas—on the constitutionality of this authorization. Although there is no constitutional language ordaining an explicit state sovereign immunity, the Court was not entirely bereft of a textual resource. The Eleventh Amendment to the Constitution was adopted in 1798 to overturn a Supreme Court ruling five

216. See Alden, 119 S. Ct. at 2254.
217. Id. at 2260.
218. See id. at 2268-69.
220. See 29 U.S.C. §§ 203(x), 216(b). One clarification should be made. The Court had held previously, in Seminole Tribe v. Florida, 517 U.S. 44 (1996), that Congress did not have the power to abrogate an unconsenting state's immunity in federal court under the Eleventh Amendment. See Seminole Tribe, 517 U.S. at 76; see infra text accompanying note 224. In fact, the plaintiff's probation officers in Alden first brought suit in federal district court, but the court dismissed the suit on the authority of Seminole Tribe. See Alden, 119 S. Ct. at 2246.
221. See Alden, 119 S. Ct. at 2246.
222. As noted earlier, see supra note 67, and as Justice Souter would punctuate in his dissent in Alden, the Constitution never mentions the word "sovereignty" at all. See Alden, 119 S. Ct. at 2270 (Souter, J., dissenting).
years earlier in *Chisholm v. Georgia* 223 that the Judiciary Article of the Constitution authorized a private citizen of another state to sue the State of Georgia in federal court without its prior consent. 224 The Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." 225 This text reproduces, and effectively rescinds, the original language in Article III, Section 2, of the Constitution, which extended the judicial power to controversies "between a State and Citizens of another State," and "between a State . . . and foreign . . . Citizens, or Subjects." 226 Thus, read literally, the Eleventh Amendment describes a circle of immunity that includes only *diversity* lawsuits that were permitted under the original language of Article III, Section 2. 227 The *Alden* Court, therefore, seemed immediately to face a refractory literalism similar to its earlier dilemma in *United States Steel*.

To achieve its outcome of applying state sovereign immunity in state courts, therefore, the majority would need to overcome the plain reading that the Amendment simply carved out a narrow slice of immunity—that is, diversity lawsuits—from a broad general principle of state suability. Flipping the reading, the Court instead would find that the Amendment shut down a loophole of suability that perhaps the Framers had opened inadvertently in an otherwise universal and indefeasible doctrine of state sovereign immunity. How would the Supreme Court justify this inverted interpretation, confronting the obvious silence of the Constitution and the plain meaning of the Eleventh Amendment?

As in *United States Steel*, the Court invoked each of the primary methodologies of forensic interpretation. Applying, first,
the institutional conventions of the common law, it uncovered case support for its motivating idea that the Eleventh Amendment merely exemplified a wider constitutional truism—that states may not normally subject to any private lawsuits without their consent—rather than crafted an exception to a competing understanding that states normally are suable by private citizens. The Court also distinguished "isolated statements" from earlier cases suggesting that the Eleventh Amendment could not apply in state courts. The Court deployed familiar techniques of the common law advocate, spotlighting "footnote digressions," "irrelevan[cy]" to a holding or rationale, "unnecessary" discussion, and confining unhelpful precedents to "narrow proposition[s]."

The majority argued that the holdings on which it relied reflected "a settled doctrinal understanding... that sovereign immunity derive[d] not from the Eleventh Amendment but from the structure of the original Constitution itself." Integrating precedents under the rubric of structure allowed the Court to pass from conventional common law justification to more dynamic arguments based on interpretive theory. Thus, the Alden majority relied on a structuralist assumption of the viability of the states after the adoption of the Constitution, an assumption based on the limited and enumerated powers of the national judicial and political branches and the resolving power of the Tenth Amendment, which reserves undelegated powers "to the States respectively, or to the people."

The Court concluded that, within their proper spheres of sovereignty, the states "form distinct and independent portions of

228. See Alden, 119 S. Ct. at 2253-54, 2258, 2270.
229. Id. at 2257.
230. Id. at 2257-58. The Court's decision in Howlett v. Rose, 496 U.S. 356 (1990), for example, was distinguished conventionally as a case that withheld immunity from a subgovernmental unit, a school board, that the Court found not to be an "arm of the State." Alden, 119 S. Ct. at 2259. Avoiding the issue presented by the analogy of state and sub-state authorities, the Court found that Howlett "did not address the question of Congress' power to compel a state court to entertain an action against a nonconsenting State." Id. at 2259-60.
231. Alden, 119 S. Ct. at 2254 (emphasis added). Later in its opinion, the Court would need to consider the unhelpful implications of Chisholm, the case that provoked the Eleventh Amendment. See infra text accompanying note 242.
232. Alden, 119 S. Ct. at 2247.
the supremacy, no more subject ... to the general authority than the general authority is subject to them, within its own sphere." Recognition of such state supremacy within certain reserved spheres, however, would not necessarily procure for the states a constitutional immunity from the lawful exercise of the national powers, including subjection to suit in their own courts, within the proper sphere of Congress's limited and enumerated authority. The Court's response, couched again in structural terms, insisted that the constitutional "design," as explained at length in The Federalist, empowered Congress to regulate individuals rather than states, and thus departed from the state-centered experience of the Articles of Confederation. In the Court's constitutional polity, the states were more than "mere provinces or political corporations" and possessed "the dignity, though not the full authority, of sovereignty." In other words, the scope of state immunity was determined not by the Eleventh Amendment's text alone, but by a structural underlay that the majority called "fundamental postulates implicit in the

233. Id. (quoting The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)).
234. This had to be a telling objection for the majority because Justice Souter's dissent made much of a distinction drawn historically between the acts of the sovereign itself—to which a strong presumption of immunity has attached—and the acts of other sovereigns, where immunity has had, at the least, a murkier pedigree. See id. at 2270 (Souter, J., dissenting) (noting that no evidence existed of an inherent sovereign immunity "when the sovereign sued was not the font of the law"). To be frank, Justice Kennedy simply dodged the challenge, relying on the absence of much contrary evidence—a conventional brief-writing device—and some writings of early-twentieth-century English scholars to rebut the proposition. See id. at 2257.
235. See id. at 2247 (citing The Federalist No. 20 (James Madison & Alexander Hamilton)). Reliance on The Federalist has itself become a staple convention of constitutional analysis, irrespective of the political or ideological complexion of the invoking judge. As Jack Rakove explains, nothing has equaled this collection of commentaries in analytical scope or conceptual power. See Rakove, supra note 7, at xv.
236. See Alden, 119 S. Ct. at 2247.
237. Id. Later in his opinion, Justice Kennedy lightly embellished this phrasing to read "mere prefectures or corporations." Id. at 2268. He did not explain, however, whether his usage was merely striving for effect or if he intended a helpful juridical comparison with the unit of French administration called the prefecture.
238. Id. at 2247. In his dissent, Justice Souter found the majority's exaltation of the dignity of the states, see id., to be distasteful to the republican idea of the Constitution, see id. at 2269 (Souter, J., dissenting).
These arguments showed the Court attempting to bond textualism and Blackian structuralism with the eclectic animus that forensic interpretation would expect, and predict. The point is not whether the argument is persuasive—its metaphorical tilt might offend originalists and structuralists in equal measure—but that it was expected by the Court to persuade.

The Court also availed itself of arguments that might be designated historicist/originalist, looking at the prevailing view of state sovereign immunity among the generation that designed and adopted the federal system of government. In doing so, the Court construed the absence of discussion of state immunity as proof of the well-established status of the doctrine, noting that arguments raised by states' advocates against the Constitution—that federal jurisdiction under Article III would not require state consent—made sense only if the states were understood at the time of the founding to have a preexisting immunity in their own courts. Justice Kennedy portrayed Chisholm v. Georgia—which, as the dissent emphasized, appeared to vitiate his historical reconstruction—as an unfaithful reading of the Constitution. He recalled that the majority in Chisholm had failed to address the practice and understanding of the states at the time the Constitution was adopted and had conceded, through expectation of an unpopular and surprised reaction to their decision, that they had defied the prevailing wisdom. For the Alden majority, therefore, the Eleventh Amendment was a kind of synecdoche for the deeper idea that the Constitution, in

239. Id. at 2254.
240. See id. at 2247.
241. See id. at 2263. Otherwise, using early Court rulings, the writings of jurists, and the testimony of the Rhode Island and New York ratification debates, Justice Kennedy assembled an orthodoxy that a specific doctrine of state sovereign immunity had survived the framing of the new Constitution. See id. at 2247-49. Quoting again from The Federalist, Justice Kennedy emphasized Alexander Hamilton's confidence that "[t]he contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force." Id. at 2248 (quoting THE FEDERALIST NO. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).
242. See id. at 2283.
243. See id. at 2250.
244. See id.
its history and structure, upheld the states' traditional comprehensive immunity from private suits.\textsuperscript{245}

Finally, in the spirit of pragmatic functionalism, the Court used public policy arguments as crossbracing for its structural, textual, and historical edifice. Fearing a federal attempt, as he put it, "to commandeer the entire political machinery of the State against its will,"\textsuperscript{246} Justice Kennedy argued that a denial of immunity would strip from the states their sovereign power to determine priority among claims on the "public fisc."\textsuperscript{247}

2. Justice Souter's Dissent: A Dynamic Functionalism

Justice Souter, joined by three colleagues, filed a lengthy dissent in \textit{Alden}.\textsuperscript{248} What is most instructive about the dissent, as constitutional theory, is that its dialectical method—a blending of history, precedent, structure, and public policy—so closely tracked the majority's forensic reasoning.\textsuperscript{249} If anything, Justice

\textsuperscript{245} For the \textit{Alden} majority, State immunity trumped even the virtually plenary legislative authority of Congress under Article I. Backed by the Supremacy Clause, it might well have been expected (consistently with precedents allowing Congress to impose social legislation on the states as employees) that the federal government simply could legislate to subject the states to suit in their own tribunals. But the Court, again thinking structurally, held that the Supremacy Clause enshrined as supreme law only acts of the federal government "that accord with the constitutional design"—including, presumably, the a priori sovereign immunity of the States. \textit{Id.} at 2255. The Court used identical reasoning with respect to any implied extension of Congress's enumerated authority through the Necessary and Proper Clause, holding that a law that violated the principle of state sovereignty could not properly execute, for example, the Commerce Clause. \textit{See id.} at 2264.

\textsuperscript{246} \textit{Id.}

\textsuperscript{247} \textit{Id.} The majority did acknowledge some limits to the sweeping immunity it was enunciating. In particular, the immunity could bar suits only in the absence of consent, and could not prevail under the Constitution against suits brought by other States or by the federal government. \textit{See id.} at 2267. Moreover, Congress may authorize private suits against nonconsenting states using its enforcement power under the Fourteenth Amendment. \textit{See id.} \textit{But see supra} note 215 (discussing recent Supreme Court opinions circumscribing even this power in favor of state immunity). Further, as noted earlier, immunity will bar suits against states but not against substate entities such as municipal corporations or other governmental entities that are not arms of the state. \textit{See Alden}, 119 S. Ct. at 2287. The \textit{Alden} Court did not discuss the constitutional status of a private federal claim brought against a state, in its own courts, \textit{by a citizen of that state}. Although this precise circumstance is not included in the categories of federal jurisdiction in Article III, Section 2 of the Constitution, it presumably would be excluded \textit{caeteris paribus} by the general reasoning of \textit{Alden}.

\textsuperscript{248} \textit{See Alden}, 119 S. Ct. at 2269-95 (Souter, J., dissenting).

\textsuperscript{249} \textit{See id.} This parallelism is perfectly legitimate in forensic interpretation. As
Souter indulged himself in heavier historical beachcombing than did the majority, and scrutinized the writings of many more—and rather more obscure—publicists. Some parallel, too, can be detected between Justice Souter’s primary thesis, directed to the implications of the Eleventh Amendment, and the dissent filed by Justice White in *United States Steel*. Each Justice believed that the majority’s reading sapped normative power from a clear constitutional directive. Justice White decried the emasculation of the Compact Clause, while Justice Souter accused the *Alden* majority of rendering the Eleventh Amendment “beside the point,” on the ground that a fundamental principle of state sovereignty, confirmed by the Tenth Amendment, would have precluded the need for constitutional confirmation that states also enjoyed this immunity in federal courts. Like Justice White, therefore, Justice Souter struck at the dialectical heart of the majority’s opinion, which had struggled from the outset with a need to prefer one interpretation—the Eleventh Amendment as a specimen of a much wider

Akhil Amar indicates in a recent essay, all legitimate forms of argument can be deployed on both sides of a given issue. See Amar, supra note 39, at 772.

Only the final purpose of Justice Souter’s historical lucubrations need be considered here. Using the ambiguities and disputes of early state practice (including the ratification debates), as well as the works of philosophers, historians, and jurists, he sought to demonstrate that sovereign immunity—had the question been posed—was not conclusively thought in early postrevolutionary America to shield a state from suit under federal law on a subject reserved to the *national* jurisdiction by Article I. See *Alden*, 119 S. Ct. at 2270; *supra* note 238. In Justice Souter’s history, the prerogative of state sovereign immunity was a creature of the common law, unmentioned at the Constitutional Convention, and therefore a proper object of congressional abrogation. See *Alden*, 119 S. Ct. at 2283. To the extent that Hamilton mentioned state immunity in *The Federalist*, it was as a principle of natural rather than constitutional law, something that inhered in the nature of sovereignty—itself a subject little treated at the Convention, and indeed sovereignty was a word that was conspicuously omitted from the Constitution. See *id.* at 2275, 2280; *supra* note 67. Moreover, members of the majority in *Chisholm*, see *supra* text accompanying notes 242-44, seemed to favor a revolutionary ideology that treated immunity as an anomalous residue of the imperial order. In that *quondam* order, the sovereignty of princes could never be perceived, as it was in America, as a joint tenancy with “the people.” *Alden*, 119 S. Ct. at 2281 (Souter, J., dissenting); see *supra* note 238.

Moreover, members of the majority in *Chisholm*, see *supra* text accompanying notes 242-44, seemed to favor a revolutionary ideology that treated immunity as an anomalous residue of the imperial order. In that *quondam* order, the sovereignty of princes could never be perceived, as it was in America, as a joint tenancy with “the people.” *Alden*, 119 S. Ct. at 2281 (Souter, J., dissenting); see *supra* note 238.

250. See *supra* notes 203-13 and accompanying text.

251. *Alden*, 119 S. Ct. at 2269 (Souter, J., dissenting). A broad view of immunity, moreover, would have allowed the states to escape any judicial power, whether the court be state or federal, and whether the claim arose under state or federal law. See *id.*
immunity—at the expense of a second, and textually more plausible, interpretation—the Amendment as an exception to a wider suability.253 Justice Souter seemed to suggest that the majority's sweeping view of immunity would make the Eleventh Amendment a peculiarly asymptotic exercise, because the broader notion of immunity could just as readily have been stitched into language that ultimately went for ratification to presumably receptive state legislatures.254

In closing, Justice Souter maintained that the absence of precursors to the legal claim pursued in Alden must not preclude an evolution of constitutional principles in "a world that the Framers could not have anticipated."255 He believed that the reach of the modern Commerce Clause made it impossible to rely on calcified doctrines like sovereign immunity.256 Ironically, Justice Souter's dynamic vision of federal/state relations—a pragmatic functionalist view—ultimately put him philosophically closer to the harmonious federalism of the majority in United States Steel than to Justice White's literalist dissent.

253. See supra text accompanying note 227.
254. As considered earlier, see supra note 245 and accompanying text, the majority dismissed Justice Souter's objection that immunity did not apply unless the sovereign was itself the source of the challenged law. See Alden, 119 S. Ct. at 2269-70. This objection was a recurring preoccupation in Justice Souter's dissent, see id. at 2285, 2294 (Souter, J., dissenting), for which Justice Souter enjoyed some precedential support. In Kawananakoa v. Polyblank, 205 U.S. 349, 353-54 (1907), the Court held that, "in the case of multiple sovereignties, the subordinate sovereign will not be immune where the source of the right of action is the sovereign that is dominant." Alden, 119 S. Ct. at 2287 (Souter, J., dissenting). Thus, state sovereign immunity should not have been available to block private enforcement of the challenged law in Alden that emanated from the Article I authority of Congress. See id. To the plaintiffs' lawyers reading Kawananakoa, the nature of Justice Souter's objection must have looked like a precision weapon in the war against Maine's view of sovereign immunity.
255. Alden, 119 S. Ct. at 2291. Justice Souter argued that cases like Alden were historically rare because Congress had not always felt comfortable subjecting the states to legislation—and private causes of action in state court—under the authority of the Commerce Clause. See id.
256. See id.
C. Some Thoughts on the Federalism Debate and Forensic Interpretation

I have demonstrated the application of the forensic method by examining two cases from the formalistic jurisprudence of governmental structure and design, rather than the hot-blooded arena of civil and political rights. This does not diminish the resolving power of the method. The Framers of the Constitution organized design principles like federalism as the first line of defense for individual rights.\textsuperscript{257} It is true that federalism itself was intended, as Robert Nagel puts, "to maintain a rough system of power allocation over long periods of time."\textsuperscript{258} Nagel assumes incorrectly, however, that structural opinions are not necessarily based on the injustice of depriving a single individual of a particular allocation of authority.\textsuperscript{259} As in \textit{Alden}, these opinions may come down to precisely that, and the amenability of state power to individual challenge becomes an issue of procedural due process and personal liberty.

The broader issues of governance, in any event, will always command our independent attention. The \textit{United States Steel} and \textit{Alden} majorities exploited the range of the forensic method to defend a vision of power allocation, with all of the internecine rivalry and claims of ruffled sovereignty that the allocation has always implied.\textsuperscript{260} After all, the Framers did not abolish the

\begin{footnotesize}
\begin{enumerate}
\item See Calabresi & Rhodes, \textit{supra} note 63, at 1155-56 (describing the use of structural devices—such as separation of powers—to preserve individual liberty as the "genius" of the Constitution).
\item Nagel, \textit{supra} note 35, at 81.
\item See id. at 82.
\item The importance of the project of reconciliation of the sovereigns cannot be understated. The Framers, conscious of what Madison called the solecism of an \textit{imperium in imperio}—two sovereigns coexisting in a common territory—seemed to resolve the paradox by having the federal government operate directly on the individual citizen. See Rakove, \textit{supra} note 7, at 153; Raoul Berger, \textit{Jack Rakove's Rendition of Original Meaning}, 72 Ind. L.J. 619, 637 (1997). This was a capital solution to what seemed a constitutional absurdity to many of the Framers; unfortunately, it never explained fully or rationalized the content of state sovereignty in relation to the new federal polity. As Rakove indicates, if the states were perceived as losers in the dynamic competition for power, and because power itself was dynamic, their authority might continue to atrophy. See Rakove, \textit{supra} note 7, at 182. Further, the Necessary and Proper Clause and the Supremacy Clause established a constitutional basis for legislation that could overturn state government at a stroke. See id. at 184.
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states; they assumed that some subsidiarity would persist even as a new national power center assumed dominance. To that extent, the Court’s federalism concerns serve a continuing purpose to implement the constitutional design favoring a defined role for the states. Flexibility under the Compact Clause was an obvious and successful expansion of state authority in the practical field of tax administration; the Alden Court’s wide reading of state sovereign immunity may have been less justifiable practically, particularly in light of the role played by the states today in the commercial marketplace, but undoubtedly must carry talismanic significance in the construction, or reconstruction, of a harmonious federalism. If occasionally the Supreme Court fine-tunes the balance toward one locus of power or the other, but does so within the expectations of common law reasoning and the methodology of eclecticism, it respects the constitutional culture.

261. The principle of subsidiarity, developed in the jurisprudence of the European Union, expects that certain legislative and administrative responsibilities will be discharged at national or regional level by locally franchised bodies. See generally MARGOT HORSPOOL ET AL., EUROPEAN UNION LAW 93-95 (1998) (discussing the origins of subsidiarity).

262. See Dorf, supra note 137, at 594 (suggesting that the Supreme Court’s post-New Deal Commerce Clause jurisprudence, until very recently, was insufficiently responsive to the Framers’ strategy of enumerating specific national powers).


264. Unsurprisingly, the Supreme Court’s Alden ruling has spurred much debate about the proper limits of the national power. The practical consequence of Alden is clear: Maine’s probation officers will get the overtime pay for which they sued only if the federal government sues on their behalf under the FLSA. Should the Supreme Court have left these federal rights unenforceable in private lawsuits—in federal and state courts—against state employers? See supra note 247 (discussing enforcement in federal court). Congress can constitutionally impose minimum wage laws on the States, see Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); therefore, is it appropriate, or merely inconsistent, to police state compliance with these laws exclusively through litigation brought by the federal government? If inconsistency is detected, the Court may in the future overrule Seminole Tribe, which barred private suits against the States in federal court, see supra note 220, while preserving Alden. For opposing views of the jurisprudential backwash of Alden, see Charles Fried, Supreme Court Folly, N.Y. TIMES, July 6, 1999, at A17; Michael Greve, Federalism Is More than States’ Rights, WALL ST. J., July 1, 1999, at A22.
CONCLUSION

As Richard Fallon argues, legal interpretation should be purposive, not rigid or mechanical, and "the variety of sources of law to which a legal interpreter can appeal includes principles and policies as well as canonical texts." The strict textualist or originalist may disparage result-oriented reasoning as provoking mayhem, but the premise of this Article is that mayhem more likely resides in the proffered alternative—a blinkered and unreliable assembly of sources that does not know, or claims not to know, its destination until the place is reached. Moreover, neither the Constitution nor the constitutional culture has elevated to primacy any single group of justices, or any single theory of interpretation. That some judges are wise, and some are foolish, is not something for which constitutional theory can sensibly control. By emphasizing eclecticism, forensic constitutional interpretation enables every judge to interpret with integrity, if not always to become Hercules.


266. See Berger, supra note 260, at 620.

267. And, to underscore an earlier point, the Justices of the Supreme Court have not coalesced around a specific theory. See supra note 15 and accompanying text.

268. In a recent essay, Rebecca Brown includes a wonderful quotation from Felix Frankfurter that seems particularly appropriate here. Frankfurter called on judges for allegiance to nothing except the effort, amid tangled words and limited insights, to find the path through precedent, through policy, through history, to the best judgment that fallible creatures can reach in that most difficult of all tasks: the achievement of justice between man and man, between man and state, through reason called law.

Rebecca L. Brown, Constitutional Tragedies: The Dark Side of Judgment, in CONSTITUTIONAL STUPIDITIES, supra note 20, at 139, 139.

Brown observes that the Lochner Court was faithful to the text of the Constitution, and to contemporary societal values of liberty to contract and liberty to sell one's labor. See id. at 140. She warns, however, that "[a]ll constitutional theorists must allow for the possibility of error." Id. at 143. Was the Court in error, or just reflecting a moment in the evolution of a constitutional understanding?

269. To repeat Akhil Amar's motif, "[a]ll proper techniques of constitutional interpretation can be used by both liberals and conservatives alike." Amar, supra note 39, at 801 n.204. Liberal textualists of one generation can become conservative textualists of another. See id.