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Legitimate Interpretation – Or Legitimate Adjudication?

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LEGITIMATE INTERPRETATION—OR LEGITIMATE ADJUDICATION?

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Current debate about the legitimacy of lawmaking by courts focuses on what constitutes legitimate interpretation. The debate has reached an impasse in that originalism and textualism appear to have the stronger case as a matter of theory while living constitutionalism and dynamic interpretation provide much better account of actual practice. This Article argues that if we refocus the debate by asking what constitutes legitimate adjudication, as determined by the social practice of the parties and their lawyers who take part in adjudication, it is possible to develop an account of legitimacy that produces a much better fit between theory and practice. The decisional norms employed by adjudicators include faithful agent arguments about governing texts, arguments from precedent, and arguments from settled practice, but also, in a more qualified fashion, considerations of morality and social consequences. Adjudicators mix and match these norms in reaching outcomes but do so in a way that is regarded as legitimate by the losers as well as the winners in contested adjudications. A general normative implication of this refocused account of legitimacy is that adjudicators, including high-level appeals courts, should not stray far from their basic function of dispute resolution, as opposed to law declaration.

† Charles Evans Hughes Professor, Columbia Law School. Earlier versions of this Article were presented at the Ninth Annual Originalism Conference at San Diego Law School and at faculty workshops at Columbia and Florida State Law Schools. Particular thanks to Michael McConnell and Richard Primus for extensive comments on that draft. I have also benefitted from discussions with Will Baude, Hanoch Dagan, Philip Hamburger, Bert Huang, and Henry Monaghan. Alan Berkowitz provided valuable research assistance.

INTRODUCTION: CHANGING THE FOCUS

This is an Article about the legitimacy of lawmaking by adjudicative bodies, most prominently, but not exclusively, courts. The question to be considered is this: When adjudicators resolve a dispute between adverse parties, what types of decisional norms can the adjudicator invoke that will be regarded as legitimate?

Currently, the dominant mode of inquiry about the legitimacy of decisional norms is framed in terms of legitimate *interpretation* of enacted texts. Thus, in constitutional law, we find vigorous debates between "originalists" and "living constitutionalists."[1] As a matter of theory, the originalists appear to be winning, based on powerful arguments grounded in the consent of the governed and the nature of communicative acts more generally. [2] As a matter of descriptive accuracy, however,

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[1] For overviews of the literature, see Mitchell N. Berman, *Originalism is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 781–96 (2010).

[2] For the argument from the consent of the governed, see KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 110–113 (1999). For the argument from the nature of communicative acts, see, e.g., Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 987–98 (2017) (summarizing the view that interpretation requires the attribution of intent to the speaker); Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning,* 91 NOTRE DAME L. REV. 1, 20-30 (2015) (summarizing argument for determining the meaning of a text as of the time it is promulgated). This hardly exhausts the arguments for originalism. *See also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 88–89, 253–56 (2004) (adhering to the original meaning of the Constitution promotes individual liberty); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 33 (2013) (arguing that the supermajority

the living constitutionalists have by far the better case since the understanding of the Constitution enforced by the courts today bears little resemblance, in many ways large and small, to the understanding of the text when it was ratified.[3] The great tension this has created explains the emergence of claims that one can be both an originalist and yet can also embrace the evolving nature of constitutional law. [4] So far, however, no version of "living originalism" appears to have garnered general assent.

In statutory interpretation, the primary theoretical debate pits "textualists" against "purposivists."[5] Textualists point out that the only thing actually enacted by the legislature is the text of the statute; legislative purposes (unless also set forth in the text) are likely to vary from one legislator to another and are qualified by compromises reflected in how the statute provides for its implementation or enforcement.[6] Purposivists counter that the words of the text make sense only when read in context, which means only in light of the evident purpose(s) of the enactment; moreover, interpreters inevitably rely on various aids and devices—like canons of construction—which are not themselves part of the text adopted by the legislature.[7] Debate continues over whether these conflicting perspectives are sus-

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support required to ratify and amend the Constitution increases the likelihood that its provisions advance social welfare).

3 *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232–49 (1994) (documenting the ways in which modern administrative law is inconsistent with the original understanding of the Constitution).

4 *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 3 (2011) [hereinafter BALKIN, LIVING ORIGINALISM] (suggesting that a living constitutionalist approach and an originalist approach are "compatible rather than opposed"); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2349–61 (2015) (describing a version of originalism more open to giving weight to precedent than is commonly supposed); Lawrence B. Solum, *We Are All Originalists Now*, *in* CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 67–71 (2011) (arguing for a broad role for "constitutional construction" consistent with a commitment to original meaning).

5 *See generally* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) (documenting the rise of theoretical debate about the proper approach to statutory interpretation). For overviews, see generally John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70–78 (2006); Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 347–53 (2005).

6 *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y. 61, 64–68 (1994) (discussing statutory interpretation and noting how legislation is produced through compromise).

7 *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 845–48 (1992) (defending the use of legislative history when interpreting statutes).

ceptible of reconciliation in some sort of synthesis.[8] Meanwhile, the perspective that seems to match actual practice most closely—at least with respect to framework legislation that has been subject to frequent interpretation—is dynamic interpretation. [9] The dynamic account emphasizes how interpretations change over time in response to different readings of precedent that reflect changing social values. But this account seems difficult to justify in terms of either textualist or purposivist theory.

In both constitutional and statutory contexts, the inquiry proceeds as a series of debates about the proper way to interpret particular legal texts, whether it be the Constitution or a particular statute. The authority of the texts themselves remains unquestioned; the question is what they mean. And the performance of any actor in declaring what the text means is assessed against rival norms of what constitutes legitimate interpretation.

I propose to discuss the legitimacy of decisional norms from a different perspective: that of a particular type of institutional actor—the adjudicator. There are two critical reasons for changing the focus from legitimate interpretation to legitimate adjudication.

The first is that such a change in perspective creates a better fit between theory and practice. Interpretation of the language of texts constitutes only a portion of what adjudicators do. Adjudication draws on a number of other decisional variables including, most notably, findings of fact, both historical facts about the parties to the adjudication and more general legislative facts that bear on the dispute. Adjudicators also pay careful attention to precedent, typically prior decisions of higher-level tribunals and of the tribunal that engages in the adjudication. In addition, adjudicators often refer, explicitly or implicitly, to considerations of equity, fairness, or justice in rendering their decisions. And finally, at least occasionally, adjudicators will consider the consequences of particular deci-

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8 *Compare* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 35–36 (2006) (arguing that textualism and purposivism are converging), *with* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 131–32 (2009) (arguing that the textualists' rejection of legislative history precludes any reconciliation).

9 *See generally* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 5–11 (1994) [hereinafter ESKRIDGE, DYNAMIC] (advancing the thesis that "statutory interpretation is *dynamic*"). For empirical support, which unfortunately is rather dated, see Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1098–1107 (1992).

sions in terms of social welfare. In practice, these decisional variables are interwoven in the process of adjudication. References to the meaning of the text will be mixed up with findings of fact, precedents, and notions of equity or social welfare. The perceived legitimacy of an adjudicator will be a function of how the adjudicator deploys these decisional elements in combination, not just how the adjudicator interprets the language of enacted laws.

The multiplicity of factors that adjudicators draw upon in reaching decisions obviously complicates any assessment of what will be regarded as legitimate adjudication. Arguably it is preferable to abstract away from these complications and consider what constitutes legitimate interpretation free from these complications. But this kind of abstraction comes at a very high cost in terms of realism. For example, commentators furiously debate whether the Supreme Court should interpret the Constitution in accordance with its original understanding, and if so, whether it should do so at a high level of abstraction or in terms of historically fixed meanings.[10] Yet in its decisions that arise under the Constitution, the Court relies primarily on precedents interpreting the Constitution.[11] Only occasionally does the Court engage with evidence of original understanding in a way that is directly relevant to the outcome of the case. Commentators are forced either to ignore actual practice, treat it as an irritating exception, or condemn it as illegitimate. [12] An approach that begins from the perspective of legitimate adjudication promises to produce a theory that captures a much larger portion of actual practice.

The second reason for changing the focus from legitimate interpretation to legitimate adjudication is that it promises to suppress—at least to a degree—the growing perception that judges engage in political decision making. This is because the

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10 *Compare* BALKIN, LIVING ORIGINALISM, *supra* note 4, at 263–68 (arguing for high level of abstraction that necessarily evolves), *with* John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 739 (arguing that broad constitutional language may have concrete or general legal meanings, as opposed to abstract meaning, and that the proper interpretation must be determined by historical evidence).

11 *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION 33 (2010).

12 *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) (Thomas, J., concurring) (dismissing leading precedent as contrary to the original understanding of the First Amendment); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005) (arguing that it is illegitimate to allow precedent to trump original understanding); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (treating precedent as an irritating exception to originalism).

rival schools of thought in the disputes about legitimate interpretation have a distinct political valence. In constitutional law, those who espouse originalism are perceived to be hostile to *Roe v. Wade*[13] and the regime of abortion rights it established, while championing individual gun ownership under the Second Amendment.[14] Those who favor a living Constitution are regarded as holding the opposite views. In statutory interpretation, textualists are seen as favoring narrow interpretations of civil rights and environmental statutes; purposive or dynamic interpreters are assumed to harbor the opposite positions. Whether or not these perceptions are strictly accurate, they have come to serve as signaling devices in assessing candidates for the bench and feed into bitter partisan battles over judicial appointments. Potential nominees who convey sympathy with originalism or textualism are championed by Republicans and are frantically opposed by Democrats; those who express skepticism about these interpretive theories elicit the opposite responses.

Obviously, a change in the theory of legitimacy cannot by itself save the judiciary from descending into the maw of partisanship. But if it would help even a little bit it would be worth the effort. The stakes could not be higher. As the political branches sink into growing animosity, and political polarization is increasingly reflected in geographic polarization, it becomes critical to preserve the authority of institutions dedicated to peaceful dispute resolution. The best way to preserve the legitimacy of courts and other adjudicators, this Article contends, is to assess the performance of these institutions in terms of norms of legitimate dispute resolution, not legitimate law declaration.

In pursuing the question of what constitutes legitimate adjudication I will follow the lead of H.L.A. Hart and modern legal positivists in looking to social practice as the source of legitimacy. Legitimacy as I use the term is not something that can be deduced from a higher-level premise, like the consent of the governed, the nature of communicative acts, or conformance with the ideals of international human rights. It is, instead, a function of sociology or what Hart called social practice.[15] Hart and his successors have been concerned with identifying what

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13 Roe v. Wade, 410 U.S. 113 (1973).

14 *See* District of Columbia v. Heller, 554 U.S. 570, 635–37 (2008) (interpreting the Second Amendment to protect an individual's right to possess firearms).

15 H.L.A. HART, THE CONCEPT OF LAW 100–17 (3d ed. 2012). *See also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792–1802 (2005) (distinguishing legal, sociological, and moral concepts of legiti-

is regarded as "law" by considering the social practices of officials, most prominently courts.[16] In particular, they postulate that law is determined by courts applying a rule of recognition, which is in turn a function of social practice. The major departure from Hartian approach in this Article involves the identity of the "recognitional community" that determines legitimacy. [17] I argue that the critical community that determines what constitutes legitimate adjudication consists of the losers in adjudication, as advised by their lawyers. The losers will commonly regard the decision as wrong. But as long as they regard the outcome as legitimate, they will comply with the judgment. Adjudicators cannot afford to incur more than occasional defiance of their judgments; hence they will systematically strive to reach judgments that both the winners and the losers regard as legitimate.

The effort here to explicate the norms of legitimate adjudication is primarily descriptive or interpretive, rather than prescriptive or normative. Nevertheless, in the final section of the Article, I will consider three possible normative implications of the analysis. Each of these implications concerns ways in which the law-declaration function of adjudicators appears to be ascendant and the dispute-resolution function in retreat. Each presents a growing risk that the judiciary will be perceived, at least by the losers in contested cases, as having eschewed the norms of legitimate adjudication in favor of adopting decisional norms preferred by the winner. The first involves the vexed question of how and when to adopt faithful agent modes of argument in adjudicating claims brought under very old and effectively unamendable laws like the Constitution. The second concerns the manner in which adjudicators deploy arguments from precedent in rendering their decisions, particularly the growing use of what I call "Scrabble Board precedentialism." This leaves existing precedent undisturbed and quotes extensively from previous opinions while in fact endorsing significant innovations in law that deviate from a fair integration of prior precedent and settled practice. The third

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macy and endorsing the sociological perspective as the most useful for purposes of jurisprudential analysis).

16 *See generally* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 83–104 (2018) [hereinafter FALLON, LAW AND LEGITIMACY] (describing a "practice based" theory of legitimacy for assessing the performance of the Supreme Court).

17 The phrase "recognitional community" is taken from Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 726 (2006).

concerns the rapid growth in the issuance of universal injunctions by federal district courts in order to block immigration initiatives adopted by the executive branch. In our politically polarized world, with rapidly expanding perceptions that the judiciary is also politically polarized, each of these trends, if not checked, poses a threat to the legitimacy of courts as our primary instrument of peaceful dispute resolution.

I
THE FOUNDATIONS OF LEGITIMATE ADJUDICATION

A. The Centrality of Dispute Resolution

Adjudication has a function that distinguishes it from other activities that entail interpretation of enacted texts. The primary purpose of adjudication is to resolve a dispute. Often, these are disputes between private, i.e., nongovernmental, actors. Sometimes the dispute is between the government and a nongovernmental actor. In either form, the primary purpose of adjudication is to resolve a conflict pitting A against B. Other interpreters may be interested in avoiding, creating, influencing, or predicting the outcome of such conflicts. But they are not charged with *resolving* conflicts, which is the distinctive function of adjudication.

That adjudication entails dispute resolution is true virtually by definition.[18] That dispute resolution is the primary purpose of adjudication has been proclaimed by many esteemed authorities.[19] Yet we do not have to rest on a priori reasoning to perceive the centrality of dispute resolution to the institution of adjudication. This is revealed in a number of social practices of adjudicators, at least in the American legal tradition.

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18 *Adjudication*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "adjudication" as "[t]he legal process of resolving a dispute").

19 KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 12 (1930); JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 175–76 (2d ed. 2009); Neil MacCormick, *Why Cases Have Rationes and What These Are*, *in* PRECEDENT IN LAW 158–59 (Laurence Goldstein ed., 1991). The fountainhead of American public law, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), rests on the dispute resolution function of courts as the source of judicial authority. Those who endorse a broad "law declaration" function for the courts often quote the line from *Marbury* that it is "the province and duty of the judicial department to say what the law is." *Id.* They commonly omit the very next sentence, which explains why this is the "province and duty" of the courts: "*Those who apply the rule to particular cases*, must of necessity expound and interpret that rule." *Id.* (emphasis added).

First, adjudicators will dismiss an action if it appears that there is no actual dispute to be resolved.[20] This is especially prominent in the practice of federal courts, although it also characterizes state courts and even administrative agencies to a significant degree. Thus, the Supreme Court has developed an elaborate jurisprudence of standing, designed to weed out cases brought by persons who cannot claim to be suffering a concrete and particularized injury that will be redressed by adjudication.[21] This jurisprudence is supplemented by strictures against deciding controversies that are moot, are insufficiently ripe, will be decided in due course by other tribunals, or present questions that have been assigned to other branches of government.[22] The Court has largely justified these doctrines on the ground that they are required by the language of the Constitution describing the judicial power in terms of "cases" and "controversies."[23] A deeper rationale is the understanding that the core function of adjudication is dispute resolution.

Second, an adjudication results in a decision that is binding only on the parties that have presented their dispute to the

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20 *See, e.g.*, FEC v. Akins, 524 U.S. 11, 20 (1998) ("[C]ourts will not 'pass upon . . . abstract, intellectual problems,' but adjudicate 'concrete, living contest[s] between adversaries.'") (second alteration in original) (quoting Coleman v. Miller, 307 U.S. 433, 460 (1939)); Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 297–98 (1979) ("The basic inquiry is whether the 'conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'") (quoting Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 93 (1945)); Muskrat v. United States, 219 U.S. 346, 357 (1911) (noting that a prerequisite to bringing a matter into court is "'the existence of present or possible adverse parties, whose contentions are submitted to the court for adjudication.'").

21 *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546–50 (2016) (summarizing the tenets of standing doctrine).

22 *See* DeFunis v. Odegaard, 416 U.S. 312, 317 (1974) (stating that an action is moot when it no longer "'touch[es] the legal relations of parties having adverse legal interests.'") (alteration in original) (quoting Aetna Life Ins. v. Haworth, 300 U.S. 227, 240–41 (1937)); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 90 (1947) (stating that a case is not ripe when the parties no longer need "judicial authority for their protection against actual interference."); R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941) (abstaining from deciding a constitutional claim because "[i]t touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."); *see also* Nixon v. United States, 506 U.S. 224, 230–38 (1993) (concluding that legal questions regarding the impeachment process are assigned to Congress to resolve).

23 *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750 (1984) ("Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies.'").

tribunal for resolution.[24] As to the parties, a final adjudication is res judicata. If the loser defies the judgment, the winner can bring an action for contempt or for execution on the judgment, and the factual findings and legal conclusions reached in the original action cannot be revisited.[25] But if someone who is not a party defies a legal interpretation reflected in an adjudication, an adversary must bring an entirely new proceeding to secure relief, and the defendant in the new proceeding is free to raise any and all arguments in support of a contrary outcome.[26] The conclusions reached in the first adjudication may be given respectful consideration as a matter of precedent, but contestation will not be foreclosed. This reflects a basic understanding that the only authority of an adjudicator to legally bind persons is its power to enter judgments establishing the legal rights and obligations of the parties who have presented their dispute to the tribunal for its resolution.

Third, not only are judicial decisions binding on the parties, the Court has held that Congress has no power to override final judicial judgments resolving individual disputes.[27] The Court reasoned that the "judicial power" given to federal courts by Article III of the Constitution is the power to "render dispositive judgments" that conclusively resolve a case or controversy between adverse parties.[28] "Having achieved finality," the Court explained, "a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was."[29] In other words, dispute resolution is so central to the function of courts it must be walled off from legislative intrusion.

Fourth, all adjudicators who issue written opinions follow a practice of reciting in the opinion a relatively detailed account of conflict between the parties and how that conflict came to be presented to the adjudicator.[30] Even the highest level appeals courts do not proceed by announcing a legal issue and plung-

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24 RESTATEMENT (SECOND) OF JUDGMENTS § 34(3) (AM. LAW INST. 1982); 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (3d ed. 2018).

25 Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 66 (1993).

26 Martin v. Wilks, 490 U.S. 755, 761–62 (1989).

27 Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 211 (1995).

28 *Id.* at 219 (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989)).

29 *Id.* at 227.

30 LON L. FULLER, ANATOMY OF THE LAW 94 (1968) [hereinafter FULLER, ANATOMY].

ing into an explanation of how it will be resolved. They begin by describing, usually in some detail, the history of the dispute between the parties. Often these narratives include details that are not strictly germane to the ultimate judgment the adjudicator settles upon. Yet the adjudicator will recite them in order to clarify how the parties came into conflict and how the various dimensions of that conflict have been resolved or have remained unresolved through earlier stages in the adjudication. This practice reveals that adjudicators see their function as fundamentally one of dispute resolution.

Finally, consider the performance of nominees for judicial appointments in federal confirmation hearings. Regardless of the party affiliation of the participants in these rituals, nominees always present themselves as committed to the dispute resolution model of the judicial process. Whether it is Chief Justice John Roberts, insisting that his job is simply to act as a neutral umpire calling balls and strikes, [31] or Justice Sonia Sotomayor, declining to "engage in a question that involves hypotheses,"[32] the nominee intuitively appreciates that the dispute resolution model is the one with the best chance of being accepted as legitimate by his or her interlocutors. A nominee who proclaims the primary function is something else (whether it be promoting social justice or restoring the Constitution in exile) would be attacked as proposing to "legislate from the bench" and would face an enhanced risk of rejection.[33]

In stressing the centrality of dispute resolution, I do not deny that adjudication serves additional functions. These include social control, especially in the criminal law context;[34] "enrichment of the supply of legal rules," especially in common law cases;[35] and preserving the supremacy of the Constitution and federal law more generally, especially in cases presenting

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31 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005).

32 *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2009).

33 As a byproduct of this caution, confirmation hearings have become frustrating affairs for interlocutors. *See* Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 941 (1995) (reviewing STEPHEN L. CARTER, THE CONFIRMATION MESS (1994)) (noting that confirmation hearings (well before her own) have become "a vapid and hollow charade, in which repetition of platitudes has replaced discussion of viewpoints and personal anecdotes have supplanted legal analysis.").

34 MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 17–20 (1981) [hereinafter SHAPIRO, COURTS].

35 MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 4 (1988).

separation of powers and federalism disputes.[36] All this is undoubtedly true. But it does not detract from the point that dispute resolution is the sine qua non of adjudication.[37] Courts and other adjudicators perform these additional functions only in the course of resolving disputes. Whether adjudication performs these or other functions is contingent on special circumstances that are not invariably present.

The centrality of dispute resolution to the legitimacy of adjudication has been emphasized in a trenchant analysis by Martin Shapiro.[38] His most general comments, supported by a wide-ranging comparative analysis of courts in different societies, are worth quoting at length:

> Cutting quite across cultural lines, it appears that whenever two persons come into a conflict that they cannot themselves solve, one solution appealing to common sense is to call upon a third for assistance in achieving a resolution. So universal across both time and space is this simple social invention of triads that we can discover almost no society that fails to employ it. And from its overwhelming appeal to common sense stems the basic political legitimacy of courts everywhere. In short, the triad for purposes of conflict resolution is the basic social logic of courts, a logic so compelling that courts have become a universal political phenomenon.
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> The triad, however, involves a basic instability, paradox, or dialectic that accounts for a large proportion of the scholarly quarrels over the nature of courts and the political difficulties that courts encounter in the real world. At the moment the two disputants find their third, the social logic of the court device is preeminent. A moment later, when the third decides in favor of one of the two disputants, a shift occurs from the triad to a structure that is perceived by the loser as two against one. To the loser there is no social logic in two against one. There is only the brute fact of being outnumbered. A substantial portion of the total behavior of

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36 *See* Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What the Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 23–26 (2019); Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 717–18 (2012).

37 *See generally*, RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–75 (7th ed. 2015) (contrasting the "dispute resolution" model of adjudication with the "law declaration" model, but cautioning that the law declaration model, "sensibly construed, cannot be understood to license judicial review at the behest of any would-be litigant on the basis on any hypothesized set of facts or indeed no facts whatsoever[ ]" and acknowledging that "[t]he Supreme Court has never explicitly rejected the dispute resolution model.").

38 SHAPIRO, COURTS, *supra* note 34 *passim*.

> courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one.[39]

Shapiro's functional insight serves as the starting point for my analysis of legitimate adjudication. Put simply, if adjudication is to be perceived as legitimate, the adjudicator must seek to resolve the dispute in such a way that the loser does not believe he or she is outnumbered two to one. In Shapiro's words, "[t]he basic tension to be found in courts as conflict resolvers lies in their need to persuade the parties that judges and laws they have not chosen nonetheless constitute a genuine, neutral third."[40]

B. Sources of Adjudicator Legitimacy

How do adjudicators establish and maintain a reputation for neutrality, and hence legitimacy? A number of institutional practices contribute to overcoming or at least diminishing the two-against-one problem. Some are well known, and I mention them briefly since they fall outside my main topic of concern, which is decisional norms. Establishing the independence of the adjudicator from either of the contesting parties is important.[41] Prohibiting adjudicators from deciding cases in which they have a financial or personal interest is important.[42] Careful attention to fact finding is important, since the fact-finding process will nearly always be perceived by the parties as having an objective foundation in the world outside the courtroom.[43] Giving reasons in support of judgments is important.[44]

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39 *Id.* at 1–2.

40 *Id.* at 17.

41 *Id.* at 19 ("It is to counteract [the] perceptions of judges as part of a two against one rather than a genuinely triadic structure that the prototype stresses the 'independence' of the judge.").

42 *See* 28 U.S.C. § 455(b)(4) (requiring judge or magistrate to disqualify himself if he "has a financial interest in the subject matter in controversy or in a party to the proceeding").

43 SHAPIRO, COURTS, *supra* note 34, at 43–49.

44 Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1002 (2008) ("When parties offer reasons for their claims in the form of legal arguments . . . they can reasonably expect that judges will weigh those reasons and provide a decision based on an evaluation of them. Decisions reached without regard to reasons are not responsive to the underlying conflict between the parties.") (footnote omitted); *see also* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 656–59 (1995) (arguing that reason-giving is a commitment by the decision maker to prioritize reliance and stability); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) ("A requirement that judges give reasons for their decisions . . . serves a vital function in constraining the judiciary's exercise of power.").

Although the forgoing social practices are individually and collectively important in establishing and maintaining the legitimacy of adjudication, I will concentrate on an additional feature critical to the legitimacy of adjudication, namely, the invocation by the adjudicator of one or more objective decisional norms as a foundation for resolution of the conflict. This is where my inquiry crosses paths with the contemporary debate about legitimate interpretation.

The need to resolve disputes with reference to some objective decisional norm follows from the central imperative of adjudication, which is to convince the loser that the outcome is not simply the "brute fact" of being outnumbered two to one. If the adjudicator can point to some proposition over which the adjudicator has no control as the foundational norm that governs the resolution of the controversy, this will obviously increase the willingness of the loser to believe that the outcome is a function of something other than the adjudicator's preference for the winner.

In terms of the types of norms that satisfy the requirement of objectivity we find considerable variation across human societies over time and space. Modern societies tend to emphasize that the adjudicator must resolve the dispute in a manner consistent with existing law. Existing law, on this understanding, is regarded as having an objective and ascertainable content independent of the personal preferences of the adjudicator. But we know that other societies have invoked different sorts of norms for resolving disputes in a manner independent of the preferences of the adjudicator. Medieval societies used trial by ordeal and trial by battle as ways of resolving disputes.[45] Earlier societies used practices such as examining the entrails of animals to resolve disputes.[46] As should be obvious, social practice again dictates what will be regarded as a permissible in the way of an objective norm to serve as the foundation for an adjudication. The relevant point, for present purposes, is that nearly all forms of adjudication, if they are regarded as legitimate, will invoke one or more norms as a basis for resolving the dispute that will be perceived by the disputing parties

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45 *See* Paul R. Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, *in* ON THE LAWS AND CUSTOMS OF ENGLAND 90, 110–11 (Morris S. Arnold et al. eds., 1981) (trial by ordeal); EDWARD J. WHITE, *Trial by Battle* in LEGAL ANTIQUITIES: A COLLECTION OF ESSAYS UPON ANCIENT LAWS AND CUSTOMS 109, 109 (1913) (trial by battle).

46 *See* Morris Jastrow, Jr., *Hepatoscopy and Astrology in Babylonia and Assyria*, 47 PROC. AM. PHIL. SOC'Y 646, 646 (1908).

as having an objective basis independent of the preferences of the adjudicator.

C. Losers as the Relevant Recognitional Community

Before considering what decisional norms are regarded as legitimate for purposes of adjudication in the context of contemporary American social practice, it is important to identify *whose* social practices are relevant in this regard. Hart was somewhat unclear in specifying whose social practices count in identifying the norms we regard as law. Sometimes he wrote of public officials being the relevant reference group; sometimes he referred more narrowly to courts.[47] His successors have divided over whether public officials or courts are the appropriate recognitional community.[48]

As should be obvious, the institutional actors with which I am concerned are courts and other adjudicators, not other public officials or members of the general public. In a departure from Hartian jurisprudence, however, I do not view the matter as simply one in which courts proceed in accordance with their own social practices. Instead, in keeping with Shapiro's key insight that problem of legitimacy for adjudicators is whether *the loser* regards the decision as legitimate, I will argue that the relevant audience consists of the parties who present their dispute for adjudication, not the adjudicators themselves. To be sure, adjudicators will look to past practices of other adjudicators for guidance in adopting decisional norms. But the ultimate touchstone will always be what the parties—most critically the loser—regard as legitimate. The loser will be more inclined to accept the legitimacy of the adjudication if he or she perceives that the decision (in addition to having the other qualities previously mentioned) rests on decisional norms that the loser recognizes as being legitimate. In this sense, the ultimate recognitional community is not the adjudicator but the parties who submit their conflict to resolution by the adjudicator.

Here I hasten to offer an important qualification: the parties' views about the legitimacy of the process will be significantly influenced by the advice of their lawyers. In particular, the decisional norms employed by the adjudicator are likely to require some explication for nonlegally trained parties. On

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47 *Compare* HART, *supra* note 15, at 111–17 (discussing rule of recognition based on social practices of officials) *with id.* at 256 (grounding rule of recognition in social practices of courts in the postscript).

48 Adler, *supra* note 17, at 723–26.

other dimensions of the process, this is less true. With respect to findings of fact, the parties will typically understand the points of disagreement and will be keenly aware of how the adjudicator resolves these disagreements. With respect to the adjudicator's choice of decisional norms, however, the parties will typically be dependent on their lawyers in forming any judgment about whether the adjudicator has adopted an objective norm, i.e. one that is not stacked against the losing party. On this dimension—which is my focus of concern here—the relevant recognitional community is the parties as advised by their lawyers.

One could go further and say that, at least with respect to the choice of decisional norms, the lawyers representing the parties are the critical recognitional community.[49] Consider how the matter appears to the parties. The immediate question may be whether to accept a plea bargain or offer of settlement. The parties will seek the advice of their lawyers about the adjudicator's likely view of the relevant decisional norms, perhaps as foreshadowed by the adjudicator's response to preliminary motions. The parties will want to know if the adjudicator's view of the relevant decisional norms is amenable to change after a more complete presentation of argument. If a final judgment is entered, the question for the loser will be whether to file an appeal. The loser will want to hear from her lawyer about whether the adjudicator adopted one or more decisional norms vulnerable to being overturned on appeal.

Critically, the function of the lawyers in the adjudication process goes well beyond advice giving to the parties. The lawyers are also actively engaged in seeking to persuade the adjudicator about the decisional norms the adjudicator should adopt for resolution of the dispute.[50] They do so through filing motions and briefs and in oral argument. Often the give-and-take between the lawyers will significantly narrow the range of potential decisional norms presented for consideration. Most adjudicators are too busy to go off in search of a set of norms different than the ones presented by the lawyers.[51] If, as usu-

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49 *See* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 665 (1987) (observing that a lawyer advising a client about the law will adopt "something very close to the sociologist's approach" to identifying the law).

50 FULLER, ANATOMY, *supra* note 30, at 109 ("A judge is one who decides disputes within an institutional framework assuring to the litigant a collaborative role, which consists in the opportunity to state, prove, and argue his case.").

51 Consider the occasional laments of Justices Scalia and Thomas that they cannot resolve an issue in accordance with the original understanding of the

ally happens, the adjudicator adopts norms that have been presented by the lawyers, perhaps as qualified by objections advanced by opposing lawyers, it is small wonder lawyers ordinarily advise their clients that the choice of decisional norms is legitimate.

In a sense then, one can say that the adjudicator and the lawyers for the parties constitute an "interpretive community" or "coordinating convention" that collectively works to identify the decisional norms that will be used to resolve the dispute.[52] They will nearly always share a common educational background, having graduated from law school. There, they will have absorbed certain conventions about the appropriate norms to use in resolving disputes between adverse parties. Their understanding of these norms will have been refined through practice. Lawyers who specialize in appellate litigation will be particularly attuned to the range and type of decisional norms that the legal community regards as legitimate at any moment in time.[53]

Constitution because the relevant material was not presented by the parties. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (declining to consider whether the enacted statute was a proper exercise of the Commerce Clause because the question was not presented by the parties); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517–18 (1996) (Scalia, J., concurring in part) (stating that he could not determine the scope of regulation of commercial speech when the Constitution was adopted because the parties and their amici did not address the point).

52 *See* STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 95–98 (1989) (arguing that the practice of law should be understood as a profession that constitutes an interpretive community); Gerald J. Postema, *Coordination and Convention at the Foundations of Law*, 11 J. LEGAL STUD. 165 (1982) (explicating the rule of recognition in terms of coordinating conventions shared by courts, the parties, and their lawyers). *See also* Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 187 (1985) ("I picture the judge trying to choose, in a self-conscious and reflective manner, between the arguments of the contending lawyers, and in that process thinking about and perhaps discussing (with colleagues and clerks) the rules and norms of the profession—What do they imply for the case at hand?").

53 One study, which tested the ability of a panel of experts to predict the outcome of future Supreme Court decisions, found that legal academics had a 53% success rate in predicting outcomes whereas experienced Supreme Court advocates predicted correctly 92% of the time. Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1177–88 (2004). Although the number of experienced advocates in the study was too small to be statistically significant, this suggests that active participants in adjudication may have a superior sense of existing decisional norms. *Id.* The same study found that a statistical model was more accurate in predicting outcomes of Supreme Court decisions than was the panel of experts, which included both the legal academics and the experienced Supreme Court advocates. Id. at 1171. Since the "experts" consisted primarily of legal academics, this result does not necessarily contradict

D. The Enforcement Constraint

An objection to the foregoing might be that the views of the parties, as advised by their lawyers, provide little constraint on adjudicators because adjudicators are confident that any final decision they reach will be enforced against the losing party. Losers acquiesce in the results of adjudications, on this view, because they are advised by their lawyers that the judgment will be enforced, if need be by force in the form of seizure of assets or jail time for contempt. The threat of coercive enforcement action, and not legitimacy, explains the high rates of voluntary compliance with final judgments.[54]

The objection is consistent with classical legal positivism, which characterized law as an order backed by the threat of sanctions.[55] But modern research indicates that obedience to law is fostered more by belief in its legitimacy than by the threat of sanctions.[56] The same is probably true of compliance with judgments. The ultimate reason why judgments are routinely obeyed is that the parties to adjudicated disputes, over time, have concluded that the decisional norms adopted by adjudicators are generally legitimate. It is not necessary that every judgment be regarded as legitimate. Especially for tribunals like the Supreme Court, which have amassed a very large storehouse of legitimacy over a long period of time, it is possible to "expend" some of this accumulated capital in reaching occa-

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the finding that active participants may have a superior sense of existing judicial norms. *Id.* at 1168.

54 Data on rates of voluntary compliance are hard to come by, which in itself indicates that noncompliance is not seen as a pressing issue. Justice Department statistics indicate that contempt citations to enforce federal court orders are quite rare—less than 0.2% of all criminal referrals handled by the Department (over half of which were not prosecuted). Mark Motivans, *Federal Justice Statistics*, *2014 Statistical Tables*, U.S. DEP'T JUST. BUREAU JUST. STAT. 11 tbl.2.2 (Mar. 2017), https://www.bjs.gov/content/pub/pdf/fjs14st.pdf [https://perma.cc/VW4N-EHPG] (The table combines contempt referrals with referrals for "perjury" and "intimidation," and is thus overinclusive.). Looking at the published budget of Marshals Service, it is difficult to determine what portion is devoted to executing court orders. Whatever it is, it is too small to warrant a separate line in the Office of Management and Budget's annual budgetary breakdown. The major budgetary categories for the Marshals Service are "judicial and courthouse security," "fugitive apprehension," "prisoner security and transportation, "protection of witnesses," and "tactical operations." OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, APPENDIX: BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2018, at 692 (2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/appendix.pdf [https://perma.cc/WJM7-C2XU].

55 *See* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 151 (1995) ("The binding virtue of a law lies in the sanction annexed to it.").

56 *See generally*, TOM R. TYLER, WHY PEOPLE OBEY THE LAW 58–59 (2006). (finding that compliance with the law is strongly influenced by perceptions of legitimacy).

sional decisions that the loser regards as highly dubious.[57] Nevertheless, widespread compliance with judgments ultimately depends on belief that the decisional norms employed by the adjudicator are nearly always legitimate.

The place to start in considering the relevance of enforcement of judgments is Alexander Hamilton's *Federalist Paper* No. 78. In this essay, Hamilton was anxious to reassure those skeptical about the proposed Constitution that they had nothing to fear from the creation of a federal judiciary.[58] He wrote that the judiciary would be the "least dangerous" of the three branches, because it would have "no influence over either the sword or the purse."[59] Indeed, the courts "must ultimately depend upon the aid of the executive arm" for the enforcement of their judgments. Consequently, he wrote, the courts would exercise "neither FORCE nor WILL, but merely judgment . . . ."[60]

What was Hamilton driving at? He implied, but did not expressly state, that judicial judgments based on "will" rather than "judgment" would be met with resistance from the executive.[61] This in turn implied that judges would have a powerful incentive to ground their decisions in "judgment"—in other

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57 Political scientists have hypothesized that the Court enjoys high "diffuse" support even if "specific" support for particular decisions is low. *See* James L. Gibson & Michael J. Nelson, *The Legitimacy of the U.S. Supreme Court: Conventional Wisdom and Recent Challenges Thereto*, 10 ANN. REV. LAW & SOC. SCI. 201, 206 (2014). Thus, although many thought the decision in *Bush v. Gore*, 531 U.S. 98 (2000), would destroy the Court's legitimacy, this did not happen. *See* James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507, 533 (2007). This does not mean that exposure to a long sequence of decisions that appear to be illegitimate would not undermine the standing of the Court. Evidence from opinion surveys indicates that support for the Court declines when its decisions are presented as being driven by the political preferences of the Justices. *See infra* note 199. This is a plausible explanation for the precipitous decline in public approval of the way the Court is "doing its job," falling from 74% in a 2001 Gallup to 45% in 2015. FALLON, LAW AND LEGITIMACY *supra* note 16, at 156.

58 THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* THE FEDERALIST NO. 81 (Alexander Hamilton) (making the same point more briefly).

59 THE FEDERALIST NO. 78, *supra* note 58.

60 *Id.*

61 *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 251–52 (1994) (interpreting Hamilton as making such an argument); *see also* Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897, 900 (2019) ("[I]f adjudicators know they are ultimately dependent on the political branches for enforcement of their judgments, they will not stray very far, certainly not on a consistent basis, from settled expectations about the decisional norms that they must use in assessing the conduct of the parties that come before them.").

words, to rule in a fashion regarded by the parties as legitimate.

As things turned out, the executive was not given discretion to decline to enforce individual judgments, "willful" or not. Shortly after Hamilton highlighted the weakness of federal courts in an effort to secure ratification of the Constitution, a Congress dominated by the Federalist Party enacted, as part of the Judiciary Act of 1789, a statute creating the U.S. Marshals Service and requiring it to enforce all "lawful precepts" issued by federal judges.[62] With variations in language, this statutory obligation has remained on the books ever since.[63] On rare occasions, Presidents or their lawyers have asserted that they might defy a judicial judgment.[64] But nearly all commentators regard these episodes as outliers. The dominant position of Presidents and their lawyers has been that the executive is duty bound to enforce all final federal court judgments.[65] This duty is grounded in a statute and the internal executive norm that has grown up around it. State court orders, which are generally enforced by county sheriffs' offices, are governed by a similar understanding.

This does not mean that concerns about compliance have disappeared. A recent study by Nicholas Parrillo of cases in which federal agencies have failed to comply with judicial judgments is illuminating in this regard. Parrillo finds that coercive sanctions (monetary penalties, jail time for officials, or fines of

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62 For the original enactment, see Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87 (providing for the appointment of a marshal in each federal judicial district, and stipulating that the marshal should "execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States . . . .").

63 *See* 28 U.S.C. § 566(a) (2018) ("It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals, the Court of International Trade, and the United States Tax Court, as provided by law.").

64 *See* Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 22 (discussing a comment made by President Nixon's lawyer at oral argument in the tapes case) [hereinafter Fallon, Jr., *Executive Power*]; Paulsen, *supra* note 61, at 259–60 n.159 (discussing President Andrew Jackson's alleged refusal to enforce the Supreme Court's judgment about state interference with the Cherokee).

65 *See* William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1821–26 (2008) (and sources cited). The most prominent dissenting voice is Michael Paulsen. *See* Paulsen, *supra* note 61, at 294–303. The duty of the executive to comply with judicial judgments, including those about the meaning of the Constitution, is longstanding. *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 543 (2008) (noting that it is "difficult to locate constitutional cases from the first fifteen years after Independence in which a party resisted the authority of a court to give judgment").

officials) are almost never imposed on noncompliant agencies. In the rare case in which sanctions are imposed, the sanctioning court typically backs down after further rounds of litigation or the court is reversed on appeal, usually on case specific grounds.[66] One plausible explanation for this pattern of judicial behavior is that courts suffer from Hamiltonian anxiety about a showdown with the executive, given the dependence of courts on the executive for enforcement of their judgments. In effect, when executive agencies engage courts in a game of "chicken," the courts swerve.[67] Another explanation might be that administrative defiance of judicial judgments is extremely rare, precisely because agencies regard most judicial judgments as legitimate. In the unusual case where the court encounters executive resistance, the sanctioning court (or its appeals court) may interpret the defiance as a signal that the executive has reasonable grounds for questioning the legitimacy of the court's judgment. This signal causes the judiciary to reconsider its order. As Parrillo observes, "if a judge issues an order so aggressive or rigid as to invite official disobedience, the judge risks undermining the self-reinforcing perception that compliance is the norm."[68]

Congress can also get into the act when it is unhappy with particular judgments entered by federal courts. After the Ninth Circuit held that the inclusion of the phrase "under God" in the Pledge of Allegiance was unconstitutional,[69] and the Eleventh Circuit held that a granite monument to the Ten Commandments in the Alabama State Judicial Building had to be removed,[70] the House of Representatives passed two appropriations riders prohibiting the Marshals Service from spending any money to enforce these judgments. Both riders

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66 Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 712–35, 745–46, 761 (2018).

67 *See* DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 44 (1994) (explaining the game of chicken).

68 Parrillo, *supra* note 66, at 790. One study of institutional reform litigation notes that prison officials in Texas resisted complying with court-ordered prison reform because they regarded the orders as "illegitimate." Sheldon Ekland-Olson & Steve J. Martin, *Organizational Compliance with Court-Ordered Reform*, 22 L. & SOC'Y REV. 359, 371 (1988).

69 Newdow v. U.S. Cong., 292 F.3d 597, 612 (9th Cir. 2002).

70 Glassroth v. Moore, 335 F.3d 1282, 1297 (11th Cir. 2003). Alabama Chief Justice Roy Moore refused to comply with the judgment, which led to his suspension by the other Justices on the court. *Ten Commandments Judge Removed from Office*, S. POVERTY L. CENTER (Nov. 13, 2013), https://www.splcenter.org/news/2003/11/13/ten-commandments-judge-removed-office [https://perma.cc/8RZ4-WEEQ].

were deleted by the Conference Committee, as was a similar rider approved by the House several years later involving a judgment about a Ten Commandments monument in Indiana.[71] Whether such targeted riders are constitutional is untested. Nevertheless, they underscore the dependence of the courts on the support of the political branches for enforcement of judgments.

Concern about compliance with judgments is not the end of the matter, however. Although courts have little reason to worry that their judgments will be enforced (except in rare cases), it is much less certain that the decisional rules courts espouse in support of their judgments will be followed in the future.[72] The legal commentary is divided on the question whether nonparties have a duty to comply with the legal rationales adopted by courts in support of their judgments.[73] Whether or not such a duty exists, there are many examples in recent history of Supreme Court decisions being ignored, protested, and occasionally defied by officials other than those immediately subject to a judgment.[74] There is also extensive evidence that courts adjust the remedies they adopt for legal violations in order to maximize the prospect of compliance, by parties and nonparties alike.[75] Finally, there is the famous insight of Alexander Bickel that the Court will frequently ap-

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71 These episodes are reviewed in Jennifer Mason McAward, *Congress's Power to Block Enforcement of Federal Court Orders*, 93 IOWA L. REV. 1319, 1323–26 (2008).

72 As Alexander Bickel wrote:

> "[N]o one is under any legal obligation to carry out a rule of constitutional law announced by the Supreme Court until someone else has conducted a successful litigation and obtained a decree directing him to do so. Any rule of constitutional law not put into effect voluntarily by officials and other persons who acquiesce in it, or not taken up by legislation and made more effective by administrative or noncoercive means—any such rule is not in our system an effective rule of law."

Alexander M. Bickel, The Morality of Consent 111 (1975).

73 My view is that judicial opinions should be regarded as predictive of future judicial judgments, but not legally binding on nonparties. *See* Merrill, *supra* note 25; *accord*, Fallon, Jr., *Executive Power*, *supra* note 64, at 12; Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1560–64 (2005). For the contrary view, see Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1359 (1997).

74 For an account of popular and political resistance to rulings on desegregation, school prayer, criminal procedure, and other matters, see generally BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 237–79 (2009).

75 *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 884–89 (1999) (summarizing various ways the Court has modified remedies to enhance enforcement).

proach controversial issues tentatively, through jurisdictional or justiciability rulings, before finally ruling on the merits.[76] One explanation for this pattern of behavior is that the Court wants to test the degree of potential opposition to a controversial ruling, including the likelihood of noncompliance.[77]

In any event, it is incorrect to assume that the strong norm of executive enforcement of judgments means that adjudicators are unconcerned with whether losers regard their judgments as legitimate. The executive norm very likely owes its existence to the perception that judicial judgments are nearly always legitimate. And judicial judgments may nearly always be legitimate, in significant part, because courts and other adjudicators are aware that they are dependent on the executive (and the legislature, which funds the executive) for the efficacy of their judgments.[78]

In short, when I speak of legitimate decisional norms, I refer to norms that the loser's lawyer advises are broadly acceptable within the legal community. The loser may sincerely believe that the judgment is wrong (probably more often than not does believe this). But the loser will nonetheless acquiesce in the judgment if the loser is advised by her lawyer that the decisional norms adopted by the adjudicator are legitimate. In modern societies, this means the decisional norms are recognized to be grounded in law. It is in an effort to identify what it means for a decisional norm to be grounded in law that I now turn.

II
LEGITIMATE DECISIONAL NORMS

The ultimate criterion for identifying the types of decisional norms that the parties to an adjudication regard as legitimate is simple and easy to state: a category of norms will be regarded as legitimate if it conforms to the expectations of the parties, as advised by their lawyers. This follows in a straightforward fashion from the understanding of legitimacy as grounded in social practice—in this case, the social practice of the parties who have submitted their disputes to adjudication, as advised

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76 ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962) [hereinafter BICKEL, LEAST DANGEROUS].

77 *See id.* at 251; *see also id.* at 147–49, 155–56 (making the point in the context of a challenge to anti-contraceptive legislation).

78 *Cf.* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 679 (2005) (concluding that "[i]n practical terms," judicial legitimacy means "the ability of courts to secure compliance with their decisions, absent the powers of the purse or the sword.").

by their lawyers. The social practice of lawyers will include a complex of expectations about what types of decisional norms are appropriate to be used in adjudication. These understandings will differ from one society to another and from one era to another. But at any particular point in place and time they will be reasonably settled and will enjoy a fair degree of consensus among those lawyers who are actively engaged in litigation. As my colleague Philip Bobbitt has written, "[t]here is a legal grammar that we all share and that we have all mastered prior to our being able to ask what the reasons are for a court having power to [act]."[79]

The fact that the set of legitimate decisional norms is generally stable does not mean that change does not take place over time—or that future expansion or contraction in the set of norms will not occur. As Frederick Schauer has pointed out, new sources of law can emerge at the "boundaries of law" that are, at least initially, controversial.[80] He cites as an example the question whether non-U.S. court decisions, statutes, and constitutional provisions should be consulted in determining the meaning of open-ended provisions of U.S. law, such as the guarantee of due process and the prohibition on the use of cruel and unusual punishments.[81] Some Justices regard such foreign sources as legitimate; others do not.[82] One can imagine the legitimacy of this form of argument tipping one way or the other in the future.

Although there will be a broad consensus at any time about the *types* of norms that can be called upon to resolve an adjudication, the content of these norms may be—and often is—disputed. Thus, it is critical to distinguish between types or categories of decisional norms and the content of those

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79 PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 6 (1982) [hereinafter BOBBITT, FATE].

80 *See, e.g.*, Frederick Schauer, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2435–36 (2017) (exploring the creation of law through the expansion of "law's boundaries").

81 *Id.* at 2456–57.

82 *Compare* Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (invoking support from British and European sources in invalidating sodomy statute), *with id.* at 598 (Scalia, J., dissenting) (condemning reliance on these sources); *compare also* Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988) (listing countries that have abolished the death penalty for juveniles), *with id.* at 868–69 n.4 (Scalia, J., dissenting) (objecting to references to foreign law). Some scholars argue for nonconclusive reliance on foreign sources; others question it. *See generally* Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (arguing for nonconclusive reliance on foreign sources); Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) (questioning even nonconclusive reliance).

norms. To make this concrete, suppose that one category of norm regarded as legitimate is following precedent previously established by the relevant adjudicative tribunal. The lawyers advising the parties will likely have no quarrel about this general proposition. But they may disagree sharply about which of two conflicting precedents is the appropriate authority to adopt, or they may agree about the relevant precedent but disagree about how it should be interpreted.[83] These sorts of disagreements are to be expected. Indeed, they are the source of much of the adjudication that results in published opinions at the appellate level. My concern here is not with the particular content of norms but with identifying the categories of norms that are accepted as legitimate by lawyers engaged in contemporary American practice before adjudicative tribunals.

What types of decisional norms will conform to the expectations of lawyers engaged in litigation in various forums in contemporary American society? I argue that five such categories exist. Three I describe as robust, meaning that they will be regarded as legitimate without regard to their content. Two I regard as qualified, meaning that they will be regarded as legitimate only when there is a very high degree of consensus about the content of the norm. The robust norms consist of arguments based on faithful agent interpretation of a controlling text, precedent, and settled practice. The qualified norms consist of arguments based on moral principles and social welfare. A brief word of explanation about each before considering some evidence in support of my typology of norms, and how the norms interact in the process of justifying the outcome of adjudicated disputes.[84]

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83 *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2053–54 (2018) (identifying a key precedent and interpreting it one way); *id.* at 2066–67 (Sotomayor, J., dissenting) (agreeing that the precedent is key but offering a different interpretation of it).

84 Arguments from multiple modalities of legitimacy are often criticized as lacking a "metaprinciple" to resolve conflicts among the modalities or the problem of incommensurability in determining their respective weight. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1788–94 (1997). But if the criterion of legitimacy is existing social practice of the parties to adjudication, as informed by their lawyers, then the expectations of the parties constitute the relevant metaprinciple. The demand for something else shifts the foundation of legitimacy from social practice to a different type of legitimacy theory, such as social contract theory or moral theory.

A. Five Types of Decisional Norms

Contemporary American legal practice recognizes five types of decisional norms that are regarded as legitimate. [85]

1. *Faithful Agent Arguments*

The first type of robust decisional norm consists of what I will call faithful agent arguments. These are arguments to the effect that the controversy should be resolved in accordance with the instructions of the enacting body that authored an authoritative text that governs the controversy in question.

American legal practice recognizes the principle of popular sovereignty—the proposition that the people, collectively, are the ultimate source of governmental authority.[86] Thus, the Constitution, through the process of ratification of the original document and its amendments, is viewed as having secured the consent of the people as the supreme law of the land. Similar arguments pertain to state constitutions. Each of these constitutions, federal and state, creates a legislature elected by the people of the respective jurisdictions, whose function is to enact laws that govern persons living within their respective jurisdictions. Provided such legislated enactments are consistent with the relevant constitution, they are understood as commands having secured the (constructive) consent of all persons within the relevant jurisdiction, including adjudicators. The adjudicator respects the sovereignty of the enacting body only by interpreting its instructions to mean what the enacting body intended them to mean.[87]

Faithful agent arguments are thus grounded in the proposition that the adjudicator is subject to a duty to carry out the will of the people and their elected representatives as ex-

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85 In a previous essay, I offered a three-part taxonomy of decisional arguments: faithful agent, integrative, and welfarist arguments. Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1566–72 (2010) [hereinafter Merrill, *Interpretation*]. I did not there expressly distinguish arguments between precedent and settled practice as different forms of integrative interpretation (as I do here), and I lumped moral and social welfare arguments together under the heading of welfarist interpretation. *Id.* at 1572.

86 *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7 (1980) ("[W]hatever the explanation, and granting the qualifications, rule in accord with the consent of a majority of those governed is the core of the American governmental system.").

87 *See* Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 258 (Robert P. George ed., 1996) ("It makes no sense to give any person or body lawmaking power unless it is assumed that the law they make is the law they intended to make.").

pressed in duly ratified constitutions and enacted legislation. This is a straightforward principal/agent mode of argument. The people, and derivatively their elected representatives, are the principal. The adjudicator is the agent. The adjudicator, like all other persons within the relevant jurisdiction, is bound by the constitution and the enacted laws that have been promulgated by the principal. If lawyers can convince the adjudicator that the principal has issued an instruction that bears on the controversy, the adjudicator is required to carry out that instruction as the faithful agent of the principal.

There is a very broad consensus among American lawyers (and in all liberal democracies) that faithful agent arguments are legitimate decisional norms for adjudication.[88] Everyone agrees that the text of the Constitution and statutes that have been duly enacted in the manner set forth in the Constitution are legally binding on adjudicators, as they are on everyone else in the policy.[89] Thus, insofar as there is agreement that a particular enacted law has a "plain," "clear," or "unambiguous" meaning, it supplies a binding norm for resolving the adjudication.[90] This is the powerful core of faithful agent arguments: it is always legitimate to resolve a contested adjudication in accordance with the undisputed meaning of a binding form of enacted law.

There is, of course, less consensus about how to determine the meaning of an enacted law when it is not plain, clear, or unambiguous. Legal commentators operating in the faithful agent tradition vigorously debate whether it is appropriate to determine the instructions contained in enacted law by reference to the law's purpose, and if so, at what level of generality. And commentators (and some judges) vigorously debate whether the legislative history of an enactment should be consulted in trying to discern the meaning of an uncertain law. It

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88 *See* JOHN F. MANNING & MATHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 24 (3d ed. 2017) (postulating that textualism, intentionalism and purposivism are each "grounded in the principle of *legislative supremacy*, which encapsulates the related ideas that in the U.S. constitutional system, acts of Congress enjoy primacy as long as they remain within constitutional bounds, and that judges must act as Congress's *faithful agents*.").

89 The Supremacy Clause of the Constitution says as much: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ." U.S. CONST. art. VI, cl. 2; *see also* FALLON, LAW AND LEGITIMACY, *supra* note 16, at 98 ("I know of no case in which the Justices have ever suggested that they could reach a decision contrary to the Constitution's requirements.").

90 *See* BALKIN, LIVING ORIGINALISM, *supra* note 4, at 35–58 (affirming the binding nature of formal constitutional rules); *cf.* STRAUSS, *supra* note 11, at 7.

is not clear, however, that these debates have significantly affected the general legal culture. Evidence suggests that lower courts and lawyers continue to invoke arguments from purpose and legislative history, even if these techniques of faithful agent interpretation have been condemned by self-proclaimed custodians of originalism and textualism.[91] Practicing lawyers and judges clearly accept the legitimacy of faithful agent arguments but by and large remain eclectic about how those arguments are pursued. Thus, legal practitioners will sometimes stress dictionary definitions of the words in the text, sometimes will invoke the purpose of the enactment (perhaps with reference to its structure), and sometimes will delve into legislative history.[92]

The important point is that even if questions are earnestly debated in academic circles about the proper method of implementing the faithful agent decisional norm, the central proposition that the adjudicator must act as the faithful agent of the enacting body enjoys a very high degree of consensus in our legal culture. Faithful agent arguments thus conform to the general criterion for legitimate decisional norms in adjudication: they comport with the expectations of the lawyers who represent and advise the parties in adjudication.

2. *Arguments from Precedent*

The second robust type of decisional norm consists of arguments from precedent. Arguments from precedent are ubiq-

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91 *See* Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1324–27 (2018).

92 American constitutional law is particularly subject to a variety of understandings about the "meaning" of the text, some of which bear no resemblance to the shared understanding of the text at the time it was ratified. *See generally* Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235 (2015) (arguing that different constitutional provisions have different temporal referents). For example, in *Bolling v. Sharp*, 347 U.S. 497, 499 (1954), the Court interpreted the Due Process Clause of the Fifth Amendment as incorporating the equal protection mandate of the Fourteenth Amendment, which was in turn interpreted as barring segregation in public schools. There was no suggestion that "due process of law" had this meaning in 1791, when the Fifth Amendment was adopted. It is nevertheless striking that the Court nearly always cites some clause in the Constitution in support of its decisions. An exception are its decisions recognizing a broad principle of state sovereign immunity that goes beyond the text of the Eleventh Amendment. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54–55 (1996). But these decisions have been justified on the ground that such an understanding was implicitly assumed by the framers when the Constitution was drafted and ratified. Alden v. Maine, 527 U.S. 706, 713–24 (1999). Thus, they too fall within the scope of the faithful agent argument.

uitous in any form of organized human activity.[93] "This is the way we have done it in the past" is a decisional shortcut used all the time, for the simple reason that it would be impossible to rethink every step in every collective decisional process every time it comes up.[94] If you doubt this, consider how matters are resolved at faculty meetings, or at any type of meeting by a board of directors or trustees. Precedent following is especially entrenched in American legal culture, given the prominence accorded to the common law in the first-year curriculum in law schools and the dominance of the case method of instruction even in courses about constitutional law and legislation. Unsurprisingly, then, arguments from precedent form a second robust norm used by adjudicators in resolving disputes.[95]

Historically, arguments from precedent have been closely associated with private law, where common law has played a prominent role. In recent decades, however, private law has become increasingly dominated by statutes, including uniform laws, model state laws, and federal and state regulatory enactments. Meanwhile, amendments to the Constitution and to many framework statutes have become increasingly difficult to obtain. With the "statutorification" of private law[96] and gridlock afflicting public law, arguments from precedent have receded in private law and have surged to the fore in public law. This is especially pronounced in federal constitutional law, where nearly every contested case is resolved by following, distinguishing, or qualifying existing precedent.[97] David Strauss

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93 *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 572 (1987) ("Reliance on precedent is part of life in general.").

94 *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 96 (2010) [originally published 1921] ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case . . . .").

95 *See* Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1129–30 (2008) [hereinafter Fallon, *Constitutional Precedent*] ("So far as I am aware, no Justice up through and including those currently sitting has persistently questioned the legitimacy of stare decisis or failed to apply it in some cases.").

96 *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

97 *See, e.g.*, Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755, 764 (2002) (noting that "arguments from precedent vastly outnumber all other kinds of arguments in attorneys' written briefs, the Court's written opinions, and the [J]ustices' arguments in conference discussions."); *see also* Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018, 1025, 1030 (1996) (providing empirical data). When the foundational legal authority is some form of enacted law, as opposed to common law, the relevant precedents are those that have resolved how the text in question (or a similar text) has been interpreted in the past. Nevertheless, the conventions that govern the use of precedent in resolving interpretational questions are closely similar to, and appear to have been borrowed from, those originally developed in the common law context.

has persuasively argued that precedent has almost entirely displaced original meaning argument in construing the federal Constitution, the main body of which is now 230 years old.[98] Arguments from precedent are also increasingly prevalent in cases governed by statute, especially where the statute has been around for a long time and has been frequently litigated. In general, the older the text, and the more frequently it has been interpreted in the past, the greater the likelihood that we will find legal argumentation based on precedent, rather than interpretation of the instructions of the enacting body. Public law, and especially constitutional law, has become the new common law.

The theoretical literature on precedent following is relatively thin compared to the extensive literature on faithful agent interpretation. This is unfortunate, given the prominent role that precedent plays in modern American public law. One proposition about precedent, however, enjoys general consensus: if a controlling precedent is perceived to be indistinguishable from the case at hand, that precedent must be followed unless there is a "special justification" for overruling it.[99] This is analogous to the proposition that the adjudicator is obliged to enforce an enacted law whose meaning is "plain." Admittedly, lawyers and adjudicators show considerable ingenuity in arguing that precedents either are or are not distinguishable.[100] Precedent by its nature has an accordion-like quality, allowing it to be either broadly or narrowly characterized in later adjudications.[101] And if no precedent is directly on point, lawyers and adjudicators are free to argue that other precedents either should or should not be extended by analogy. Considered more abstractly, lawyers and adjudicators argue that precedents reflect embedded rules, and the hypothesized

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98 STRAUSS, *supra* note 11.

99 *See, e.g.*, Kimble v. Marvel Entm't, LLC, 135 S. Ct. 2401, 2404 (2015). The percentage of precedents that are overruled, although not negligible, is actually quite small. A recent empirical study puts it at 3%–4% of all Supreme Court precedent. Lee Epstein et al., *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1141 (2015). The study further finds that there is no appreciable difference between statutory and constitutional precedent in this regard, contrary to the conventional wisdom that stare decisis is weaker in constitutional cases. *Id.*

100 *See* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1–2 (1949) (developing the point that the following court determines the meaning of the precedent court, giving the system of precedent considerable room for evolution).

101 *See* Shapiro, *supra* note 44, at 734.

rules can be characterized in different ways.[102] Considerable ingenuity is on display in arguing for broader or narrower characterizations of the embedded rule.

The legal conventions that govern arguments from precedent defy easy formulation, and are learned by lawyers and adjudicators through emulation of what other adjudicators do. At any given point in the evolution of the legal culture, there will be limits on what is regarded as acceptable in the way of using precedent, although these limits will be hard to define.[103] In the normative section of the Article, I will criticize a form of precedential argument that appears to be taking hold in the Supreme Court, which I call Scrabble Board precedentialism.

The important point for present purposes is that there is a broad consensus in our legal culture that indistinguishable precedents must be followed unless overruled and that arguments by analogy from precedent are a legitimate source of decisional norms in adjudication. Arguments from precedent thus comport with the expectations of the lawyers who represent parties in adjudications and conform to the general criterion for legitimate decisional norms.

3. *Arguments from Settled Practice*

My third type of robust decisional norm is argument from settled practice. Arguments from settled practice are not always identified as such but are encountered quite frequently. They include the settled practices of courts, of other branches of government, and of the institutions of society more generally. Once we identify them as a discrete category of argument, we can see that they enjoy widespread support and thus qualify as a robust.

Settled practice plays a large role in constitutional law, far more than is commonly acknowledged. The very practice of

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102 *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1 (1989) (arguing that the constraining force of precedent comes from rules embedded in decisions justifying outcomes).

103 Consider *Keystone Bituminous Coal Ass'n v. DeBenedictis*, a case involving surface subsidence from mining of bituminous coal, where the majority declined to follow a precedent (from the same state, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)) involving surface subsidence from mining anthracite coal. 480 U.S. 470, 474 (1987). The majority did not argue that the earlier decisions was distinguishable from the present one because it involved mining anthracite rather than bituminous coal—that would have been regarded as silly given that subsurface mining in both cases posed similar risks of surface subsidence. Instead, the majority argued that the doctrinal framework had changed from that applied in the earlier decision. *Id.* at 485. The dissent regarded the factual similarity to be controlling. *Id.* at 507 (Rehnquist, C.J., dissenting).

judicial review is not mentioned in the constitutional text. It is commonly justified by citation to precedent—*Marbury v. Madison*[104]—but the adequacy of the argument for judicial review set forth in Chief Justice Marshall's opinion has long been questioned.[105] The strongest justification, as Charles Black wrote, rests on "the visible, active, and long-continued acquiescence of Congress in the Court's performance of this function."[106] In other words, judicial review is constitutional because it is part of settled practice.

Settled practice appears in many other guises in constitutional law. Separation of powers disputes are often resolved by invoking the shared understandings of the political branches[107] and has recently been invoked in the voting rights context.[108] Even general societal practices often count in constitutional law, as under the Fourth Amendment, with its invocation of reasonable expectations of privacy[109] and in substantive due process cases that rely on practices "deeply rooted in this Nation's history and tradition."[110] Michael

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104 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

105 *See, e.g.*, BICKEL, LEAST DANGEROUS, *supra* note 76, at 2–14 (noting that Chief Justice Marshall's opinion addresses the easy question whether the Constitution is binding law but ignores the hard question whether the courts are entitled to exercise independent judgment in its interpretation); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 6–33 (discussing a number of questionable aspects of the decision).

106 CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 71 (1969).

107 *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 433–35 (2012) (interbranch consensus); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1620–31 (2014) (similar); David E. Pozen, *Self Help and the Separation of Powers*, 124 YALE L.J. 2, 34–39 (2014) (discussing a variety of separation of powers conventions). To cite a recent example, in *NLRB v. Noel Canning*, 132 S. Ct. 2550, 2567 (2014), the Court interpreted the Recess Appointments Clause to allow presidents to make temporary appointments even when a vacancy exists before the Senate goes into recess, relying in significant part on an unbroken practice going back seventy five years.

108 Evenwel v. Abbott, 136 S. Ct. 1120, 1129 (2016) (relying in significant part on settled practice in interpreting "eligible voters" for voting rights purposes).

109 Carpenter v. United States, 138 S. Ct. 2206, 2215–16 (2018); Katz v. United States, 389 U.S. 347, 351–52 (1967).

110 Washington v. Glucksberg, 521 U.S. 703, 721 (1977) (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)). The Court of course has been inconsistent in this regard, invoking settled practice to reject a constitutional right to state-assisted suicide, *Glucksberg*, 521 U.S. at 706, but ignoring settled practice in creating a right to abortion and same-sex marriage. Obergefell v. Hodges, 135 S. Ct. 2584, 2596–97 (2015); Roe v. Wade, 410 U.S. 113, 116 (1973).

Gerhardt has collected a number of other examples, which he calls "nonjudicial precedent."[111]

Invocation of settled practice as a decisional norm is hardly limited to constitutional law. It plays a large role in the common law, where it is usually referred to as "custom." Blackstone argued that the common law originated in the general customs of the realm which have been followed from time immemorial.[112] Whether or not this is generally true, there is no doubt that the very idea of a common law, based on courts following their own prior decisions, is itself grounded on nothing more than settled practice. "[T]his rule was never 'made' by any explicit enactment; it is a part of the customary rules governing the actions of courts."[113] With respect to the content of the common law, Melvin Eisenberg has argued that usages or "experiential propositions" have always been a factor in shaping its development. A usage can take on a normative aspect, he argues, when it "generates an expectation that it will continue."[114]

Perhaps the most widely referenced types of argument from settled practice are canons of interpretation. Many of these can be characterized as "linguistic" canons (like *expressio unius*),[115] and as such can be justified as part of the package of interpretational tools that fall under the faithful agent rubric. Other canons (such as the doctrine of lenity) can be justified as devices for implementing particular constitutional norms and thus can also be assimilated to faithful agent argument. Yet there remains a residual set of canons that can be justified only

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111 MICHAEL J. GERHARDT, THE POWER OF PRECEDENT 111–46 (2008) (collecting examples). As in the case of precedent, arguments from settled practice come in different versions. One version, which is relatively restrictive, would limit the use of settled practice to situations in which the meaning of the text of the Constitution is unclear, multiple branches of government have deliberated about the correct answer, and both the branches and the general public have acquiesced in this meaning. *See* William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (developing this conception). Another and weaker form would simply require a longstanding practice that has been allowed to persist without significant challenge. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

112 1 WILLIAM BLACKSTONE, COMMENTARIES *67.

113 FULLER, ANATOMY, *supra* note 30, at 46–47.

114 EISENBERG, *supra* note 35, at 37.

115 *See, e.g.*, United States v. Gonzales, 520 U.S. 1, 5 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting Russello v. United States, 464 U.S. 16, 23 (1983))). The full maxim is *expressio unius est exclusio alterus* (the expression of one implies exclusion of the other). *Expressio Unius Est Exclusio Alterius*, BLACK'S LAW DICTIONARY (11th ed. 2019).

because of long-standing usage—such as the canon that later enactments prevail over earlier enactments if they cannot be reconciled, the *Charming Betsy* canon counseling avoidance of conflict with international law, the canon enjoining courts to interpret statutes in favor of Indian tribes, the presumption against extraterritorial application of statutes, and various doctrines in administrative law.[116] Whatever their justification, adjudicators (including self-proclaimed textualists) show no hesitation about applying these canons in resolving disputes over interpretation.[117] The unstated reason for doing so is that the canons are part of the settled practice of adjudicators and as such are legitimate.

Several commentators have discussed a phenomenon called "superprecedent," meaning, roughly, precedent that has virtually no chance of being overturned.[118] Superprecedent, in my view, is simply precedent that has become part of settled practice.[119] Richard Fallon cites as examples of superprecedent decisions upholding the Social Security Act and the use of paper currency as legal tender.[120] These decisions owe their immunity from overruling not to the quality of their reasoning, but because they have given rise to settled practices that have generated enormous reliance interests. The Social Security system—and for that matter the entire administrative state—is not going to be overturned even if historical evidence

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116 *See, e.g.*, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (stating that there is a presumption against extraterritorial application of statutes); Morton v. Mancari, 417 U.S. 535, 550 (1974) (explaining that a prior statute is presumed repealed by inconsistent later statute); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (stating that statutes are to be construed if possible as consistent with the law of nations).

117 *See generally*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109 (2010) (discussing the historical use of substantive canons and the tension with textualist beliefs).

118 *See, e.g.*, Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1180 (2006) ("[B]edrock precedents—precedents that have become the foundation for large areas of important doctrine."); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1205–06 (2006) ("Super precedents are the constitutional decisions whose correctness is no longer a viable issue for courts to decide . . . ."); Michael Sinclair, *Precedent, SuperPrecedent*, 14 GEO. MASON L. REV. 363, 365 (2007) ("To say a case is a superprecedent means it is judicially unshakeable . . . .").

119 *See* Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1735 (2013) ("The force of these cases [superprecedent] derives from the people, who have taken their validity off the Court's agenda."); Michael J. Gerhardt, *The Irrepressibility of Precedent*, 86 N.C. L. REV. 1279, 1293 (2008) ("[T]he point at which a well-settled practice becomes, by virtue of being well-settled, practically immune to reconsideration is the point at which that precedent has become a superprecedent.").

120 Fallon, *Constitutional Precedent*, *supra* note 95, at 1113, 1150.

conclusively shows that it violates the original understanding of the framers about scope of federal power. This is because the Social Security system has been integrated into the warp and woof of American society, with millions of individuals and institutions organizing their lives and practices around it.[121] This suggests that arguments from settled practice may be, if anything, more powerful than arguments from precedent. I suspect that precedent is invoked more commonly than settled practice primarily because it is more accessible to lawyers and adjudicators; proving settled practice, if it is not so obvious as to be susceptible of judicial notice, requires expert testimony, which is more costly.

The ultimate justification for using settled practice as a decisional norm, of course, is that this is congruent with the expectations of parties to an adjudication. No litigant can claim surprise—disappointment, maybe, but not surprise—when a court rebuffs efforts to upend settled practices.

4. *Moral Arguments*

I come now to two types of argument that I regard as more qualified, in the sense that they depend on agreement about the content of the norm. Moral arguments have been regarded by certain commentators, most prominently Ronald Dworkin, as being the ultimate touchstone of legitimate adjudication.[122] This, I believe, mischaracterizes existing norms of legal practice. It is true that moral arguments—including references to fairness, equity, and good faith—appear with some frequency in adjudicated decisions.[123] But they often appear in a supporting role, after arguments from original meaning, precedent, and settled practice have been canvassed.[124] Moral arguments are generally designed to reinforce the conclusion reached on

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121 Even Judge Bork, often regarded as a leading spokesman for originalism, wrote that "[n]o judge would dream" of overruling precedents that violate the original understanding if they have become "embedded in the life of the nation . . . . accepted by the society . . . [and] fundamental to the private and public expectations of individuals and institutions." ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 158 (1990).

122 RONALD DWORKIN, LAW'S EMPIRE 410–11 (1986) [hereinafter DWORKIN, EMPIRE].

123 *See* Jules L. Coleman, *Constraints on the Criteria of Legality*, 6 LEGAL THEORY 171, 171 (2000) ("No one denies that moral principles figure in legal argument and practice.").

124 Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1942 (2004) ("Policy and principle appear before us when the law runs out, and also when the results the law generates even when it has not run out seem extremely, and not just somewhat, unwise as a matter of policy or extremely, and not just a little bit, unjust as a matter of morality.").

the basis of these more robust forms of argument, not to stand alone as a primary ground for decision. As Melvin Eisenberg has concluded:

> [C]ourts do not have a legislative discretion to establish the rules they think best on the basis of the moral norms and policies they think best. Rather, they can properly establish legal rules only by employing doctrinal and social propositions that have the requisite degree of support, in the manner required by the institutional principles of adjudication.[125]

To be sure, one can occasionally find decisions that seem to turn entirely on moral arguments. A good example is a decision discussed by Dworkin, which he calls *Elmer's Case.*[126] Elmer was a young man who murdered his grandfather in order to secure an inheritance. Although the New York statute of wills contained no exception for such cases, the majority disallowed the inheritance, invoking the equitable maxim that no person should be allowed to profit from his wrong.[127] Note, however, that the moral norm invoked in this case is one that enjoys an extraordinarily high degree of consensus. I suspect that there would be no dissent from the proposition that it is morally wrong to murder someone to secure an inheritance. *Elmer's Case* thus shows that an adjudication can be considered legitimate, even if it cannot be justified by one or more robust norms, if it rests on moral reasoning that enjoys a very high degree of consensus.[128]

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125 EISENBERG, *supra* note 35, at 151. Whether adjudicators can invoke moral norms in support of decisions is related to the question whether the English practice of interpreting statutes in light of precepts of equity carried over to American courts. *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 85–104 (2001); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1082–86 (2001); John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1672–80 (2001) [hereinafter Manning, *Deriving Rules*]. Whatever the original understanding of the "judicial power," I agree with Manning that the Marshall Court marked a decisive turn away from this practice in matters of statutory interpretation, in favor of faithful agent interpretation. *Id.* at 1651. Nevertheless, an echo of this tradition remains, primarily in the form of observations about the fairness or justness of particular decisions principally justified on other grounds.

126 DWORKIN, EMPIRE, *supra* note 122, at 15–20 (discussing Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889)).

127 *Riggs*, 22 N.E. at 190.

128 By interpreting existing decisional norms to include moral norms that enjoy a high degree of consensus, this article can be said to embrace a version of what has been called "inclusive" or "soft" positivism. *See generally,* JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 103–19 (2001) (distinguishing "inclusive" positivism from "exclusive" positivism); *see also* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 355–70 (Jules Coleman, ed., 2001) (essays by Stephen R.

Moral norms that are actively contested are unlikely to provide a legitimate basis for an adjudication, at least not on a stand-alone basis. Consider in this regard the contrasting fates of two of the Supreme Court's most notable decisions, *Brown v. Board of Education* and *Roe v. Wade*.[129] At the time they were decided, neither decision was securely grounded in arguments based on original meaning, precedent, or settled practice. Racial integration of public schools was rapidly becoming an accepted norm in northern states but not in the south.[130] *Brown* was justified by the Court largely on the basis of a social welfare argument—that segregation impaired the educational progress of black children.[131] Given that the mandate to integrate public schools was inconsistent with social practice in the south, the decision met with strong resistance in that part of the country, and remained largely unenforced until reinforced by legislation and federal threats of funding cutoffs more than a decade later.[132] Today, racial segregation is universally condemned as morally unacceptable, in all parts of the country. Any person who questions the legitimacy of *Brown* or denies that it is settled law would be denied confirmation to public office.[133] This is because racial equality has become a moral norm enjoying strong consensual support.

Roe met a very different fate. Although, like *Brown*, it was weakly grounded in robust decisional norms, *Roe* was quickly hailed by one segment of society as a decision of great moral significance because it reinforced the reproductive autonomy of

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Perry, Brian Leiter, Liam Murphy, and Jeremy Waldron). The version of inclusive positivism advanced here (if that is what it is) is limited by the qualification that only moral norms that enjoy a high degree of social consensus can serve, by themselves, as a ground for decision by an adjudicator. The same qualification applies to social welfare arguments.

129 Roe v. Wade, 410 U.S. 113 (1973); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

130 *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 291, 292–313 (2004) (noting that when *Brown* was argued, "racial segregation in public grade schools remained completely intact in the southern and border states and in the District of Columbia" and documenting that Justices from northern states, where segregation was breaking down or increasingly regarded as immoral, were initially more receptive to the ruling in *Brown* than were the Justices from southern or border states).

131 *Brown*, 347 U.S. at 494–95 & n.11.

132 *See* KLARMAN, *supra* note 130, at 389–99; GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 94–100 (1991).

133 *Cf.* Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. Chi. L. Rev. 1819, 1840 (2016) (noting that early versions of originalism that were hard to reconcile with *Brown* were "jettisoned in part to 'make originalism safe for *Brown*'" (quoting Jed Rubenfeld, *Reply to Commentators*, 115 YALE L.J. 2093, 2098 (2006))).

women. At the same time, however, another segment of society believes with equal intensity that the decision sanctions a form of infanticide. No consensus has yet emerged resolving this controversy.[134] Unless and until it does, the legitimacy of *Roe* and follow-on abortion decisions must be based on the ground that abortion rights have become part of settled practice.[135]

5. *Social Welfare Arguments*

Social welfare arguments seek to justify decisions based on their consequences. Like moral arguments, social welfare arguments have their champions as the ultimate touchstone for legitimate adjudication, two jurists, Judge Richard Posner and Justice Stephen Breyer, being the most notable examples in this instance.[136] Both argue that the ultimate criterion for judging in an adjudication should be "pragmatism," meaning essentially doing the most to enhance aggregate social welfare.[137] But these views are outliers. The notion that adjudicators should always exercise their discretion to promote social welfare greatly overstates the role of social welfare arguments in the social practice of adjudication.

Social welfare arguments, like moral arguments, tend to play a supporting role in justifying judgments. A good illustration is the law of qualified immunity in civil actions brought against state officials for violating constitutional rights in actions brought under 42 U.S.C. § 1983. One can find statements in these cases about the need for immunity to prevent "dampen[ing] the ardor" of public officials.[138] But as a recent assessment concludes, "the Court has used more traditional

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134 *Cf. Public Opinion on Abortion*, PEW RESEARCH CENTER RELIGION & PUB. LIFE (Aug. 29, 2019), http://www.pewforum.org/fact-sheet/public-opinion-on-abortion/ [https://perma.cc/S7MA-Z394] (reporting that 61% of the public believes that abortion should be legal in most or all cases and 38% of the public believes that abortion should be illegal in most or all cases).

135 *See* Fallon, *Constitutional Precedent*, *supra* note 95, at 1116 ("[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration . . . .").

136 *See, e.g.*, STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 75–87 (2010) (comparing originalism and legal pragmatism); RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 57–96 (2003) [hereinafter POSNER, PRAGMATISM] (discussing legal pragmatism and pragmatic adjudication broadly). Although Justice Breyer does not commonly identify himself as a pragmatist, many commentators have done so. *See, e.g.*, Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719, 1720 (2006).

137 *See* BREYER, *supra* note 136, at 80–87; POSNER, PRAGMATISM, *supra* note 136, at 59–60.

138 *E.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949).

legal arguments as the opening wedge for these policy concerns."[139] One can speculate that the "policy concerns" may in fact carry more weight with the Justices than the traditional legal arguments. But the fact remains that in justifying the legitimacy of its decisions, policy takes a back seat to legal arguments.

The same pattern predominates even in common law adjudication. One can of course perceive social welfare arguments in common law adjudication, as in the emergence of strict liability in tort for manufacturers of defective products, where early decisions cited concerns about the superior ability of manufacturers to spread the costs of accidents.[140] But academic writings that urge a more general use of explicitly welfarist concepts, such as the "Hand formula," have found few adherents, other than former academics named to the bench.[141]

A pervasive concern about invoking social welfare as a reason for resolving particular adjudicated disputes is the competence of adjudicators to make accurate assessments of the welfare consequences of different decisional rules. Comparative institutional analysis would suggest that legislatures, and even more plausibly administrative agencies, have better fact finding and analytical capacities in assessing the welfare effects of decisional norms than do courts and other types of adjudicators.[142] There is also a concern about the variability of assessments of social welfare over time, as new information emerges and social values change. Adjudicators are supposed to apply objective decisional norms that conform to the expectations of the parties, as advised by their lawyers.[143] There is an inherent tension between applying settled norms and adjusting policy based on the latest social science or policy prescriptions. Consequently only social welfare norms that enjoy a strong consensus can provide a basis for legitimate adjudication on a stand-alone basis.

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139 William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 79 (2018).

140 *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 39 (1970) (noting that loss spreading was the justification most often cited among early legal writers advocating for strict liability in products cases).

141 *See* Lawrence A. Cunningham, *Traditional Versus Economic Analysis: Evidence from Cardozo and Posner Torts Opinions*, 62 FLA. L. REV. 667, 680 (2010) (finding little evidence that judges other than Judge Posner rely on the Hand formula in deciding torts cases).

142 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 208–11, 213 (2006).

143 *See supra* Part I.

B. Support for the Typology

Any assertion about the structure of legitimate argument in adjudication cries out for supporting evidence. This is inherently difficult to develop, given the practice by adjudicators of blending different types of argument in justifying individual adjudications (discussed below) and the difficulty of defining the types of argument in easily measured terms.[144] I offer here two types of evidence, approaching the problem from different ends of the adjudication spectrum and using very different methodologies. The first is a thought experiment based on how a nonspecialized legal advisor would respond to a request to represent a party in an arbitration. The second draws on typologies of arguments used in Supreme Court decisions, as developed by close observers of the Court's practice.

1. *A Thought Experiment*

Consider the following hypothetical. You are a law professor at a university that has an honor code.[145] The honor code sets forth a number of behaviors that will be deemed to violate the code, including plagiarism. Students who are accused of violating the code must appear before an honor code tribunal, consisting of students appointed for this purpose. The case against the accused is presented by a law professor who is appointed to that role. Accused students are represented by another law professor, typically appointed one case at a time. A student, call him Peter, has been accused of plagiarism by a classroom instructor. The charge is based on the instructor's discovery (using analytical software) that a term paper submitted by Peter included three strings of words, each consisting of five to eight words and less than a complete sentence, that are identical to strings of words found in an open-source internet site that includes a discussion of the same topic. The term paper contains no quotations marks around the words nor does it include any citation to the internet site. You have been appointed to defend Peter against the charge of plagiarism before the honor code tribunal.

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144 *See infra* subpart III.C.

145 For representative examples of honor codes, see, e.g., see, e.g., Procedures for Student Discipline, COLUM. L. SCH. § 7, https://www.law.columbia.edu/academic-rules/student-discipline#3 [https://perma.cc/68QC-EX8V] (last visited Jan. 3, 2020); The Student Judicial Charter of 1997, STAN.: OFF. COMMUNITY STANDARDS § 3, https://communitystandards.stanford.edu/policies-and-guidance/student-judicial-charter-1997#judicial [https://perma.cc/7J33-XXJJ] (last updated Oct. 2013).

Although there may be factual issues that warrant investigation, the principal issue here is a legal one: Does the replication of three short strings of words from an internet site, without attribution, constitute plagiarism within the meaning of the honor code? This is your first foray as a representative of an accused student before the honor code tribunal. The question is: How would you proceed in developing a legal defense of Peter against the charge of plagiarism?

As a member of the legal community, presumptively socialized into the practices of that community, I submit that you would proceed as follows. The first thing you would do would be to review the language of the honor code. How does it define plagiarism? Is it possible to argue that Peter's conduct does not fall within the definition? Is there other language in the code, such as a characterization of offending behavior as "serious" or "significant" that might be employed to characterize Peter's conduct as de minimis? You might also review any documents accompanying the promulgation of the code, or perhaps previous iterations of the code, to see if there is any language that might be used to characterize Peter's conduct as something that the enactors of the code would not have regarded as sufficiently serious to warrant a finding of a violation. In short, the first thing you would do would be to explore potential faithful agent arguments that could be deployed to Peter's advantage.

You quickly discover that the honor code tribunal follows a practice of issuing written decisions in resolving honor code cases and that a collection of these decisions going back several decades is publicly available. The next thing you would do would be to flip through these decisions, looking for any that involve charges of plagiarism. It turns out there are quite a few. You will want to identify those most closely on point to see how they resolved the charge and what reasons they gave for their resolution. You will want to develop, if possible, an argument that prior honor code cases support an acquittal of Peter, or at least warrant a relatively lenient sanction. You intuit that the honor code tribunal will want to resolve Peter's case in a manner consistent with the way previous tribunals have resolved cases in order to assure predictability and equal treatment over time. As should be obvious, this will constitute an argument based on precedent.

After that, it is unclear how you would proceed. If faithful agent arguments and arguments from precedent are sufficient to make out a decent case in support of Peter, perhaps you

would stop at this point. If these primary sources leave the matter up in the air, or they suggest things are not looking good for Peter, you might press further. One possibility would be to canvas various professors about how they respond to evidence of copying of short strings of words from internet sites. Perhaps an informal norm has developed at the university that regards these sorts of copying as not worth charging as violations. Alternatively, it might make sense to gather information about how other institutions of higher learning define plagiarism. Perhaps some kind of general norm or rule of thumb can be identified which can be characterized as a settled practice among such institutions in dealing with charges of plagiarism. If Peter would be exonerated under the settled practice followed by similar institutions, this will likely carry significant weight with the honor code tribunal.

If all else fails, you might explore various moral arguments that could render Peter more sympathetic or give cause for an exculpatory excuse for his behavior. Perhaps his instructor encouraged students to explore information on the internet, or perhaps Peter thought that because the site was an open source, ordinary rules against copying did not apply. Conceivably, similar arguments could be couched in social welfare terms: students should be encouraged to use the internet, cutting and pasting from electronic sources has become routine behavior, and on balance this should be encouraged, etc.

This thought experiment is obviously open to contestation. Others may have a different view about how they would proceed in developing arguments in the hypothetical adjudication. If my conjectures are plausible, however, they provide some evidence in support of the classification of legitimate forms of argument I have set forth.

2. *Typologies of Supreme Court Arguments*

A second source of support comes from various attempts to classify the types of arguments relied upon by the much-studied Supreme Court in resolving contested cases. Philip Bobbitt has developed perhaps the best known typology, in his book *Constitutional Fate*.[146] Based on a review of Court decisions over the course of time he discerns six modalities of argument: historical, textual, doctrinal, prudential, structural, and ethi-

146 BOBBITT, FATE, *supra* note 79; *see also* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12–13 (1991) (restating and analyzing the modalities he identified in *Constitutional Fate*).

cal.[147] Although I do not agree with everything Bobbitt says about the modalities of argument, there is at least a substantial overlap with my classification. Bobbitt's historical, textual and structural arguments I would group together as different forms of faithful agent argument.[148] His doctrinal category corresponds to my argument from precedent.[149] His ethical argument corresponds to my moral argument.[150] And his prudential argument resonates with my social welfare argument.[151] The only thing missing from Bobbitt's account but present in mine is argument from settled practice, although there are elements of this in his account of structural argument and ethical argument.[152]

Another notable effort at developing a typology of argument in constitutional cases is found in an early article by Richard Fallon.[153] He discerns five modalities of argument: text, historical intent, constitutional theory, precedent, and values.[154] Here too I do not agree with everything he says. By constitutional theory, Fallon refers to theories like John Ely's representation-reinforcing theory or theories about the purpose of protecting freedom of speech.[155] Theories in this sense are surely part of academic literature about constitutional interpretation, but I see little evidence, and Fallon cites none, that

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147 BOBBITT, FATE, *supra* note 79, at 7, 93.

148 *See id.* at 9, 26, 74; *supra* subsection II.A.1. To be clear, Bobbitt regards textual arguments as permitting arguments about present meaning of the text, rather than the meaning it had at the time of ratification. *Id.* at 26. I agree that faithful agent arguments often proceed as if the current meaning of the text is controlling; this is especially common in statutory interpretation cases. But this is probably based on an unexamined assumption that the meaning of the words has not changed. If perchance the current meaning and the original meaning have diverged (this is rare), a faithful agent is required to adopt the original, not the current meaning. The current meaning could be adopted only on the understanding that the enacting body, by choosing open-ended language, had delegated authority to future interpreters to give content to the words in an evolving, common-law fashion. For a suggestion along these lines, see Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 40–46 (1985).

149 *See* BOBBITT, FATE, *supra* note 79, at 40; *supra* subsection II.A.2.

150 *See* BOBBITT, FATE, *supra* note 79, at 93–94; *supra* subsection II.A.4.

151 *See* BOBBITT, FATE, *supra* note 79, at 61; *supra* subsection II.A.5.

152 *See, e.g.*, BOBBITT, FATE, *supra* note 79, at 84 (stating it would be "absurd" to undo a settled understanding about the President's right to remove executive officers without congressional consent); *id.* at 96–97 (treating decisions that protect family units long recognized by settled tradition as a form of ethical argument); *supra* subsection III.A.3.

153 Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987) [hereinafter Fallon, *Constructivist*].

154 *Id.* at 1194–1209.

155 *Id.* at 1200–02 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 4–9, 73–104 (1980)).

they have been relied upon by courts in resolving discrete constitutional cases or that lawyers regard them as the kinds of arguments that would carry weight with courts or other adjudicators. Fallon's invocation of text and historical intent I would lump together under faithful agent arguments. By "values" Fallon means both moral values and arguments based on social welfare.[156] So in the end, Fallon's taxonomy differs from mine only in its introduction of a non-factor (constitutional theory) and in his omission of arguments from settled practice, which may have taken on greater prominence in the years since he wrote.

Jack Balkin has offered a third and more complex menu of constitutional arguments. Balkin is a "new originalist," someone who believes that that the Constitution must be interpreted according to its original meaning, but when its meaning is unclear or when it must be applied to circumstances not addressed by the text, it is necessary to engage in "constitutional construction."[157] In recent work Balkin has offered a list of arguments which he believes are widely accepted by the legal profession for engaging in this process of constitutional construction.[158] Drawing on traditional studies of rhetoric, he calls these arguments *topoi* or "topics."[159] The list is comprised of arguments from text, structure, purpose, consequences, judicial precedent, political convention, custom, natural law or natural rights, national ethos, political tradition, and honored authority.[160] Once again, there is substantial overlap with my

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156 *See* Fallon, *Constructivist*, *supra* note 153, at 1204–09.

157 *See* Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 145–46 (2018) [hereinafter Balkin, *Topics*]. The strategy of dividing constitutional law into "constitutional interpretation" and "constitutional construction" can be credited to Lawrence Solum. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 457 (2013). This strategy seems designed primarily to allow all modes of argument in constitutional law to be assimilated to "originalism." *Id.* I do not consider the distinction because so far it has not entered into the discourse of lawyers and courts. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13–15 (2012) ("[The] supposed distinction between *interpretation* and *construction* has never reflected the courts' actual usage."). The perceived imperative to cloak all constitutional decisions in the mantle of originalism may be related to heightened anxiety about policymaking in the name of the Constitution, given the great age of the document and the very low probability of its being amended any time soon. *See* Thomas W. Merrill, *Interpreting an Unamendable Text*, 71 VAND. L. REV. 547, 559–60 (2018) [hereinafter Merrill, *Unamendable Text*].

158 Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 660 (2013) [hereinafter Balkin, *New Originalism*]; Balkin, *Topics*, *supra* note 157, at 181–83.

159 Balkin, *Topics*, *supra* note 157, at 181.

160 *Id.* at 181–82.

categories. I would lump text, structure, and purpose together as modes of faithful agent argument; judicial precedent is clearly the same as my category of precedent; political convention, political tradition and custom I would group together as types of argument from settled practice; natural law or natural rights I would classify as types of moral argument; and consequences I would call social welfare arguments.[161] So in the main, the differences between Balkin's account and my account here relate to taxonomy rather than substantive disagreement. Balkin is surely right that one can find appeals to national ethos and honored authority in opinions, but I regard these "topics" as rhetorical flourishes supporting decisions reached primarily on other grounds, rather than as independent grounds of decision.

A number of other esteemed commentators have recognized that courts are guided by multiple decisional norms regarded as legitimate, including William Baude, Michael Dorf, Kent Greenawalt, Henry Monaghan, Robert Post, and Richard Primus.[162] These accounts are less comprehensive than those of Bobbitt, Fallon, and Balkin, so I do not discuss them here. But they too are not significantly inconsistent with the typology I have offered.

C. Mixing and Matching

One frustrating aspect of changing the focus from legitimate interpretation to legitimate adjudication is that adjudicators are resolutely eclectic in their use of justifying arguments. In common law cases, courts will concentrate on precedent but may throw in arguments from settled practice, supplemented with observations sounding in morality or social welfare. In statutory cases, arguments from text and structure are likely to be reinforced by arguments from legislative history, precedent, settled practice, and perhaps even morality and social welfare. In constitutional cases, precedent will dominate, with occasional references to originalist sources, morality or social welfare, and in some contexts settled practice will appear. In short, adjudicators mix and match different modalities of argument in justifying their selection of decisional norms. As Bob-

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161 *See id.* at 181–83; *supra* subsections II.A.1–5.

162 *See* Baude, *supra* note 4, at 2403–04; Dorf, *supra* note 84, at 1788; Greenawalt, *supra* note 49, at 659–60; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 756, 763 (1988); Robert C. Post, *Theories of Constitutional Interpretation*, 30 YALE L. SCH. FAC. SCHOLARSHIP SERIES 13, 19, 21, 23 (1990); Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 183–84 (2008).

bitt observes, "The various arguments . . . often work in combination."[163] Fallon insightfully notes that in practice, the different modalities of argument are often deployed in such a way as to reinforce the result reached by the adjudicator.[164]

This mixing and matching is no doubt an artifact of the way adjudicated controversies are litigated and decided. The lawyers for the contesting parties will develop rival "theories of the case" which purport to integrate or synthesize different argumentative sources.[165] The adjudicator, if worth her salt, will adopt one or the other of these theories or perhaps a synthesis of the theories as her own. Again we see how the practice of lawyers, as part of a community participating in the social practice of adjudication, determines what constitutes legitimate adjudication.

The cost of mixing and matching is that adjudicators have significant discretion in their selection of appropriate decisional norms, at least in hard cases. This is frustrating to those who place a high value on predictability, stability, and equal treatment of litigants in adjudicated cases.[166]

One possible way of constraining the discretion created by the practice of mixing and matching decisional norms is to determine if social practice includes an implicit hierarchy among different modalities of argument. Fallon argues that there is a hierarchy. He ranks the arguments in constitutional cases in the following order from most to least important: text, original intent, theory, precedent, and values.[167] In a previous article, I also argued for a hierarchy, to wit, in the following order from most to least important: faithful agent arguments, arguments from precedent and settled practices, and moral and social welfare arguments.[168] Balkin's new originalism clearly gives precedence to original meaning over various forms of constitutional construction.[169] In all these accounts, the proffered hierarchies rest on an intuition that faithful agent arguments carry the most weight in contemporary American practice, with arguments from precedent, if only because of

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163 BOBBITT, FATE, *supra* note 79, at 8.

164 Fallon, *Constructivist*, *supra* note 153, at 1237–42.

165 *See, e.g.*, CAROLE C. BERRY & RAYMOND MICHAEL RIPPLE, EFFECTIVE APPELLATE ADVOCACY 69 (5th ed. 2016).

166 *See* LON L. FULLER, THE MORALITY OF LAW 33–94 (1964) (summarizing the values promoted by the rule of law); JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210 (2d ed. 2009).

167 Fallon, *Constructivist*, *supra* note 153, at 1243–46.

168 Merrill, *Interpretation*, *supra* note 85, at 1590–92.

169 BALKIN, LIVING ORIGINALISM, *supra* note 4, at 21–34; Balkin, *New Originalism*, *supra* note 158, at 645.

their extensive use, coming in ahead of arguments from settled practice, moral and social welfare arguments. One can perceive here a glimmer of consensus about an unstated hierarchy. If the hierarchy were made more explicit, this might constrain the discretion of adjudicators, at least to a degree.

Perhaps the most important form of ranking, already discussed, is that arguments from original meaning, precedent, and settled practice are robust in a way that arguments from morality and social welfare are not. The reason is that arguments from morality and social welfare are typically contested, and hence, in many cases, will not incur the assent of the loser. Consequently, arguments from morality and social welfare should provide the principal basis for decision only when those norms enjoy a very broad consensus.[170]

III
ARE APPEALS COURTS DIFFERENT?

To this point I have assimilated all forms of adjudication together, treating adjudication as a unitary phenomenon in which the legitimacy of decisional norms is determined largely by the need to secure the assent of the loser. A potential objection to this approach is that there are important differences among different types of adjudicators. In particular, appeals courts are concerned primarily with resolving disputed questions of law. Given that appeals courts specialize in norm clarification and elaboration, it is possible that they proceed differently than trial courts, administrative agencies, or arbitrators in determining the proper content of decisional norms. This possibility would seem to be especially likely in considering high-level appeals courts, like the U.S. Supreme Court and state supreme courts, which have very broad discretion in deciding what cases to hear, and hence have a significant degree of control over their decisional agenda.

I agree that there are important differences between appeals courts and other types of adjudicators. And the contemporary U.S. Supreme Court represents the ultimate in discretionary control over its docket, with the Court insisting that it will agree to hear cases only when lower courts have disagreed about decisional norms or the case involves an im-

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170 *See* Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 206, 213 (2012) (finding that support for the Supreme Court is highest when opinions use conventional legal arguments and declines when the Court's reasoning becomes more controversial and "extraconstitutional").

portant and unresolved question of law.[171] Surely the Court functions like a "lawmaker" in a way that my hypothetical professor tasked with representing a student in an honor code arbitration does not. Perhaps this means that arguments from morality and social welfare play a larger role in Supreme Court cases than they do in primary level tribunals, and in this sense the Supreme Court is closer to a legislative body than to an adjudicator.

There is clearly some merit to the objection. Still, I think dispute resolution remains the ultimate basis for establishing legitimacy at all levels of adjudication. Consider in this regard that the Supreme Court insists it will resolve cases only if they present a live controversy between adverse parties that will be resolved by adjudication. It will not decide "undifferentiated, generalized grievance[s] about the conduct of the government."[172] All Justices remain committed to characterizing its authority as based on dispute resolution, suggesting that this self-characterization is critical to its continued legitimacy. Dispute resolution remains a constant even if the Court primarily decides only important issues of law implicated by such disputes.

Also, it is not true that appeals courts, including the Supreme Court, confine themselves strictly to questions of law and ignore the facts.[173] As Shapiro points out, appeals courts, although nominally restricted to reviewing questions of law, will always review findings of fact under some standard of review. Shapiro explains that appellate courts keep "clawing their way back toward the facts" because they "continuously seek to reiterate their connection with the basis of all judicial legitimacy, conflict resolution."[174]

As an illustration, consider a recent abortion decision, *Whole Woman's Health v. Hellerstedt*.[175] The majority opinion contains no discussion of the applicable decisional norms other than precedent. The bulk of the opinion (and of the principal dissent) consists of an elaborate evaluation of the facts about whether the Texas regulations being challenged would present an undue burden for women seeking abortions in the state—facts which the majority drew from an exhaustive review

171 *See* SUP. CT. R. 10.

172 Lance v. Coffman, 549 U.S. 437, 442 (2007).

173 *See, e.g.*, Flowers v. Mississippi, 139 S. Ct. 2228, 2254–55 (2019) (Thomas, J., dissenting) (describing the Court's rewording of the question presented on certiorari so that it could reconsider the factual findings of the state courts).

174 SHAPIRO, COURTS, *supra* note 34, at 42–43.

175 136 S. Ct. 2292 (2016).

of the trial record, supplemented by the findings of other trial courts, representations in amicus briefs, newspaper articles, and even materials obtained through internet searches.[176] Another recent example is provided by the conflict created when a same-sex couple requested a wedding cake from a local baker who refused on the ground that it would violate his religious convictions.[177] The Court resolved the case by closely scrutinizing statements in the record generated by a local nondiscrimination commission suggesting hostility toward the religious claims of the baker.[178] The highest court in the land reverted to a type of review ordinarily performed by an intermediate appeals court under state administrative law. These examples are admittedly exceptional, yet they show that fact-finding is hardly irrelevant, even in the highest and most discretionary appellate tribunals.

A more refined argument to the effect that high-level appeals courts are different might be that the audience changes as litigation proceeds to higher levels of tribunals. Focusing on changes in the audience is consistent with the social practices conception of legitimacy adopted in this Article. If the audience for the adjudicator's decisions changes, the recognitional community that determines whether the adjudication is legitimate may also change. Thus, the decisions of arbitration panels, administrative law judges, and trial courts are almost invariably significant only to the immediate parties seeking resolution of their dispute. As to these primary-level tribunals, it is plausible to say that the only critical variable is whether the loser accepts the legitimacy of the ruling. But as the dispute moves to higher level appeals courts, and especially as they move to a tribunal of national significance like the U.S. Supreme Court, the relevant audience whose views matter arguably becomes much wider. As to such high-level tribunals, the objection might run, the critical factor may be whether the general public regards the decision as legitimate. This may suggest, in turn, that for high level appeals courts the *outcome* reached by the court is what is important in determining the legitimacy of the process, as opposed to the decisional norms invoked by the court in reaching the decision.[179]

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176 *Id.* at 2311–18.

177 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

178 *Id.* at 1729.

179 Evidence as to whether judges are influenced by public opinion is mixed. *See* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 88 (2013) (review-

There is again clearly some merit to the objection. Certainly one can think of a number of U.S. Supreme Court decisions—such as *Brown v. Board of Education*,[180] *Roe v. Wade*,[181] *Bush v. Gore*,[182] *Citizens United v. FEC*,[183] and *Obergefell v. Hodges*[184]—which are headline news and which are presumably familiar (even if not by name) to a large portion of the general population. As to these decisions, the outcome reached is clearly what matters to the general public, not the particular decisional norms or line of reasoning used in reaching the decision. And if the Court consistently reached outcomes in these cases that resulted in strong rates of disapproval from the general public, its standing with the public would presumably decline.

Again, there is some merit to the objection. High level appeals courts are probably constrained in cases of great moment to reach outcomes that they perceive will be acceptable to a wider audience, at least if it is possible to do so in a legally credible fashion. But it is a mistake to think that the general public pays much attention to the decisions of courts except in relatively unusual circumstances. The vast majority of appeals court decisions are of interest only to the parties to the case and their lawyers. And even decisions that have a political valence, in the sense that they divide judges along predictable liberal-conservative lines, are rarely of interest other than to lawyers who specialize in the area of law in question. This is a wider audience than the parties to the case and their lawyers, but it is tiny relative to the size of the general public or even the legal community at large. And the specialist-lawyers, like the lawyers who advise the parties to the controversy, will regard such decisions as legitimate insofar as they comport with decisional norms that are regarded as legitimate, even if they disagree with the decision on policy grounds.

Another way of looking at appeals courts is that they are not an exception to the dispute resolution model of adjudication but serve as an integral part of the strategy for assuring

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ing studies). A conceptual difficulty in measuring the effect of public opinion is that it is hard to know "whether judges are responding to public opinion or to the same things that shape public opinion . . . ." *Id.*

180 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

181 Roe v. Wade, 410 U.S. 113 (1973).

182 Bush v. Gore, 531 U.S. 98 (2000).

183 Citizens United v. FEC, 558 U.S. 310 (2010) (holding that the First Amendment protects the right of corporations to spend unlimited sums of money in support or opposition to candidates for election).

184 Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

the legitimacy of adjudication. As Shapiro observes, the right to appeal helps take the sting out of losing an adjudication: "[A]ppeal allows the loser to continue to assert his rightness in the abstract without attacking the legitimacy of the legal system or refusing to obey the trial court."[185] Indeed, the right to appeal reinforces legitimacy even if it is not exercised: "The loser can leave the courtroom with his head high talking of appeal and then accept his loss, slowly, privately, and passively by failing to make an appeal."[186] Everyone is familiar with the losing advocate who resolves to appeal the case "all the way to the Supreme Court" but never follows through. In this sense, appeal functions as a safety value which helps assure that losers accept the legitimacy of the judgment—my test for legitimate adjudication. Whether appeals courts also serve to clarify and elaborate decisional norms is a byproduct of their basic function in helping to preserve the legitimacy of adjudication.

IV
SOME NORMATIVE IMPLICATIONS

My primary objective in this Article has been to explicate and describe what I take to be the conditions that establish legitimate adjudication and in particular the decisional norms that reinforce the legitimacy of adjudication. My central claim is that if we start by asking what legitimate adjudication is, we find that a number of decisional norms are regarded as legitimate. I will close, however, with some normative thoughts that, if they do not follow from this exercise, at least resonate with it. Each normative concern focuses on a different aspect of current judicial practice. What unites them is a trend away from dispute resolution in the direction of law declaration and with that trend, a rising danger of a more general challenge to the legitimacy of the courts. This in turn imperils what is arguably the United States' greatest asset: its reputation as a country where both public and private actors are held to account by the rule of law.

A. Faithful Agent Interpretation of Old Texts

A primary normative implication concerns the problem of achieving legitimacy in cases that are governed by old legal texts.[187] The principal example, of course, is the U.S. Consti-

185 SHAPIRO, COURTS, *supra* note 34, at 49.
186 *Id.*
187 The argument in this subpart is treated at greater length in Merrill, *Unamendable Text*, *supra* note 157.

tution, the main body of which is some 230 years old and which has been amended only 27 times, with no amendment having been proposed and adopted in the last 40 years. In our present state of political and geographic polarization, further amendment seems unlikely in the foreseeable future given the difficulty of securing the assent of two-thirds of both houses of the Congress and three-fourths of the states. A number of foundational statutes, including the Administrative Procedure Act, the Sherman Act, the Voting Rights Act, the National Labor Relations Act, and the Clean Air Act have also defied attempts at amendment in recent decades.[188]

As a general matter, as we have seen, the decisional norm that enjoys the highest degree of legitimacy is faithful agent interpretation. All or nearly all commentators concede that an adjudicator is bound by the text of a relevant enactment that has the force of law.[189] The adjudicator is not permitted to ignore the text or declare that it is outweighed by other considerations such as morality or social utility. It is also revealing that many of the most vocal critics of originalism concede that "courts should presumptively treat original meanings of relatively newly adopted provisions as dispositive."[190] These critics thus concede that recently enacted and directly relevant texts must be interpreted in accordance with the faithful agent norm. Their position, at least implicitly, is that faithful agent interpretation has an expiration date, such that it no longer applies to enacted laws after they reach a certain age.

What might explain the falloff in the plausibility of faithful agent interpretation as constitutional and statutory provisions age? There is a simple functional explanation and a more debatable jurisprudential one. The functional explanation is that as enactments age, it becomes more difficult to comprehend what they were designed to accomplish and to translate this understanding to modern controversies.[191] Meanwhile, precedents pile up and tend to speak more directly to contested

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188 *Id.* at 549–50.

189 *See, e.g.*, FALLON, LAW AND LEGITIMACY, *supra* note 16, at 85 ("[W]hat ultimately matters today . . . is that everyone continues to accept the Constitution . . . as valid, binding law."); *cf.* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

190 Berman, *supra* note 1, at 68.

191 *See* Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 463–64 (1984); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 218–22 (1980).

issues.[192] So precedent becomes a more accessible tool for lawyers to draw upon in urging how decisional norms should be formulated and a more persuasive basis for use from the perspective of adjudicators. Some confirmation of this is provided by certain controversies where precedent is thin or has depreciated in force due to nonuse. In these circumstances, faithful agent arguments tend to return to the fore, even if the enactment is very old. Recent controversies about the Second Amendment and the Alien Tort Statute illustrate this.[193]

The jurisprudential explanation, advanced by Richard Primus, is that the consent of the sovereign people fades away as time passes and the enacting generation dies off.[194] Thus, the original meaning gradually loses is power to command the assent of the governed. There is probably something to this, although it remains true that even non-originalists generally concede that the *text* of old enactments remains binding, even if their original meaning is not.[195] After all, non-originalists do not argue that there is no duty to comply with the First Amendment or the Equal Protection Clause or other old provisions of which they approve. The argument is over what these provisions mean. There is also the awkward fact that as the Constitution ages, it increasingly takes on the role of something like a sacred symbol of the nation, which carries over into veneration of the Framers and (perhaps) what they sought to accomplish.[196]

Whatever the explanation, the demise of faithful agent arguments with respect to aged enactments is troubling, given the superior status of these arguments in terms of the implicit

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192 *See* Thomas W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, 22 CONST. COMMENT. 271, 285 (2005).

193 *See* Kiobel v. Royal Dutch Petrol. Co., 569 U.S. 108, 117–24 (2013) (extensively canvasing original materials in interpreting a statute passed in 1789 and rarely invoked thereafter); District of Columbia v. Heller, 554 U.S. 570, 621–24 (2008) (engaging in extensive discussion of original meaning of the Second Amendment when the most recent precedent was over seventy years old); *id.* at 652–70 (Stevens, J., dissenting) (reviewing similar material); *see also* Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635, 687 (2006) (noting that the Court often reverts to original meaning when overruling constitutional precedents).

194 Primus, *supra* note 162, at 186–201.

195 *See, e.g.*, BALKIN, LIVING ORIGINALISM, *supra* note 4 (acknowledging that the text is binding but arguing that broadly worded clauses should be interpreted in an evolutionary manner).

196 Michael Dorf has argued that originalist arguments often resonate as a kind of celebration of the framers as "ancestors" or "heroes." Dorf, *supra* note 84, at 1801–10. To the extent there is something to this—and I think there is—then deviating from the understandings of the generation that adopted Constitution may be regarded as a kind of insult to the "founding fathers."

hierarchy of decisional norms. There are two standard responses to the problem. One, which is epitomized by Justice Clarence Thomas's innumerable dissenting and concurring opinions, is to insist on adhering to faithful agent interpretation, without regard to the consequences.[197] On this approach, the many precedents and established practices that deviate from the correct discernment of the original understanding would be overruled. The prospect of this position being adopted and carried out by the courts is highly remote given the massive disruption it would entail.

The second standard response, which is much more popular in the legal academy, is to urge the substitution of dynamic decisional norms, like moral arguments and social welfare arguments, for faithful agent interpretation of old and unamendable texts. This would seem to be a point of agreement that unites otherwise quite diverse thinkers such as Ronald Dworkin, Bill Eskridge, and Richard Posner.[198] The problem with this response is that it is highly vulnerable to the charge that the adjudicator is simply imposing its own policy preferences in the form of a supposed interpretation of the text. This is likely to lead (and has led) to the charge that the adjudicator is "legislating from the bench."[199]

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197 *See generally*, HENRY MARK HOLZER, THE SUPREME COURT OPINIONS OF CLARENCE THOMAS, 1991–2006: A CONSERVATIVE'S PERSPECTIVE (2007) (collecting opinions of Justice Thomas advocating originalism).

198 *See generally*, DWORKIN, EMPIRE, *supra* note 122; ESKRIDGE, DYNAMIC, *supra* note 9; POSNER, PRAGMATISM, *supra* note 136.

199 For evidence that opinion about the legitimacy of the Court declines as its decisions are perceived to align with the political preferences of the Justices, see, e.g., Vanessa A. Baird & Amy Gangl, *Shattering the Myth of Legality: The Impact of the Media's Framing of Supreme Court Procedures on Perceptions of Fairness*, 27 POL. PSYCHOL. 597, 607 (2006) ("[O]ur results suggest that perceptions of fairness are adversely affected when people receive information about a politically charged Court, indicating a likely decline in public support for the institution if citizens came to see judicial deliberations to be . . . politically driven . . . ."); Brandon L. Bartels & Christopher D. Johnston, *Political Justice? Perceptions of Politicization and Public Preferences Toward the Supreme Court Appointment Process*, 76 PUB. OPINION Q. 105, 113 (2012) (noting that "[t]o the degree . . . the process . . . becomes more visibly politicized, we should expect citizens' differentiation of the Court from the explicitly political branches to decrease, leading to even further politicization"); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 659–60 (1992) ("To the extent that the Court becomes politicized or perceived as such, it risks cutting itself off from its natural reservoir of goodwill and may become reliant for basic institutional support on those who profit from its policies. This is a risky position for any institution to adopt."). For recent evidence that the public increasingly perceives the judiciary as afflicted by political bias, see S.I. Strong, *How Legal Academics Can Participate in Judicial Education: A How-to Guide by Richard Posner*, 66 J. LEGAL EDUC. 421, 422 n.5 (2017) (book review).

In short, the difficulty of engaging in faithful agent interpretation of old and unamendable texts such as the Constitution leads directly to the standoff described in the Introduction between "originalists" and "living constitutionalists." There is no sign, as things presently stand, that either side in the endless debate over legitimate interpretation is posed to vanquish the other.

A better solution to the problem posed by very old texts is to shift the locus of decision toward enactments that are more recent or more susceptible to amendment. In other words, adjudicators should try, if possible, to avoid resolving disputes based on the Constitution and certain foundational statutes and instead rely more on relatively recent statutes and administrative regulations. This would allow robust faithful agent arguments—in the form of arguments from original meaning—to resume their rightful place in the menu of decisional norms used by adjudicators in resolving disputes between adverse parties.

How might this be accomplished? One way would be to revive and generalize the avoidance canons highlighted in Justice Brandeis's famous *Ashwander* concurrence.[200] Constitutional decisions should be avoided, if possible, along with decisions grounded in other old and unamendable texts. Another way would be to interpret the Constitution and other aged texts in a stand-pat or Burkean fashion in order to create incentives for parties to seek legal change by securing the adoption of relatively more amendable enactments (like statutes and administrative regulations).[201] Stand-patism could be advanced by leaning on nondynamic decisional norms, like settled practice and a strict approach to precedent,[202] and downplaying relatively more dynamic norms, like creative uses of precedent, and moral and social welfare arguments.[203]

Paradoxically, once enacted laws become very old, original meaning arguments are likely to function like sources of legal change, assuming (as is likely) that the law as defined by precedent and settled practice has diverged from what a faithful reconstruction of original meaning would reveal. So using original meaning arguments when texts are old and unamendable becomes a tool for activists seeking social change through liti-

200 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring).

201 Merrill, *Unamendable Text*, *supra* note 157, at 589–90.

202 *See id.* at 591.

203 *See id.* at 592.

gation.[204] The basic point is that adjudicators should try to steer the law in the direction of relatively more current or amendable laws.[205] This may be the only way to revive the use of faithful agent decisional norms—the decisional norms that appears to enjoy the highest level of legitimacy—in an era when the Constitution and many framework statutes are very old.

B. Scrabble Board Precedentialism

A second normative implication concerns the manner in which adjudicators deploy arguments based on precedent. Arguments from precedent are significantly constrained. One constraint, which is familiar, is that precedent that cannot be distinguished must be followed, unless overruled.[206] Another constraint, less familiar, is that precedent that has congealed into settled practice will always be followed (so-called super precedent).[207] A third constraint, which follows from the passive nature of adjudicative bodies, is that precedent cannot be revisited unless raised in a case brought by a party or in the case of a high level appeals court with discretion over its docket, unless the tribunal agrees to hear a case that challenges a precedent.[208]

Notwithstanding these constraints, there is still significant room for different approaches to precedent. I will highlight one difference, which I believe is reflected in the current practice of the Supreme Court. I will describe the difference in terms of two stylized models of precedent-following behavior set forth in extrajudicial writing. In actual practice, arguments from precedent undoubtedly reflect a complex matrix of approaches to following, distinguishing, extending, and narrowing prece-

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204 J. HARVIE WILKINSON, III, COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE 57 (2012) (arguing that originalism, given its multiple exceptions, is an "invitation to unbridled subjectivity" and often serves as a form of "activism cloaked as restraint.").

205 *See* Merrill, *Unamendable Text*, *supra* note 157, at 594–99 ("Burkean interpretation of unamenable texts should promote governance by means of relatively more amenable texts . . . because status-quo reinforcing interpretation, by definition, is inhospitable to efforts to achieve deliberate legal change through interpretation.").

206 *See* Sinclair, *supra* note 118, at 370 (citing Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 654 (1999)).

207 *See id.*, at 364 (citing William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis,* 19 J.L. & ECON. 249, 251 (1976)).

208 *See* Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 9 (2006) (noting the "small proportion of the nation's agenda that comes directly before the Supreme Court in particular and the courts in general").

dents.[209] The dichotomy I describe represents one pole cutting across a variegated landscape of conventions, with most invocations of precedent by adjudicators falling somewhere in between these extremes.

The first conception of precedent following is the integrity model, based on Ronald Dworkin's theory of law as integrity.[210] Dworkin illustrated his theory with the metaphor of a chain novel, the idea being that each adjudicator must account for chapters previously written by earlier authors, while retaining the freedom to add new characters or plot elements consistent with what has been laid down before.[211] At a more conceptual level, Dworkin argued that adjudicators must resolve disputes in a manner consistent with the constraints of fit and principle. The requirement of *fit* means that the adjudicator must rule in such a way as to take into account what all previous adjudicators (at the same or higher level in the decisional hierarchy) have decided. The decision need not replicate every detail of every precedent, but a decision will be "flawed if it leaves unexplained some major structural aspect" of prior decisions.[212] The requirement of *principle* means that the adjudicator must adopt a theory that explains prior decisions and generates a result in the present case that is the "best, all things considered."[213] For Dworkin, "the best" meant a principle based on "political morality."[214] Dworkin was a bit unusual in that he believed that there is generally one right answer to legal questions, once one factors in political morality, rightly understood.[215] Most scholars today are less confident that questions of political morality have a single right answer; at least, they are likely to be somewhat skeptical that adjudicators have the right answer to such questions.[216]

Still, one can interpret Dworkin's theory in a way that imposes a significant degree of constraint on arguments from precedent. The theory can be reformulated as stipulating that arguments from precedent must satisfy the requirement of fit,

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209 For an illuminating discussion, see generally Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861 (2014) (noting the many ways the Court narrows precedent).

210 *See generally* DWORKIN, EMPIRE, *supra* note 122.

211 *Id.* at 228–38.

212 *Id.* at 230.

213 *Id.* at 231.

214 *Id.* at 216.

215 RONALD DWORKIN, JUSTICE IN ROBES 41–43 (2006).

216 *See id.* at 42 ("Legal theorists have an apparently irresistible impulse . . . to insist that the one-right-answer thesis must mean something more than is captured in the ordinary opinion that one side had the better argument . . . .").

that is, they must explain all "major aspects" of past decisions, and they must be principled, in the sense that they articulate some decisional rule that both accounts for the prior decisions and provides a foundation for ruling in the present and foreseeable future cases. This might be a principle of political morality, but it could also be a principle grounded in a generalization from original meaning, or from settled practice, or from considerations of social welfare.

A very different model of precedent following is one offered in passing by Justice Scalia in his Tanner Lectures at Princeton.[217] He suggested there that the common law, which he regarded as a pure form of decision by precedent, is like a game of Scrabble.[218] As he put it, "[n]o rule of decision previously announced [can] be *erased*, but qualifications [can] be *added* to it."[219] The Scrabble Board model shares with the integrity model the understanding that the adjudicator cannot ordinarily erase the blocks of letters that have been previously laid on the board. And it shares with Dworkin's model the understanding that the adjudicator, once the constraint of fidelity to past decisions is satisfied, exercises a significant degree of discretion. Where the Scrabble Board model differs is in its understanding of how the judge exercises the discretion that remains after the various constraints of the precedent system are satisfied. The objective of the players in a Scrabble game, to put it bluntly, is to score the most points. This is clearly what Justice Scalia sought to convey by his metaphor. Subject to the constraint against disregarding indistinguishable precedent, he regarded the precedent-following judge as one who seeks to resolve cases so as to maximize his or her personal legal and policy preferences.[220] Moreover, the judge's personal preferences need not conform to any overarching principle that brings coherence to the full range of decisions over time. The preferences may simply reflect the judge's desire to mold the law in a way that the judge finds more congenial.[221]

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217 *See generally*, ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

218 *Id.* at 8.

219 *Id.* at 8. Switching metaphors, Justice Scalia also compared the precedent-oriented judge to a broken field runner: "distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law." *Id.* at 9.

220 *See id.*

221 This cynical view of precedent following is not new. *See* JEROME FRANK, LAW AND THE MODERN MIND 163 (2009) [originally published 1936] (commenting

Scalia's image of precedent following as a game of Scrabble thus presents a picture of the precedent-following adjudicator as an aggressive manipulator seeking to advance his or her legal and policy preferences. The adjudicator may not disturb previous moves by others already on the board.[222] But otherwise the adjudicator, if he or she can garner the requisite support from other like-minded members of the tribunal, is expected to adopt distinctions, extensions, and qualifications of what has been decided in the past in an effort to advance his or her legal or policy preferences.[223]

A good example of the Scrabble Board model in action is last Term's decision in *Kisor v. Wilkie*.[224] The Court took the case to decide whether to overrule a longstanding administrative law doctrine, called "*Auer* deference," which says that an agency's interpretation of its own regulation is "controlling unless 'plainly erroneous or inconsistent with the regulation.'"[225] The Court declined to overrule *Auer*, but proceeded to set forth five major qualifications on the doctrine, some based on analogies to other administrative law doctrines, others on generalizations from previous decisions applying *Auer*, and still others supported by statements in dissenting opinions.[226] The upshot was that the Court could claim that it was following precedent (*Auer*) while at the same time significantly modifying the law.[227]

"[s]omehow or other, there are plenty of precedents to go around"—enough, he suggested, to support any outcome in any given case).

222 Scalia, *supra* note 217, at 8.

223 *Id.* at 8–9 ("The first case lays on the board: 'No liability for breach of contractual duty without privity'; the next player adds 'unless injured party is member of household.' And the game continues.").

224 139 S. Ct. 2400, 2407 (2019).

225 Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

226 *See Kisor*, 139 S. Ct. at 2415–18. The qualifications were borrowed from the jurisprudence elaborating on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *Kisor*, 139 S. Ct. at 2415; taken from a dissenting opinion in *United States v. Mead Corp.*, 533 U.S. 218, 257–59 & n.6 (2001), *Kisor*, 139 S. Ct. at 2416; supported by language contained in a decision determining which of two agencies given divided authority is entitled to deference, *Martin v. Occupational Safety & Health Review Commission*, 499 U.S. 144, 153 (1991), *Kisor*, 139 S. Ct. at 2417; and derived from the generalization of an exception recognized in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), *Kisor*, 139 S. Ct. at 2417.

227 The outcome in *Kisor* was not particularly controversial among the Justices, other than that it was seen as a kind of precursor of some future showdown over the fate of the *Chevron* doctrine. The division centered on whether to overrule *Auer* and replace it with the standard of review associated with *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), as urged in Justice Gorsuch's concurring opinion, *see Kisor*, 139 S. Ct. at 2442–43 (Gorsuch, J., concurring), or to preserve *Auer* but

The normative concern here is that the Supreme Court, at least in cases where law is highly unamendable and arguments from precedent dominate, is increasingly gravitating toward the Scrabble Board model of precedent. This is particularly true in areas of constitutional law that have a significant political valence, but fly below the radar of general public awareness. Examples might include questions about state sovereign immunity,[228] qualified immunity for officials charged with civil rights violations,[229] preemption of tort law,[230] commercial speech cases,[231] the availability of class actions,[232] and regulatory takings cases.[233] What we increasingly see in these areas are decisions by the Court that leave all relevant precedents undisturbed, but add qualifications or exceptions that move the law in a direction favored by the legal or policy preferences of the Justices in the majority.[234] These moves tend not to be supported by the articulation of some overarching principle, in the manner of the integrity model.[235] Rather, the decisions are justified by reading favored precedents broadly, disfavored precedents narrowly, and by compiling masses of quotations culled from a variety of authorities.[236] The dissenting opinions tend to produce mirror image exercises, emphasizing broad readings of different precedents and offering competing quotations.[237] With the policy preferences

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extensively reconstruct it, as pursued by the majority, *see Kisor*, 139 S. Ct. at 2415–18 (majority opinion). Quite arguably the majority's approach, grounded in Scrabble Board precedentialism, resulted in the greater change in existing law.

228 *See* Alden v. Maine, 527 U.S. 706 (1999).

229 *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

230 *See* Wyeth v. Levine, 555 U.S. 555 (2009).

231 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980).

232 *See* Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036 (2016).

233 *See* Murr v. Wisconsin, 137 S. Ct. 1933 (2017).

234 For discussion of the path of regulatory takings decisions in terms of different models of precedent, see Thomas W. Merrill, *The Supreme Court's Regulatory Takings Doctrine and the Perils of Common Law Constitutionalism*, 34 J. OF LAND USE 1, 8–26 (2018).

235 *Id.* at 4.

236 *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. Rev. 1156, 1195–96 (2005).

237 For some qualitative evidence of this at the Supreme Court level, see generally Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165 (2016). Several studies of precedent-following behavior at the court of appeals level reveal similar patterns. *See e.g.*, Lindquist & Cross, *supra* note 236, at 1200–06 (finding that "[p]recedent appears to have a moderately constraining effect on judicial freedom" and that "while our system of precedent creates some path dependence in law, it is relatively weak, leaving judges ample opportunity to abandon a given path should it appear, in the clearer light of hindsight, unwise"); Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 57 WM. & MARY L. REV.

of the Justices now perfectly aligned with those of the party that appointed them, the result has been aptly described as a "political Court," with the qualification that the Court operates only in narrow areas of controversy and is constrained in other ways, as I have described.[238]

The larger normative concern, in keeping with the themes of this Article, is that the Court has been able to move toward the Scrabble Board model only because it has amassed, over many years, a large reservoir of legitimacy in the eyes of the lawyers who appear before it and the larger public more generally.[239] As things stand, although the Court increasingly resolves cases politically salient cases in ways that conform to the majority's legal and policy preferences, the losers continue to acquiesce in its judgments. But with each decision, a small portion of its reservoir of legitimacy is consumed. Eventually, the reservoir may be depleted, and the losers may regard the Court's decisions as simply a matter of the "brute force" of two against one.[240] When this happens, the Court may face a general crisis of legitimacy.[241]

To head this off, the Court should strive to resolve cases, as best it can, in accordance with objective decisional norms, meaning settled forms of argument. It is difficult to do this when faithful agent arguments fade away, as has happened in constitutional law and increasingly in statutory and administrative law where political polarization and associated legislative gridlock have made large chunks of statutory law unamendable. As this happens, precedent comes to the fore as the dominant mode of legitimate argument. But argument

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1789, 1819 (2016) (finding that "the ideological composition of federal appellate panels—whether a Democratic or Republican President appointed members of the panel—powerfully predicts the type of precedent they include in their opinions"); Anthony Niblett & Albert H. Yoon, *Judicial Disharmony: A Study of Dissent*, 42 INT'L REV. OF L. & ECON. 60, 61 (2015) (finding that on divided appeals panels, "[p]recedents that are cited only by the majority are strongly correlated with the ideology of the majority judge; precedents that are cited only by the dissent are strongly correlated with the ideology of the dissenting judge.").

238 Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301–03; *see* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 39 (2005). *See supra* Part I.

239 *See supra* note 57 and accompanying text.

240 *See supra* note 39 and accompanying text.

241 *Cf.* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 138–39 (2008) ("[W]ithin a particular jurisdiction, courts may accrue something akin to credit for their longstanding conformity with standards of correct judicial decision, so that the occasional act of extreme boldness . . . acquires authority not simply because it is successful but also because the track record of a particular court suggests that such action would never be undertaken lightly.").

from precedent, however constrained, is vulnerable to corruption in the form of Scrabble Board precedentialism.[242] The Court needs, at a minimum, to move closer to the integrity model of precedent, supplemented by a more explicit use of arguments from settled practice and by moral arguments and social welfare arguments that enjoy a high degree of social consensus.

The normative argument for resisting Scrabble Board precedentialism is grounded, once again, in the belief that preserving the rule of law is vital to the future of liberal democracy and that preserving the rule of law requires maintaining the legitimacy of the dominant forms of adjudication in society.[243] Conceivably, the courts will come to be perceived as hopelessly politicized, and society will turn to arbitration as the primary form of dispute resolution. But much will surely be lost if this happens. Far better for the courts, and other adjudicators, to remember always that the ultimate source of their legitimacy is the belief of losers that their case has been resolved in accordance with objective legal norms, not because the adjudicator harbors a personal preference for the winner.

C. Universal Injunctions

A third normative concern involves the recent wave of "nationwide" injunctions (perhaps more precisely, "universal" injunctions) against particular policies adopted by the executive branch.[244] This development reveals that the law declaration perspective is not the monopoly of the Supreme Court. It has the potential to move rapidly down the judicial hierarchy to include federal district courts and perhaps other tribunals as well.

Both the Obama Administration and the Trump Administration have been stymied by universal injunctions barring the implementation of their respective immigration policies.[245] Both have complained that the scope of these injunctions is

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242 *See supra* notes 217–220 and accompanying text.

243 *See supra* note 57 and accompanying text.

244 *See generally* Howard M. Wasserman, *"Nationwide" Injunctions Are Really "Universal" Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 336 (2018) ("Recent constitutional litigation has challenged the validity of laws, regulations, and policies from the Obama and Trump Administrations regulating immigration and immigration-adjacent matters. Plaintiffs have brought pre-enforcement lawsuits seeking to enjoin responsible federal officials from enforcing challenged laws, regulations, and policies.").

245 For an overview of the cases, see *id.* at 340–48.

improper.[246] The universal injunction seeks to handcuff the executive by exploiting an aspect of the law of equity—that it acts in personam on the defendant.[247] When a court of equity obtains jurisdiction over a defendant, it can enter an order directing the defendant to desist from certain actions or to take certain affirmative actions in order to provide complete relief to the plaintiff. Given this understanding, it is easy to see how a federal district court that obtains jurisdiction over a federal agency or department can assert the power to enjoin the defendant agency or department from taking action that the district court regards as unlawful—anywhere.

The universal injunction could be called the nuclear option in the assertion of judicial supremacy over the political branches. In effect, it converts what would ordinarily be governed by the norms of stare decisis—the question whether one legal actor regards itself as obliged to follow the legal understanding reflected in a judgment rendered by another legal actor—into a judgment that is binding on the executive with the force of law. As most commentators have perceived, this is deeply problematic.[248] Two sitting Justices have called for the Court, "at an appropriate juncture," to reign in the practice.[249]

What is wrong with universal injunctions? To begin, the universal injunction encourages an extreme form of forum shopping.[250] Opponents of the Obama Administration—most prominently red state attorneys general—liked the Southern District of Texas as their source for universal injunctions.[251]

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246 *Id.* at 364; President Barack Obama, The White House, Remarks by the President on the Supreme Court Decision on U.S. Versus Texas (June 23, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/06/23/remarks-president-supreme-court-decision-us-versus-texas [https://perma.cc/9LZS-YBKP].

247 *See* Wasserman, *supra* note 244, at 354–65.

248 In addition to Wasserman, *supra* note 244, at 338–39, see DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 436–37 (4th ed. 2010); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419 (2017); cf. Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1069 (2018) (acknowledging that limiting injunctions to injured plaintiffs should be the default rule but that exceptions are appropriate).

249 DHS v. New York, No. 19A785, slip op. at 5 (Jan. 27, 2020) (Gorsuch, J., joined by Thomas J., concurring) at 5; Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, J., concurring).

250 As Bray observes, if plaintiffs do not succeed in getting the requested injunction on the first attempt, they can "[s]hop 'til the statute drops." Bray, *supra* note 248, at 460.

251 Dan Frosch & Jacob Gershman, *Abbott's Strategy in Texas: 44 Lawsuits, One Opponent: Obama Administration*, WALL ST. J., (June 24, 2016, 10:36 AM), https://www.wsj.com/articles/abbotts-strategy-in-texas-44-lawsuits-one-opponent-obama-administration-1466778976 [https://perma.cc/E5Q4-HXKN].

Opponents of the Trump Administration prefer the Northern District of California, Maryland, and Hawaii.[252] The success of these ideologically-motivated plaintiffs in obtaining universal injunctions in these forums has generated extensive news coverage and is likely to encourage the public perception that the federal judiciary is hopelessly politicized.[253]

The injunctions in question also undermine deliberation about the appropriate decisional norms that should govern judicial action. They are typically temporary restraining orders or preliminary injunctions, and as such are subject to revision and even outright rejection after full consideration on the merits. They are also vulnerable to being stayed by higher level tribunals.[254] And as illustrated by the litigation over the Trump Administration's so-called travel ban, the initial preliminary injunction can be mooted by successive revisions by the executive branch in the matter under review.[255] Reflecting the views of a single federal judge, a universal injunction lacks the authority of a Supreme Court decision or even a decision by a panel of a court of appeals.[256] Such an injunction, especially on an issue of great political controversy like immigration policy, is unlikely to achieve general assent about the requirements of the law. It is more likely to embroil the federal judiciary in ongoing controversy and accentuate the charge that judges are just another type of partisan actor.[257]

The universal injunction also frustrates the intercircuit percolation that helps the Supreme Court decide when to intervene and illuminates the arguments in favor of different legal understandings.[258] When a federal district court issues a uni-

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252 *See* Rebecca Davis O'Brien & Sadie Gurman, *States File Suit Against Trump Administration over Wall Emergency*, WALL ST. J. (Feb. 18, 2019, 9:27 PM), https://www.wsj.com/articles/california-lawsuit-is-expected-on-wall-emergency-11550535544 [https://perma.cc/VH2A-V4RX].

253 The Editorial Board, *The Judicial Injunction Dysfunction*, WALL ST. J., (July 28, 2019, 6:06 PM), https://www.wsj.com/articles/the-national-injunction-dysfunction-11564348739 [https://perma.cc/K4HQ-ZC3K]; Robert Knight, *Dems Respect the Constitution Only When it Suits Them*, WASH. TIMES, (Jan. 18, 2020), https://www.washingtontimes.com/news/2020/jan/18/democrats-respect-the-us-constitution-only-when-it/ [https://perma.cc/JZ29-KLQ6].

254 *See* Wasserman, *supra* note 244, at 379.

255 *See* Trump v. Hawaii, 138 S. Ct. 2392, 2403–06 (2018) (recounting the procedural history of the "travel ban").

256 *See* Bray, *supra* note 248, at 461–62.

257 President Trump has disparaged the district judges who have entered universal injunctions as "so-called judges," and Attorney General Jeff Sessions condemned the injunction entered against the travel ban as lawless action by "a single judge sitting on an island in the Pacific." Wasserman, *supra* note 244, at 364 (quoting Attorney General Jeff Sessions).

258 *See* Wasserman, *supra* note 244, at 378–79.

versal injunction the matter zips straight up the judicial hierarchy on a very fast track. The administration will seek a stay from the court of appeals, which must resolve the matter on hastily prepared papers and an incomplete record under a standard of review that gives deference to the district court. If the court of appeals denies a stay, the administration must go to the Supreme Court for a stay, which again must rule on hastily prepared papers and an incomplete record and without the benefit of full opinions by any court of appeals, including the court below.[259] This short-circuits the process that ordinarily leads to the resolution of controversial legal questions.[260]

The last concern, and to my mind the most serious, is that the practice of issuing nationwide injunctions of executive policy could jeopardize the received understanding that the executive has a legal duty to enforce all federal judicial orders. As previously noted, this duty rests on statutory and conventional grounds.[261] It is not compelled by the Constitution. Which does not mean it is unimportant. One can argue it is the lynchpin that makes ours a country governed by the rule of law. One danger here is a funding cutoff or amendment of the Judiciary Act of 1789 to deny enforcement of certain categories of universal injunctions or perhaps all injunctions against the government. The greater danger is outright defiance of such orders. The Parrillo study, previously mentioned, indicates that defiance of judicial injunctions is not a hypothetical possibility.[262] In recent history, it has occurred in low visibility contexts, involving structural injunctions affecting prisons, entitlement programs, and the like.[263] In the current climate, one can readily imagine defiance coming from the top, justified perhaps by claims of national security and the status of the President as Commander in Chief. The slope from constitu-

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259 *See* DHS v. New York, No. 19A785, slip op. at 3–4 (Jan. 27, 2020) (Gorsuch, J., and Thomas, J., concurring) ("Rather than spending their time methodically developing arguments and evidence in cases limited to the parties at hand, both sides have been forced to rush from one preliminary injunction hearing to another, leaping from one emergency stay application to the next, each with potentially nationwide stakes, and all based on expedited briefing and little opportunity for the adversarial testing of evidence.").

260 In this respect, the universal injunction suffers from infirmities closely analogous to those that would arise if the executive branch were required immediately to acquiesce in any decision invalidating a regulation or administrative interpretation. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 757 (1989).

261 *See supra* at notes 54–78 (discussing enforcement constraint).

262 *See supra* at notes 66–68.

263 *Cf.* Robert A. Schapiro, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231, 238 (1989).

tional republic to authoritarianism may be slipperier than we like to think.

Unfortunately, we cannot rely on the good sense of every federal district judge to forbear from entering universal injunctions. In search of a solution, I suggest we turn to the distinction between the judgment power and the conventions of stare decisis. With respect to judgments, I think Samuel Bray has the right idea: the traditions of equity and the understanding that injunctions operate in personam should be clarified to specify that injunctions are binding not only on the named defendant but also that they run only in favor of the named plaintiff.[264] In effect, the law of standing, which limits relief to those who can show actual injury that will be redressed by eliminating allegedly unlawful action, should be extended to requests for injunctive relief.[265] Enjoining a federal agency or department to act or desist from acting in certain ways with respect to "all the world" should be disclaimed. Class actions seeking to enjoin the government should be possible, but only if they satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure. Suits by state attorneys general should be possible, but only on behalf of specific state institutions shown to have Article III standing, and then any equitable relief should be limited to those institutions. An analogy would be to the understanding that principles of offensive collateral estoppel do not apply to the federal government, precisely for the reason that this would eliminate the needed percolation of issues before they must be resolved by the Supreme Court.[266]

The Bray solution, standing alone, is subject to the familiar objection based on vertical equity. If one plaintiff, represented perhaps by a state attorney general or pro bono, secures an injunction against the executive branch, why should other similarly-situated persons, perhaps not so lucky in their representation, be forced to sue to secure the same relief? The answer is that this ignores the operation of the conventions of stare decisis. To be sure, the reasoning of the district court that enters the injunction is not binding on other courts, not even within the same district. But if the decision of the district court is affirmed on appeal, this decision will be binding on all district courts in the circuit. And district judges will make short shrift of the government if it persists in litigating the issue in the circuit. The courts may award attorneys fees to prevailing par-

264 Bray, *supra* note 248, at 469–80.
265 Trump v. Hawaii, 138 S. Ct. 2392, 2428 (2018) (Thomas, J. concurring).
266 United States v. Mendoza, 464 U.S. 154, 158–59 (1984).

ties under the Equal Access to Justice Act (EAJA), on the ground that the government's position is not substantially justified.[267] The prospect of fee-shifting will attract more representation. If the matter plays out the same in other circuits, the government will likely acquiesce and drop or modify the contested policy. If the circuits disagree, the Supreme Court will likely intervene. And the executive will almost surely comply with the Supreme Court judgment—at least one that is the product of the ordinary process of careful deliberation reflecting multiple points of view.

The process is unlikely to appeal to the impatient. But it has worked, over a significant span of time, in achieving a significant degree of coordination about the requirements of the law, even in the face of significant disagreement about the correct interpretation of the law. A renewed emphasis on legitimate adjudication—and with it, the dispute resolution function of adjudicators—would go far to restore a norm of self-restraint with respect to the proper scope of judicial injunctions.

CONCLUSION

Questions about what constitutes legitimate interpretation of enacted law, most prominently the Constitution, have been with us since the founding. They have become more urgent in recent times, as arguments between originalists and living constitutionalists grow heated and remain unresolved. Originalists seem to have the better case as a matter of theory; living constitutionalists can claim greater congruence with judicial practice. A similar unhappy choice dominates debates about statutory interpretation. Textualists and purposivists battle for supremacy as a matter of theory; dynamic interpretation seems to offer a better account of actual practice. The key point I advance in this Article is that the severe tradeoff between legitimacy and descriptive accuracy can be eliminated by adopting a different theory of legitimacy. If we shift the focus from legitimate interpretation to legitimate adjudication, embrace a conception of adjudication as dispute resolution, and borrow the familiar conception of legitimacy advanced by H.L.A. Hart and the positivists based on social practice, the gulf between legitimacy and actual practice largely disappears.[268]

The payoff from changing the focus from legitimate interpretation to legitimate adjudication is potentially large. The

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267 28 U.S.C. § 2412(d) (2018). *See generally* Pierce v. Underwood, 487 U.S. 552 (1988) (interpreting various aspects of the Act).

268 *See* HART, *supra* note 15 and accompanying text.

literature on legitimate interpretation, in both constitutional and statutory interpretation contexts, suggests we must make a painful choice: either adjudicators must change their practices in order to achieve legitimacy, or we can endorse existing practice at the expense of nagging doubt about whether that practice is legitimate. When we refocus the inquiry by asking what decisional norms are regarded as legitimate in adjudicating a dispute between adverse parties, we discover much greater congruence between what is regarded as legitimate and existing practice. In particular, we find that not just arguments about original meaning but also arguments from precedent and settled practice are regarded as legitimate. And we learn that there is even an accepted supporting role for arguments from morality and social welfare. The topography of legitimate decisional norms may fall short of the exuberant exhortations to promote social justice, associated with living constitutionalism and dynamic statutory interpretation.[269] But it offers a much better match with actual practice than the stern injunctions of originalists and textualists.

I have argued that in determining when adjudication is legitimate, the social practice that matters is that of the parties to the adjudication, as advised by their lawyers. It is critical that the loser in the adjudication not regard the outcome as simply a matter of the adjudicator harboring a personal preference for the winner. Viewed this way, the decisional norms that are regarded as legitimate in an adjudication are those that correspond to the expectations of the parties. I have argued that three types of decisional norms are robustly legitimate: faithful agent arguments, arguments from precedent, and arguments from settled practice. Other more qualified decisional norms are moral arguments and social welfare arguments. Adjudicators mix and match these decisional norms in various ways, depending on the relative strength of the arguments in any given case. This does not appear to undermine the legitimacy of the adjudication, perhaps because adjudicators apply an unstated hierarchy among norms, including the understanding that moral and social welfare arguments play only a supplemental role unless the particular norm enjoys a very high degree of consensus.

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269 *See* WILKINSON, *supra* note 204, at 20 (characterizing living constitutionalism as "replete with vague exhortations about 'human dignity,' 'evolving standards of decency,' and the perceived demands of justice and needs of society") (footnotes omitted).

Social practice evolves over time, and I worry that the social practice of adjudication may be evolving in troublesome ways. One concern is the age and extreme unamendability of the Constitution and many framework statutes, which tend to make faithful agent arguments problematic. Another is that arguments from precedent have increasingly come to resemble Scrabble Board precedentalism, which is essentially a constrained but weakly disguised form of political judging. A third is the recent emergence of the universal injunction as a weapon in the struggle over national immigration policy. Unless resisted, these developments could jeopardize the high level of legitimacy that adjudication has long enjoyed in our society. Because legitimate adjudication is a vital ingredient of preserving the rule of law, this is troublesome indeed.