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DEONTOLOGICAL ORIGINALISM: MORAL TRUTH, LIBERTY, AND, CONSTITUTIONAL “DUE PROCESS”

PART I – ORIGINALISM AND DEONTOLOGY

PETER BRANDON BAYER*

This article offers what has been needed but lacking in modern legal commentary: thorough, meticulous and timely proof that, pursuant to principles of Originalism, the Constitution—the highest law of the United States—*mandates that any governmental act is unconstitutional if it is immoral.*

Specifically, this article returns fundamental constitutional jurisprudence to where it rightly was until roughly a century ago; and, where, recently, it has been returning in the form of Supreme Court substantive due process precedents based on admittedly ill-defined principles of human dignity. The overarching concept, which I call Deontological Originalism, asserts that both the Founders of this Nation and the Reconstruction Congress properly believed in natural rights derived from principles of natural law. Accordingly, they sought to enforce through the Constitution, the natural rights philosophy set forth in the Declaration of Independence. Most importantly, natural law and resultant natural rights are deontological, that is, they enforce *a priori*, immutable moral precepts that descend not from human imagining but from the natural order of existence, what the Declaration denotes as, “Nature and Nature’s God.” *That is why, under the Constitution, any and all immoral governmental conduct is unconstitutional* regardless of bureau or actor—

* Peter Brandon Bayer, Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks The Thurgood Marshall Law Review for having the faith to publish this lengthy work. I am grateful that the editors have given me a full platform for my constitutional metatheory. Turning to my colleagues at the William S. Boyd School of Law -UNLV, I thank Dean Daniel Hamilton for his support and great patience. The author thanks as well his uncomplaining colleagues Ian Bartrum, Tom McAfee, Ruben Garcia, and Thomas Main, for their thoughtful comments when discussing the ideas in this article.

This article was written in remembrance of my Father, Stephen R. Bayer, whom I was fortunate to know for over 60 years and whose stalwart decency inspires me to this day. This article is written as well thinking of my Mother, Susan Bayer, who, thankfully is still with us and who is just the greatest person in the world. *Most of all, I dedicate this work to my wonderful wife Joan, who has made my life a blessing and who, as always, is my strongest support and my most perceptive critic.*

legislative, judicial, executive or administrative—and regardless of level—federal, state or local.

Unlike articles that aver similar ideas, this writing presents Deontological Originalism as a *metatheory*, meaning, it expounds at once essentially all fundamentals, and their respective proofs, as indeed any work defining and defending a theory of Originalism should do. Metatheory accounts for this commentary's length; but, frankly, it is time that one law review article presented a meta-theoretical perspective given the exasperated skepticism and postmodernist complacency most often greeting serious assertions that the Constitution enforces natural law and, therefore, the bench and bar must become "natural lawyers" when addressing constitutional rights. After thirty years of perhaps sporadic writings addressing many of the relevant aspects, I offer Deontological Originalism, a venture proceeding from the utility of Originalism, to the meaning of Deontology, to the intent of the Founders and of the Reconstruction Congress, to the deontological principles of Enlightenment philosopher Immanuel Kant, to modern due process dignity theory enforcing Deontological Originalism through Kantian morality, culminating in the Supreme Court's bravura rulings requiring that Government accord same-sex marriage the full and equal legal status accorded opposite-sex marriage.

I. INTRODUCTION TO DEONTOLOGICAL ORIGINALISM --

A. *A Spiritual's Lesson about Liberty* --

One of the most lyrical among American folksongs is the plaintive yet inspiring *All My Trials*. Part-spiritual, part-lullaby, part-political manifesto, the song intrepidly declares, "All my trials, Lord, soon will be over. I had a little book that was given to me. *And, every page spelled Liberty.*"¹

1. Peter, Paul and Mary, *All My Trials Lyrics*, METROLYRICS.COM, <http://www.metrolyrics.com/all-my-trials-lyrics-peter-paul-mary.html> (accessed, March 14, 2017) (emphasis added). Traced as far back as "the antebellum South," thereafter reposing quietly for decades in the West Indies, *All My Trials* enjoyed a much-deserved resurgence during America's folk music revival of the 1950s and 1960s. "This spiritual-lullaby probably originated in the antebellum South, from where it was transported to the West Indies. It appears to have died out in this country, only to be discovered in the Bahamas. From there it was reintroduced to us, eventually becoming one of the standards

All My Trials is understood primarily as a religious “message of hope that however bad the trial [a person] was facing there was a promise of liberty and freedom in the afterlife.”² Nonetheless, I have felt since I first heard it over fifty-five years ago that All My Trials holds an equally strong “message of hope” for life. Whatever the cryptic “little book” actually might be, that its “every page spelled Liberty” evokes a compelling lesson: nothing is more important than the amalgam of rights and principles which combined become Liberty, for it is Liberty which, the lyrics promise, will free the book’s holder from “all [her] trials.”

Because poetry may be subject to numerous, coextensive interpretations,³ considering its pre-Civil War origin along with its spiritual

of the [post-World War II-Civil Rights Era] popular folk song movement.” *The Joan Baez Songbook*, (Maynard Solomon 1964), SECONDHANDSONGS.COM, <https://secondhandsongs.com/work/122929> (accessed, Mar. 14, 2017).

All My Trials became a favorite among that movement’s most popular folksingers. “By the 1950s the song had become popular in the American south and in the early 1960s it was a staple of the folk revival. Among the artists to have recorded the song are Harry Belafonte, Pete Seeger, Joan Baez, and Peter, Paul and Mary.” SONGFACTS, <http://www.songfacts.com/detail.php?id=8605> (accessed, March 14, 2017). Even the hugely flamboyant rock-and-roll icon Elvis Presley, as part of his 1970s concerts, included portions of All My Trials, “in the medley ‘An American Trilogy’ ... together with ‘Dixie’ and ‘The Battle Hymn of the Republic.’” *Id.*

2. *All My Trials*, WIKIPEDIA, https://en.wikipedia.org/wiki/All_My_Trials (accessed, March 14, 2017). All My Trials, “is based on a Bahamian lullaby that tells the story of a mother on her death bed, comforting her children, ‘Hush little baby, don’t you cry. /You know your mama’s bound to die.’” *Id.* Most of the lyrics concern death and the Afterlife which evinces that All My Trials’ primary message is that Liberty arises from mortal death that frees the soul. For example, stanzas include, “There is a tree in Paradise, the pilgrims call it the Tree of Life,” and a lyric commonly found in spirituals, “The river of Jordan is muddy and cold; it chills the body, but not the soul.” Miriam Berg, *All My Trials*, FOLKSONG COLLECTOR, <http://folksongcollector.com/alltrial.html> (accessed, July 29, 2017).

3. *E.g.*, *Booth Oil Site Admin. Grp. v. Safety-Kleen Corp.*, 194 F.R.D. 76, 81 (W.D.N.Y. 2000) (“the Requests [for Admissions] at issue do not relate to material which, like a line of lyrical poetry, may be subject to multiple interpretations.”). As one scholar explained,

[Noted Yale literature scholars Cleanth] Brooks and [Robert Penn] Warren taught that the poem’s language and structure, not its historical context, had a special claim on the student’s attention. ... [Concurrently,] Brooks insisted that the poem must be “considered as a whole” and with a concentrated focus on its “structure” or “total pattern” and the relationships among its parts. Brooks on poetry ... favored the practiced reader’s direct encounter and conversation with the texts in the canon, attuned to both internal structures and relations and to the ways the texts echo and engage one another across generations and centuries.

William E. Forbath, *Lincoln, The Declaration, and the “Grisly, Undying Corpse of States’ Rights”*: History, Memory, and Imagination in the Constitution of a Southern Liberal, 92

premise, “I had a little book that was given to me” suggests that Liberty could be a gift of natural rights from, as the Declaration of Independence tells us, “God and Nature’s God.”⁴ Thus, the “little book” might be the enslaved race’s hope of deliverance through death *and*, while alive, liberty—liberation—through the Declaration, the Constitution of the United States (amended to prohibit slavery), or both. Accordingly, among its many connotations, All My Trials may tell us that because God’s will is to be done “on earth as it is in heaven,”⁵ life “on earth” is not principled unless its “every page”—everything we do individually and collectively—“spell[s] Liberty.”⁶ Indeed, *All My Trials*’ implicit meaning that *liberty* links life and soul is captured in the adage that, “Life without liberty is like a body without spirit.”⁷

GEO. L.J. 709, 718 (2004) (Symposium on Charles L. Black, Jr.) (quoting, Cleanth Brooks, *The Well Wrought Urn: Studies in the Structure of Poetry* 192 (1947)).

4. THE DECLARATION OF INDEPENDENCE, par. 1 (U.S. 1776); *see also, infra* notes 479-510 and accompanying text discussing the Declaration and natural law.

As is common among folksongs, All My Trials, is known to have alternate lyrics. For example, “I’ve got a little book with pages three, And every page spells liberty, ...” Harry Belafonte, *All My Trials*, GENIUS, <https://genius.com/Harry-belafonte-all-my-trials-lyrics>. (accessed, March 14, 2017). While it likely refers to some religious text, a “book with pages three” could simultaneously infer a page for each of America’s founding documents: the Declaration of Independence, the Constitution, and, the Bill of Rights, thus again offering as one among many concurrent meanings that *liberty* frees us in life as it does in death.

5. *Matthew* 6:10.

6. This lay expression through song matches the conclusions of some of our most insightful and provocative thinkers. For instance, the noted constitutional scholar Laurence Tribe stated unequivocally, “Nothing is more devastating than a life without liberty.” LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 3 (New York City: W.W. Norton & Company, 1992) (quoted in, Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion For Rape And Incest?*, 43 J.L. MED. & ETHICS 87, 90 (2015)). Similarly, Professor John C. Fletcher observed, “With liberty as its hallmark, we once believed (and I think we still do) that life without liberty is not worth living. Thus to argue that the problem with Americans is that we put too high a value on self-determination, and should look for other values instead to live by, is to argue against our basic political system itself.” John C. Fletcher, *Standard of Care: The Law of American Bioethics*. By George J. Annas. New York: Oxford University Press. 1993, 10 J. CONTEMPORARY HEALTH L. & POL. 589, 597 (1994) (footnote omitted).

7. Alicia Brown, *Striking a Balance: The Conflict Between Safety and Due Process Rights -- The Practical Implications of Zadvydas v. Davis*, 22 J. NAT’L ADMIN. L. JUDGES 429, 429 (2002) (quoting, Kahlil Gibran, QUOTELAND.COM, http://www.quoteland.com/author.asp?AUTHOR_ID=79 (last visited Nov. 13, 2002)).

B. Deontological Originalism, and Why that Theory Is Needed --

While properly not a religious document, for life worth living, the Constitution likewise prescribes that nothing surpasses liberty. Indeed, among its many provisions, the Due Process Clauses of the Fifth and Fourteenth Amendments, ensuring that no office of American government may intrude upon “life, liberty or property” without “due process of law,” set forth this Nation’s primary, overarching law against which neither inferior law, nor any governmental action, at any governmental level, can contend.⁸ The supremacy of liberty is America’s core moral promise and legal commitment to all those—citizens, invitees and even to some extent “illegal aliens”⁹—who come within the jurisdiction of the United States. More than territory, more than human and natural resources, more than might and power, more than symbols such as flags and banners, it is the promise of “liberty and justice for all”¹⁰ that both defines America and fulfills the original hope and intent of this Nation’s founders, those who authored our formative documents The Declaration of Independence and The Constitution.

Accordingly, regarding the meaning of *liberty* under the Constitution, this article seeks to reaffirm that despite prominent postmodern skepticism and cynicism:

8. The forthcoming See, *infra* Part II will demonstrate, Section 4d, notes 937-1008 and accompanying text demonstrating that all constitutional civil rights express in the text and implied from the text, including separation of powers and Federalism, emanate from the Due Process Clauses as liberty interests. See, Bayer *infra* note 23.

9. While certainly not without limits, the Judiciary rightly has recognized that their status as “illegal aliens” does not *per se* deprive such persons of constitutional liberty at least, “when they have come within the territory of the United States and developed substantial connections with this country.” *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (citing cases); *Osorio-Martinez v. Attorney Gen. United States of Am.*, 893 F.3d 153, 168 (3d Cir. 2018); *Castro v. United States Dep’t of Homeland Sec.*, 835 F.3d 422, 448 (3d Cir. 2016). Perhaps the most celebrated holding is *Plyler v. Doe*, 457 U.S. 202 (1982) which answered “no” to its stated issue, “whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.” *Id.* at 205. See generally, Amanda Frost, *Independence and Immigration*, 89 S. CAL. L. REV. 485 (2016) (discussing how the natural rights precepts of the Declaration of Independence can and should inform the constitutional rights of “noncitizens”); D. McNair Nichols, Jr., *Guns and Alienage: Correcting a Dangerous Contradiction*, 73 WASH. & LEE L. REV. 2089 (2016) (note).

10. PLEDGE OF ALLEGIANCE, 4 U.S.C. § 4 (2003).

-- (1) Liberty is a principle of morality manifested as the amalgam of natural rights that emanate not from human imagining, but from natural law.

-- (2) Because it arises from natural law, morality is neither a matter of human opinion nor of human preferences. Rather, *morality is deontological*, that is, *a priori*, immutable, part of the natural order of existence, discerned through impartial reason, applicable at all times in all situations to all persons of any and every social order, and binding no matter how terrible the consequences of moral compliance may be. *The belief in deontological morality is called in philosophy, Deontology.*

-- (3) Deontological morality was both understood and accepted by this Nation's founders who incorporated into the Declaration of Independence the theory that government is legitimate *only* if it comports with the deontological morality of natural rights, which, reduced to a single encompassing idea, is *liberty*.

-- (4) The Founders in 1787-1791¹¹ and the Reconstruction Congress that achieved ratification of the Fourteenth Amendment intended the Constitution to effectuate as supreme law, the Declaration's moral principles of natural rights *liberty* emanating from natural law.

11. For simplicity's sake, I use the term "Founders" and "Framers" essentially interchangeably. Often, Founders refers to those who drafted the Declaration of Independence and otherwise effected the American Revolution. Framers, by contrast, usually identifies those who drafted the original Constitution, the Bill of Rights of 1791, and, possibly the post-Civil War Amendments. Because of the inextricable linkage, as demonstrated herein, between the Declaration and the Constitution as initially ratified, as amended in 1791, and, as amended in 1866-1868, it is fair to use Founders and Framers synonymously. For example, applying the proposition that "[E]arly congressional enactments provid[e] contemporaneous and weighty evidence of the Constitution's meaning," *Printz v. U.S.*, 521 U.S. 898, 905 (1997), over a century ago the Supreme Court noted, "The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish." *Knowlton v. Moore*, 178 U.S. 41, 56 (1900).

A quarter-century later, the Court reiterated the interrelationship between America's "founders" and the Constitution's "framers," "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions." *Myers v. U.S.* 272 U.S. 52, 175 (1926) (over turned in part on other grounds) (recognized by *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010)). See also, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 214 (2003); *U.S. v. Yancy*, 621 F.3d 681, 684 (7th Cir. 2010); *State v. Ketchikan Gateway Borough*, 366 P.2d 86, 90 n. 29 (Alaska 2016); *Carter v. Lehi City*, 269 P.3d 141, 155 n. 40 (Utah 2012).

-- (5) Accordingly, liberty alone is the Constitution's highest edict, the dominant law of the land.

-- (6) Given its natural law origin, the actual meaning of liberty—of “due process of law”—is discerned only through moral philosophy, revealing what natural rights ascend from natural law and how such rights apply in discrete legal conflicts. Therefore, this article argues that any law or governmental conduct is constitutional as a matter of due process liberty if it is moral. True, some constitutional commands, although moral, implicate no moral conduct on the part of governmental actors.¹² Nonetheless, most constitutional challenges ultimately involve questions of individual liberty which are moral issues. Not only are such matters the meat of constitutional rights emanating from the Bill of Rights and the Civil War Amendments, but indeed, courts habitually resolve constitutional issues such as commerce, taxes, and separation of powers, by assessing whether the challenged law or official conduct offends principles of liberty.¹³ Therefore, for simplicity's sake, this writing asserts that constitutional dilemmas are, in fact, moral dilemmas.

Accepted and unquestioned by the 1700s and 1800s courts,¹⁴ during the Twentieth Century and into the new Millennium, the principles just listed came under misguided attack, particularly by jurists and commentators who embraced and continue to accept the interpretive scheme popularly known as Originalism, the idea that “the discoverable meaning of the Constitution at the time of its initial adoption [is] authoritative for purposes of constitutional interpretation in the present.”¹⁵ *My claim is not that Originalism is wrong, but rather, no present iteration of that theory completely captures the true and actual shared original*

12. RONALD DWORKIN, *FREEDOM'S LAW--THE MORAL READING OF THE AMERICAN CONSTITUTION* 8 (Harv. U. Press, 1996). “The American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle.” For example, Article II, sec. 1, cl. 4, requires that a sitting president must be thirty-five-years-old or older. As Dworkin rightly noted, enforcement of that minimum age requirement would not necessarily raise moral questions, but, rather, require only an empirical assessment whether an elected person or candidate is or would be age-eligible to assume the presidency. *Id.*

13. E.g., Peter Brandon Bayer, *The Individual Mandate's Due Process Legality: A Kantian Explanation, and Why It Matters*, 40 LOY. U. CHI. L. J. 865, 879-84 (2013) (hereinafter “Bayer I”) (resolution of interstate commerce questions usually is predicated on individual liberty interests).

14. See *infra* note 23, Part II, Section 5-e-3-A, notes 1032-60 and accompanying text.

15. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y. 599, 599 (2004).

intent of both the Founders and the Reconstruction Congress. In response, I propose, as just mentioned, that the Constitution has but one core, essential “original meaning”¹⁶ enforceable as America’s supreme law: *no legislation, regulation, executive order, judicial opinion, governmental conduct, or, other inferior law issuing from any office or official of any branch, at any level, may violate the immutable, a priori principles of natural-rights-based moral governance described in the Declaration of Independence and commemorated as supreme law in the Constitution.*

Premised in part on propositions I earlier advocated in *Sacrifice and Sacred Honor: Why the Constitution Is a “Suicide Pact,”*¹⁷ this theory, which I call “Deontological Originalism,” is the true originalist paradigm of the United States Constitution, espoused by the original drafters in 1787 (and 1791 when the Bill of Rights was added), fostered almost a century later by the Reconstruction Congress shortly after the Civil War, and applicable to all matters of constitutional law to this day. Deontological Originalism returns us to the original intent shared by both the 1787 and 1868 framers who through the United States Constitution, sanctioned Enlightenment political and social philosophy by boldly, unprecedentedly *and correctly* ordaining as America’s paramount and controlling law, the theory set forth in the Declaration that natural rights, which may be summarized under the rubric “liberty,” define the legitimate authority of governments.

In this regard, I note at the outset that certainly I do not write on a new slate. For instance, during his remarkable and influential career, the highly regarded jurist Ronald Dworkin famously expounded at length that, as intended by the Framers, the Constitution’s text mandates a “moral reading,” a theory popularly referred to as Moral Reading Originalism.¹⁸ Similarly, one fresh offshoot of Originalism, known as Liberal Originalism, emphatically links the originally intended meaning of the Constitution to the Declaration of Independence.¹⁹ Along somewhat similar lines, Professor Ian P. Farrell’s recent provocative work

16. The idea that all moral principles can all be derived from a single, dominating, overarching moral precept is known in moral theory as “value monism.” See *infra*, notes 179-87 and accompanying text.

17. Peter B. Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a “Suicide Pact”*, 20 WM. & MARY BILL RTS. J. 287, 287 (2011) (hereinafter “Bayer II”).

18. See *supra* note 12 and *infra* notes 205-26 and accompanying text. Indeed, the subtitle of Dworkin’s important *Freedom’s Law* is: *The Moral Reading of the American Constitution*.

19. See *infra* notes 562-78 and accompanying text.

*Enlightened Originalism*²⁰ in very broad strokes avers, as do I, that the Constitution’s drafters imbued as America’s highest law, the immutable, *a priori* moral precepts set forth in the Declaration.

However, each of these interesting theories have significant infirmities that the proposed Deontological Originalism corrects. Indeed, the weaknesses of Moral Reading Originalism, Liberal Originalism and Enlightened Originalism highlight that what Originalism literature needs, and what I believe this article supplies, is a meticulous metatheory, meaning the scrupulous detailing of the many propositions that together comprise Deontological Originalism.²¹ The unavoidable hitch is that there

20. Ian P. Farrell, *Enlightened Originalism*, 54 HOUS. L. REV. 569 (2017); see also *infra* notes 579-93 and accompanying text.

21. The project to discern a framework defining the very core of the Constitution in a way that allows resolution of specific constitutional issues, is the search for a metatheory – an idea or approach that captures everything relevant and from which all particular problems find solutions. As Thomas Baker summarized, “To develop a set of criteria for understanding and evaluating existing theory, one must escape to a higher level of abstraction and consider what would be an ideal theory. This [is] metatheory, or theory of theories, ...” Thomas E. Baker, *The Right of The People To Be Secure . . .*: Toward a Metatheory of The Fourth Amendment, 30 WM. & MARY L. REV. 881, 882 (1989); see also e.g., H. William Fischer, *Dworkin’s Right Answer Thesis: A Statistical Regression Coherence Model*, 73 IOWA L. REV. 159, 162 (1987).

True, at an absolute level proof of any given metatheory may be impossible based on an infinite progression analysis: “Comparison of one science to another requires a metatheory outside the domain of any particular science, but any such metatheory can claim scientific legitimacy only if it too is scientific. That task in turn calls for a metatheory of the metatheory, then a metatheory of the metatheory of the metatheory, and so on, with the result that no attempt at scientific closure can be scientifically legitimate.” David M. Frankford, *Privatizing Health Care: Economic Magic To Cure Legal Medicine*, 66 SO. CAL. L. REV. 1, 77 (1992) (footnote omitted). Thus, as Professor D’Amato concluded, because human beings are incapable of considering an infinite number of ever more abstract theories in a finite amount of time, it follows that any “general theory of interpretation is impossible.” Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134, 142 (1990) (quoting, Anthony D’Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 562-63 (1989)).

Of course, Humankind’s postulated inability to discern an actual metatheory does not mean that such fails to exist in nature. Cf., Michael S. Moore, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 724 (1997) (that human beings may never be certain if and when they have found actual truth is no proof that there is no truth) (discussed in, Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893, 896 (2000)); see, *infra* Section 2-d (discussing the “consequentialist error”), notes 83-123 and accompanying text. Still, even if “at an epistemic or practical level” we can never actually isolate a true metatheory, Kress at 142, at most D’Amato shows that what we hastily label as a metatheory may be a highly abstract intermediate theory contained within other, even broader as yet undiscovered theories, *but nonetheless, complete and reliable enough for pragmatic application*. For instance, although our understanding of mathematics and

are no convenient, reliable shortcuts to address the numerous and complex matters attendant to proving Deontological Originalism, thereby debunking anti-deontological originalist theories while simultaneously correcting the misperceptions and filling the significant gaps of “Moral Reading,” “Liberal,” and, “Enlightened” Originalism. *Consequently, demonstrating that morality is deontological, proving that deontological morality was and remains the foundation of the Constitution, and, defining the exact parameters of constitutional morality which the Judiciary has encapsulated under the Due Process Clauses, require exacting fastidiousness to be persuasive.* Such requisite detail takes space which is why this article is uncommonly long. But, constitutional metatheory requires nothing less; and, the time has come for the thoroughgoing analysis this article attempts.²²

Specifically, this article is divided into two parts each of which contains discrete sections discussing relevant sub-topics that together comprise Deontological Originalism.²³ Part I addresses the metaphysical nature of morality and the philosophic basis of constitutions insofar as they set forth the basic structures of governments. In particular, after this Introduction which is Part I’s Section 1, Section 2 explains that moral principles indeed are immutable, *a priori* and emanate not from individuals’ imaginations but rather from impartial reason. Accordingly, Section 2 explicates that, contrary to the unsupported assumptions made by

physical science surely is imperfect, it seems to be sufficient to build buildings that remain standing, to construct bridges that do not collapse, and, to launch satellites capable of successfully reaching objects millions of miles from Earth. In the realm of theories, we know that often perfection is not required to do well enough.

22. Indeed, the moral theory portion of Ian Farrell’s Enlightened Originalism can only be described as skeletal, offering neither a detailed description, nor an in-depth historical review, nor philosophical proof supporting his claims that morality is deontological and that the Declaration of Independence sets forth correct moral precepts that the Founders incorporated into the Constitution as supreme law. Nonetheless, Professor Farrell’s conclusory, sketchy presentation fills roughly fifty law review pages. Farrell, *supra* note 20, at 570-619. Surely then, the several law review pages herein both expounding a comprehensive theory of Deontological Originalism and applying that theory to elucidate a century and a half of American substantive due process jurisprudence, is fully warranted.

23. Peter B. Bayer, Deontological Originalism: Moral Truth, Liberty, and, Constitutional “Due Process,” Part I—Originalism and Deontology, 43 T. MARSHALL L. REV. 1 (2017) sets forth Part I. Peter B. Bayer, *Deontological Originalism: Moral Truth, Liberty, and, Constitutional “Due Process,” Part II – The Reconstruction Amendments. Kantian Morality and the Dominance of Due Process*, 43 T. MARSHALL L. REV. 150 (2017) (hereinafter “Part II”).

many, perhaps most legal commentators, morality is not humanly created, but rather is deontological.²⁴

The next logical question becomes: What precisely are the best extant precepts of morality? In response, Section 3 extolls the deontological perspectives of the Enlightenment philosopher Immanuel Kant who not only aptly described the character of immutable, transcendent morality, but as well explicated the precise, *fundamental moral duties* incumbent all persons both natural and legal. Accordingly, the same abiding, primary moral requisites demanded of human beings inure not only to groups, organizations, corporations, but indeed to the very government individuals designated to regulate and to stabilize their lives through law. Kant will teach us that legitimate government is not merely a logical convenience, *but is rather a moral necessity because the rules of societal interactions must be legally formalized to assure that they comport with the moral requisites incumbent on all persons.* Absent formal law enacted through the legitimate source of formal law –Government– individual transactions devolve into a series of *ad hoc* practices agreed to solely by the transacting parties, and not subject to a communal review both to assure moral comportment and to provide reliable, consistent neutral fora for the resolution of legal disputes. Accordingly, the tenets to transact commercial, personal and other dealings which individuals and their respective groups, organizations, and corporations habitually undertake cannot be left exclusively to the subjective, selfish, possibly imprudent and ephemeral whims, preferences and caprices of the transacting parties. Even if fortuitously such individual transactions actually conform to deontological commands, absent societally set standards, there is no overarching regulatory system which legitimately compels under threat of punishment that individuals engage only in morally correct transactions, and which duly handles transgressors.

The formation of governments, then, is a moral requisite because only the offices of government rightfully may set societal-wide standards of conduct enforced as law and subjecting offenders to legal punishments compelled, if necessary, through violence. In turn, since Government itself acts legitimately only if it acts morally, moral governance is the means to forestall both tyranny and anarchy, which, of course, is the very theory of our Constitution.²⁵

24. See *infra*, notes 30-187 and accompanying text.

25. See Bayer, *infra* note 23, Part II, Sections 1-3 and accompanying text.

Having set the general and specific moral framework, and having established that Government not only must act morally but is itself the only legitimate source of force compelling moral comportment from the people it governs, this article's Part I, Section 4 verifies that the theory of constitutional interpretation called Originalism correctly asserts that "original meaning" is the sole appropriate source of the Constitution's meaning.²⁶ This section is essential lest critics assert that constitutional theory should care nothing about Originalism, but instead simply concern itself with discerning and applying moral precepts. Originalists cogently assert that the very rightfulness of America (or indeed of any nation) requires that its founding ideologies must be enforced by succeeding generations unless changed through a legitimate amending or restructuring processes. As detailed in Section 4, because we have decreed America's establishing principles in the Constitution, if present-day constitutional applications fail to comport with the original intent of the Framers, the provisions of the Constitution, thus its establishing principles, become unmoored from any reliable meaning rendering that charter's text essentially hollow, subject to the fancies and vagaries of the particular person or office that happens to be applying the Constitution at any particular moment. A true Constitution cannot be the proverbial empty vessel purporting to hold truths of proper governance but, in fact, bereft of substance, thus constantly filled, emptied and refilled pursuant to the preferences of whoever holds power. Accordingly, as Originalism urges, every contemporary interpretation and application of the Constitution must plausibly be traceable to its original meaning (or duly replaced by a re-founding of the Nation).²⁷

As shown in Part I, Sections 2 and 3, no government is legitimate unless it is moral pursuant to Kantian precepts; and, as proven in Section 4, originalists properly understand that no charter of government, written or unwritten, is legitimate unless its present meaning comports with its original meaning. Consequently, true and correct Originalism – Deontological Originalism – must require that founders of governments intend that the particular governments they establish enact and enforce laws, manage domestic and foreign relations, and otherwise conduct business in perfect compliance with Kantian moral norms. Section 4 concludes, then, with a brief review of prevailing subcategories of

26. See *infra*, notes 386-449 and accompanying text.

27. *Id.*

Originalism. As asserted earlier in this Introduction, none of the prevalent originalist frameworks, even those purportedly steeped in moral theory, are correct because they fail to espouse that the Founders understood deontological morality as the sole legitimate foundation of government.

With the framework properly set, this article proceeds to Part II, addresses the American constitutional experience.²⁸ Based on the principles established in Part I, it is insufficient to claim that even if history reveals that the Framers were unconcerned with enforcing deontological moral precepts, they nonetheless drafted a charter of American government that future generations could convert into a license for moral governance. Rather, the legitimacy of the United States depends on whether indeed the Framers were deontologists who expected –in fact, demanded— that constitutional meanings and applications arise not pursuant to their own moral beliefs, but rather to the best deontological principles available to the particular generation enforcing the Constitution. And, of course, American legitimacy further requires adherence to that original intent. Such is what Part II hopes to establish.²⁹

28. See *supra*, note 23, Peter B. Bayer, *Deontological Originalism: Moral Truth, Liberty, and, Constitutional “Due Process,” Part II – The Reconstruction Amendments. Kantian Morality and the Dominance of Due Process*, 43 T. MARSHALL L. REV. 150 (2017).

29. Specifically, Part II, Sections 1-2 prove happily that both the Founders and the Reconstruction Congress knowingly and deliberately incorporated deontological moral principles into the Declaration of Independence and the Constitution. Indeed, the Reconstruction Congress’ predominant goal was to rectify what it believed to have been two critical, unfortunate concessions on the part of the original Founders: (1) legalizing slavery and (2) declining to hold the States legally obliged to abide by the natural rights principles set forth in the Bill of Rights. The *post-Bellum* Congress corrected those serious failures through the Thirteenth and Fourteenth Amendments.

The Founders and the Reconstruction Congress understood as well that the Constitution must be interpreted pursuant to the best moral theory extant. Because they freely acknowledged knowing moral truth only imperfectly, the Founders and the Reconstruction Congress entreated successor generations to comprehend the Constitution by discerning morality more completely even if that superior understanding invalidated deeply-rooted moral suppositions of the Framers and their greater society. As demonstrated in Part I, Section 3, that superior understanding arises from Immanuel Kant’s moral philosophy. Thereafter, Part II, Section 3 explains that, indeed, the Natural Law principles espoused in the Declaration and codified into the Constitution sound in deontological morality.

This writing concludes with Section 4, an intricate examination exploring both the meaning and the development of due process jurisprudence. Section 4 demonstrates that at present, the modern Supreme Court employs not one, but two different and irreconcilable frameworks when addressing liberty, meaning, constitutional issues sounding in “due process of law.” One standard defines due process liberty empirically, based on discerning applicable liberty principles “deeply rooted” in American history and culture. I argue that

II. WHY DEONTOLOGY IS THE CORRECT BASIS FOR MORAL THEORY

As noted in the Introduction, I begin by demonstrating that among competing definitions of morality, Deontology alone is correct. Because discerning the meaning of morality, surely among the most urgent tasks in human experience, purportedly has confounded Humankind for eons,³⁰ what follows may seem both a dubious and pompous assertion. Nonetheless, I propose that defining morality, *at least in meta-terms*, is curiously, almost bizarrely easy: it has to be Deontology, there really is no other way. Not only is Deontology the only plausible, credible metatheory for morality, but as well, Deontology's correctness is so patently obvious that I cannot account for the persistent, widespread reluctance to acknowledge Deontology; and, candidly, I do not have to. All I have to show is why Deontology is correct.

Consequentialism and Deontology -- the "Good" Versus the "Right"

The overarching meaning of morality falls into two competing paradigms: Consequentialism and Deontology.³¹ "The pivotal

reducing the meaning of liberty essentially to an uncritical historical review based on popular culture defies the moral standards set forth in the Declaration.

The second framework defines due process liberty in terms of protecting and respecting what the Court aptly denotes as the "dignity" innate in every human being. Although declining to so attribute, through this dignity approach, the Judiciary correctly evokes Kantian moral theory to animate the Constitution's overarching guaranty of morality found in the liberty provisions of the Due Process Clauses. As part of that final proof, this writing explains why the recent decisions *Windsor v. U.S.*, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), ruling that the Constitution requires all levels of American government to treat same-sex marriages equally with opposite-sex marriages, is eminently correct constitutional moral theory. (Understandably, the formal concluding section is Section 5—Conclusion—briefly encapsulating the teachings of this article.)

30. "It may seem a bit difficult to discuss the subject of corporate morality without defining morality itself. Obviously, we are not, in these few pages, purporting to resolve a matter that has occupied our philosophical betters for centuries." Lawrence E. Mitchell and Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TULANE L. REV. 1645, 1648 (2002) (footnote omitted).

31. Scholars have long noted that Deontology and Consequentialism are, "the two most prominent traditions in Western normative ethics." Kiran Iyer, *Nudging Virtue*, 26 S. CAL. INTERDISC. L.J., 469, 470 (2017). In his recent book, Professor John Lawrence Hill accented, "It was in the 1780s that two contrasting schools of thought emerged, both of which have dramatically and irrevocably influenced modern moral philosophy. Though they are different in many crucial ways, the two systems of moral thought—utilitarianism [for our purposes, synonymous with Consequentialism] and Kantian deontology—represent the two last gasps of the moral objectivity thesis in modern philosophy." JOHN L.

disagreement between deontology and consequentialism concerns whether morality comprises the right –transcendent, compulsory principles applicable come what may— or the good—the result that produces the most pleasing outcome.”³² Consequentialists argue the latter, that the morally correct answer or outcome to any given dilemma is that which produces the greatest “good” measured empirically as the greatest aggregate happiness.³³ Accordingly, a consequentialist claim or argument, “seek[s] to maximize good consequences under some conception of which kinds of good (or bad) consequences are to count in the consequentialist calculus.”³⁴ Noted, legal and moral philosopher Gabriella Blum neatly summarized the proposition. “Consequentialists maintain that choices are not morally ‘good’ or ‘bad’ in themselves, but should instead be assessed solely by virtue of the outcomes they bring about, that is, by their consequences.”³⁵

This is why it is said Consequentialism focuses on the good -- what people want -- based on some estimation of a person or group’s preferred outcome. Thus, as its name suggests,³⁶ Consequentialism avers that the moral answer is the one that produces the best outcome or consequence, discerned empirically by determining whether a designated person or group’s aggregate happiness exceeds some other person or group’s

HILL, AFTER THE NATURAL LAW: HOW THE CLASSICAL WORLDVIEW SUPPORTS OUR MODERN MORAL AND POLITICAL VIEWS 216-17 (Ignatius Press 2016).

32. Bayer II, *supra* note 17, at 294 (citing ALLEN W. WOOD, KANTIAN ETHICS 261-62 (2008)).

33. E.g., Allen W. Wood, KANTIAN ETHICS 262 (2008); see also, e.g., William Powers, *On the Priority of Justice*, 63 TEX. L. REV. 1569, 1569 (1985) (reviewing MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (footnote omitted)).

34. Frederick Schaurer, *The Annoying Constitution: Implications for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1689, 1692 (2017) (footnote omitted).

35. Gabriella Blum, *The Laws of War and the “Lesser Evil”*, 35 YALE J. INT’L L. 1, 38 n.166 (2010); see also, Bayer I, *supra* note 11, at 889. Professor Kramer likewise explained, because Consequentialists hold, “that the moral character of any type or instance of conduct is fully determined by the probable consequences thereof ... no type or instance of conduct is ever endowed with any inherent moral status. Instead, every action or omission derives its moral status from the effects with which it is associated.” MATTHEW H. KRAMER TORTURE AND MORAL INTEGRITY 21 (Oxford U. Press 2014).

36. “[C]onsequentialism ... holds that behaviors, laws, and policies are either right or wrong; just or unjust; or better or worse, solely on the basis of their consequences.” Tyler A. LeFevre, *Justice in Taxation*, 41 VT. L. REV. 763, 779 (2017) (citing, STEVE MCCARTNEY & RICK PARENT, ETHICS IN LAW ENFORCEMENT 13 (2015), <http://opentextbc.ca/ethicsinlawenforcement> (last visited May 7, 2017)).

aggregate unhappiness.³⁷ Perhaps the most famous among such theorists, noted utilitarian,

[Jeremy] Bentham defined happiness as whatever brings pleasure and reduces pain. Deriving morality and public policy through the [] pleasure-pain principle meant that every precept would be judged by its consequences, not by some fixed standards. Based on this view of morality, Bentham derided the notion of human rights as nonsense and famously called imprescriptible human rights “nonsense upon stilts.”³⁸

Pursuant to the influence of respected scholars such as Bentham, among various competing forms, Utilitarianism is, “[t]he paradigmatic strand of consequentialism”³⁹ As Professor Robin West explained,

Utilitarianism alone, however, only requires that individuals, when making moral decisions, choose those actions which will maximize the pleasure and minimize the pain of the affected community. On an

37. For example, “direct utilitarianism” is “Any object of moral assessment (e.g., action, motive, policy, or institution) should be assessed by and in proportion to the value of its consequences for the general happiness.” David O. Brink, *Mill’s Ambivalence about Rights*, 90 B.U. L. REV. 1669, 1671 (2010).

38. Richard Weikart, Ph.D., *Upholding the Sanctity of Life in a Culture of Death*, 32 ISSUES IN L. & MED. 269, 272 (2017) (quoting JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ED. J. H. BURNS AND H. L. A. HART (London: University of London, The Athlone Press, 1970), 100)).

Some strains of Consequentialism have tried to escape the inherent selfishness and shallowness of discerning morality as a given person’s or group’s aggregate happiness outweighing others’ by requiring some measure of overarching society “good.” For example, the celebrated philosopher John Stuart Mill refined the classic Utilitarianism of Jeremy Bentham by espousing, “consequential utilitarianism [under which] the happiness of the greatest number of persons is not sufficient to render an action, or course of action, correct. To qualify as correct, a course of action must result in foreseeable consequences that provide the greatest good to the greatest number of persons.” Kenneth Schuster, *Because of History, Philosophy, the Constitution, Fairness & Need: Why Americans Have a Right to National Health Care*, 10 IND. HEALTH L. REV. 75, 111 (2013) (citing JOHN STUART MILL, UTILITARIANISM 263 (Mary Warnock ed., World Publishing Company 1971) (1863)).

Of course, the question remains how to discern in any give instance what is “the greatest good for the greatest number of persons.” Insofar as that determination is premised on what people *want* rather than on what they *must do*, seemingly benign or altruistic forms of Consequentialism still are fundamentally wrong, the next proven in this writing’s text.

39. Blum, *supra* note 35, at 38 n.166. Indeed, commentators usually identify utilitarianism as the most prevalent type of consequentialism. See, e.g., JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 23 (1994); Bailey Kuklin, *The Morality of Evolutionarily Self-Interested Rescues*, 40 ARIZ. ST. L.J. 453, 477 (2008).

institutional level utilitarianism holds that the community's happiness is the only moral goal of government, and, therefore, community happiness is the end for which people in government must aim.⁴⁰

Therefore, aside from the principle of maximizing happiness, there are no abiding moral truths under Consequentialism because over time individuals and groups can shift their preferences, regarding what once made them happy or unhappy may vary. Correspondingly, the morally correct answer to any particular consequentialist dilemma may be X one day and Y the next day simply because, for whatever reasons, the relevant individual or group changed its mind. This shows that Consequentialism renders moral matters into political issues, meaning that the “determination of a society's goals and ideals, mobilization of its resources to achieve those goals and ideals, and distribution of rights, duties, costs, benefits, rewards, and punishments among members of that society.”⁴¹ As purportedly there are no enduring moral truths (except aggregate happiness *uber alles*), morality itself must be a humanly conceived and constructed notion reducing moral dilemmas to political disputes, the resolving which might as well depend more on partisan power, influence, and bribery than on rational discourse.⁴²

40. Robin L. West, *In the Interest of the Governed: A Utilitarian Justification for Substantive Judicial Review*, 18 GA. L. REV. 469, 475 (1984) (citing, J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE WORKS OF JEREMY BENTHAM 1 (J. Bowring ed. 1962) (1st ed. London 1789)); Marco I. Jimenez, *The Value of a Promise: A Utilitarian Approach to Contract Law Remedies*, 56 UCLA L. REV. 59, 73 n. 59 (2008), HENRY SIDGWICK, THE METHODS OF ETHICS 411, 413 (7th ed. 1907) (defining utilitarianism as “conduct which...will produce the greatest amount of happiness on the whole” and defining happiness as “the greatest possible surplus of pleasure over pain, the pain being conceived as balanced against an equal amount of pleasure, so that the two contrasted amounts annihilate each other for purposes of ethical calculation”).

41. WALTER F. MURPHY & C. HERMAN PRITCHETT, COURTS, JUDGES, & POLITICS 2 (4th ed. 1986) (quoted in Timothy O. Lenz, *State Constitutional Commentary: Article: The Restriction of Abortion Protesters in Florida*, 59 ALB.L. REV. 1685, 1685 n. 1 (1996)).

42. Consequentialism's proposition that moral principles are humanly conceived and endure or fail through political means is consistent with the still prominent Legal Realism movement that seeks “to understand legal rules in terms of their social consequences” and that “proclaim[s] the uselessness of both legal rules and abstract concepts... Rules do not decide cases; they are merely tentative classifications of decisions reached, for the most part, on other grounds.” Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 468-69 (1988) (review essay of LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (Chapel Hill and London: University of North Carolina Press 1986)). As one author put it,

Surprisingly, the realists' rejection of legal rules is their most defensible theory of law, ... Properly understood, however, it does not deny that statutes and the like can be law; nor does it deny that these laws can guide a judge's decision

Regarding particularly Consequentialism's most famous and pervasive form, Utilitarianism avers that maximizing "utility" is considered the greatest possible good.⁴³ Of course, theorists do not all agree on what measures or aspects best define "utility."⁴⁴ That

making when the judge's attitudes recommend conformity with the law. Instead, the theory rejects the ability of the law to provide reasons for conformity with what the law recommends that exist independently of the judge's attitudes. The realists' rejection of legal rules was an attack on the idea of political obligation and the duty to obey the law.

Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1919-20 (2005).

Accordingly, legal realists did not necessarily claim that rules and general principles must be both meaningless and harmful. But, realists eschewed the idea that law and legal norms exist independently of their outcomes. Rather, law should advance "socially desirable consequences" through, *inter alia*, judicial opinions premised on consistent, easily understood principles that promote stability, predictability and just results. Singer, 76 CAL. L. REV. 465 at 471-73.

43. "The utilitarian version of consequentialism evaluates the rightness and wrongness of actions by the degree to which those actions increase utility." Jennifer Bird-Pollan, *Utilitarianism and Wealth Transfer Taxation*, 69 ARK. L. REV. 695, 709-710 (2016-17) (article defining "utility;" footnote omitted). Similarly, Professor Schauer noted, "Utilitarianism is the subset of consequentialism presupposing that utility is the consequence to be maximized. But other consequentialisms seek to maximize consequences other than utility." Schauer, *supra* note 34, *The Annoying Constitution: Implication for the Allocation of Interpretive Authority*, 58 WM. & MARY L. REV. 1688, at 1692 n. 13 (citing, Walter Sinnott-Armstrong, *Consequentialism*, STAN. ENCYCLOPEDIA PHILOSOPHY, <http://plato.stanford.edu/entries/consequentialism> [<https://perma.cc/7HAK-9FNB>] (last revised Oct. 22, 2015)).

Commonly, the Enlightenment English philosopher Jeremy Bentham is deemed the fountainhead of pioneering Utilitarianism. "Utilitarianism is an ethical philosophy postulating that the morally 'right' action is the one that best maximizes 'utility.'" ... Jeremy Bentham, the father of modern utilitarianism, defined 'utility' as that which maximizes pleasure and minimizes pain. Bentham named this 'the principle of utility,' although it is often referred to as the 'felicific calculus.' Bentham conceptualized pleasure and pain as the two 'sovereign masters' with complete control over what a person should do and what a person ought to do." Wesley M. Bernhardt, *A Clash of Principles: Personal Jurisdiction and Two-Level Utilitarianism in the Information Age*, 11 Wash. U. Jurisprudence Rev. 113, 114 (2018) (quoting, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 1-2 and n.1 (1823), and citing, Linda S. Mullenix, *Burying (With Kindness) the Felicific Calculus of Civil Procedure*, 40 VAND. L. REV. 541, 557 (1987) ("Bentham postulated the felicific calculus, a method of codifying the law based on the 'greatest happiness' utility principle.")).

44. LeFevre, *supra* note 36, at 780-81; David Fagundes, *Buying Happiness: Property, Acquisition, and Subjective Well-Being*, WM. & MARY L. REV. 1851, 1881-1890 (2017) (discussing utilitarian theories of property, particularly wealth maximization); Bird-Pollan, *supra* note 43 (discussing numerous approaches to defining "utility"). As Prof. Bernhart explained, "The abstract principles of 'pleasure' and 'pain'" leave much to the imagination. Is pleasure defined purely as that which most activates the brain's reward system? Or is it

disagreement, happily, is immaterial in this writing because whatever its formulation, Utilitarianism in particular and Consequentialism in general remain premised on defining morality as that which attains the greatest fulfillment of the “good,” meaning, maximizing some person’s, group’s or society’s concept of happiness. As explained below, any moral theory based on attaining “good” or avoiding “bad” outcomes is erroneous because “good” is what best engenders “happiness” or most avoids “unhappiness” (and “bad,” consequently, is what engenders more unhappiness than happiness). Determining “good” versus “bad,” as noted, depends upon the peculiar preferences and predilections of some chosen person, groups or social order. But, as next shown, no true moral code can be justified fully, predominately or even partially because such is what some person, group or society wants. Morality is not discerned by what any given person, groups, or society wants; rather, morality is predicated on what people, groups and societies must do to become and to remain upright and honorable.⁴⁵

defined more broadly as that which is pro-social? Is it that which progresses humanity forward, rather than backwards? If the latter, how is pro-social defined? If ‘pro-social’ can be defined, who defines it?” Bernhart, *supra* note 43, at 114-15 (footnote omitted).

⁴⁵ Certainly, utilitarians do not wish their theories to be used to justify evil even if the pursuit of evil engenders greater aggregate happiness than does the pursuit of justice. The problem facing utilitarians (and indeed consequentialists of any bent), then, is reconciling the pain-pleasure principle with a greater sense of decency. Efforts may be noble as, for example, “Jeremy Bentham provided us at least some guidance:

By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness, (all this in the present case comes to the same thing) or (what comes again to the same thing) to prevent the happening of mischief, pain, evil, or unhappiness to the party whose interest is considered: if that party be the community in general, then the happiness of the community: if a particular individual, then the happiness of that individual.

Indeed, Bentham’s felicific calculus accounts for goodness of the individual and goodness of society as a whole.” Bernhart, *supra* note 43, at 115 (quoting, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 2 (1823), and thereafter discussing several factors that Bentham suggested inform the felicific calculus).

For all their conceptual shortcomings, one cannot accuse utilitarians in particular and consequentialists in general of utterly disregarding overarching societal good in favor of the selfish pursuit of individual or group happiness. Yet, as explicated next, so long as the pain-pleasure calculus is a *sine qua non*, any consequentialist model must fail. Correspondingly, so long as some principle greater than human desire is a *sine qua non*, the applicable theory becomes deontological not consequentialist because no matter how dire, the event of an adverse consequence no longer dictates the correct outcome of any given

Accenting the upright and the honorable, in stark contrast to consequentialist theories, Deontology focuses on what individuals and groups must do, how they must comport themselves regardless of any personal preferences otherwise inducing them to behave differently from that which morality mandates.⁴⁶ Deontologists so conclude because morality antecedes and, therefore, is not dependent on Humankind for either its reality or its meaning. Rather, morality comprises immutable, *a priori* propositions,⁴⁷ part of the natural order of all things, and regardless of culture, history, or politics applicable to every human being, and their respective groups, corporations, cultures, governments and other collectives.⁴⁸ As jurisprudent Edward S. Corwin explained nearly a century ago:

moral dilemma. Bayer II, *supra* note 17, at 322-28 (discussing various refined consequentialist theories attempting to include principles of right).

46. Sometimes theorists employ different terms for essentially identical propositions. For example, Professor Michael Dorf used the alternative terms 'realist' and "anti-realist."

[M]oral philosophers may be divided into realist and anti-realist camps. A moral realist believes that moral propositions are true, even though we lack the tools to prove their truth. Moral anti-realists deny this, and accordingly interpret moral statements such as 'slavery is wrong' as expressing preferences or emotions of the speaker. Thus, according to the moral anti-realist, the speaker means to say that he dislikes slavery or slavery makes him feel bad.

Michael C. Dorf, *Review Essay: Truth Justice, and the American Constitution, Freedom's Law: The Moral Reading of the American Constitution*, 97 COLUM. L. REV. 133, 145 (1997). (citing DENNIS PATTERSON, *LAW AND TRUTH* (Oxford U. Press 1999)).

As the terms *Deontology* and *Consequentialism* (along with its massive offshoot *Utilitarianism*) predominate, those are the idioms this writing will employ.

47. *A priori* means, "Relating to or denoting reasoning or knowledge which proceeds from theoretical deduction rather than from observation or experience." *A Priori*, *ENGLISH OXFORD LIVING DICTIONARIES* (2d ed. 2017) https://en.oxforddictionaries.com/definition/a_priori (accessed August, 19, 2017).

48. It must be axiomatic, of course, that the deontological principles constraining individual actions likewise constrain the various groups to which those individuals belong. Otherwise, individuals could escape their moral duties simply by forming groups, thereby pursuing immoral activities and attaining immoral ends not as individuals, but as collectives. Certainly, no moral theory is either apt or useful if its edicts as applied to individual persons legitimately may be circumvented by joining like-minded others to act collectively. *See e.g.*, Wood, *supra* note 33, at 37; THOMAS L. PANGLE, *THE PHILOSOPHIC UNDERSTANDINGS OF HUMAN NATURE INFORMING THE CONSTITUTION IN CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, HISTORICISM, MARXISM, FREUDIANISM, PRAGMATISM, EXISTENTIALISM . . .* 52-53 (Allan Bloom ed., 1990) (discussing Locke and Montesquieu); Bayer II, *supra* note 17, at 297-99.

Homicide, for instance, must remain immoral whether perpetrated by Al Capone or by Murder, Inc. *See generally*, Bayer II, *supra* note 17, at 297-99

There are certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. . . . They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are . . . merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration.⁴⁹

Thus, “A deontologically prohibited type of conduct is wrong always and everywhere.”⁵⁰ That is because, “from a deontological perspective, certain choices are inherently evil and can never be justified, even if they would bring about a good outcome.”⁵¹ By logical contrast, deontologically allowable conduct is right “always and everywhere” because, by definition, “If a course of conduct on the part of any person P is covered by deontological permission, then P’s engaging in that conduct is not wrong in any respect regardless of the consequences that it causes or is likely to cause.”⁵²

From this dominance of the right over the good, deontologists derive the startling, hugely uncomfortable, counterintuitive reality that outcomes simply do not matter. They are utterly irrelevant and, indeed, dangerous in their propensity to distract from discerning the right moral answer to whatever ethical issue, great or small, is under consideration. Therefore, moral reality cannot depend on how any given person or collection would prefer to act, nor on what outcomes or results any given person or collective would like either to occur or avoid. Even more startlingly, moral comportment may require persons or groups to act in ways producing truly horrific outcomes that any reasonable person vehemently would lament. Certainly, one may hope the right outcome likewise will be a good outcome but; the possibility exists that the right outcome may not be the one that makes either the most people or a certain segment happy.⁵³ Indeed, the

49. Edward S. Corwin, *The “Higher Law” Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928) (quoted in, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 U.C.L.A. L. REV. 639, 659 (2005)).

50. Kramer, *supra* note 35, at 21.

51. Blum, *supra* note 35, at 38 n.165.

52. Kramer, *supra* note 35, at 20.

53. See Wood, *supra* note 33, at 262; Bayer II, *supra* note 17, at 294.

right outcome may cause great harm to innocent persons who have done nothing to deserve such harm.⁵⁴

By demarcating the immutably right from the immutably wrong, morality knows no compromise.⁵⁵ The respected Enlightenment

54. To mention one of the most prominent examples, if torturing a suspected terrorist is immoral, then the suspect may not be tortured even if almost certainly she knows where a primed nuclear bomb is hidden and even if under torture she likely would reveal the bomb's location, thus saving tens of thousands of lives, preventing tens of thousands of injuries, and, forestalling tens of millions of dollars' worth of property damage. See e.g., RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 81 (2006) (criticizing the deontological stance regarding the ticking time bomb scenario among others); see also ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS 215 (2007).

55. In an often cited and quoted work, Arthur Kuflik offered that "willingness to compromise is often viewed as a profound 'expression of moral goodwill.'" Fred S. Hjelmeset, *Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 CLEVE. ST. L. REV. 75, 81 n. 19 (1995) (describing 1995 Judge John M. Manos Writing Competition on Evidence) (quoting, ARTHUR KUFLIK, *Morality and Compromise*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS 38 (J. Roland Pennock & John W. Chapman eds., 1979)). Kuflik elucidated,

There is at least an air of paradox surrounding the connection between morality and compromise. As we want to say that the person of good-will is a person of firm principle, we are often inclined to suppose that the willingness to compromise is a sad but sure sign of moral turpitude. ... Of course, to affirm that compromise is in many cases morally commendable is not to deny that at times it is reprehensible.

Id. at 81 n. 21 (quoting, Kuflik at 38, 52).

With respect, Kuflik misperceives the nature of moral obligation. Under deontological principles, compromise can be an act of "moral good will," accordingly, one rightly may, "affirm that compromise is in many cases morally commendable" only if the particular compromise itself is moral. Put slightly differently, *there is never a moral obligation to compromise because, if the given matter raises a moral issue, the sole choice is to act morally*. Therefore, to compromise in a moral fashion may be "morally commendable" when and only when the compromise itself is moral. But, as there is never an obligation to compromise on moral matters, an immoral compromise that pleases others is never "morally commendable;" nor can pleasing others turn an immoral compromise into an act of "moral good will" although the compromiser intended to make others happy, this seemingly expressed a "good will."

For instance, if the issue is where to have dinner, Smith may feel strongly in favor of steak while her friend Jones may be vegan and the three others in the party do not care deeply. Unless Smith affirmatively promised otherwise, in which case her promise created a moral duty, Smith has no obligation to compromise in favor of veganism any more than Jones, absent a promise, has a duty to compromise by eating at a steakhouse where there may be few if any vegan choices. So, if Smith agrees to forgo meat that evening by eating at a vegan restaurant that pleases Jones, she and the three others may carelessly say that Smith's compromise was "morally commendable" in that, Smith ended what might have become a needlessly prolonged and aggravating quarrel among friends by compromising

philosopher Immanuel Kant, whose deontological moral theory essentially has been adopted, albeit without attribution, by the Supreme Court,⁵⁶ was not being hyperbolic when he wrote, “*Fiat iustia, pereat mundus*,” that is, “Let justice be done even if the world should perish.”⁵⁷

At the risk of understatement, then, deontological morality is a harsh, unbending, and, unforgiving taskmaster that cares nothing about what people want, nor whether following its inflexible edicts results in catastrophic harm to the blameless as well as the blameworthy. A course of conduct either is moral or it is not. Consequently, people either act morally or they do not. Because immoral conduct by definition is wrongful regardless whether we wish it were otherwise, there simply is no excuse for failing to abide by whatever morality commands. We may understand, even sympathize with those who act immorally, but understanding and sympathy cannot excuse immoral behavior, nor transform immorality into morality.

her preferences. They might add that Smith’s compromise is all the more “morally commendable” because as Jones is vegan, she could not comfortably have eaten at a steakhouse while, because Smith likes meat but has no dietary limitations, she can enjoy food at a vegan restaurant.

However, while Smith’s peacemaking may be *commendable*, it was not morally required and thus is not “morally commendable” because it made peace, rather it was arguably “morally commendable” because it was not immoral for Smith to compromise her then-preference for steak to accommodate her friend. But, had Smith promised the other three that she would support eating at a steakhouse, her compromise would have been immoral as promise-breaking unless she affirmatively asked for and received a release from those to whom she made that promise.

56. See *infra*, Part II, Section 3-d (Kant’s theory of morality and human dignity), and, Bayer, *supra* note 23, Section 6-c-5 (how the Supreme Court has applied Kantian dignity theory as the framework for substantive due process).

57. IMMANUEL KANT, PERPETUAL PEACE AND OTHER ESSAYS 133 (Ted Humphrey trans., 1983). Prof. Rabkin offers an interesting sidebar which, as Rabkin notes, does not really diminish the meaning of Kant’s unrelenting sentiments: “Kant himself somewhat flinches from the implications of this motto, rendering it (in Humphrey’s translation) ‘Let justice reign, even if all the rogues in the world should perish.’ But the righteous would perish with the rogues if ‘the world should perish.’” Jeremy Rabkin, *American Self-Defense Shouldn’t Be Too Distracted by International Law*, 30 Harv. J.L. & Pub. Pol’y 31, 49 (2006). IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 102 n.16 (Pauline Kleingeld ed., David L. Colclasure trans., 2006).

b. Why Deontology Must Be Correct -- the Consequentialist Error --

Interestingly, there are no alternatives between these two diametrically opposing perspectives; that is, there is no third choice, one either must be a deontologist or a consequentialist. True, there are different proposed varieties of Consequentialism and Deontology some of which attempt (but fail as we will see) to be simultaneously partially deontological and partially consequentialist.⁵⁸ Regardless, any paradigm of moral theory must embrace either Consequentialism or Deontology as *its sine qua non*, not both.⁵⁹ That is because either, as Deontology claims, morality is transcendent, inherent in the natural order of existence and, thus, not in any fashion or measure the product of human imagination, or, as Consequentialism claims, morality is a human invention wherein whatever engenders the greatest happiness for some designated person or group is the morally correct answer to the relevant moral dilemma. Morality cannot be partially deontological and partially consequentialist, nor can there be a third option because either morality is in whole or part a human creation or it is not. As the two are the only options, and as the two are irredeemably incompatible, one of the theories -- Consequentialism or Deontology -- must be right and the other must be wrong.⁶⁰ Accordingly, disproving one inevitably means the second must be correct.⁶¹

58. See *infra*, notes 161-78 and accompanying text.

59. This article's Section 4 on Originalism discusses *virtue ethics originalism* which claims that understanding the meaning of the Constitution should be based on moral theory known as "virtue ethics." Briefly, virtue ethics proposes that human conduct should be guided by certain ennobling characteristics such as forthrightness and integrity. Accordingly, virtue ethics is a "middle level" theory because it lacks a paradigmatic principle defining morality. As its proponents recognize, virtue ethics is not enough to define moral precepts because we do not know from that theory itself whether the applicable virtuous qualities are humanly invented or emanate from the natural order of existence. See *supra*, notes 539-61 and accompanying text.

60. Therefore, by averring that Deontology is the correct theory of morality, I am not committing, "a textbook example of what logicians call the fallacy of black-and-white reasoning. The fallacy consists of falsely positing that there are only two alternatives, and then purporting to prove one by disproving the other." Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1282 (1997).

61. The proposition recalls the famous and logically sound observation of author Sir. Arthur Conan Doyle's beloved fictional character, the brilliant "consulting detective" Sherlock Holmes, "How often have I said to you that when you have eliminated the impossible, whatever remains, however improbable, must be the truth?" Sherlock Holmes, *The Sign of the Four*, ch. 6 (1890), <http://www.bestofsherlock.com/top-10-sherlock-quotes.htm#impossible> (accessed on February 17, 2017) (emphasis in original).

Given centuries of impassioned debate continuing to the present, one might expect that demonstrating Deontology's correctness and Consequentialism's erroneousess is not simply difficult but perhaps impossible. After all, unless no actual answer existed, it seems intuitively unlikely that the accumulated wisdom and experience of Humankind over millennia would have failed to resolve absolutely a philosophic matter as basic as: Is morality a construct of human beings or is it extra-human, originating from the very nature of existence? The persistence of disagreement over Deontology versus Consequentialism implies no definitive resolution exists and that, unlike, for example, science or mathematics, the meaning of morality is merely a matter of opinion wherein one's estimation arguably is as cogent as another's.

Yet, Deontology's rightness is so palpable and Consequentialism's infirmities shimmer with such sharp clarity, that one can only surmise the persistence,⁶² actually the petulance of anti-deontologists evinces understandable resistance to a moral philosophy that, as Kant understood,

62. For example, Professor Simon asserted in a conclusory manner, "All I am trying to establish at this time is that in arguing about constitutional interpretation, 'goodness' and 'justice' are exactly what we ought to be, and the only thing we could coherently be, arguing about. ... In my opinion, no 'objective truth' stands behind justification." Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482, 1488 n. 20 (1985). Similarly, Justice William Brennan, echoing principles often stated in judicial opinions, boldly but unprovenly averred, "that a state's interest in suppressing obscenity was 'predicated on unprovable, although strongly held, assumptions about human behavior, morality, sex, and religion,' and that such assumptions could not validate a statute substantially undermining the guarantees of the First Amendment."

Manuel Possolo, *Morals Legislation After Lawrence: Can States Criminalize the Sale of Sexual Devices?*, 65 Stan. L. Rev. 565, 575 (2013) (quoting, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 109-10 (1973) (Brennan, J., dissenting) (emphasis added)); see also, Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. Ill. L. Rev. 363, 438-39 (2004) ("My defense of compatibilism begins with the unprovable but common and plausible assumption that morality and its practices, including blame and punishment, are human constructs and that there are no metaphysical moral facts about the universe to which our moral judgments and practices may appeal."); Julie Turner, *Ill-Gotten Gains: Evasion, Blackmail, Fraud, and Kindred Puzzles of the Law* by Leo Katz. Chicago: The University of Chicago Press, 1996. Pp. Xiv, 293. \$29.95 Cloth., 84 Cal. L. Rev. 1492, 1494 (1996) (discussing, the "irretractably unprovable nature of morality").

Such sentiments led one commentator observed perhaps hyperbolically, "Moral values are generally ignored as being subjective and/or indemonstrable and/or unscientific in contemporary legal discourse. As a result, economic analysis is ascendant. This is because economic analysis can claim to be objective, and thus scientific." Eric Engle, *Knight's Gambit to Fool's Mate: Beyond Legal Realism*, 41 VAL. U. L. REV. 1633, 1676 (2007) (footnote omitted).

requires the obliteration of Humanity if nothing else will prevent an immoral outcome.⁶³

Doubtless, at first blush, it seems peculiar to claim, as does Deontology, that assessing the relative harm of possible outcomes is not only irrelevant but is actually a treacherous distraction likely to thwart discerning the true moral answer. One might suppose that any outcome in which many are hurt and few are bettered is, if not immoral *per se*, likely to be proved immoral due, at least in part, to that outcome's starkly disproportional harm. Regardless, Consequentialism as a moral theory simply is impossible; that is, no rational moral theory could be grounded on consequentialist principles.

The ineptness of Consequentialism is blatant because it has no bases -- no standards -- to judge whether the ends -- the goal of optimal happiness -- and means that maximize happiness are worthy in and of themselves, that is, whether they are inherently commendable. Consequentialism proposes that morality is defined not by its content, but by some empirically deduced measure of acceptance, whether it be acceptance by the majority, by a powerful elite, by a purported group of experts, or some other designated individual or group. Indeed, as Profs. Zamir and Medina correctly asserted, there are no inherent limits to what consequentialist morally will justify to maximize the designated group's aggregate happiness: "The first critique is that Consequentialism allows too much. Consequentialism imposes no restrictions on attaining the best outcomes, thus legitimizing and even requiring harming people, lying and breaking promises to achieve desirable ends."⁶⁴ Conflating what "is" with what "ought to be" engenders a morality of popularity, not principle.

Thus, the uncomplicated, easily identified and just as easily understood fatal flaw of Consequentialism is that any theory delineating moral correctness as that which most pleases either greater Society or some favored group or individual, abdicates the very meaning of morality to the selfish preferences of that Society or favored member. Such preferences may be deeply held, persisting long enough to become honored traditions, even revered norms. They may be not only intense and enduring, but honest and noble in that adherents truly believe that the specific preferences they assert are best for Society. But, none of that really matters. No matter how sincere and seemingly unselfish any given consequentialist

63. See *supra* note 57 and accompanying text.

64. Eyal Zamir & Barak Medina, Law, Economics, and Morality, 96 CAL. L. REV. 325 (2008).

proposition may be, its merit is no better than the demands of a petulant child because the “but-for” cause -- the *sine qua non* -- the defining premise -- of the particular moral proposition is that its advocate wants it. Indeed, under Consequentialism, wanting something -- maximizing one’s happiness -- is all the justification one needs so long as some sufficient number of sufficiently dominant others agree. We may call this: *the consequentialist error*.⁶⁵

The definition of morality cannot depend simply on an empirical assessment of competing groups favored outcomes absent an independent, impartial reckoning of the inherent rightness of one outcome over

65. Professor Kramer offered a fascinating corollary to Consequentialism’s inherent infirmity: under a consequentialist regime, “one’s sole fundamental moral obligation is to contribute maximally to the realization of the [particular] commended objective [at issue.] ... In the eyes of consequentialist theorists, the lone source of moral obligatoriness is the conduciveness of this or that mode of conduct to the maximal attainment of the desideratum or set of desiderata which the theorists favour.” Kramer, *supra* note 35, at 12. Certainly, Consequentialism’s potential for tyranny is clear in that, to maximize happiness, the relevant government could require unwilling others to perform acts that “contribute maximally to the realization of the [particular] commended objective.” But, contrary to Kramer’s assertions, such oppressiveness is neither mandatory nor inevitable.

In a non-totalitarian nation with democratic institutions, policies arise in substantial part from the way people vote, with votes presumably expressing what maximizes the happiness of the voters. The perfectly moral outcome of the democratic process is that the losers have an obligation to act in ways that comport with what the winners won, but such does not inevitably require the losers to “contribute maximally to the realization of the [particular] commended objective.” (Emphasis added.) Rather, in many, perhaps most instances, all they will need to do is not unlawfully interfere with, rather than affirmatively promote the “commended objective.” For example, although I might oppose a war that my nation has commenced -- therefore, I am not part of the national group whose aggregate happiness is maximized by that war -- I nonetheless must obey lawful orders or face prosecution, such as complying with a draft notice, pay relevant taxes that fund the war, and, observe regulations requiring rationing and other sacrifices to prosecute the war. But otherwise, I do not have to support the war effort such as buying government bonds issued to help finance the war, joining pro-war rallies, or supporting charities to help soldiers and their families.

Moreover, I am free to advocate my opposition to the war through speeches, writings, peaceful assemblies, and, other such lawful protests. Indeed, consistent with consequentialist principles, I ought to be free to oppose actively whatever at present is maximizing happiness, such as the war in the above example, in the hope of changing peoples’ minds, thus shifting the aggregate happiness balance to what makes me happy. Because, Professor Kramer has overstated his point by asserting as a *per se* maxim that, “under a consequentialist regime, “one’s sole fundamental moral obligation is to contribute maximally to the realization of the [particular] commended objective,” I have not based my argument that Consequentialism in and of itself is an unfeasible moral theory on Kramer’s assertion.

alternative others.⁶⁶ Indeed, over two millennia ago, the great philosopher-attorney Cicero recognized that very proposition.⁶⁷ Beginning with his assertion that “Law” is immutable, “the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite,”⁶⁸ Cicero drew the logical conclusion:

The most foolish notion of all is the belief that everything is just which is found in the customs or laws of nations. . . . But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace.⁶⁹

Consistent with Cicero’s irrefutable logic, Professor Sagoff brusquely but aptly characterized consequentialists’ perception of morality as, “a notion of the good based on sheer preference or inclination, a conception so shallow, arbitrary, heteronomous, and mired in contingency that no one could defend it in the first place.”⁷⁰ If arguably surly, Sagoff’s dismissive tone is pardonable. No advanced degree in Philosophy is needed to understand that a moral theory based on individuals’ or groups’ subjective pursuits of happiness would have to concede the moral fitness of, *inter alia*, slavery, genocide, homicide, rape, racism and any other similar atrocity if that atrocity happened to produce more happiness than unhappiness.⁷¹

66. Bayer II, *supra* note 17, at 295.

67. Armando Gustavo Hernandez, *Delineating Defects: A Primer on Florida Product Liability Law* (2017), 30 St. Thomas L. Rev. 141, 179 (2018) (“See generally Marcus Tullius Cicero, HISTORY CHANNEL, <http://www.history.com/topics/ancient-history/marcus-tullius-cicero> (last visited Mar. 18, 2018) (noting how Cicero was one of the “greatest orator[s] of the late Roman Republic” as well as “[a] brilliant lawyer ... [who] was one of the leading political figures of the era of Julius Caesar, Pompey, Marc Antony and Octavian”).

68. MARCUS TULLIUS CICERO, *Laws-Book I*, in THE GREAT LEGAL PHILOSOPHERS: SELECTED READINGS IN JURISPRUDENCE 44 (Clarence Morris ed., University of Pennsylvania Press, 1959) (quoted in, Douglas W. Kmiec, *Natural Law Originalism for The Twenty-First Century - A Principle of Judicial Restraint, Not Invention*, 40 SUFFOLK U. L. REV. 383, 391 (2007)).

69. *Id.* at 47-48 (quoted in Kmiec, *supra* note 67, at 391).

70. Mark Sagoff, *The Limits of Justice*, 92 YALE L.J. 1065, 1079 (1983) (reviewing MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982)).

71. “Classic utilitarianism does not deal with intensity of feelings, but rather only with the number of people affected.” Stephanie Loomis-Price, *Decision-Making in the Law: What Constitutes A Good Decision - the Outcome or the Reasoning Behind It?*, 12 Geo. J. Legal Ethics 623, 638 note 20 (1999) (note); *but see, e.g.*, Bird-Pollan, *supra* note 43, at

Similarly, consequentialism notoriously can justify killing knowingly innocent individuals to prevent purportedly worse outcomes than the deliberate slaying of the blameless.⁷² Indeed, if the greater happiness

726 (“[R]obust utilitarianism evaluates pleasures based not merely on their intensity or duration, but also on the quality of the pleasure, ...”). Nonetheless, certainly it is possible that, taking intensity into account, the unhappiness of a minority might outweigh the happiness of the majority, but, that hardly assures that the consequentialist outcome is just. Let us suppose in a population of fifty individuals, there are forty white persons who wish to enslave the ten black persons. Possibly, the accumulated unhappiness of the ten black slaves would far exceed the combined happiness of the forty white persons, especially presuming that slaves are not co-owned so that only a maximum of ten white persons would each own a slave. But, if, for some reason, the white persons’ love of enslaving the black persons exceeds the latter’s misery, then under Consequentialism, the regime of slavery is moral.

Let me further state in passing that examples such as the above involving slavery seem to immediately spring to mind when considering the *bona fides* of competing moral theories. I certainly make no claim of originality; but, rather, present this and other examples as emerging from the common sense imagining of which all of us are capable. For example, Meir Dan-Cohen observed, “One way in which slavery serves as a counterexample to utilitarianism is by exposing and targeting its aggregative aspect: As long as enough people are sufficiently benefited by slavery, the institution is justified on utilitarian grounds, no matter how wretched the slaves’ lives turn out to be. Utilitarianism is here castigated for its willingness to sacrifice some people in order to benefit others.” Meir Dan-Cohen, *Basic Values and the Victim’s State of Mind*, 88 CAL. L. REV. 759, 768 (2000) (citing *see, e.g.*, R. M. Hare, *What Is Wrong with Slavery*, 8 PHILOSOPHY & PUBLIC AFFAIRS 103 (1979)); *see also e.g.*, John Rawls, *Justice as Fairness*, 67 PHIL. REV. 164, 188 (1958)

72. *E.g.*, Adam Slavny, *Alon Harel on How To Deliberate Permissibly*, 11 CRIM. L. & PHIL. 833, 834 (2017) (“Consequentialists typically think that harming for the greater good is fundamentally permissible ... whilst non-consequentialists typically think that it is not.”); J. G. Moore, *Criminal Responsibility and Causal Determinism*, 9 WASH. U. JURIS. REV. 43, 77 (2016) (“Indeed, as Hart suggests, consequentialism could lead to punishing the innocent if doing so would maximize the desired good.”) (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 82 (2d ed. 2008)); Brian Neill, *A Retributivist Approach to Parental Responsibility Laws*, 27 OHIO N.U. L. REV. 119, 125 note 42 (2000) (H.J. MCCLOSKEY, A NON-UTILITARIAN APPROACH TO PUNISHMENT, IN CONTEMPORARY UTILITARIANISM 239, 244–49 (Michael D. Bayles ed., 1968) (posing a hypothetical where utilitarianism would condone killing an innocent African American for the rape and murder of a white woman when the real culprit could not be found and a threat of vigilante groups killing dozens of innocents existed).

Indeed, regarding events most notorious among the history of human evil, Prof. Howard F. Chang recently and similarly explained regarding the purported unlikelihood of a utilitarian justification for the “Final Solution,”

It is not “obvious,” however, that the [a consequentialist justification] requires a “fantastic” intensity of desire among the Nazis. We can simply increase the number of Nazis and reduce the number of Jews in the hypothetical until the benefits of “ethnic cleansing” (or perhaps even genocide) exceed the costs. Under utilitarianism, for any given intensity of satisfaction for each Nazi and any given

derives from executing or torturing persons who disagree with the happy majority's or elite's principles, then those executions and torture are moral.⁷³ Such is the moral theory of a petulant child who equates fairness with being told "yes" and unfairness with being told "no."⁷⁴ A moral theory must have more to it than a major premise of, "This makes me feel good."⁷⁵

amount of suffering for each Jew, there must be some ratio of Nazis to Jews that would be large enough to justify the policy in question. [R.M.] Hare apparently believes that the necessary ratio would border on "fantasy," but given the intensity of violent ethnic hatreds we observe in the world, it is not "obvious" that such a ratio is necessarily "fantastic," especially if we assume a very small number of victims.

Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 Yale L.J. 173, 181 (2000) (quoting, R.M. Hare, Comments, in Hare and Critics 199, 245 (Douglas Seanor & N. Fotion eds., 1988), and citing, John C. Harsanyi, Problems with Act-Utilitarianism and with Malevolent Preferences, in Hare and Critics 89, 96).

73. To offer still another distressing example, thanks to modern science, the organs of a fit persons may be transplanted to save the lives of many others. Accordingly, Consequentialism could morally condone the random abduction and euthanizing of healthy persons so that their harvested organs can save numerous others, and, as well, enhance the lives of still more. One individual might supply to otherwise doomed persons, a heart, two lungs, two kidneys, a liver (or more if the liver can be safely cut into working portions), blood, and, bone marrow. Thus, the euthanizing of one human being, willing or otherwise, could save eight or more lives. Plus, the eyes, skin and other portions of the sacrificed person could enhance the quality of life of many others which alone would not justify killing an unwilling healthy person but brings added value. Given the simple utilitarian calculus that saving many lives at the cost of one is moral, Consequentialism could justify euthanasia of the unwilling to serve the greater good. Cf., Kurt Darr, *Physician-Assisted Suicide: Legal and Ethical Considerations*, 40 J. Health L. 29, 42 (2007) ("The elderly and those with severe chronic and degenerative diseases may believe that, as in the Netherlands, they are at a higher risk of active, involuntary euthanasia because of the effects of an express or implied utilitarian calculus that will value their lives as less worthy."); but see, Hon. Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 Harv. J.L. & Pub. Pol'y 599, 677-90 (2000) (arguing that empirical research debunks utilitarian justifications for assisted suicide and euthanasia).

74. It is no response to assert, for example, that, at least in extreme cases, people have the fortitude to set aside their selfish preferences for the sake of the greater good. Therefore, more people will oppose immoral conduct such as slavery than will support it. Even assuming such likely is true, if in a given society the presumption fails, as history recounts has occurred persistently and continues to occur at present, Consequentialism will validate the conduct whether slavery, Nazi concentration camps, laws permitting persons to rape their spouses, or any other horrid abuse of human beings. See, Chang, *supra* note 74, at 181.

75. Altruism, if such exists, does not disprove the criticisms against Consequentialism. For instance, a person who espouses moral proposition X that makes her personally unhappy but, in her assessment, increases aggregate societal happiness is not being unselfish. The reason is clear. The unhappiness she feels by supporting X is less than the dismay should

For these reasons, since I first embarked on studying moral issues, I have not budged an iota from the conclusion I drew five years ago, “Human desire alone may demonstrate the good but it is insufficient to prove the right unless one simply wishes to define morality as a state of nature -- pursuing whatever one wants by whatever means one wishes. Thus, a consequentialist definition of morality is both unremittingly circular and distressingly self-indulgent.”⁷⁶

c. Experience and the Processes of Deontology --

Doubtless, personal preferences -- maximizing happiness and minimizing unhappiness -- may be the starting point of analysis.

Contrary to a frequent criticism by consequentialists, deontologists fully appreciate that contemplating the experience of one’s life is a formative step in the process of discovering and applying moral precepts. The pursuit of timeless morality does not require deontology

would endure by opposing X to promote her immediate good. In other words, apparent selflessness is more pleasing to this person than would be apparent selfishness; she is indulging the greater selfishness of promoting the interests of others because by doing so, she makes herself happier than if she opposed X.

76. Bayer II, *supra* note 17, at 296 (footnote omitted).

Importantly, that Consequentialism is an inadequate moral theory does not mean that its utilitarian aspects are inapt for all human conduct. To the contrary, *within the realm of moral conduct*, Consequentialism is the way people choose from among competing moral choices when resources such as time, finances, physical capacity, and, other factors mean that one cannot do everything one would like, at the given time, in the given place. In other words, choosing among moral “pursuit[s] of happiness,” requires a consequentialist approach. “In regard to manifold sets of circumstances, a consequentialist emphasis on balancing is entirely appropriate; countless sets of circumstances do not pose any moral conflicts.” Kramer, *supra* note 35, at 12.

For example, Smith has \$5,000 to spend as she wishes. She would like to buy a new television, go on a vacation and save some of that money for retirement. Her \$5,000 will not buy the perfect TV set, nor buy the perfect vacation, nor provide fully for Smith’s retirement. Therefore, using the principles of Consequentialism, Smith will decide whether she wants to use her available cash to get the best TV she can, or buy the best vacation she can, or put it all towards enhancing her retirement fund, or choose to spend the money on some combination of her preferences. Any of these consequentialist choices are moral because, absent additional facts, Smith’s desires for a new television, for a vacation and for enhancing her retirement fund, are moral pursuits. But, while it can tell Smith how to spend her \$5,000, Consequentialism cannot tell us why those choices are moral.

to ignore “all empirical facts about the world, including all facts about human beings, as irrelevant to explaining the nature of morality.”⁷⁷

Likewise, the arch deontologist Immanuel Kant⁷⁸ aptly understood that, “Though all of our knowledge begins with experience, it does not follow that it all arises out of experience.”⁷⁹ Deontologists have no quarrel that individuals’ chosen preferences and beliefs “give individuals identity and character; they reflect what they are, not just what they want.”⁸⁰ That starting point, however, cannot be part of the ending point. Rather, proof of a moral argument must stand on its own, unattached to any outcomes the proposer prefers or abhors; otherwise, we cannot judge whether the proposed morality truly is apt or, instead, is a ruse to attain the proposer’s desired result.

d. The “Consequentialist Error” and Three Related Specious Presumptions Against Deontology

Despite its manifest correctness, critics both legal and otherwise tend to dismiss Deontology by resorting to what I denoted above as *the consequentialist error*: presuming without explication that morality is a human creation reflecting the preferred outcomes of one or more individuals, or of one or more groups, or of greater Society; and that, even were it otherwise, our innate inability to understand fully metaphysical morality renders any attempt useless, indeed dangerous. The consequentialist error is predicated on three interrelated and equally fallacious modes of reasoning. First, critics habitually assume that because morality is an idea the appliances of which depend solely on human behavior, it cannot exist independently from human imagining; accordingly, morality could not have emerged from some natural order of

77. Bayer II, *supra* note 17, at 305 (quoting, Bernard Gert, MORALITY: ITS NATURE AND JUSTIFICATION 241 (2005)).

78. See *infra* Section 3.

79. Murphy, *supra* note 39, at 14 (quoting Immanuel Kant, Critique of Pure Reason 1 (2d ed. 1787)); see also, Wood, *supra* note 33, at 28. As Professor Wright explained, “Kant sensibly recognizes that the duty of [morality] . . . cannot be determined by a precise universal rule, because context and circumstance play important roles. The exercise of judgment is necessary to decide particular cases.” R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 278 (2002) (discussing Immanuel Kant, The Metaphysics of Morals 156 (Mary Gregor ed. & trans., 1996) (1797)).

80. Sagoff, *supra* note 72, at 1070.

existence that would persist absent human intervention as do planets and galaxies -- physics, biology and chemistry -- due to the Big Bang and its aftermath.⁸¹ The second assertion, often conjoined with the claim that morality can have no existence outside of the human imagination, is that because purportedly thoughtful academics earnestly disagree, there cannot be one provably correct concept of morality from which to discern equally true sub-principles to resolve any given moral dilemma.

Particularly relevant to constitutional analysis, like morality, the third false avowal avers that law does not deal with “absolutes,” but rather, law enforces personal preferences sufficiently shared throughout a given community to be formally legitimized into law.⁸²

Addressing together these three objections to Deontology as they seem to come in tandem, one odd and, frankly, annoying aspect is that commonly critics assume that morality’s subjective character is too obvious to require thoughtful explication supported by cogent authority. Such dismissive attitudes, entirely inconsistent with proper research and analytical methodology, rightly would not be tolerated in any other analytical context, especially judicial opinions⁸³ and scholarly excursions

81. “The big bang theory holds that an unknown singularity exploded and transformed itself into an ordered universe with fixed laws.” Jeffrey F. Addicott, *Storm Clouds on The Horizon of Darwinism: Teaching the Anthropic Principle and Intelligent Design in the Public Schools*, 63 OHIO ST. L. J. 1507, 1584 n. 455 (2002) (citing inter alia, Arthur S. Eddington, *The End of the World: From the Standpoint of Mathematical Physics*, 127 NATURE 447, 450 (1931); Timothy Ferris, *THE WHOLE SHEBANG* 17 (1997)).

82. While technically the third fallacy concerns legal, not purely abstract moral theory, it is so closely related to moral theory that discussing it here makes more sense than presenting such legal theory as part of this article’s Part II, Section 4’s discussion of constitutional law. Deflating all three related fallacies together saves space, thereby avoiding any redundancy or confusion that would result if this analysis were divided between two separate sections of this article.

83. Courts traditionally pride themselves on demanding empirical and logical proof while, concurrently, eschewing as manifestly improper, ruling in favor of parties’ unproven assertions of law or fact. For example, in 2005 the Supreme Court noted, “Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States’ unsupported assertions. Under our precedents, which require the ‘clearest showing’ to justify discriminatory state regulation ... this is not enough.” *Granholm v. Healed*, 544 U.S. 460, 490 (2005) (quoting *C & A Carbone, Inc.*, 511 U.S. 383, 393 (1994)); see also e.g., *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 438-39 (1968) (“[T]he record contains solid facts ... point[ing] to the probable existence of valid and valuable causes of action. Balancing these facts are nothing but bald assertions to the contrary and general conclusions for which foundations nowhere appear.”); *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 534 (5th Cir. 2016) (quoting *Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978) (“[B]ald assertions of ultimate facts are ordinarily insufficient to support

into legal theory,⁸⁴ particularly when interdisciplinary.⁸⁵ As Robert F. Gerooge succinctly stated the crucial if unsurprising premise, “Any philosophy worth entertaining must be capable of providing an intelligible (coherent, internally consistent, plausible) account of itself. Its claims must square with its own premises, other claims and implications. This is true of skeptical philosophies, as much as non-skeptical ones.”⁸⁶

There likewise is no reason to tolerate conceptual laxity when discussing the nature and application of morality. Doubtless, instinct, experience, purported “common sense” and homely wisdom may disclose much;⁸⁷ but, morality and its legal applications are complex, often

summary judgment.”); *Yufa v. TSI, Inc.*, 652 Fed. Appx. 939, 947 (Fed. Cir. 2016) (“unsupported assertions are insufficient to defeat summary judgment. See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) (a party may not avoid a motion for summary judgment by resting on “conclusory allegations of the complaint” or by answering “with conclusory allegations of an affidavit.” (citation omitted)).”); Michael J. Garrisona and J. David Reitzel, *Zoning Restrictions and Marketability of Title*, 35 REAL EST. L. J. 257, 278 (2006) (“The courts’ failure to articulate a cogent legal theory for the ‘existing violation’ exception creates uncertainty in its application.”).

84 *E.g.*, Jack Goldsmith and Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153 (2002) (“Scholarship generally, not only in law or political science, should ground its empirical assertions in warranted inferences from sound evidence, should admit to causal and empirical uncertainty where it exists, should avoid tendentiousness and selection bias, and should follow the best statistical practices when making statistical claims.”); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1441 n. 91 (2006) (quoting Goldsmith and Vermeule).

85. Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 521 (1997) (“[L]egal scholarship needs to rely on other methodologies, particularly social science, to provide an understanding of the forces that act upon the legal system and of the impact of legal decisions.”).

86 Robert P. George, *Holmes on Natural Law*, 48 VILL. L. REV. 1, 8–9 (2003). George continued,

And the problem is not simply logical, though logical inconsistency, if proven, is damning to any philosophical claim. For the canons of reasoning include elements that go beyond the demand for logical consistency. If, for example, a philosopher lays claim on our attention to consider a proposition he is asserting, we are entitled to count it against his assertion that the claim itself, even if internally consistent, is being asserted, not as true, but as, say, merely his opinion, where he has detached the idea of “opinion” from the concept of truth, such that his opinion is put forward as something other than an opinion about the truth of what he is asserting. Similarly, we need not, and should not, credit a claim being asserted as something other than a proposition we ought to hold because the reasons for holding it are, all things considered, sound, or, at least, sounder than the reasons, if any, for not holding it.

Id. at 9.

87. See *supra* notes 79-82 and accompanying text.

counterintuitive concepts that must be studied earnestly, assiduously and with respect for the subject matter, as one would scrutinize conscientiously the meaning and extent of comparably abstract concepts, legal or otherwise, such as “interstate commerce,” “right to bear arms,” “unreasonable searches and seizures,” and, our Constitution’s bedrock legal principle, “due process of law.”

Nonetheless, the consequentialist error—presuming without explication that morality is an essentially deficient and subjective human creation—is common to American courts and legal commentators who perpetuate the related, ubiquitous, and equally inaccurate proposition that, “As a general rule, law is not a space for [moral] absolutes.”⁸⁸ Agreeing with critics who deny Deontology, the Supreme Court bluntly asserted that, “We do not think the [Due Process] Clause lays down any ... categorical imperative.”⁸⁹ In that light, roughly a quarter-century later, Chief Justice John Roberts casually and speciously asserted with neither explication nor elaboration the purported discordance between law and moral truth, “Whatever force th[e] belief [in some principle such as the rightness of same-sex marriage] may have as a matter of moral philosophy, it has no ... basis in the Constitution...”⁹⁰

Hardly surprising, the acerbic Justice Oliver Wendell Holmes, foremost among legal realists, castigated in the typically conclusory manner noted above those who claim that law is predicated on immutable

88. Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT’L & COMP. L. REV. 331, 354 (2012).

89. *United States v. Salerno*, 481 U.S. 739, 748 (1987) (holding that the Bail Reform Act of 1984, 18 U.S.C. § 3142(e), permitting certain pretrial detentions without bail, is not *per se* unconstitutional); *see also e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 591 (2004) (Thomas, J., dissenting, urging that the Constitution sets no “categorical imperatives”). Shortly before *Salerno*, discussing its Establishment Clause jurisprudence, the Court noting that “[O]ur decisions have tended to avoid categorical imperatives and absolutist approaches ...” *Comm. for Pub. Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

90. *Obergefell*, 135 S. Ct. at 2621 (Roberts, C.J., with Scalia and Thomas, JJ., dissenting). Commenting on the specific issue of abortion, the California Supreme Court comparably and erroneously asserted, “we emphasize at the outset that the morality of abortion is not at issue in this case. ‘The morality of abortion is not a legal or constitutional issue; it is a matter of philosophy, of ethics, and of theology. It is a subject upon which reasonable people can, and do, adhere to vastly divergent convictions and principles.’ Our decision in this case does not turn upon the personal views of any justice with regard to that moral issue.” *American Academy of Pediatrics v. Lungren*, 16 Cal. 4th 307, 313-14 (Cal. 1997) (footnote omitted) (quoting, *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 284, 172 Cal. Rptr. 866, 625 P.2d 779 (1981)).

moral precepts. For instance, in 1908, describing states' "police powers," Holmes offered without exposition,

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. ... The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line...⁹¹

Aversion to deontological moral philosophy and its influence on constitutional law is not necessarily limited to so-called "conservative" or "strict constructionist" judges. To offer one example, Justice John Paul Stevens, often classified as a "liberal" prone to expansive readings of constitutional provisions,⁹² likewise curtly asserted that although due process analysis "requires judges to apply their own reasoned judgment...that does not mean it involves an exercise in abstract

91. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355-56 (1908); *see also* *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 70 (1978) (quoting *McCarter*); *U.S. v. Rumely*, 345 U.S. 41, 43-44 (1953) (per Frankfurter, J., quoting *McCarter*); *Gilbert v. U.S.*, 640 F.3d 1293, 1295 (11th Cir. 2011).

Five years earlier, Holmes correctly offered, "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree." *Otis v. Parker*, 187 U.S. 606, 608-09 (1903) (per Holmes, J.). Justice Holmes was perhaps inadvertently astute in *Otis*. Likely, Holmes was reiterating his belief in the political mutability of moral theory which, if true, would estop judges from substituting their personal moral preferences for those expressed in legislation and referenda. However, because as now we know, moral principles are deontological, that is, absolute, pre-existing Humanity, and neutral, judges can lament, but may not "disagree" with moral precepts that define law (although, in the good and neutral quest to discern the actual meaning, judges may disagree that extant elucidations properly depict true, immutable moral standards). Thus, Holmes' observation in *Otis* was apt, but perhaps not for the reasons he thought.

Summarizing Holmes' ideas, then-Professor (later Justice) Felix Frankfurter explained, "For Mr. Justice Holmes, 'principles' are rarely absolute. Usually they are sententious expressions of conflicting or at least overlapping policies. The vital issue is their accommodation. Decisions thus become a matter of more or less, of drawing lines." Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 133 (1927) (footnote omitted).

92. Lee Epstein, William M. Landes, & Adam Liptak, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115, 1125 (2015); Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 800 n. 171 (2015).

philosophy.”⁹³ According to Holmes, Stevens, and similar theorists, any invocation of metaphysics is either false—a facade to make the theorist’s personal beliefs appear impersonal assertions of inherent truths—or such an invocation becomes so vague that its meaning can accommodate anything the theorist wants.⁹⁴ Indeed, both could be true -- the claim of transcendent moral truth could be at once pretense and indeterminate.

Equally, many eminent legal scholars, who otherwise would saturate their scholarly writings with both copious attributions and meticulous coherent expositions, are content to assert as facially obvious the same infirm conclusions. For instance, Professor Broyles opined:

Beyond the Constitution and the laws in our society, there simply is no basis other than the individual conscience of the citizen that may serve as a platform for the launching of moral judgments. There is no conceivable way in which I can logically demonstrate to you that the judgments of my conscience are superior to the judgments of your conscience, and vice versa.⁹⁵

93. *McDonald v. City of Chicago*, 561 U.S. 742, 872 (2010) (Stevens, J., dissenting). Intriguingly acknowledging concepts that animate this article’s thesis, Justice Stevens could not quite bring himself to discard entirely an arguably deontological vision of constitutional law. “Implicit in [the Court’s due process] test is a recognition that the postulates of liberty have a universal character. ... Whether conceptualized as a ‘rational continuum’ of legal precepts, or a seamless web of moral commitments, the rights embraced by the liberty clause transcend the local and the particular.” *McDonald*, 561 U.S. at 871-72 (Stevens, J., dissenting) (quoting *Poe v. Ullman*, 367 U.S., 497, 543 (1961) (Harlan, J., dissenting)). Indeed, Justice Harlan’s concept of due process jurisprudence as a “rational continuum” helps explain why, in fact, fundamental constitutional rights are deontological moral constructs. See *supra* note 23, Part II at section 5-e-3-B-iii (discussing Justice Harlan’s theory).

94. For example, Professor Alford offered that there is an inherent vagueness in judicial decisions based on natural law “that permits invocation of metaphysical principles to support constitutional propositions [that] also has the distinct disadvantage of its transparent indeterminacy.” Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 U.C.L.A. L. REV. 639, 672 (2005) (footnote omitted).

95. D. Scott Broyles, *Doubting Thomas: Justice Clarence Thomas’s Effort to Resurrect the Privileges or Immunities Clause*, 46 IND. L. REV. 341, 356 (2013) (quoting, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976)). Similarly, Profs. Purdy and Siegel aver without proof that because theorists earnestly disagree about what is or is not moral, there cannot be one truly correct set of moral precepts, nor one truly correct resolution of any moral dilemma:

No doubt many [persons] today believe that the moral and philosophical truth of their commitments is independent of current social morality. But there is deep and extensive disagreement over the basis and content of any such reasons and, indeed, whether they exist at all. Absent some means of persuasion that can bridge these

In this regard, let us return to Oliver Wendell Holmes, but in the role of scholar rather than Associate Justice, who rightly noted that, “Certitude is not the test of certainty.”⁹⁶ Holmes aptly discerned that because we so dearly love our personal preferences, we often confuse them, innocently or otherwise, with transcendent morality. We deem our preferences to be naturally right, while correspondingly judging others’ contrary preferences to be both unnatural and wrong.⁹⁷ Unfortunately, the truth of Holmes’ above observation led him astray as part of his wholehearted indulgence of the consequentialist error that morality is simply a matter of opinion:

Deep-seated preferences can not be argued about — you can not argue a man into liking a glass of beer — and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.⁹⁸

I agree with Prof. George’s conclusion regarding Holmes’ clearly stated propositions:

I take Holmes to be denying that there are objective truths about what it is ultimately reasonable to want and to consider worthy of acting to realize, attain, preserve, promote and participate in. “Values” are subjective, according to Holmes, inasmuch as they are given by emotion, which varies from person to person and from culture to culture, and are not susceptible of rational evaluation. People act in light of their values; but values provide merely emotional, and not rational, motivation. ...

gaps ... these principles cannot count as public reason-giving in the United States today.

Jedediah Purdy and Neil S. Siegel, *The Liberty of Free Riders: The Minimum Coverage Provision, Mill’s “Harm Principle,” and American Social Morality*, AM. J. OF L. & MED. 374 at 388 (2012) (citing JOHN RAWLS, *POLITICAL LIBERALISM* 223-27 (1993)).

Professor Simon offered the same conclusory assertion, “Claims on behalf of the ‘authoritativeness’ of competing constitutional interpretive methodologies or interpretations ... rest ultimately upon the authority of moral reasoning Given the range of legitimate disagreement about the requirements of political morality, the ‘correct’ or ‘authoritative’ interpretation will often depend on the interpreter.” Simon, *supra* note 63, at 1487.

96. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

97. *Id.* (“[O]ne’s experience ... makes certain preferences dogmatic for oneself, ...”)

98. *Id.*

Holmes disbelieves in the possibility of normative science or rationality--the use of intellectual faculties to ascertain objective truths about what one ought to want, what is worth wanting and what is not.⁹⁹

Indeed, Prof. George agrees that Justice Holmes' skepticism of Deontology in general and of natural law principles in particular, "is central among the views that qualify Holmes, in Richard Posner's approving judgment, as 'the American Nietzsche'."¹⁰⁰

Consistent with his Harvard Law Review article's sprawling title "Natural Law," nowhere does Holmes imply that he is reserving arguments for another time, nor does he cite any of his other works as necessary sources to fully understand his stance. Given that Holmes is lauded as one of America's foremost legal and philosophical intellects,¹⁰¹ I feel justified

99 George, *supra* note 88, at 2 (footnotes citing Holmes' correspondence with Harold Lasky omitted). Consistent with this writing's explanation of Consequentialism versus Deontology, Prof. George noted the alarming aspect that, "Hitler's hatred of Jews, or ancient Rome's quest for glory in the conquest and domination of other peoples, are, or were, expressions of subjective values. Under Holmes's view, they are intrinsically neither more nor less rational than the opposing values of others--say Mother Teresa and the Quakers." *Id.*

100 *Id.* at 8 (quoting, Richard A. Posner, THE PROBLEMS OF JURISPRUDENCE 239-42 (1990) ("[Holmes] enforced the lesson of ethical relativism, thereby turning law into dominant public opinion in much the same way that Nietzsche turned morality into public opinion.")).

101. In his introduction to a collection of articles inspired by Brooklyn Law School's November 15, 1996, conference on Holmes, *The Path of the Law: One Hundred Years Later*, Professor Anthony J. Sebok offered that "Oliver Wendell Holmes's landmark essay, ... *The Path of the Law*, originally delivered as a speech on January 8, 1897, is generally considered to have heralded the beginning of the modern era of American jurisprudence." Anthony J. Sebok, *The Path of The Law 100 Years Later: Holmes's Influence on Modern Jurisprudence*, 63 BROOKLYN L. REV. 1, 1 (1997). Similarly, noted contracts authority Professor Grant Gilmore proclaimed that "Holmes's series of lectures that became the Contracts chapters of [Holmes' book] *The Common Law* were 'astonishing.' ... [I]t was Holmes whose 'genius' 'brilliantly reformulated' the Langdellian idea of a general theory of contract." Charles M. Yablon, *Grant Gilmore, Holmes, and the Anxiety of Influence*, 90 NW. U. L. REV. 236, 238-39 (1995) (quoting, GRANT GILMORE, *THE DEATH OF CONTRACT* 6, 107, 15 (Ronald K.L. Collins ed., 2d ed. 1995)). See generally Gary Lawson, *Original Foreign Affairs Federalism*, 97 BOSTON U. L. REV. 301, 306 note 5 (2017) ("Justice Holmes is widely admired in American legal circles. See e.g., ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 14-15 (2000) (noting praise for Justice Holmes among jurists, legal scholars, law schools, law reviews, as well as in popular culture); MORTON J. HORWITZ, *The Place of Justice Holmes in American Legal Thought*, in *THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 31, 31 (Robert W. Gordon ed., 1992) ("There has been only one great American legal thinker and it was Holmes."); RICHARD A. POSNER, *Introduction* to OLIVER WENDELL HOLMES, JR., *The Essential*

in criticizing at some length his entirely conclusory and sketchy logic, the same intellectual laxity that habitually delineates judges' and scholars' anti-deontological stands.

One immediately senses the weakness of Holmes' approach: did he actually believe that principles of philosophy such as moral norms truly are akin to minor if "deep-seated" personal preferences such as enjoying or detesting the taste of beer? Appreciating his legal forte, it defies logic that a mind as nimble as Holmes' truly concluded that prohibitions criminalizing child molestation for instance, enforces not immutable moral norms, but rather mere, ephemeral societal preferences.¹⁰² Adapting his metaphor about enjoying beer, even if, for instance, it is true that, "you can not argue a [child molester] into [not] liking [to molest children]," reducing the law to "Deep-seated preferences [that] can not be argued about"¹⁰³ is absurd. One *can* explain logically and rationally why acts such as molesting children are inherently immoral and thus, socially proscribed even if some persons' "deep-seated preference" is sexual contact with minors.¹⁰⁴ It seems odd that any thoughtful legal theorist would reduce the

HolmesOLMES, at ix (Richard A. Posner ed., 1992) (referring to Justice Holmes as 'the most illustrious figure in the history of American law'); Benjamin N. Cardozo, *Tribute, Mr. Justice Holmes*, 44 HARV. L. REV. 682, 684 (1931) (describing Justice Holmes as 'the greatest of our age in the domain of jurisprudence')").

This is not to say that commentators have declined to reassess Holmes the scholar, philosopher, judge and person. E.g., Steven G. Calabresi & Hannah M. Begley, *Justice Oliver Wendell Holmes and Chief Justice John Roberts's Dissent in Obergefell v. Hodges*, 8 ELON L. REV. 1 (2016). As Profs. Rogat and O'Fallon noted roughly thirty years ago, "By 1962, when the Stanford Law Review published the first part of Yosel Rogat's Mr. Justice Holmes: A Dissenting Opinion, [15 STAN. L. REV. 3 (1962-63),] scholars had begun a sober reconsideration of Holmes." Yosel Rogat and James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion -- the Speech Cases*, 36 STAN. L. REV. 1349, 1349 (1984). Indeed, with sharp wit, "Walton Hamilton wrote, in 1941, that it had 'taken a decade to elevate Mr. Justice Holmes from deity to mortality,' ..." *Id.* (quoting, Walton Hamilton, *On Dating Mr. Justice Holmes*, 9 U. CHI. L. REV. 1, 1 (1941)).

Nonetheless, his legacy remains vivid even if, in the perhaps unsympathetic words of Andres Yoder, Holmes', "outsized influence on American law is beyond dispute, [but] his worldview and self-understanding seem to come from anywhere but here." Andres Yoder, 39 CAMP. L. REV. 353, 354 (2017) (citing, Fred R. Shapiro, *The Most-Cited Legal Scholars*, 29 J. LEGAL STUD. 409, 424 tb1.6 (2000) ("identifying Holmes as the third-most cited American legal scholar of all time")).

102. George, *supra* note 88, at 8-11 (arguing the weaknesses of Holmes' analysis).

103. Holmes, *supra* note 98, at 41.

104. "Some acts are so inherently harmful that the intent to commit the act and the intent to harm are one and the same. The act is the harm. Child molestation is not the kind of act that results in emotional and psychological harm only occasionally. The contrary view would be absurd. Indeed, a recent federal decision well demonstrates the point." J. C.

profundities of law, such as time-honored proscriptions against homicide, rape, battery, and thievery to mere societal preferences suggesting sheer if fortuitous happenstance instead of the discovery of immutable moral precepts.

Regardless, from the foregoing, Holmes drew the false associated conclusion that, “The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”¹⁰⁵ Such devotion, Holmes rightly cautioned, often is mistaken for the discovery of transcendent morality¹⁰⁶ inspiring an animal-like insistence on the inherent rightness of the particular moral preference, just as a “dog will fight for his bone.”¹⁰⁷ However, the propensity to conflate erroneously one’s preference with immutable philosophic truths does not prove that there are no immutable philosophic truths any more than the formerly popular but incorrect supposition that the World is flat proves that there is no reliable physical science.

Doubtless, as for instance Joshua Sarnoff argues, human frailty may prevent the full discovery of complete moral truth.¹⁰⁸ But from that, consistent with the consequentialist error, Sarnoff joins the many who speciously surmise, “If morality is metaphysically uncertain, there simply

Penney Cas. Ins. Co. v. M. K., 52 Cal. 3d 1009, 1026, 804 P.2d 689, 698 (1991). By obvious contrast, while one may not be able, “to argue a man into liking a glass of beer,” Holmes, *supra* note 98, at 41, one can explain why enjoying beer is no more or less moral than not enjoying beer.

105. *Id.* Holmes accepted that there are certain physical needs to live, such as “food and drink,” that may be considered immutable. *Id.* He further presumed that forming and participating in some social order is so essential to remaining alive that some form of social contract (although he does not use that term) essentially is an immutable element of human life. *Id.* at 42. But, otherwise, there are no transcendent rules of moral comportment, rather, over time, one tends to embrace the precepts of one’s society to the degree that, “I not only accept the rules but come in time to accept them with sympathy and emotional affirmation and begin to talk about duties and rights.” *Id.*

106. “No doubt behind these legal rights is the fighting will of the subject to maintain them, and the spread of his emotions to the general rules by which they are maintained; but that does not seem to me the same thing as the supposed a priori discernment of a duty or the assertion of a preëxisting right.” *Id.*

107. *Id.*

108. “The reason that just treatment is not self-evident is that substantive morality is ‘epistemologically’ or ‘metaphysically’ ‘uncertain.’ Therefore, justice should not be conceived as ‘the result of the application of all, and only, the relevant criteria.’ If morality is epistemologically uncertain, we can never know all the relevant criteria and how they should be applied.” Joshua D. Sarnoff, *Equality as Uncertainty*, 84 IOWA L. REV. 377, 384-85 (1999) (footnotes omitted).

is no objective standard to determine the relevant criteria of justice. ... [W]e cannot know whether and when we treat people justly in an absolute sense.”¹⁰⁹ Sarnoff and his ilk conflate the presumed inability to fully apprehend abstract concepts with the conclusions that (1) such concepts cannot exist outside of human imagining and (2) therefore we cannot know if we have fulfilled some goal or obligation such as attaining justice.

Regarding the role of human imagining, as juriprude Michael Moore, among others, has forefully rejoined, that human beings may never be certain if and when they have found actual truth is no proof that there is no truth, but rather, simply offers proof of human imperfection.¹¹⁰ Equally important, accepting without admitting that, as Sarnoff claims, human limitations may prevent us from ever, “know[ing] whether and when we treat people justly in an absolute sense,”¹¹¹ that observation essentially has no practical significance. Even in the “hard sciences,” such as physics and chemistry, and as well in the social sciences, we function effectively without full knowledge.

Of course, incomplete understanding has led to failures, some of which have been calamitous. But, in many vital regards, we have acquired knowledge of truths, imperfect but nonetheless sufficient to legitimately and validly attain our ends. We do not seriously doubt that pursuant to the natural order of our physical universe, there is a complete science of, *inter alia*, physics and chemistry that can be, but likely never will be learned fully. Correspondingly, as experience teaches, we know that we can learn, and often have learned, well enough to employ such science reliably despite our incomplete knowledge.¹¹² While unfinished, our

109. *Id.*

110. Michael S. Moore, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 724 (1997) (discussed in, Larry Alexander, Deontology at the Threshold, 37 SAN DIEGO L. REV. 893, 896 (2000)).

111. Sarnoff, *supra* note 111, at 384-85.

112. “For those practitioners who really know, science is a gloriously messy business, where things at the exciting research fronts are totally insecure in nearly every way and where the different sorts of scientific communities solve their communal problems imperfectly but still (we hope) well enough.” Jerome R. Ravetz, *Essay: Conventions in Science and in the Courts: Images and Realities*, Law & Contemp. Probs., Winter 2009, at 25, 31; see also, e.g., Richard A. Posner, OVERCOMING LAW 10, 19, 450 (1994). As discussed in David Luban, *The Posner Variations (Twenty-Seven Variations on A Theme by Holmes)*, 48 Stan. L. Rev. 1001, 1007 (1996) (footnotes omitted),

For Posner, pragmatism means being a consequentialist in ethics and a moderate skeptic in epistemology, who doubts that we can know anything infallibly, but not that we can know things well enough for practical purposes. In his philosophy

comprehension of physics and chemistry is sufficient to build high structures that do not collapse, to design vehicles that move, even fly, as planned, and to otherwise bring the benefits of modernity despite our lack of absolute or complete knowledge.

Likewise, one might as well say that mathematics is merely a purely human construct, unrelated to physical actuality, because mathematics is an idea that we likely never will fully understand nor appreciate. However, as Prof. Anthony D'Amato rejoined,

[E]very bridge, tunnel, and skyscraper relies upon mathematics in its design, as do molecular biology, genetic engineering, and all statistics. A point of contact, or isomorphism, is a two-way street. Not only does it confirm the applicability of the system to a real-world event, but it also counts the real-world event as corroborating the utility of the system. The net result is a heightening of our level of confidence that the system can successfully predict other potential applications to real-world events. This is not to say that mathematics is analytically congruent with the real world, but it fits well enough for practical purposes.¹¹³

Indeed, if erroneous conclusions proved that there are no bases outside of the human imagination, then, “nothing is real except our desires,”¹¹⁴ a proposition specious on its face.

of science, Posner is a falsificationist, who believes that we test theories empirically not to confirm the true ones, but to expose the false ones. This conception of science fits Posner's version of pragmatism, which is decidedly pro-science and anti-philosophy.

113. Anthony D'Amato, *Anthony D'Amato Responds*, 108 Am. J. Int'l L. 715, 716 (2014). As one commentator explained, “[M]athematics includes not only fundamental rules, but also practical applications based on those rules. Mathematics is another tool in the arsenal of the inventor, just as chemistry is such a tool.” W. Wayt King, Jr., *The Soul of the Virtual Machine: In Re Alappat*, 2 J. Intell. Prop. L. 575, 591 (1995) (footnotes omitted).

114. Peter Berkowitz, *On the Laws Governing Free Spirits and Philosophers of the Future: A Response to Nonet's “What Is Positive Law?”*, 100 YALE L. J. 701, 716 (1990) (discussing Nietzsche's “distinction between appearance and reality. Nietzsche introduces section 36 [of his *Beyond Good and Evil* (W. Kaufmann trans. 1966) (orig. ed. 1886)] with the command to suppose (gesetz), or consider as a hypothesis, that nothing is real except our desires (Begierden), passions (Leidenschaften), and drives (Triebe).”; cf., Catherine A. MacKinnon, *Points Against Postmodernism*, 75 CHI-KENT. L. REV. 687, 711-712 (2000). Postmodernists’ “critically-minded students are taught that nothing is real, that disengagement is smart (not to mention career-promoting), that politics is pantomime and ventriloquism, that reality is a text (reading is safer than acting any day), that creative misreading is resistance (you feel so radical and comfortably marginal), that nothing can be changed (you can only amuse yourself).”

Ironically then, the whole rationale of Holmes' argument sounds in the very mistake he chides in others: assuming that his instinctive, experiential, deeply-held *beliefs*, herein morality is not deontological, are entirely correct and require no independent proof.¹¹⁵ Throughout his article, Holmes presumes but never proves that because people usually do not engage in reliable deontological analysis, there is no such thing as reliable deontological analysis. Instinct, mere inferences from experience and coy prose,¹¹⁶ are no substitutes for reasoned analysis.¹¹⁷ Holmes' bald assertions that morality is merely opinion are unsupported by logic, only insinuation, while Deontology is predicated firmly on reason.

To close this part of the discussion, just as the mere presumption that morality is a human creation cannot vindicate Consequentialism, neither

115. Holmes does attempt one logical argument, "The most fundamental of the supposed preëxisting rights — the right to life — is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it. Whether that interest is the interest of mankind in the long run no one can tell, ..." Holmes, *supra* note 92, at 42. Holmes may be correct that people and governments, particularly through war, immorally deprive individuals of "the right to life;" but he failed to disprove the existence of transcendent morality because he inaccurately presumed that under deontological theory, "the right to life" is a supreme moral right that has no limits. Holmes' error is supposing without verifying that there are no rights greater than "the right to life," which, if true, indeed would preclude any social policies justifying the deliberate taking of life. Rather, as we will learn, there are overarching moral principles sounding in the innate dignity of Humankind that trump even the "right to life," as when, for instance, persons kill in true self-defense of their own lives. In this regard, it is worth recalling Kant's stunning pronouncement "justice [must] be done even if the world should perish." KANT, *supra* note 57. Because, as we will learn, Kant is correct, much in morality proves that the "right to life" is not supreme. See, *infra* Section 3.

Accordingly, that through ignorance or guile, Society may condone immoral killing, is no proof that deontological principles of morality do not exist. At most, it is proof that Society has failed to appreciate the nuances of Deontology.

116. See generally, Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L. J. 243, 268 n.85 (1998) (quoting Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 CHI. L. REV. 506, 506 (1988) ("The tradition of praising Holmes's prose continues. Robert Ferguson has recently opined that 'Holmes's mastery of the judicial opinion as literary genre is unmatched in the twentieth century'")).

117. See generally George, *supra* note 88 at 11 (critiquing *Professor Holmes*, on the issue of whether people ought to believe and act on the basis of what is true, correct, sound, warranted; Holmes's assertion of his view presupposes that they should, and, thus, presupposes that people can and should grasp the point--the basic, more-than-merely-instrumental, point and value--of truth, knowledge, reasonableness, rationality. But, if they can, then it is a mistake to suppose that all values are subjective, and it is time to launch, or continue, the quest to distinguish mere matters of taste (a glass of beer) from those aspects of human well-being and fulfillment (such as practical and theoretical knowledge of truth) that have objective worth and, thus, standing as principles of "natural law.").

can the equally familiar claim that because over the course of centuries thoughtful people sincerely and intensely have disagreed about the nature and meaning of morality, there is no single correct meaning.

Relying on rejoinders similar to those above debunking the claim that moral truth does not exist, all disagreement *qua* disagreement can show is, well, that there is disagreement. Only a profound and serious inquiry can prove whether the particular disagreement concerns a matter for which there is or is not a definitive answer outside of the particular preferences of the disagreeing parties. That persons happen to disagree does not foreclose the possibility that one of them actually may be right, or that none of them are, but rather the truth has yet to be discovered.¹¹⁸ Thus, we recall noted jurisprude Michael Moore, whose specialties include expounding on the theory of truth, who made the point succinctly: “Discussing the possible legitimacy of torture, Professor Moore noted by analogy ‘the medieval worry of how many stones make a heap. Our uncertainty whether it takes three, or four, or five, etc., does not justify us in thinking that there are no

118. Even perennial skeptic Judge Richard Posner begrudgingly accepts that there is knowable morality such as the inherent immorality of infanticide, at least of “normal” babies. Hon. Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1636, 1643-44 (1998). Nonetheless, Posner, predictably without attribution, rejects the idea that we can glean from unquestionable moral norms ways to answer “interesting moral questions.” *Id.* That argument is incongruous; and it is hard to believe a mind as intense as Judge Posner’s does not recognize how illogical his assertion is. *If*, as Posner asserts, persons are able to discern one immutable moral point, such as the intrinsic immorality of infanticide (at least, as Posner shrugs, when “normal” infants are murdered), there is no reason to suppose that they likewise cannot grasp other moral truths which, as a whole, reveal an entire fabric of moral precepts.

Nor does Judge Posner explain why, if we can, we ought not discern the entire moral tapestry, except to suppose that, “given the variety of necessary roles in a complex society, it is not a safe idea to have a morally uniform population.” *Id.* at 1681. I can discern no explanation for this remarkable idea except that we need “a variety of types,” *Id.* (discussing judges), so that one paradigm does not unduly take hold, frustrating the recognition of better paradigms. That might be sensible if Posner had not, as they say, “hedged his bets” by denouncing abstract, impartial morality, but admitting at least in the instance of murdering the wrong class of children, that impartial morality exists. He never clarifies why that class of immutable immorality is cognizable but other classes, by definition equally reprehensible, are to be ignored.

Having acknowledged, as he should, that single instance where morality transcends human partiality, Posner truly has “opened the floodgate,” and rightly so. Yet, by trying to dissuade scholars from leaning more about immutable morality as an entirety, Posner would stop what must be the noblest pursuit of Humankind. That makes no reasonable sense, especially since Posner does not and cannot really explain why “the variety of necessary roles in a complex society” justifies some role-players to act immorally while others may not.

such things as heaps.”¹¹⁹ Likewise, uncertainty, if any, as to its definition does not prove that there is no true, certain, single delineation of morality.

In sum, the anti-deontological assertions in judicial opinions, law reviews, and similar sources embracing the *consequentialist error* are remarkably, indeed excruciatingly lacking in both thorough reasoning and basic analytical methods.

d. The Capacity to Reason --

In addition to the criticisms just discussed, skeptics assert that, even if morality were deontological, human beings lack the capacity to perform the neutral, unbiased reasoning required to discern moral truths.¹²⁰ If so, purported good sense and experience become the only bases to premise some general theory of morality. In that case, Consequentialism -- morality defined as that which produces the best outcome -- is the most reasonable alternative to deontological analysis. After all, if there is no moral truth, or if truth exists but we cannot discern it (or come sufficiently close for practical use), then, we should adopt the next best paradigm which, as there are no reasonable alternatives, must be that which enforces the best outcome thereby engendering the greatest possible happiness with the least possible sadness.

Professor Carlson summarized the contention bluntly, “The problem is that I never know whether my acts are from the moral law or from some pathological inclination.”¹²¹ A more thorough analysis comes from Professor Simon:

The classical articulation is that government must be of law and not of rulers. This articulation embodies an ideal that is far from attainable, however, for its full implementation presupposes that all positive law is logically deduced from the nature or edicts of an authoritative outside source. These edicts, however, will lose their objectivity when they suffer the inevitable manipulations by humans. Even in societies in which law is fervently believed to be wholly deducible from religious

119. Bayer II, *supra* note 17, at 310 n.120; *see also, e.g.*, Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 312 (1985) (distinguishing the realist from the skeptic); *see also* Michael S. Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1109 (1982) (discussing factual and moral belief).

120. *E.g.*, David Gray Carlson, *Hart avec Kant: On the Inseparability of Law and Morality*, 1 WASH. U. JURIS. REV. 21, 35 (2009).

121. *Id.* at 81.

or supernatural concepts, it is clear at least from an external perspective that the process of deduction requires human interpretation of the resulting concepts and human administration of the resulting positive laws.¹²²

Consistent with much anti-Deontology critique, Professor Simon offers scant proof, but merely asserts that even should extra-human abstract morality exist, “it is clear” that “[t]hese edicts, however, will lose their objectivity when they suffer the inevitable manipulations by humans.”¹²³ Doubtless human beings have limited intellectual capacities. “Immanuel Kant, perhaps the most celebrated of the deontological rationalists, understood that ‘human beings are not fully rational beings; they are, rather, creatures of limited knowledge and self-restraint.’”¹²⁴ If perfection were the only acceptable standard, then, as Simon avers, we could never prove a theory of morality. Nor, however, could we prove many things in many realms that we take for granted.

In that regard, it is worth again emphasizing that, for example, even after millennia of study, Humankind’s understanding of mathematics and science remains incomplete, and possibly faulty in that some of the precepts currently believed to be true may be wrong, at least in part.¹²⁵ Nonetheless, applying what we know of science and mathematics, absent corruption or negligent construction, buildings do not routinely collapse, dams do not habitually burst, and bridges do not customarily crumble. We could build things better and we continually strive to do so; but, we have learned to build well enough to support an urbanized, industrialized society.

The above-mentioned logic does not apply solely to the “hard sciences,” but as well to the social sciences and the Humanities. To cite a classic example from law and law practice, the Supreme Court constantly

122. Simon, *supra* note 63, at 1521-22.

123. *Id.* at 1521.

124. Bayer II, *supra* note 17, at 306 (“Kant concedes that neither the actor nor an observer can be sure if the action proceeds out of [rational, unbiased] duty alone.”); *see also infra* Section 3-a-2 (discussing Kant’s philosophy).

125. LEWIS WOLPERT, *What Lawyers Need to Know About Science*, in LAW AND SCIENCE: CURRENT LEGAL ISSUES 289, 289 (Helen Reece ed., 1998) (“Science ... is progressive ... approach[ing] closer and closer to understanding the nature of the world.”); *see also, e.g.*, Robin Cooper Feldman, *Historic Perspective on Law & Science*, 1 STAN. TECH. L. REV. 1, 3 n.6 (2009) (“describing tenets of critical realism including that there is an objective truth and that science undergoes continual revision towards a better, although imperfect, understanding of it”).

cautions that a judge or jury must “judge a case, as due process requires, impartially, unswayed by outside influences.”¹²⁶ Such has been the presumed human facility since the earliest days of American law, inherited from our British forebears.¹²⁷ The faith in judges’ and jurors’ abilities to apprehend and effectively nullify their personal prejudices and preferences is a subset of the Courts’ accurate, if curt, shorthand, “[A person] is entitled to a fair trial but not a perfect one.”¹²⁸ Through procedural and evidentiary rules, and other offshoots of “due process of law,” we attempt to reach the correct legal and factual conclusions. We do not capitulate to our imperfections by claiming the quest for fairness and justice is futile, therefore “anything goes” — any conduct is self-justifying. Rather, we believe that the harder we try, the better we can do. *Moreover, experience and research confirm the foregoing.*¹²⁹

As these examples evince, “Despite infirm or incomplete comprehension, we successfully can fulfill tasks and projects while trying to avoid past errors. With proper effort, we do well enough.”¹³⁰

126. *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010); *see also, e.g.*, 28 U.S.C. § 455(a) (2006) (stating that a judge must disqualify him/herself “in any proceeding in which his impartiality might reasonably be questioned.”); *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (Roberts, C.J. dissenting) (“All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”); *Mala v. Crown Bay Marina, Inc.*, 704 F.3d 239, 244 (3d Cir. 2013) (“Judges must be impartial, and they put their impartiality at risk — or at least might appear to become partial to one side — when they provide trial assistance to a party.”); *United States v. Casellas-Toro*, 807 F.3d 380, 385 (1st Cir. 2015) (“The Sixth Amendment guarantees criminal defendants the right to trial by an impartial jury”); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (“The theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print”).

127. *See generally*, *Cohens v. Virginia*, 19 U.S. 264, 380 (1821).

128. *Lutwak v. United States*, 344 U.S. 604, 619 (1953); *see also*, *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 553 (1984); *see also*, *United States v. McBride*, 656 Fed. Appx. 416, 425 (10th Cir. 2016); *see also*, *United States v. Haldar*, 751 F.3d 450, 459 (7th Cir. 2014).

129. *E.g.*, Justin D Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, And Misremembering*, 57 DUKE L. J. 345, 345 (2007) (explaining and suggesting methods to mitigate “implicit memory bias in legal decisionmaking”); Jennifer McNulty, *Sociologist Testifies About How to Overcome Racial Bias in Jury Selection*, U.C. SANTA CRUZ CURRENTS (March 3, 1997), <http://www1.ucsc.edu/oncampus/currents/97-03-03/fukurai.jury.htm>; J. Stephen Welch, *When Doctors Push Pain Pills*, AM. ASS’N OF JUST.: TRIAL (May 2014), [http://trial.justice.org/publication/?i=205696&p=&l=&m=&ver=&view=&pp=#{"issue_id":205696,"page":44}](http://trial.justice.org/publication/?i=205696&p=&l=&m=&ver=&view=&pp=#{); Lyn A. Pruitt, *Overcoming Jury Bias: Trial Advocates Must Understand It and Cope with It*, 69 DEF. COUNS. J. 331(2002).

130. *Bayer II*, *supra* note 17, at 311.

Accordingly, whatever they may be, our inherent or self-imposed intellectual limits do not refute the actuality that principles of science and reason -- including moral precepts -- exist prior to and are independent of Humanity.¹³¹ *That is why, Deontology is not religion, it is comprehension.*¹³² Of equal urgency, that is why our imperfections in no manner “absolves us from understanding as fully as possible what morality requires.”¹³³

As mentioned, Professor Simon opined that arguably neutral “edicts ... will lose their objectivity when they suffer the inevitable manipulations by humans.”¹³⁴ It is worth noting in passing the rather odd conclusion Simon thereby draws: that true objectivity would result in despotism:

The growth of modern political theory became both possible and necessary because of the demise of the supernatural view of law. When positive law was believed to have its source in a divine or infallible agent or a natural order, or rulers were believed to rule by divine or natural right, the authority of government was based on attitudes of individuals toward those wider belief systems. From its inception, modern political theory has attempted to discover and articulate a theory about authority that can serve as an acceptable substitute for the belief in the authority of an outside entity or order, religious or otherwise. *Id.* at 1522.¹³⁵

I frankly do not understand Simon’s logic except that, as noted in earlier discussion, morality is despotic in that there is no choice but to

131. See, *supra* notes 113-17, 122-23 and accompanying text.

132. See, BERNARD GERT, *MORALITY: ITS NATURE AND JUSTIFICATION* at 6 (1998) (“[E]very feature of morality must be known to, and [can] be chosen by, all rational persons. No religion is known to all rational persons, and all religions have some feature that could not be chosen by all rational persons”). The human potential fully to understand morality, then, is not akin to a claimed human capacity fully to understand God which is impossible because, most religions claim, one must be God to understand God in all ways. Accordingly, religious practices often eschew actually naming “God,” but rather designate words or phrases to denote their respective deity. Such designating identifies when God has acted, thereby allowing adherents some practical understanding of their statuses and duties while acknowledging that the designation in no manner signifies that God is fully comprehensible. *E.g.*, Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 995 (1991) (“[N]aming God only through prohibition and negation, [] affirm[s] our inability to name God at all, giving us knowledge of our finitude.”).

133. Bayer II, *supra* note 17, at 310.

134. Simon, *supra* note 63, at 1521.

135. Simon, *supra* note 63, at 1522.

follow the moral path wherever it leads, no matter how terrible is the ultimate destination. But, that reality does not result from the dictatorship of one human being against others. Rather, the despotism of morality arises because human statutes cannot amend the laws of nature, such is the tyranny of the natural order of things,

Indeed, instead of confounding oppression, Profs. Simon's and Carlson's logic leads to desperation -- to an attitude of, "Why bother? Who cares?" If we truly cannot escape our personal prejudices, inclinations and preferences, and, thus, if perfect moral knowledge leading to complete moral comportment can never be ours, then some may conclude there is no point in even attempting to be moral if that means foregoing our selfish preferences for the sake of attaining either the greater good or the right result. One researcher rightly summarized, "Voluntary individual rational action requires a particular value criteria to justify the act and separate it from random behavior. Complete moral skepticism leads to chaos."¹³⁶ As Simon and Carlson do not so advocate, one must presume that, despite their skepticism, they accept the belief if not the reality that, if we try hard enough, we can be moral enough.

F. Why be Moral? The Challenge of Threshold Deontology --

At this juncture, one might reasonably ask, "Why be moral?" If following the moral path leads to horrific consequences -- outcomes -- that any rational person would hope to avoid, what good is such morality, why not just defy what is "right" to promote what is "good?" A reasonable person might suggest that, at least to avoid the most catastrophic outcomes, one might embrace Consequentialism and set aside Deontology which, respecting only moral principles derived from impartial reason, is blithely unconcerned with the extraordinary harm and pain deontological

136. Randolph Marshall Collins, *The Constitutionality of Flag Burning: Can Neutral Values Protect First Amendment Principles?* 28 CRIM. L. REV. 887, 900 (1991); see also, e.g., Stephen L. Winter, *Human Values in a Postmodern World*, 6 YALE J. L. & HUMAN. 233, 237 (1994) ("Relativism appears identical to nihilism. Postmodernism -- with its rejection of meta-narratives, deconstruction of meaning, and decentering of the self -- looks like a radicalized version of skepticism that threatens a frightening descent into intellectual and moral chaos"); Allan C. Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 YALE L. J. 209, 211 (1984) ("[Philosophers] Descartes, Kant, and Locke ... wanted to ground truth and knowledge on an ahistorical and universal foundation, unconditionally valid for all persons at all times. Without such an objective grounding, knowledge would become prey to a radical skepticism, behind which lurks the spectre of social chaos and madness").

comportment may engender. Indeed, there is such a theory, known as “Threshold Deontology.”

The attractiveness of Threshold Deontology is clear and undeniable. “[E]ven Kantians typically believe that moral rules can be subject to consequentialist override if the consequences are sufficiently serious. If total catastrophe really would ensue, judges should not rule as they believe that principle requires.”¹³⁷ As one commentator succinctly put it, “threshold deontology [holds that] rights serve as trumps to a point, but consequentialism kicks in if the consequences of protecting the right are sufficiently dire.”¹³⁸ In light of these apparently common sense propositions, Threshold Deontology proposes that:

At some extreme points, one cannot avoid some consequentialist analysis that would require a departure from the absolute prescription. Threshold deontology responds to the accusation that pure deontology would allow catastrophic outcomes for the sake of moral narcissism. For this school, the debate is no longer about the permissibility of lesser-evil calculations, [it is] only about the terms and conditions for its application ...¹³⁹

Usually, Threshold Deontology presumes that some moral principles of high importance, such as the prohibition against torture, may be sacrificed for the greater good of avoiding catastrophic outcomes such as the detonation of a nuclear bomb in the heart of a city. By contrast, Professor Kramer envisioned a reverse cost-benefit approach yielding a form of Threshold Deontology that would sacrifice minor moral precepts for the greater good:

When a deontological obligation (such as a minor promissory obligation) is not formidably stringent, and when a breach of that obligation can avert a very substantial detriment, or bring about a very substantial benefit, and when the non-occurrence of the breach would not involve any contraventions of deontological duties, the situation can

137. Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 165 (2007).

138. Note, *Rights in Flux: Nonconsequentialism, Consequentialism, and the Judicial Role*, 130 HARV. L. REV. 1436, 1443 (2017); see also Richard H. Fallon, Jr., *Interpreting Presidential Powers*, 63 DUKE L. J. 347, 368 (2013) (citing philosophical accounts); EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* 51-55 (2010) (critiquing threshold deontology).

139. Blum, *supra* note 35, at 43.

be such that a breach of a deontological obligation -- despite its wrongness -- is better in the circumstances than so such breach at all.¹⁴⁰

Arguably, if both forms of Threshold Deontology were merged -- use consequentialist theory when the stakes are very high and when the stakes are rather low -- the result would be Consequentialism, the logical premises of which have been disproved above.¹⁴¹ Moreover, even assuming moral precepts are not all of equal status (and that assumption is wrong),¹⁴² the very concept of Threshold Deontology is flawed. The infirmity of Threshold Deontology is not that its proposition, "that we can never truly know exactly when the invitation to evil is strong enough to permit consequentialism to overtake deontology."¹⁴³ Similarly, considering Professor Kramer's variant, it may be true that we can never truly know when a moral obligation is sufficiently "not formidably stringent" that it should fall to forestall an outcome that is "substantially detriment[al]."

As accented regarding the "consequentialist error" and equally applicable to Threshold Deontology, of necessity, most theories of law and morals are based on concepts that may be "deeply but not completely understood."¹⁴⁴ One need not have a formal legal education to appreciate Justice Felix Frankfurter's admonition applicable certainly to law, philosophy and its offshoots that "the task of scrutinizing is a task of drawing lines."¹⁴⁵ Indeed, "the capacity to 'draw lines' -- to make meaningful, appropriate distinctions even among nearly equivalent things and ideas -- is the hallmark of legal decision-making."¹⁴⁶ We may never know where the exact legal line -- boundary -- lies demarcating lawful from non-lawful conduct. To cite a classic example, we usually are unable to

140. Kramer, *supra* note 35, at 233.

141. See, *supra* notes 59-78, 83-123 and accompanying text; see also, Bayer II, *supra* note 17, at 293-96.

142. See, *supra* notes 59-78, 83-123 and accompanying text; see also, Bayer II, *supra* note 17, at 293-96.

143. *Id.* at 320 n. 176.

144. *Id.* at 320.

145. Freeman v. Hewitt, 329 U.S. 249, 253 (1946).

146. Bayer I, *supra* note 13, at 895 n. 121 (citing, *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2083 (2012); *Perry v. Perez*, 132 U.S. 934, 941 (2012) (discussing relevant considerations to enable line drawing); *Pollard v. Hagan*, 44 U.S. 212, 220 (1845)). *Ellis v. United States*, 206 U.S. 246, 260 (1907) (Justice Holmes explained the necessity of drawing lines: "As in other cases where a broad distinction is admitted, it ultimately becomes necessary to draw a line, and the determination of the precise place of that line in nice cases always seems somewhat technical, but still the line must be drawn.").

define with final precision negligent from non-negligent behavior, but, rather set specific enough criteria so that we know when the metaphysical line has been crossed even though we cannot discern where that line exactly is.¹⁴⁷ Therefore, Threshold Deontology's weakness is not that we might never be able to determine definitively when a portending catastrophe is sufficiently catastrophic to annul deontological morality and trigger threshold deontological morality.¹⁴⁸

The true infirmity of Threshold Deontology is that it eschews Deontology's core precept, namely, morality's immutable, *a priori*, transcendent commands must be obeyed. Moral comportment is not a choice—it is not an option—even when the moral way causes appalling harm to entirely innocent parties.¹⁴⁹ The reason Deontology must prevail -- the reason why “justice [must] be done even if the world should perish”¹⁵⁰ -- is that morality does not exist to slake our passions, nor to satiate our desires, even desires that appear unselfish if not utterly compelling. Were it otherwise, morality would be consequentialist, predicted on, one hopes, magnanimous motives, but regardless, measured by the aggregate happiness of some individual, group, or social order.

Accordingly, Threshold Deontology is neither a fitting compromise nor a discovered moral truth; rather, as two astute observers explain, it is wholly unprincipled:

147. *O'Malley v. Jegabbi*, 12 A.D.2d 389, 390 (N.Y. App. Div. 1961) (“the Supreme Judicial Court of [Massachusetts], while admitting the inherent impossibility of defining ‘gross negligence’ with the utmost precision ... has given to it a meaning of sufficient distinctness to be applied usefully by courts and juries to particular facts before them”) (quoting *Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932)).

148. For instance, again using a trite but popular example, reasonable minds might differ regarding how many people must be endangered before authorities may deliberately torture a suspect reasonably believed to have useful knowledge regarding the location of the “ticking time bomb.” See, e.g., RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* 81 (2006) (mentioning the ticking time bomb scenario among others). But, we can set some arbitrary but basically reasonable threshold.

149. See, *supra* notes 59-78, 83-123 and accompanying text; see also, *Bayer II*, *supra* note 17, at 293-96. This is not to suggest, of course, that morality *per se* permits “appalling harm” against culpable persons. Punishment and other acts against deserving individuals must not exceed that necessary and appropriate to accomplish amoral goal. THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY* 160-84 (1992) (punishment is legitimate to vindicate liberty, not to provide a quantum of misery to the offender to match the quantum of misery the offender inflicted on the victim).

150. KANT, *supra* note 57, at 102 n.16.

“Put crudely, once principles have a price all that is left is the bargaining ... Threshold deontology does not avoid this embarrassment, but merely pretends it does not exist.”

There is nothing incoherent in maintaining that quantitative changes in the number of people saved as a result of an act of torture may change the moral status of the act. Yet, quantitative concerns of the type described by threshold deontology seem to be in tension with its aggregation proscribing rationale. Such quantitative concerns appear on their face to be much more congenial to consequentialist reasoning. *Thus, while threshold deontology is a coherent position, it is also an unprincipled one—an unprincipled concession to pragmatism and moral intuitions that is hard to square with the deep normative (anti-aggregationist) commitments of deontology.*¹⁵¹

Having established the infirmities of Threshold Deontology, we may return to the pivotal query that opened this subsection: if morality does not exist in the natural order of things to make us happy, then *why be moral?* Indeed, what does morality do? Why does morality exist? What purpose does it serve for the sake of Humankind’s span in Eternity?

The combined answer is, because “any type or instance of human conduct is permissible if and only if it is not wrong,”¹⁵² *morality exists to keep us from doing wrong which means to keep us from doing evil.* In that regard, let me repeat what I concluded in my first exploration of the subject, that deontological moral comportment is its own reward:

[W]e are not morality’s master, but its servants; and, beyond question, morality is harsh and unsympathetic, demanding that we do what is right whatever the consequence because, by definition, acting immorally is wicked. Consequentialists are correct that deontology’s “damn the consequences” approach sometimes requires persons to do things that can cause tremendous harm, particularly to innocents. Perhaps sadly, or perhaps not, keeping faith with morality does not promise freedom from sorrow. Indeed, only the mentally infirm, incorrigibly villainous and woefully uninformed would act immorally if morality engendered no serious costs. ... [M]orality’s sole promise is that the moral are upright and honest, fulfilling faithfully their duty to humanity even if others do not -- even when the morality of the moral

151. Alon Harel & Assaf Sharon, *Dignity, Emergency, Exception*, 64 IUS Gentium 101, 105–06 (2018) (emphasis added; quoting, Kutz (2007), 256).

152. KRAMER, *supra* note 35, at 4.

enables the immorality of the immoral. If the, perhaps, sad result of adherence to morality is harm to those who, through no fault of their own, become embroiled in a moral confrontation, then suffering becomes the test of commitment to leading an upright existence. ... While utilitarian rewards often flow from moral acts, morality itself must be its own reward. These are the duties of a noble [-- moral --] life.¹⁵³

To some, Deontology may seem appallingly constraining, hampering and defiant of human freedom because it utterly disregards preferences and outcomes in favor of discerning an abstract, pristine moral code for which obedience is compulsory.¹⁵⁴ Moreover, morality promises neither happiness, nor wealth, nor security, nor other understandably desired but nonetheless indulgent pleasures. Rather, as just explained, a moral life is its own reward. That reward, then, is not inevitably happiness -- not the bliss of *la dolce vita*,¹⁵⁵ but it is the satisfaction of *la vita morale*, a life untainted by doing evil -- a life uncorrupted by betraying both oneself and fellow human beings. The integrity of moral comportment, as I emphasized in earlier writings, renders Deontology the most liberating of all philosophies in two vital ways:

First, [by replacing partisan preferences with unbiased reason,] it frees us from the methodological distortions that socialization may instill. Second, even if socialization fortuitously inculcates proper moral principles, deontology provides an impartial process through which adherents can strive to prove that their morality is true and not merely the product of even profound and momentous happenstance. Deontology frees us from the enslavement of our life experience.¹⁵⁶

153. Bayer II, *supra* note 17, at 316-17 n. 154.

154. That certainly is a prime contention of Judge Richard Posner, one of Deontology's most ardent foes. See Posner, *supra* note 120, at 1641-44, 1678-84.

155. "*La dolce vita* is a borrowed Italian phrase first used in English in the 1960s. ... *La dolce vita* describes a way of life that is easygoing, enjoying things to the fullest. Usually *la dolce vita* involves luxury and pleasure of varying degrees. It may be considered hedonistic, shallow and materialistic or simply carefree. *La dolce vita* literally translates as 'the sweet life'. The term is derived from the title of a film by Federico Fellini, which debuted in 1960 and was quite popular in the English-speaking world." Grammarist, *La Dolce Vita*, <https://grammarist.com/phrase/la-dolce-vita/> (visited, January 15, 2019).

Of course, one may pursue and attain *la dolce vita* in a moral fashion; but *la dolce vita* is not by definition a morally upright existence.

156. Bayer II, *supra* note 17, at 296.

g. The Infirmities of Quasi-Consequentialist Theories --

Given that it justifies *anything and everything* that maximizes aggregate happiness including slavery, mass murder, indeed all indisputable depravities, it is hardly surprising that adherents attempt to constrain unadulterated Consequentialism. The obvious problem is that so long as moral uprightness ultimately is defined by some person's or some group's selfish preferences, Consequentialism can never be anything but an apology for gratifying what makes the dominating person or group happy -- feel good. As we now understand, a moral system predicated on indulging selfish predilections is unmoored from any objective proof that the favored predilections indeed are just.

Accordingly, when pressed, consequentialists will seek some deontological basis to prove that a given consequentialist outcome is not simply a fascade illegitimately vindicating some immoral preference. But, rather than forthrightly admitting that only a deontological basis will prove the correctness of a moral proposition, "A well-known strategy for defending consequentialism is to adopt a complex conception of the good with a view toward imitating deontological constraints."¹⁵⁷ Likewise, Profs. Zamir and Medina noted, "There can be great disputes among consequentialism regarding the values or indices of 'well-being,' whose 'well-being' matters in given situations and what particular factors or considerations are relevant or irrelevant towards discerning optimal well-being."¹⁵⁸ Indeed, aware of the basic definitional problem, theorists have tried to salvage consequentialist theory from the *reductio ad absurdum*¹⁵⁹ it so compellingly invites.

For example, some scholars urge that the related theory Utilitarianism might provide the plausibility unalloyed Consequentialism lacks:

[B]oth consequentialism and utilitarianism agree that right actions or right rules -- normally, the law . . . -- are those that maximize, from an impartial point of view, the moral value brought about or preserved. The two views differ, however, in terms of their definition of what exactly is 'the good.' Utilitarians are concerned with happiness,

157. ZAMIR & MEDINA, *supra* note 65, at 340.

158. ZAMIR & MEDINA, *supra* note 142, at 20.

159. *Reductio Ad Absurdum*, DICTIONARY.COM, <http://www.dictionary.com/> (last visited Jan 22, 2016) ("the refutation of a proposition by demonstrating the inevitably absurd conclusion to which it would logically lead").

whether understood in terms of the balance of pleasure over pain, preference satisfaction (whether informed or uninformed), or welfare. Consequentialists accept other moral reasons as also shaping the good that is to be maximized. Utilitarians are thus a subset of consequentialists.¹⁶⁰

Not surprisingly, utilitarians are not all of one mind regarding how to assess aggregate happiness and unhappiness. “Jeremy Bentham, for instance, defines happiness as any ‘pleasure’ or ‘avoidance of pain,’ whereas John Stuart Mill distinguishes between types and degrees of pleasure. For a Mill-Utilitarian, the ‘standard of morality’ is that action which creates a set of lives ‘as rich as possible in enjoyments, both in point of quantity and quality.’”¹⁶¹ This has led to a Utilitarianism that strives to promote the good for all society, not simply to declare that whatever maximizes happiness for some group in some context *per se* is the morally correct state of affairs. As Professor Leigh Raymond put it:

The whole system of utilitarianism is based on an attitude of generalized benevolence or the disposition to seek happiness for the residents of the world . . . Ethical actors should maximize the total human happiness of the world through all of their actions. . . . For the utilitarian, the principle of utility is the ultimate definition of the “good” to be sought by human society.¹⁶²

Similarly, many consequentialists attempt to augment crude theory with seemingly sophisticated intricacies designed to eliminate Consequentialism’s intrinsic fallacy of simply equating what people want with what is good.¹⁶³ Some propose differentiating act-consequentialism from rule-consequentialism,¹⁶⁴ some embrace incrementalist rule-

160. Alec Whalen, *Proof Beyond a Reasonable Doubt: A Balanced, Retributive Account*, 76 LA. L. REV. 355, 403 (2015).

161. Peter C. LaGreca, *Separate and Unequal: The American Dream Unfulfilled*, 16 RUTGERS RACE & L. REV. 183, 194 (2015).

162. Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 ECOLOGY L.Q. 577, 580, 583-84 (1996).

163. Bayer II, *supra* note 17, at 322-28.

164. “Blum, *supra* note 35, at 45; see also, Brad Hooker, *Rule Consequentialism*, STAN. ENCYCLOPEDIA PHIL. (Jan. 9, 2008), <http://plato.stanford.edu/archives/spr2011/entries/consequentialism-rule> [<http://perma.cc/4QHN-Q5XJ>] (“The former assesses the outcomes of every particular act; . . . The latter weighs the effects of having a particular rule in place (and therefore the average outcome of acts that follow the rule)”); Walter Sinnott-Armstrong, *Consequentialism*, STAN.

consequentialism,¹⁶⁵ others follow indirect consequentialism,¹⁶⁶ while still others urge crosspollination to produce “what we might call incrementalist cosmopolitan rule-consequentialism assesses possible moral rules and policies in terms of the expected value of their acceptance (not just by one individual or by one society but) by all societies simultaneously.”¹⁶⁷

All of these sub-strata suffer from ambiguous defining,¹⁶⁸ which may not be enough to condemn them if their strictures are precise enough for reasonable persons to apply them with reasonable certainty.¹⁶⁹ *More importantly, the decent efforts of Professor Raymond and others to import humanity and nuance into Consequentialism and Utilitarianism are futile so long as some measure of aggregate happiness remains a necessary, even if not a sufficient component of analysis.* Like Professor Hooker, Professor Sagoff, for instance, seeks a “cosmopolitan” vision of Consequentialism that imports true and humane moral theory:

A cosmopolitan moral perspective . . . depends upon critical judgment, ethical intuition, and human sympathy, rather than upon a system of philosophical abstractions, such as the one deontological liberalism provides. We can rely to some extent on a general sense of moral progress . . . [revealing] a notion of goodness not of any particular time and country. Grounding the good in a historical and cultural

ENCYCLOPEDIA PHIL. (Sep. 27, 2011), <https://plato.stanford.edu/entries/consequentialism/> (cited in, Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L. J. 3094, 3167 n. 344 (2015); Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607, 627 (2005)).

165. Brad Hooker, *Griffin on Human Rights*, 30 OXFORD J. LEGAL STUD. 193, 203 (2010) (that approach requires “abid[ing] by the policies in the currently accepted morality unless and until we can calculate to a reliable degree of probability which changes to this morality would result in a net increase in value in the long run”).

166. *Id.* (“[W]hich rules and rights are the ones whose establishment would have the best consequences in the long run, impartially considered”); see also Larry Alexander, *Pursuing the Good—Indirectly*, 95 ETHICS 315, 317-19 (1985).

167. Hooker, *supra*, note 169, at 204 (“The best forms of indirect consequentialism focus neither on the consequences of one individual’s accepting and following policies nor on the consequences of one society’s accepting and following policies. The best forms of indirect consequentialism are more ‘cosmopolitan’”).

168. Scott Woodcock, *When Will Your Consequentialist Friend Abandon You for the Greater Good?*, 4 J. ETHICS & SOC. PHIL. 1, 2 n. 3 (2010) (“Indirect consequentialism, is tainted by an unfortunate ambiguity in the literature. Some philosophers use the term to refer to forms of consequentialism that employ a division between a criterion of rightness and decision-procedures that indirectly lead to the long-term satisfaction of the criterion. Others use the term to refer to versions of consequentialism in which a criterion of rightness tracks goodness indirectly via indicators such as rules rather than acts”).

169. See *supra* Section 2-d.

perspective can save us from both [deontological] over-abstraction and utilitarian reductionism. . .

. . . The self has a moral identity only within the political and social world it inhabits. . . . We develop our identities in communities . . . within which we share aspirations and a sense of the meaning or the fitness of things.¹⁷⁰

However, as his own text admit, Sagoff's claim of sophisticated analysis still relies on choosing a history and a culture among competing histories and cultures that somehow have revealed not a, but *the* correct "sense of the meaning or the fitness of things." The immediate and obvious objections include: whose concept of "fitness," from what "history," regarding which "communities," based on what "sense of moral progress?"¹⁷¹ Every community has dissenters, every epoch knows dissension, and every definition of progress acknowledges a counter-explanation. Examples are neither scarce nor difficult to access. It was not very long ago that "critical judgment, ethical intuition, and human sympathy" counseled the inferiority of non-White races. Even less in the past, judgement, intuition and sympathy advised the dominance of men over women. It is barely two decades that the prevailing sentiment arguably recognizes the dignity of the LGBT community that once was derided as unnatural if not inherently perverse, vile, and an inherent danger to the health and welfare of Society.¹⁷²

170. Sagoff, *supra*, note 72, at 1068.

171. Bayer II, *supra* note 17, at 327.

172. E.g., Andrew Koppelman, *Romer v. Evans and Invidious Intent*, 6 WM. & MARY BILL OF RIGHTS J., 89, 123-29 (1997); Dov Berger, *Separating Civil Unions And Religious Marriage--A New Paradigm For Recognizing Same-Sex Relationships*, 6 CARDOZA PUB. L. POL'Y & ETHICS J. 163, 169 (2007) (footnote omitted) (student note arguing, *inter alia*, "The history of homosexuality is a long and unfortunate one, filled with significant bigotry and danger."). Margaret Bichler, *Suspicious Closets: Strengthening the Claim to Suspect Classification and Same-Sex Marriage Rights*, 28 B.C. THIRD WORLD L.J. 167, 168 (2008) (note) (citing, Michel Foucault, 1 *The History of Sexuality: An Introduction*, 42-43, 97-101, 105-06 (1990)).

Likewise, only recently has the law has acknowledged the respect due to LGBTQ individuals. See, Bayer Part II, *supra* note 23 at Section 6-c-6. Just a half-century ago, the Supreme Court upheld federal immigration statutes identifying "homosexuals" and "sex perverts" as "psychopathic personalit[ies]" who may be refused entry into or deported from the United States. *Boutilier v. I.N.S.*, 387 U.S. 118 (1967); *see also, e.g.*, *Quiroz v. Neelly*, 291 F.2d 906 (5th Cir. 1961); *Matter of Longstaff*, 716 F.2d 439 (5th Cir. 1983) (homosexual individual is ineligible for naturalization); *LaVoie v. Immigration and Naturalization Service*, 418 F.2d 732 (9th Cir.1969), cert. denied, 400 U.S. 854 (1970)

In sum, no matter how much conceptual plastic surgery is applied, Consequentialism and its first-cousin Utilitarianism retain their original features so long as their definitions of moral comportment require some measure of human preference, predilection and subjective inclination. Indeed, the earnest attempts noted above to salvage consequentialist theory reveal, or at least strongly suggest, those theorists to be closet deontologists seeking a deontology – some neutral, overarching, and a prior definition to constrain the excesses of defining Morality in terms of good or bad outcomes.¹⁷³

Even accepting the above conclusion, the abrupt question arises: What does reason reveal the definition of morality to be? The answer will come from the celebrated Enlightenment philosopher Immanuel Kant's theory of human dignity.¹⁷⁴ Before that topic, however, this writing needs to explain one final aspect of general Deontology, the concept of value monism.

(foreigner deportable for being homosexual). *See generally*, Robert Foss, *The Demise of The Homosexual Exclusion: New Possibilities for Gay and Lesbian Immigration*, 29 HARV. C.R.-C.L. L. REV. 439 (1994). Similarly, although subsequently overruled and replaced with a morally competent jurisprudence regarding "homosexual" legal issues, barely three decades ago the Supreme Court held unequivocally that states may criminalize homosexual sodomy, thereby permitting Government to declare homosexual individuals and their supporters if not immoral, then misguided believers in the rightfulness of what the Court deemed depraved, indeed dangerous sexual conduct. *Bowers v. Hardwick*, 478 U.S. 186, 192-92 (1986), *o.*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

The Court rejected arguments that it should review and assess States' -- in that instance Georgia's -- determination that homosexual sodomy in fact is immoral conduct. *Bowers* accented that sodomy had been a widely accepted criminal offense during colonial and early *post*-Revolution years, through the ratification of the Fourteenth Amendment and well into Twentieth Century America. *Id.* at 196 (Burger, C.J., concurring) ("Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards."). *Bowers* ruled that states may exercise their authority under the Constitution's Tenth Amendment to imprison and otherwise sanction homosexual sodomy as a crime. Indeed, Chief Justice Burger quoted the now shameful text of Blackstone that sodomy is, "the infamous crime against nature," [] an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named.'" *Id.* at 197 (Burger, C.J., concurring).

173. For instance, the earlier mentioned "indirect consequentialism" would determine "which rules and rights are the ones whose establishment would have the best consequences in the long run, *impartially considered*." Hooker, *supra* note 169, at 203 (emphasis added). The highlighted term "impartially considered" arguably imports a controlling overlay of Deontology in that impartial connotes judgment based not on personal preferences or prejudices, but rather on unbiased factors. In the realm of morality, the only possible unbiased factor is reason; therefore, Professor Hooker's estimation of indirect consequentialism either is Deontology or falsely labels determining "best consequences in the long run" as an impartial endeavor.

174. *See infra*, Section 3.

H. Value Monism --

Any particular deontological system comprises a synchronization of discrete maxims, beliefs, principles, and edicts.¹⁷⁵ Of course, these maxims and edicts must harmonize; if they conflict the deontology becomes incoherent because, due to conflict, there might be no single, correct moral resolution of the problem under review.¹⁷⁶ As Professor Kuklin noted, “Qualified moral maxims . . . must satisfy the coherence requirement. That is, the set of adopted moral maxims must be consistent with one another, so that a person is able to satisfy them all simultaneously.”¹⁷⁷ Certainly, it is uncontroversial that the proper moral resolution may change depending on the discrete facts of the given moral dilemma. Indeed, a single fact can make the difference between moral and immoral comportment.¹⁷⁸ The easy exemplar comes from criminal law: killing a person to foster an ongoing robbery is homicide; killing a person to prevent her from immediately and wrongfully killing you is self-defense.

“That the moral resolution of a particular dilemma depends on unique facts accords with, rather than negates, the reality that for every moral inquiry there is a correct answer, which must be based on eternal principles of right and wrong.”¹⁷⁹ But, as just indicated, discerning the “correct answer” requires that all discrete moral maxims exist in harmony.¹⁸⁰ Accordingly, there must be a single fount from which all moral norms emerge and to which they all adhere. The “one overarching, unifying concept that serves as the pivot for resolving any moral quandary”¹⁸¹ is what Professor Wood denoted as “value monism,” one basic principle -- the meta-concept -- morality’s “Big Bang,” if you will -- producing all more specific moral norms and precepts:

175. Kuklin, *supra* note 39, at 501-02.

176. *Id.* There may be many moral ways to accomplish a moral goal. For example, there are many ethical ways to become wealthy if wealth is the goal. However, regarding any given moral dilemma, there is one and only one correct resolution. If moral precepts conflicted, it would be possible that a moral dilemma might have no clear moral answer.

177. *Id.*; see also, Wood, *supra* note 33, at 165.

178. *Id.* at 67-68, 162-65 (Kant discussing morality offered some provocative examples: “[w]ide or imperfect duties [that] succumb to strict or perfect duties; for example, the wide duty to aid a stranger is overridden by the duty not to let my parents starve . . . and you must testify truthfully in court even if a lie would help your benefactor (and thus fulfill a wide duty of gratitude).”); see also, Kuklin, *supra* note 39, at 501-02.

179. Bayer II, *supra* note 17, at 304.

180. Kuklin, *supra* note 39, at 501-02.

181. Bayer II, *supra* note 17, at 304.

An ultimate plurality of values leaves us not only with incommensurable values but also with a plurality of values between which there is in principle no way of establishing any priorities . . . Value monism is necessary to provide even a context for making comparisons between different values, however the comparisons may come out.¹⁸²

Accordingly, expressing the belief of many, Professor Dorf simply is wrong by asserting that “The most general level of a principle is essentially empty.”¹⁸³ Rather, “The most general level of a principle,” when properly

182. Wood, *supra* note 33, at 59, 67-68 (discussing how Kant and Mill agreed that moral theory requires value monism, explaining that, “a moral rule or principle may very well be conditional in other ways without affecting its categorical status. The supreme principle of morality admits of no conditions or exceptions, of course, because there is nothing higher by reference to which conditions or exceptions could be justified.”).

183. Dorf, *supra* note 46, at 140; Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (“arguing that the principle of treating like kinds similarly offers no guidance absent moral conception of what characteristics are alike”).

Dorf is hardly the only critic of value monism. There is a large but, I think, mistaken thread of commentary embracing “value pluralism,” the idea that there is no single moral value. Professor Gregory Alexander, for instance, argues, “A main, perhaps the main, objection to value monism is that it is implausibly reductive. Monists attempt to reduce all moral goods to some single irreducible evaluative standpoint, such as pleasure or desire. This attempt simply does not square with our everyday experiences. As Elizabeth Anderson states, ‘Our evaluative experiences, and the judgments based on them, are deeply pluralistic.’” Gregory S. Alexander, *Pluralism and Property*, 80 FORD. L. REV. 1017, 1035 (2011) (quoting ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 1 (1993)).

Alexander’s and Anderson’s critique fails along the same lines as does Holmes’ earlier references to purported logic and experience to disprove the existence of Natural Law. See, *supra* Section 2-d. Of course, we all weigh any number of competing, often incompatible, ideas and interests when making decisions of all kinds. But, even if imperfectly due to time constraints, lack of complete information and limited intellects, we make decisions -- we choose courses of action. To make these decisions we must find some unifying concept or theme from which to determine what particular choice is most pleasing or, if a moral dilemma, which choice is mandated, even if we are not completely happy with that ultimate decision.

For instance, suppose we have \$10 which is enough to do one, but not both, of two perfectly moral things we really would like to do at this moment: have a full hamburger lunch or go to the movies. While both projects involve pleasure -- we enjoy hamburgers and fries, and, we like movies -- the sensibilities of those pleasures are different; and, sadly, we cannot satisfy both sets of sensibilities given our limited financial resources. Presuming it would be senseless to choose a third, even less attractive alternative to avoid the aggravation of compromising by choosing only one of our top two possibilities, we must find some unifying idea that will let us decide whether, right now, we would rather have the hamburger lunch or see the movie. We use value monism to house and, more importantly, prioritize our competing values until we find the overarching desire that induces us to choose one option over the other.

expressed, is meaningful and essential to understand all sub-principles which spring from that unifying, “general level ... principle.” In that regard, this writing now turns to the philosophy of Immanuel Kant as the source for determining morality’s “general level ... principle[s].”

III. KANTIAN MORALITY --

a. Kant’s Importance --

If indeed Deontology is the only proper philosophy of morality and if, as we will see,¹⁸⁴ the Founders and the Reconstruction Congress rightly instructed their successors to enforce the Constitution by applying the best available moral precepts even if they are discovered subsequent to and confound the Founders’ beliefs. The question then becomes, among competing theories, what is that best available deontological approach. That question, as we also will learn, is not simply essential to the philosophy of morals but as well to the jurisprudence of constitutional morality.¹⁸⁵

In that specific regard, I have urged that, “Few philosophers have provoked the imagination and engendered the respect of modern legal theorists as has Immanuel Kant. Perhaps more than any other post-Hellenistic thinker before him, Kant provided a workable articulation of the abstract moral base below which human behavior *and the laws regulating human behavior* cannot go.”¹⁸⁶ Kant remains a primary source for commentators seeking a theory of morality that precedes the advent of Humanity and transcends human imagination, meaning its premises can be envisioned and understood, but not altered by human intellect. While many have used Kant’s precepts to espouse fascinating, perhaps useful variants of deontological morality,¹⁸⁷ for me at least, Kant’s basic and remarkably

184. See, Bayer *supra* note 23, Part II, Sections 2 and 3.d

185. See, *id.* at Sections 2 (the deontological philosophy of the Framers) and 4 (the deontological philosophy of the Reconstruction Congress).

186. Bayer II, *supra* note 17, at 346 (emphasis added; footnote omitted).

187. Among the most important is John Rawls whose work, particularly *A Theory of Justice*, attempted a workable Kantian approach. One discerns the Kantian influence, as well, in the works of Ronald Dworkin. For instance, in his pivotal *Freedom’s Law* wherein he expressed his theory of moral originalism, *supra* note 12 and accompanying text, Dworkin urged that the Constitution “commit[s] the United States” to abide by several moral precepts including, “treat[ing] all those subject to subject to its domain as having

profound principles remain the best building blocks to premise theories of moral comportment under law.

Certainly, the importance of abstract moral philosophy, particularly Kant, to the very concept of Enlightenment-influenced law is obvious yet should be continually re-emphasized,¹⁸⁸ particularly in light of the alarming trend of American anti-intellectualism, even within the Academy.¹⁸⁹ As a distressing example of modern legal anti-intellectualism, recently the present Chief Justice of the United States scoffed, “Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.”¹⁹⁰

Over a century earlier, in apt and stirring contrast to Chief Justice Robert’s tired, uninspired, and crabbed perspective, theorist and jurist Oliver Wendell Holmes explained with his characteristic verve Law’s debt

equal moral and political status; it must attempt in good faith, to treat them all with concern; and it must respect whatever individual freedoms are indispensable to those ends” Dworkin, *supra* note 12, at 7-8 (evoking a mild Kantian sense of respecting human dignity by treating persons as “ends,” not merely as “means” to attain one’s desires); *see infra* notes 516-38 and accompanying text.

188. A November 5, 2017, Westlaw search of “Kant” within “Law Reviews & Journals” revealed 8,873 articles. Admittedly, this search presents a very rough estimate in that, given his prominence, authors may be apt to drop at least one or a few “obligatory,” cursory Kantian references if, for nothing else, to give articles the panache of abstract philosophy implying thorough research. Still, a substantial number of these articles offer significant analysis of Kantian theory, surely underlying Kant’s importance to legal theory.

A similar search of “Locke” revealed an even more impressive 9,973 journal articles referencing philosopher John Locke. Given Locke’s pedigree linked directly to the drafting of America’s founding documents, that he received 1,100 more references than Kant is not surprising. Indeed, it may make the 8,873 Kant “hits” all the more impressive as Kant is not directly associated with either America’s founding or American legal theory, yet, comparing the two numbers, Kant earned only 12% fewer journal references than Locke.

189. *E.g.*, Tamara R. Piety, *In Praise of Legal Scholarship*, 25 WM. & MARY BILL RTS J. 801, 820 (2017) (“Populism and anti-intellectualism do seem particularly prominent in American society right now”); Marc J. Randazza, *Ulysses: A Mighty Hero in the Fight for Freedom of Expression*, 11 U. MASS. L. REV. 268, 268 (2016) (An “anti-intellectual spirit [] runs through modern American jurisprudence”).

190. Orin S. Kerr, *The Influence of Immanuel Kant on Evidentiary Approaches in 18th-Century Bulgaria*, 18 GREEN BAG 2d 251, 251 note 1 (2015) (quoting Interview with John G. Roberts, Jr., Chief Justice of the United States, at Fourth Circuit Court of Appeals Annual Conference (June 25, 2011), www.c-span.org/video/?300203-1/conversation-chief-justice-roberts).

to philosophy.¹⁹¹ Then a justice of the Supreme Judicial Court of Massachusetts, in his historic essay *The Path of the Law*,¹⁹² a transcription of his famous January 8, 1897, address celebrating the opening of a new building at Boston University School of Law, Holmes ended his lecture with insights enthusiastically romantic yet wholly pragmatic:

As Hegel says, "It is in the end not the appetite, but the opinion, which has to be satisfied." To an imagination of any scope the most far-reaching form of power is not money, it is the command of ideas. *If you want great examples ... [r]ead the works of the great German jurists, and see how much more the world is governed to-day by Kant than by Bonaparte.* We cannot all be Descartes or Kant, but we all want happiness. And happiness, I am sure from having known many successful men, cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars. An intellect great enough to win the prize needs other food beside success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.¹⁹³

In that fascinating and brilliant passage, Holmes insists, *inter alia*, that the study of Kant is, if not integral, then exceedingly helpful toward acquiring deep, meaningful, and, indeed practical understanding of law. In fact, according to Holmes' words, command of Kant, as part of a broad-based appreciation of abstract philosophy, "not only [empowers you to] become a great master in your calling," but enhances personal "happiness" by enabling "you" to, "connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law." While he certainly did not agree with Kant's belief in deontological morality,¹⁹⁴ Holmes knew that absent a genuine facility for

191. True, only a few pages ago this article resoundingly criticized Holmes' essay on natural law. See, *supra* notes 83-123 and accompanying text. Such criticism does not negate the fact of his brilliance in other areas of legal analysis; and, certainly does not preclude me from extolling Holmes when he was correct.

192. Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV 457 (1897).

193. *Id.* at 478 (emphasis added; quoting, Hegel, *Phil. des Rechts*, § 190).

194. See, *supra* notes 83-123 and accompanying text.

abstract philosophy on the part of both individuals and their greater Society, neither law nor lawyers can flourish.¹⁹⁵

Holmes was a crusty, cynical legal realist.¹⁹⁶ But, despite his skepticism, Holmes saw Law as discerned not simply by human intellect, but likewise by human imagination, maybe as well, by the human heart, thus rendering individuals both aware and appreciative of their connection to an infinite reality that, Holms dared to imagine, perhaps has spawned a “universal law.” If idealistic, Holmes’ concept of law and lawyering is ennobling and inspiring -- it is the way lawyers (and laypersons) should appreciate Law because it demands the best we can and ought to be, even when we strive only to satisfy our selfish goals. Thus, Holmes offers a vision -- a dream -- of Law that contrasts favorably against Chief Justice Robert’s arid pragmatism.

This writing, while emphasizing Kant, is well aware that, like many others deep thinkers including the Framers themselves, Kant’s presentations are incomplete and somewhat vague, looking to others to provide specifics. Professor John Lawrence Hill well expressed that concern, “Kant’s moral theory is deep and yet gossamer; it is subtle and complex but leaves the details unresolved.”¹⁹⁷ Even so, what holds true for American constitutional law applies as well to Kantian morality: the paramount concern is not detailed applications of abstract principles, but understanding the essential meaning of those abstract principles. Regarding metatheory,¹⁹⁸ Kant’s “dignity” precept, and the three “categorical imperatives” that enforce it, are as complete, elegant, evocative and accurate an encapsulation of meta-ethics as the human mind has so far

195. Another judge of essentially equal stature, Learned Hand, expressed very similar sentiments that great lawyers appreciate the Law’s integral relation to abstract philosophy. See IRVING DILLARD, *LEARNED HAND, SOURCES OF TOLERANCE, THE SPIRIT OF LIBERTY, PAPERS AND ADDRESSES OF LEARNED HAND* 81 (Irving Dilliard ed., 3d ed. 1974) (quoted at length *infra* at note 1226 and accompanying text.). [IS THIS HAND QUOTE IN PART II?]

196. *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., with Brandeis, J., dissenting). See also Brad Snyder, *The House That Built Holmes*, 30 *Law & Hist. Rev.* 661, 686 (2012) (quoting Letter from Oliver Wendell Holmes, Jr. to Felix Frankfurter (June 14, 1925) wherein Holmes described his dissent to the Court’s affirmation of *Gitlow*’s conviction for speech constituting “criminal anarchy” under New York Penal Law as “an expiring kick on the [Court’s] last [term] day (Brandeis was with me) in favor of the right to drool on the part of believers in the proletarian dictatorship ...”).

197. Hill, *supra* note 31, at 227.

198. See *supra* note 21.

perceived.¹⁹⁹ Kant's edicts provide sufficient bases for logical application to specific problems.²⁰⁰

B. Kant's Noble Vision of Humanity --

As a deontologist, Kant sought to discern absolute moral truth; accordingly, "Kant's project was to render morality undogmatic - to ground it in the fact of reason."²⁰¹ As we will see, Kant viewed emotions as inevitably corrupting reasoned analysis;²⁰² and, once discerned through unemotional reason, individuals and their various groupings have no choice but to follow moral comportment wherever it may lead.²⁰³ In that regard, there seems little left to the imagination. But, the Kantian explication of morality discerned through reason is not a cold endeavor rendering ethical precepts unromantic and the human beings who must abide by them stony, chilly automatons. Kant's deontology is not simply the moral persons' "users' manual." Rather, it is a bravura declaration of the nobility of Humankind -- a vision that Humanity, as both discrete individuals and as part of many and varied collectives, can and perhaps will discard selfish predilections, even seemingly sensible preferences to avoid pain and to protect life itself, if that is what moral conduct requires. *Kant's belief that individuals, at least to some degree, can choose doing right over doing*

199. As one scholar enthused,

There is perhaps no thinker whose work embodies, and even glorifies, the most salient themes of this tradition more than that of Immanuel Kant. The influence of his thought has been deep and far-reaching throughout the West. He is one of those thinkers about whom it truly can be said that nothing was ever the same after he wrote. While no one can deny the immense influence of John Locke, direct and incomparable, upon the Framers of the United States Constitution, it is arguably Kant's thought that best elucidates and provides the most gripping justification of the fundamental themes of classical liberalism. These themes are underscored in his critical philosophy as well as in his later political writings. As time goes on, his giant shadow lengthens, ...

L. Scott Smith, *"Religion-Neutral" Jurisprudence: An Examination of Its Meanings and End*, 13 Wm. & Mary Bill Rts. J. 841, 849–50 (2005).

200. That is why modern commentators distinguish between "Kantian eithics" and "Kant's ethics." The former is the overarching moral framework Kant espoused. The latter is the panoply of Kant's specific ethical principles steeped as they were in racism, sexism and similar untoward prejudices and misperceptions. See Bayer II, *supra* note 17 at 347-48. See also, *infra* Section 3-c.

201. Carlson, *supra* note 124, at 10.

202. See *infra* notes _ [EMOTIONS] and accompanying text.

203. This rigidity, of course, is not unique to Kant but rather a requisite of Deontology as the previous discussion debunking Threshold Deontology and quasi-deontological modifications of Consequentialism show. See *supra* notes 141-78 and accompanying text.

*good bespeaks an abiding respect in the human capacity to rise above selfishness.*²⁰⁴

Thus, although grounded in emotionless logic, Kant's theory of Humanity has not only depth but true beauty.²⁰⁵ Kant presents human beings as deeply flawed, yet capable of the magnificence in every-day life that one would expect from those who alone have been endowed by God²⁰⁶ with the capacity to comprehend and to honor the harsh sacrifice attendant to the moral life. Even though this sacrifice may require forfeiting the self-indulgence of the "good life" referring to what "most philosophers equate [with] happiness."²⁰⁷ For Kant to believe that individuals at all were capable and agreeable to "good will,"²⁰⁸ that is, to follow the barbed path of moral comportment not for personal gain but because such is the absolute duty of Humanity, is the highest accolade one can pay for, as Deontology proves, there is no nobler behavior than to do what is right, particularly when what is right is not what is good.²⁰⁹

204. Jack Russell Weinstein, *On the Meaning of the Term Progressive: A Philosophical Investigation*, 33 WM. MITCHELL L. REV. 1, 21 (2006) (noting "For Kant, progress contributes to the realization of human potential. At the core of his account is a glorification of the human capacity. Enlightenment for Kant is the point where humankind can finally do whatever it was that it was intended to do."). Ben A. McJunkin, *Rank Among Equals*, 113 MICH. L. REV. 855, 867 (2015). ("Kant claimed that dignity exists in the human capacity to subordinate bestial impulses and to follow self-crafted rules of reason.").

205. Lisamichelle Davis, *Epistemological Foundations and Metahermeneutic Methods: The Search for a Theoretical Justification of the Coercive Force of Legal Interpretation*, 68 B.U. L. REV. 733, 743 (1988) ("Kant is one of the greatest philosophical systematizers, deserving attention for the beauty of his work if not for its truth."). True, Kant's prose generally is considered "clumsy and irritating." *Id.* at 743 n. 35 (quoting, W. WALSH, KANT'S CRITICISM OF METAPHYSICS vii (1975)). Nonetheless, I agree that "Kant's work is beautiful in substance if not in form." *Id.*

206. For Kant, "God, freedom, and immortality become 'regulative ideas' -- postulates that help us to make sense of our mortal experience, though we cannot prove they exist." Hill, *supra* note 31, at 226.

207. Jerome J. Shestack, *Pursuit of the Good Life in Professionalism*, 28 STETSON L. REV. 271, 271 (1998). Not surprisingly, there are competing visions of "the good life." See Daniel M. Haybron, *Well-Being and Virtue*, 2 J. ETHICS & SOC. PHIL. 1, 6-7 (2007) ("While we do sometimes use 'the good life' to denote well-being, the most natural understanding of the expression concerns a life that is desirable or choiceworthy, not just for the individual's benefit, but, all things considered: good. ... The good life, on such a view, involves both well-being and, distinctly, virtue."); see generally Robin L. West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision*, 46 U. PITT. L. REV. 673 (1985) (discussing various theories of "the good life").

208. Hill, *supra* note 31, at 227 (discussing, IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 9 (Cambridge: Cambridge U. Press, 2012)).

209. In that regard, judges noted over a century ago the importance of Kant's metatheory, especially as it relates to law,

Kant's skepticism about persons' capacities to discern moral truth and their willingness to suffer the pain of moral fidelity is well known. Kant did lament, "[F]rom such crooked wood as man is made of, nothing perfectly straight can be built,"²¹⁰ a sentiment he likely meant.²¹¹ Yet, Kant's theory is premised on a gift from a higher power, specifically, the dignity innate within every human being. We can accept that such dignity, exercised in its fullest capacity, renders each of us sufficiently capable of both discerning abstract moral precepts and applying them correctly to guide our interactions with other persons. Faithful to such rational capacity, Kant boldly and audaciously explained not only why morality is greater than any person or even Humanity itself, but further, why each person and Humanity itself must be willing to sacrifice all to remain faithful to the paramount duty of moral comportment.

Kant was neither hyperbolic nor impaired when he expressed his ultimate conclusion, "Let justice be done even if the world should perish."²¹² Moreover, because Kant's ethical theory encompasses not only

Not less wondrous than the revelations of the starry heavens, and much more important, and to no class of men more so than lawyers, is the moral law which Kant found within himself, and which is likewise found within, and is consciously recognized by, every man. This moral law holds its dominion by divine ordination over us all, from which escape or evasion is impossible. This moral law is the eternal and indestructible sense of justice and of right written by God on the living tablets of the human heart ...

Moore v. Strickling, 46 W. Va. 515, 33 S.E. 274, 277 (W.Va. 1899) (quoting JUDGE JOHN F. DILLON, COMMENTARY ON THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA BEING A SERIES OF LECTURES DELIVERED BEFORE YALE UNIVERSITY (Boston: Little, Brown, and Co., 1894)); see also J.W. Simonton, *On the Origin and Nature of Law*, 11 YALE L.J. 195, 207 (1902) (quoting Dillon).

210. IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY FROM A COSMOPOLITAN POINT OF VIEW* (John Scott & John Taylor ed., 1824) (1784).

211. Interestingly, perhaps as a concession to the inevitability of human frailty, Kant posited that some immoral acts are so innately linked to self-preservation that while they may be criminalized, punishments should be mild if not utterly proscribed. Raef Zreik, *Notes on the Value of Theory: Readings in the Law of Return—A Polemic*, 2 LAW & ETHICS HUMAN RIGHTS, 2008, at 1, 27 (noting "Kant recognizes that there are cases of necessity when the life of one person is endangered, and in order to save his own life he might sacrifice the life of another. Kant believes that there is no point in imposing punishment in such a case, not because what the perpetrator did was justified, but simply because no penalty could deter someone whose life is in real danger from sacrificing someone else's life. In this sense the act is excused but not justified, and the act is treated as if it were right although it was not. What Kant is suggesting is that in such cases of necessity, an existential threat, we face a situation in which there is a suspension of norms, and we momentarily suspend our attempt to morally judge these actions.").

212. KANT, *supra* note 55, at 102 n.16. As a deontologist, Kant's unrelenting views makes perfect sense, as do many of his specific precepts that scholars find unreasonable and

individual behavior but that of human groupings, particularly governments, Kant's advocacy of Morality's supremacy above all other considerations expresses a duty of nations, not merely individuals.²¹³ Accordingly, Kant's assertion "if justice goes, there is no longer any value in men's living on

excessive. To cite a few prime examples, Kant famously argued that persons must never break even trivial promises although doing so might save lives, and, similarly, that lying is never moral no matter what the circumstances even if lying would save innocent lives or prevent the innocent from suffering unearned pain. Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1536 (1996); Kuklin, *supra* note 39, at 499-500. While extreme, we know that Deontology permits no compromise; therefore, Kant's admonitions are apt even though, under tragic circumstances, the outcomes may be terrible. Of course, if all persons became enlightened enough to follow Kant's philosophy, no one would lie, no one would break a promise and we would be comfortable with such a social fabric because no one would commit evil acts that would induce us to consider lying or breaking promises.

Moreover, Kant logically explicated that the duty not to lie does not necessarily entail a corresponding duty to tell the truth. Under certain circumstances, one may accept the consequences of outright refusing to answer. Thus, in response to the familiar rejoinder to Kant, if the Gestapo asks you where the Jewish family is hiding and you know the answer, as a moral matter you cannot lie, but neither need you reveal the truth because you know as a virtual certainty that the Gestapo will use the information for immoral purposes. Rather, you may refuse to answer which, almost certainly will cause you great harm likely including arrest, torture and execution. But, defiant silence under such circumstances is a rightful alternative to the truth, as commentators have emphasized:

Using a hypothetical situation in which a murderer comes to the door and asks for one's friend, Kant argues that, while it is acceptable for one to respond with silence, one must not lie to the person planning to commit the murder. Kant rejects the idea that one is justified in lying for any good cause including saving the life of another, because in telling the truth one cannot be held responsible for negative consequences.

J. Kevin Quinn, Nancy K. Kubasek, and, M. Neil Browne, *Resisting the Individualistic Flavor of Opposition to Model Rule 3.3*, 8 GEORGETOWN J. LEG. ETHICS 901, 935-36 (1995) (discussing, Immanuel Kant, *On a Supposed Right to Lie from Altruistic Motives*, in IMMANUEL KANT: CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY (Lewis White Beck ed. & trans., 1949); other citations omitted); see also Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1513 n. 120 (2004).

213. Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM., L. REV. 53, 64 (1992) ("[T]he constitution of the state, an artificial creation to serve human needs, must embody and incorporate [human morality]"); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599, 2610 (1997) ("Kant predicated his understanding of international law not on Benthamite utilitarian concerns, but on a vision of international law as a purposive system dedicated toward securing peace, and built on the cornerstones of justice, democracy, and a liberalism focused on the centrality of human rights"); AMANDA PERREAU-SAUSSINE, IMMANUEL KANT ON INTERNATIONAL LAW, THE PHILOSOPHY OF INTERNATIONAL LAW (Samantha Besson & John Tasioulas eds., 2010).

the earth”²¹⁴ is particularly poignant because, as we will learn, “justice” arises from society, not from individuals. Therefore, I join those who reject, or at least moderate, the image of, “the stiff, inhuman, moralistic Prussian ogre everyone knows by the name Immanuel Kant.”²¹⁵ Instead, one must deeply admire the Kant who perceived each member of Humankind, and the societies they form, as capable enough to discern moral truth and noble enough to die for the greatest conceivable cause, the vindication of that truth. That each of us has perhaps hidden in our souls the substance of divinities, and that each of us has the capacity, perhaps equally hidden, to act accordingly, is, I think, as gratifying a compliment as one can pay and one can receive.

C. Not Kant’s Morality but Kantian Morality

Granted, however exquisite Kant’s moral theory is, many of his particular views of Humankind are repellant. In particular, “Kant considered non-Caucasians intellectually limited, which he attributed in large measure to those races having developed in unsuitable climates and environments. In later writings, Kant appeared to have modified, but not fully repudiated, his racial theories which may have had a substantial influence on racist models of the 18th and 19th Centuries.”²¹⁶ Sadly, and not surprisingly, Kant espoused as well the intellectual and physical superiority of men over women.²¹⁷ That is why modern scholars -- perhaps appropriately denoted as neo-Kantians²¹⁸ -- embrace “Kantian ethics” but not “Kant’s ethics.”

214. Waldron, *supra* 217, at 1540 (quoting, Immanuel Kant, *Metaphysical First Principles of the Doctrine of Right*, in *The Metaphysics of Morals* 33, s 49(E)(I), at 141 [Ak. 312] (Mary Gregor trans., Cambridge Univ. Press 1991) (1797)).

215. WOOD, *supra* note 33 at xii; *see also* Hill, *supra* note 31 at 225 (“[Kant] is reputed to have been a man of lively wit, debonair charm, and preternatural regularity. A common story relates that he was so consistent in his daily habits that his neighbors could set their clocks by his four o’clock stroll through town”).

216. WOOD, *supra* note 33 at 7; *see also, e.g.*, Reginald Leamon Robinson, *Teaching from the Margins: Race as a Pedagogical Sub-Text a Critical Essay*, 19 WEST. NEW ENG. L. REV. 151, 154 n.13 (1997) (“Kant, citing with approval David Hume’s likening of learning by ‘negroes’ to that of parrots, insisted upon the natural stupidity of blacks”).

217. WOOD, *supra* note 33 at 8-10; *see also, e.g.*, ROBIN MAY SCHOTT, *COGNITION AND EROS* (1988).

218. Neo-Kantianism, “celebrates the concept of autonomy, or moral self-rule via the individual’s rational generation and acceptance of binding normative principles.” Janet Moore, *G Forces: Gideon v. Wainwright and Matthew Adler’s Move Beyond Cost-Benefit Analysis*, 11 SEATTLE J. FOR SOC. JUST. 1025, 1032 (2013) (citing, ANDREWS REATH,

Kant's ethics are his specific moral applications and discrete moral conclusions. "Kantian ethics, on the other hand, is an ethical theory formulated in the basic spirit of Kant" A proponent of Kantian ethics enthusiastically adapts Kant's broad principles to form what she believes is either a more accurate, pertinent meta-theory or a better application of such to precise circumstances.²¹⁹

Such an approach, of course, is perfectly acceptable²²⁰ and, indeed, reminiscent of the common practice among courts and commentators to respect the broad principles the Framers preserved in the Constitution while rejected specific applications the Framers themselves embraced that modern sensibilities rightly perceive as bigoted or otherwise indefensible.²²¹

C. *The Kantian Moral Metatheory* --

I have explicated Kant's theories elsewhere,²²² and, for the purposes of this article, only a reiteration is necessary to provide the applicable, workable structure.

1. *The Rational Capacity of Each Person to Discern a "Metaphysics of Morals"* --

As indicated above, the first step in Kant's analysis is his conception of human beings. Kant's crucial idea is that each of us has been given an "autonomy of the will" -- the ability to understand ideas and thus to make

AGENCY AND AUTONOMY IN KANT'S MORAL THEORY: SELECTED ESSAYS 137-38 (2006)). David Thunder, *Can a Good Person Be a Lawyer?*, 20 NOTRE DAME J. OF LAW, ETHICS & PUB. POL. 313, 318 (2006) (footnote omitted) (offering that neo-Kantianism is, "the tradition of moral thinking whose broad themes, ideas, and vision of morality have a close affinity with the broad themes, ideas, and moral vision of Immanuel Kant, and whose existence would be difficult to imagine without Kant's intellectual legacy.").

219. Bayer II, *supra* note 17, at 347 (discussing and quoting, WOOD, *supra* note 33, at 1).

220. Wright, *supra* note 81 at 274 ("[one can] make no claim to have arrived at the understanding that Kant intended . . . [a justifiable] goal is to construct a useful understanding of Kant's formula . . . rather than one that would have met with Kant's approval").

221. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 402, 407 (1976).

222. See generally Bayer II, *supra* note 17, at 293-370 (discussing Kant's theory of dignity, which explains why obeying morality is more important than life itself); see also, Bayer I, *supra* note 13, at 896-909.

thoughtful choices -- because we are endowed with “practical freedom,” meaning,

a capacity to follow determinate laws given by the faculty of reason . . . the capacity to recognize rational nature as an end in itself as a reason for acting in certain ways, and to act in those ways on the basis of that reason . . . *the capacity to act for reasons, rather than only on the basis of feelings, impulses, or desires that might occur independently of reasons.*²²³

The practical freedom secured from the autonomy of the will engenders individuals’ capacity to discover the “metaphysics of morals.”²²⁴ Kant’s metaphysics are predicated on his belief that due to Humankind’s singular capacity to discover the metaphysics of morals, “the innate worth of all persons is equal, and such worth is immeasurable.”²²⁵ Importantly, that worth is not attendant to any particular acts -- good or otherwise -- performed by any particular person. Rather, each person’s inestimable worth arises from the innate dignity bestowed by a generous deity upon each of us as human beings.²²⁶ Dignity is manifested by that which, as just accented, distinguishes Humanity from the most intelligent of other species based on individuals’ “rational capacities to surpass their sensibilities -- *to escape the grip of their desires and preferences and employ reason to discern and to apply a priori moral precepts.*”²²⁷

Their *inestimable worth* is further manifest by, “the ability of humans to appreciate the implications or ‘universality’ of their actions.”²²⁸ In general, each of us are capable of detaching ourselves, at least to a sufficient degree, from our desires, preferences and prejudices, to

223. WOOD, *supra* note 33 at 127.

224. Peter Benson, *External Freedom According to Kant*, 87 COLUM. L. REV. 559, 575-76 (1987).

225. Bayer I, *supra* note 13, at 294 (citing WOOD, *supra* note 33 at 3).

226. From a neo-Kantian perspective, one can embrace the innate dignity of Humanity not necessarily as a gift from a “supreme being,” but rather, inherent in the natural order of existence as likewise are natural rights and natural law emanating from the deontological understanding of morality. Bayer I, *supra* note 13, at 340. See *supra* Part. 2 discussing Deontology and Bayer, *supra* note 23 Part II, Sections 2-3 discussing the natural law - perspective of the Declaration of Independence.

227. Bayer I, *supra* note 13, at 348-50 (citing Wright, *supra* note 81, at 274-75).

228. John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 678 (2008); see also Ernest J. Weinrib, *Symposium on Kantian Legal Theory: Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472, 479 (1987) (citing IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Cambridge University Press, 1st ed., 1998)).

understand the transcendent, extra-human principles of morality as they apply to Humanity. Based on their rational capacities, human beings can develop several reasonably reliable senses or perceptions such as (1) a sense of self (that is, comprehension of their own individual identity including who they think they are and what they think they want to make them happy); and (2) a sense of the individual selves -- identities -- of others.²²⁹ These perceptions, in turn, allow individuals to be "purposive,"²³⁰ since individuals can accurately perceive their own desires, and then "through thoughtful deliberation, determine whether to pursue those desires; and, if they choose to do so, select among possible courses of [probable] attainment."²³¹ Kant summarized the foregoing under the heading *practical reason*, as earlier quoted, "the capacity to follow determinate laws given by the faculty of reason . . . the capacity to act for reasons, rather than only on the basis of feelings, impulses, or desires that might occur independently of reasons."²³² Through the capacity for practical reason/practical freedom, human beings can apprehend deontological truths and are not simply fated to indulge consequentialist solutions of moral problems.²³³

Practical reason fosters "practical judgment" which is, "the capacity to descend correctly from a universal principle to particular instances that conform to it"²³⁴ -- to use the abstract to understand and to solve *real life* matters. Accordingly, human beings' innate dignity allows the full panoply of moral discernment: the capacity to use neutral, unbiased reason to

229. Additionally, individuals can strive to understand how they are perceived by others. See generally, G. MEAD, *MIND, SELF AND SOCIETY* 162 (C. Morris ed. 1937).

230. Benson, *supra* note 229 at 569.

231. Bayer I, *supra* note 13, at 898 (citing, WOOD, *supra* note 33, at 67).

232. WOOD, *supra* note 33, at 125 (referring to the concept as "practical freedom."); see also Weinrib, *supra* note 233 (referring to the concept as "practical reason").

233. Weinrib, *supra* note 233, at 484; Hill *supra*, note 215 689 ("[P]ractical reason, not conscience, is the fundamental source of moral knowledge. When confronted with doubts about our initial moral assumptions, we can make our best moral judgments only by thinking critically, using our rational capacities in consultation with others and with due regard for the many potentially relevant facts (including facts about the feelings, welfare, and relationships of the people who may be affected)")

234. WOOD, *supra* note 33, at 152; see also Wright, *supra* note 81, at 278 (discussing Kant's recognition that the duty owed to others cannot be determined by a universal rule); e.g. Thomas Hill, *supra* note 215, at 689 ("Principles of practical reason remain the basic standard but individuals must use judgment to determine how these apply to particular contexts").

discover all levels of abstract moral principles plus the competence to apply those theoretical precepts correctly to resolve particular moral dilemmas.²³⁵

Individuals make use of their reasoning capacities because individuals are “purposive,” they adopt personal goals and select means to attain those goal by exercising practical reason and practical judgment. Human purposiveness, animated by the “autonomy of the will,” allows individuals to enjoy what Professor Arthur Ripstein identified as Kant’s “innate right of humanity,” meaning, the “right to be free, where freedom is understood in terms of independence from another person’s choice. The power to set and pursue your own conception of the good is Kant’s right to independence: you, rather than any other person, are the one who determines which purposes you will pursue.”²³⁶

That same “autonomy of the will” enabling human beings to be purposive yet appreciate morality, means that they likewise can grasp and obey what Kant called the “universal principle of justice,” which sanctions, “individuals’ freedom to form and pursue their own life plans subject only to the constraint that others be allowed a similar freedom.”²³⁷ Thus, the “universal principle of justice” constrains exercise of the “innate right of humanity” by requiring every individual to respect every other individuals’ right to exercise the “innate right of humanity.” This became core to Kant’s specific moral precepts, various formulations of the Categorical Imperative.

Of course, the capacity for moral comportment does not assure the actuality of moral comportment for two reasons. First, and obviously, people knowingly may choose to act immorally, thereby deliberately violating their duty to discern and to abide by moral precepts. Second, and equally obvious, people may either negligently or otherwise inadvertently act immorally. Despite their best and honest efforts, people may either misperceive abstract ethical requisites, or mistakenly determine how properly discerned moral precepts apply in a given scenario, or both. As

235. Bayer II, *supra* note 17, at 348-50 n. 335 (“Through ‘practical judgment’ individuals can both derive [all levels of] moral precepts ... and discern how to apply such precepts to discrete scenarios”).

236. Arthur Ripstein, *Symposium: Contemporary Political Theory and Private Law: Essay: Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1399 (2006).

237. Thomas Hill, *supra* note 215, at 680; see also ARTHUR RIPSTEIN, *FORCE AND FREEDOM* 288 (Harvard Univ. Press 2009) (indicating individuals are free to prioritize their personal interests over the interests of others); see also Thomas C. Grey, *Serpents and Doves: A Note on Kantian Legal Theory*, 87 COLUM. L. REV. 580, 582 (1987).

Professor Ernest Weinrib summarized, “[T]he inability of the concept of right to predetermine hard cases is merely the unavoidable concomitant of . . . being an idea of reason.”²³⁸

2. *The Effect of Emotions* --

Professor Weinrib’s statement evokes one of Kant’s most contentious suppositions of human beings’ intellectual capacity: human emotions distort, distract and otherwise impede the ability to reason impartially.²³⁹ As I noted in an earlier piece,

[Kant believed that] emotions threaten disorder because they stimulate personal inclinations, enticing individuals to satisfy their purely internal, selfish desires regardless of whether doing so promotes or confounds their moral duties to others. Worse yet, emotions can make us delusional, mistakenly believing that our choices were grounded in rational morality rather than sentiment.²⁴⁰

The debate over the purportedly corrupting influence of emotions arguably is academic because physical sciences and modern philosophy have demonstrated that it is impossible for human beings to derive the meaning, or the significance, of any idea or event absent emotions.²⁴¹ For example, assuming that a business owner may unemotionally apply proper accounting methodology to prepare her financial accountings, what those accountings actually mean to her arises from the interaction of emotions and reason.²⁴² Roughly two decades ago, I explicated the process of

238. Weinrib, *supra* note 233, at 507.

239. Carlson, *supra* note 124, at 38-39 (“Kant concedes that neither the actor nor an observer can be sure if the action proceeds out of [rational, unbiased] duty alone”) (quoting George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 538 (1987)).

240. Bayer II, *supra* note 17, at 307 (citing Carlson, *supra* note 124 at 35-39); *see also* JESSIE J. PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* 20 (Oxford Press 2007) (discussing Hila Karen, *Guilt-Free Markets? Unconscionability, Conscience, and Emotions*, 2016 BYU L. REV. 427, 460, n.134 (2016)).

241. Bayer II, *supra* note 17, at 307-09.

242. Suppose, for instance, through proper accounting methods, a merchant, Smith, concludes that she made a profit for the month of \$10,000. If reason alone can confirm if Smith’s calculations are correct, reason alone cannot reveal the meaning -- the significance -- of that profit, that is, whether the profit makes Smith happy, sad, both, and, to what extent. Possibly, Smith might at once feel happy and depressed. She uses reason to discern why she feels two seemingly contradictory emotions and then tests the cogency of her reasoning

emotions melding with reason as a necessary tool for individuals to discern meaning.²⁴³ I concluded that in this respect, the theories of philosopher David Hume, who concluded that reason essentially is meaningless absent emotions, is correct, while admitting some truth to Kant's theory that emotions inevitably distort the reasoning process.²⁴⁴ With regard to discerning moral truth, for example, Hume concluded:

The final sentence, it is probable, which pronounces characters and actions amiable or odious, praise-worthy or blamable; that which stamps on them the mark of honor or infamy, approbation or censure; that which renders morality an active principle, and constitutes virtue our happiness, and vice our misery: "*It is probable, I say, that this final sentence depends on some internal sense or feeling, which nature has made universal in the whole species.*"²⁴⁵

by whether she feels positive emotions, indicating her reasoning is correct, or negative emotions, cautioning that her reasoning is infirm.

Perhaps Smith reasons that she feels happy because, thanks to her business income, she was able to pay all her business and personal necessity expenses while earning a profit allowing her the pleasure discretionary spending. Still, she feels depressed -- anger directed at herself -- because she made a few business mistakes which prevented her from earning an even higher profit that month. Smith now feels happy which she reasons to mean that she drew the right conclusions about why she feels at once both pleased and sad about her \$10,000 profit. Absent the interplay of reason and emotions, Smith could not have ascribed meaning to that profit.

243. Peter B. Bayer, *Not Interaction but Melding - The "Russian Dressing" Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers*, 52 MERCER L. REV. 1033, 1034 (2001).

244. Bayer II, *supra* note 17, at 308 (discussing DAVID HUME, A TREATISE OF HUMAN NATURE, BOOK II 155-56 (Pall S. Ardal, ed., Fontana/Collins 1972)); see also MARTHA C. NUSSBAUM, POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE 68 (Cambridge Free Press 1995) ("Intellect without emotion is, we might say, value-blind").

There is a plausible strain of interpretation averring that, "In some writings, Kant more explicitly argues that emotions and inclinations are formative of -- not simply hostile to -- autonomy and reasoning capacity, but that such emotions and inclinations must be mastered by reason." Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. OF GENDER & LAW 428, 453 (2016) (citing, LARA DENIS, *Sex and the Virtuous Kantian Agent*, in SEX & ETHICS 42-46 (Raja Halwani ed., 2007)). This explication makes perfect sense given Kant's understanding of human nature coupled with our earlier realization that while they must be unmoored from moral judgments, personal preference and predilection are the essential starting points of moral inquiry. See *supra* notes 79-82 and accompanying text.

245. DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 5 (Tom L. Beauchamp ed., Oxford Univ. Press 1998) (1777) (placing emotions on a higher plane than

Furthermore, regarding whether we can ever fully rid ourselves of personal biases and prejudices,²⁴⁶ even assuming that emotions to some extent unavoidably warp unadulterated reason, people are capable of recognizing their emotional responses and, can compensate by discerning with reasonable precision if, and to what extent, emotions are interfering with and distorting our conclusions. As for escaping our predispositions, if we cannot perfectly elude our emotions, at least, with effort and self-awareness, we can do so well enough. Therefore, “human imperfection cannot be the justification for knowingly rebuffing the quest for morality, thus indulging every form of depravity. Our duty is to try to understand morality and to act from that understanding.”²⁴⁷

3. *The Inestimable Worth of Human Beings as “Ends in Themselves” --*

We now begin to understand why Kant is so comfortable with the proposition that people must walk the moral path, even if it takes them and their society into the abyss. Since each individual is endowed with innate dignity, thus the capacity for moral comportment, “the worth of every human being is absolute, the worth of all persons is fundamentally equal”²⁴⁸ regardless whether such persons actually abide by the moral principles that they are obligated to know and to practice.²⁴⁹ As to what exactly the “absolute” worth shared by all persons is, “Kant posited logically but notoriously that the value of humankind’s innate dignity is priceless, indeed greater than life itself because ‘[t]he value of the [person qua person] . . . must have existed already prior to [one’s] rational choice.’”²⁵⁰ Of course, it could not be otherwise because the duty to obey moral edicts

invoking the reason of slave to emotions); Bayer *supra* note 248 at 1057-58 (disagreeing arguing that both are of equal urgency, combining to form *meaning*).

246. See Bayer II, *supra* note 17 at 306.

247. Bayer I, *supra* note 13, at 898 n.136. See also, *supra* Section 2-d (discussing the “consequentialist error”).

248. WOOD, *supra* note 33, at 3.

249. Wright, *supra* note 81, at 275; LESLIE A. MULHOLLAND, KANT’S SYSTEM OF RIGHTS 314 (Columbia Univ. Press 1990); see also WOOD, *supra* note 33, at 91 (“[E]ach person’s rational capacity “must be esteemed as unconditionally good, as an end in itself.”); see also Hill, *supra* note 215, at 689 (arguing that the rational capacity of even those who act unethically is an end of itself).

250. Bayer II, *supra* note 17, at 351 (quoting WOOD, *supra* note 33, at 92); see also Bailey Kuklin, *The Labyrinth of Blameworthiness*, 51 U. OF SAN FRANCISCO L. REV. 173, 176 (2017) (According to Kantian ethics, “every moral agent has a priceless dignity that commands equal respect.”).

is absolute and paramount over everything else.²⁵¹ Thus, if the unique defining aspect of human beings is their capacity to be moral, then the worth of each person whose singular facility is the capacity for moral comportment must be as great as is the duty of moral bearing itself, which is priceless.²⁵²

Of course, the fact that all persons share equal innate worth cannot and does constrain Society from treating persons differently based on their respective conduct. Society may reward those who morally accomplish great things, and, as is the case with crime, punish those who act immorally. Rather, due to persons' equal, invaluable innate worth, Society and the individuals therein must treat all persons, including criminals, in a morally correct fashion. *Consequently, the natural corollary to the pricelessness of each human being is that all persons must respect the innate dignity of all other persons, and do so by strict moral comportment in out interactions with others.*²⁵³

Borrowing from my earlier efforts, we might, then, designate the following as the value monism²⁵⁴ of Kantian morality: persons are "ends in themselves," meaning, they are not and "may not be degenerated into objects -- may not be treated as one might use and discard equipment, furniture, tools, or other things that have neither consciousness nor the capacity to discern morality through reason. To do otherwise would deprive persons of that which is theirs by birthright -- their very humanity."²⁵⁵ This greatest moral duty of treating all other persons as "ends," "mandates that every person must respect the dignity of every other person at all times and under all circumstances."²⁵⁶

Likewise, and logically, at all times, in all circumstances, every person may demand to be treated by every other person as an end in oneself -- not due to any good works such individual may perform, but rather due to one's innate rational capacity. ... [In sum,] innate dignity allows

251. See *supra* Parts 2-a,-f.

252. Bayer II, *supra* note 17, at 351-53.

253. WOOD, *supra* note 33, at 94; Bayer II, *supra* note 17, at 350-51.

254. See *supra* notes 179-87 and accompanying text.

255. Bayer I, *supra* note 13, at 899.

256. *Id.* at 899-900 (citing Wright, *supra* note 81, at 275 and WOOD, *supra* note 33, at 94).

individuals to demand moral treatment from others while simultaneously requiring those individuals to treat others morally.²⁵⁷

Importantly, individuals owe an identical duty to themselves; that is, one must respect one's own dignity as one must respect the dignity of others. Kant called this corollary the "duty of rightful honor," which states, "Do not make yourself a mere means for others but be at the same time an end for them."²⁵⁸ For example, suicide is immoral because the self is treating the self not as an "end," but as a disposable object with no inherent worth.²⁵⁹ Similarly, while surely one may contract one's labor even for a relatively small fee, one may not voluntarily enslave oneself to others. One must be one's "own master,"²⁶⁰ that is, "Kant [] understood that freedom does not only consist in making one choice, but it also consists in being able to *at least try to undo* that choice."²⁶¹ As a logical explication of the

257. *Id.* at 900 (citing Thomas Hill, *supra* note 215, at 204 and Bayer II, *supra* note 17, at 350-51).

258. Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 811 (2003) [hereinafter Weinrib II] (quoting KANT, *supra* note 57, at 392).

259. Bharat Malkani, *Dignity and the Death Penalty in The United States Supreme Court*, 44 HASTINGS CONST. L. Q. 145, (2017) (citing KANT, *supra* note 57); *see also* Kristin Loveland, *Death and Its Dignities*, 91 N.Y.U. L. REV. 1279, n.67 (2016) (citing Jyl Gentzler, *What Is a Death with Dignity?*, 28 J. MED. & PHIL. 461, 462 (2003)); *see also* Thomas Hill, *supra* note 215, at 51, 203.

260. Bayer I, *supra* note 13, at 812 (citing KANT, *supra* note 57, at 394).

261. Bradford W. Short, *More History "Lite" in Modern American Bioethics*, 21 ISSUES IN LAW & MED. 3, 10 (2005) (emphasis in original). Short debunks the somewhat widespread misconception that in his lectures Kant approved of Roman Senator Cato the Younger's decision to kill himself rather than be captured by Julius Caesar against whom Cato had helped lead a civil war in the hopes of restoring the Roman Republic. Having successfully evacuated his troops from Utica but unable to escape himself, Cato reasoned that he would be unable to withstand the tortures that Caesar likely would impose and, thus, would betray his cause thereby lessening the possibility that the civil war might yet succeed in whole or part. Although some commentators have read Kant to declare Cato's suicide moral because Cato rationally believed he could no longer be Cato, Short's more complete review of Kant's statements show that he deemed Cato's act noble, but nonetheless an immoral betrayal of his duty of rightful honor. *Id.* at 5-9.

In his analysis, Short artfully linked the moral infirmity of suicide and voluntary slavery.

[A]ny mature understanding of liberty, says Kant, *demands that suicide never be allowed*. Suicide is a choice to end all choice; it is a liberty to destroy liberty. Viewed under this light, suicide looks much like the act of one who voluntarily sells himself into slavery. Kant is pointing out that these acts actually result in the perpetual negation of liberty, and therefore cannot be justified by an appeal to the right to liberty. When these acts occur liberty *exists for only one instant*. It exists only in the instant when one sells oneself into bondage or when one destroys

“duty of rightful honor,” some commentators argue controversially that Kant did not discount the morality of noble sacrifice such as in contexts such as war or scientific research, endangering, perhaps even forfeiting one’s life to save others. In such cases, the martyr is treating herself as an “end” and not simply objectifying herself as an inanimate instrument with no innate dignity.²⁶²

4. The Categorical Imperative Formulations One and Two -- The Moral Duty of Individuals and Private Groups --

The premise that due to their rational capacities to discern morality, yet regardless of their actual conduct, the inherent worth of individuals is invaluable, leads to the next aspect of Kant’s moral theory: principles to enable practical reason, that is, instruct how to treat both others and ourselves in a moral fashion as we interact in a world of others to pursue our personal happiness. To assure moral comportment, Kant posited three “categorical imperatives” (“CI”), the first two constrain individual human behavior as well as the behavior of groups large and small. The less widely discussed third CI explains why creating societies administered by formal governmental structures predicated on moral norms is not simply useful, convenient or efficient, but, more importantly, an un-waivable moral necessity. “In Kant’s view, all other laws of morality derive from the categorical imperative.”²⁶³

The first Categorical Imperative (“CI₁”) holds: “Act only on that maxim through which you can at the same time will that it should become a universal law.”²⁶⁴ As explained by Professor Wood, CI₁ inquires, “whether you could will it to be permissible (under the moral law) for

oneself. It is permanently negated thereafter because, first, the person who made the sale then becomes a slave who by definition has no liberty, and second, because the suicide, after committing the lethal deed, then has jumped into oblivion forever and also by definition has no liberty.

Id. at 10 (emphasis in original).

262. Wright, *supra* note 81, at 313 n.203.

263. Bayer I, *supra* note 13, at 777. Thus, the CIs comprise Kant’s “supreme principle of morality,” discerned through “pure practical reason,” expressed as “a universal law that all rational beings can make and act upon for themselves as free, self-determining agents whose actions are morally good.” See also Tesón, *supra* note 218 at 64; WOOD, *supra* note 33, at 68 (The Categorical Imperative is Kant’s “supreme principle of morality [that] admits of no conditions or exceptions, of course, because there is nothing higher by reference to which conditions or exceptions could be justified”).

264. Bayer I, *supra* note 13, at 777.

everyone to act on the maxim.”²⁶⁵ In other words, “one ought not do X unless one believes that all other persons under like circumstances may morally do X.”²⁶⁶ While perhaps a bit of an oversimplification, CI₁ may be described as Kant’s restatement of the Golden Rule: Do unto others as you would have them do unto you.²⁶⁷ Thus, CI₁ does not address the moral substance of any performed or contemplated behavior under review. Rather, it outlaws the hypocrisy of: I can do X to you but under like circumstance you cannot do X to me. Accordingly, CI₁ alone cannot confirm the moral rectitude of a proposed course of conduct.²⁶⁸ CI₁ is a necessary initial step to begin the process of escaping personal preferences -- detaching from personal yearnings and proclivities -- to assure that actors act consistently with their pure duty to respect the dignity of others.²⁶⁹ However, the first CI is inadequate because, without more, it sustains immoral conduct so long as all similarly situated persons are allowed to engage in that immoral conduct.

What next is needed is a formula to determine whether any particular goal a person chooses, plus the means she determines to attain that goal, are themselves intrinsically moral. To fill that gap, Kant presented the renowned second categorical imperative, CI₂: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”²⁷⁰ Indeed, the only way to assure moral comportment is to treat others as “ends in themselves,” which means respecting their innate dignity.²⁷¹ *By highlighting that persons may not regard other persons “simply as a means,” Kant sensibly acknowledged that pursuing means to attain*

265. WOOD, *supra* note 33, at 70.

266. Bayer I, *supra* note 13, at 901.

267. Kuklin, *supra* note 39, at 498; *see also, e.g.*, Richard W. Wright, *The Principles of Justice*, 75 NOTRE DANE L. REV. 1859, 1867-68 (2000):

Whether understood as “love of neighbor as oneself,” the golden rule, or Kant’s categorical imperative, the supreme principle of morality in natural law theory, in both its conception of human good and its conception of the equality of persons, stands in direct opposition to the supreme principle of morality in utilitarianism, which was given its most explicit expression by Jeremy Bentham.

268. “For example, Smith might honestly believe that any person who insults another, no matter how slightly, deserves to be executed. Although his principle certainly is immoral on its face, Smith may satisfy the [first] Categorical Imperative so long as he is willing to be executed should he forget himself and insult someone.” Bayer II, *supra* note 17, at 901 n. 152.

269. Fletcher, *supra* note 244, at 540.

270. Téson, *supra* note 245, at 64 (quoting KANT at 96).

271. Téson, *supra* note 218, at 64.

*selected goal requires social interactions, that is, engaging the talents, experience, knowledge, skills and offices of disparate individuals, all of which requires using those others as “means” to get what we want.*²⁷² Likewise, to attain their desired goals, other persons correspondingly use our experience, abilities, products, and, similar resources. We use others as means and others use us as means, such is a system of the exchange of goods and services. By respecting the dignity of those we use, we treat those persons morally, just as others’ use of us is moral if they respect our innate dignity.

In logical contrast, “you treat someone as a mere means whenever you treat him in a way to which he could not possibly [rationally] consent.”²⁷³ As we now understand, rational consent does not mean that, subjectively, the possibly misused person has no personal objections to her apparent mistreatment. That is because, pursuant to the *duty of rightful honor*, “just as one may not use another solely as a means, neither may one deliberately sacrifice one’s dignity by allowing oneself to be used exclusively as a means.”²⁷⁴ For instance, Smith cannot rationally condone slavery even though Smith personally would like to own slaves and, aware of CI₁ to avoid hypocrisy, is willing to run the risk of being a slave rather than a slave owner in any society that allows slavery. Although her personal tastes and preferences lure Smith into condoning slavery, if she freed herself from that subjective predilection by employing reason, Smith would understand that no rational person could deny that slavery offends the innate dignity of human being because slavery treats slaves merely as means, not as ends in themselves.²⁷⁵

Thus, treating persons “in a way to which [they] could not possibly [rationally] consent” means that, evaluating their particular situations through neutral reason wholly detached from their personal preferences

272. See WOOD, *supra* note 33, at 87; see also Wright, *supra* note 81, at 277.

273. CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* 295 (1996).

274. Bayer II, *supra* note 17, at 903; Weinrib II, *supra* note 263, at 811 (quoting Kant, “Do not make yourself a mere means for others but be at the same time an end for them.”); *supra* notes 263-67 (discussing the duty of rightful honor).

275. Of course, the so-called humane treatment of slaves such as good food, comfortable housing, reasonable work hours, no physical discipline, respecting the integrity of slave families and the like, cannot salvage slavery’s immorality. While “humane” treatment is better than complete savagery, the very status of slavery offends human dignity because slaves have no appropriate say in their treatment and status in Society. Thus, it enhances but does not change the inherent immorality of slavery that “masters” can revoke “humane treatment” at will without any meaningful participation in that decision by the slaves themselves.

and predilections, affected individuals would not consent, but rather, conclude that they were being used only as “means” with no regard for their right as dignified persons to respectful treatment.

CI₂’s quite esoteric formulation can be reduced judiciously to this: we treat human beings as “ends in themselves” by remembering that “persons are not inanimate objects”²⁷⁶ to be used at the owner’s whim and pleasure, and, when no longer useful, discarded. This is because persons are self-aware, thinking and sentient beings possessed of innate dignity, not insensible, inert things existing solely for our pleasure such as machines, tools, furniture and similar instruments.²⁷⁷ “Therefore, tactics such as coercion, deception, intimidation, and confounding are classically unethical because, under such conditions, persons cannot give meaningful consent. Either they do not really know to what they are consenting or their informed consent is the product of extortion.”²⁷⁸ Thus, such persons are reduced to mere “means” to fulfill the goals of those who so reduced them to “means.” If I may continue to quote my earlier work, an apropos example from law illustrates this point:

Smith, a rational person, would will a system of due process of law allowing meaningful participation of suspects in any criminal process brought against them. Such meaningful participation assures that if Smith is investigated, arrested, tried, convicted, and sentenced, the State at each phase respected her as an end. Although unhappy to have been so treated, Smith can have no moral objections to the process and its outcome, even if she is innocent. By [requiring reasonable investigatory and trial procedures including] allowing a meaningful defense, the State did not use Smith only as a means to obtain some State goal related to her imprisonment[, but rather, made Smith an

276. Bayer II, *supra* note 17, at 355. See also Tesón, *supra* note 218, at 64 (quoting Kant’s recognition of intrinsic human value).

277. Donald J. Beschle, *Kant’s Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 PEPP. L. REV. 949, 965 (2004) (explaining “The foundation for [CI₂], indeed for Kant’s entire Categorical Imperative, is his sharp distinction between persons and things. Persons can be distinguished from both animals and inanimate objects in that they have freedom to autonomously choose their actions.”) (citing, IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 40 (James W. Ellington trans., 3d ed. 1993) [hereinafter “Kant II”]).

278. Bayer I, *supra* note 13, at 902 (citing, Korsgaard, *supra* note 278, at 295). Beschle, *supra* note 259, at 965 n. 103 (explaining, “Things can be recognized as having a ‘market price;’ they can be ‘replaced by something else as its equivalent.’ ... Persons, in contrast, have ‘an intrinsic worth, i.e., dignity.’”) (quoting KANT II, *supra* note 282 at 40).

active and meaningful part of the criminal justice process, capable, to a proper degree, of controlling her own destiny].²⁷⁹

CIs one and two present the standards for individual conduct and, of necessity, the conduct of groups for, as noted in the general discussion of Deontology, if individuals can evade their moral responsibilities by acting collectively, then moral precepts would have scant practical effects on any given social order.²⁸⁰ Even so, Kant recognized the need for a special third CI to explain the formal formation of a social order -- the transition from uncivil to civil society.

5. The Categorical Imperative's Third Formulation: The "Kingdom of Ends" --

A. The State of Nature --

The well-known Enlightenment theory of the "social contract" recounts, "the ascent of humankind from the viciousness of the state of nature to the elegance of social orders governed by law."²⁸¹ In the state of nature there are essentially no formal societal controls over human behavior. Rather, the state of nature lacks a rightful controlling order, therefore, each person has the discretion to act on her own whims and caprice. As noted scholar Jeremy Waldron summarized, "[I]ndividuals fight in the state of nature, and the consequent war of all against all can only cease when people submit to a unitary sovereign."²⁸² The common

279. Bayer I, *supra* note 13, at 902 n. 158 (discussing how the criminal justice example reminds us as well, "that using others in ways that they rationally would will themselves and all others to be used does not necessarily mean that such use will make persons happy. The project is not consequentialist to maximize contentment; rather the goal is moral comportment."). Even if the process entirely comported with moral procedures, Smith, in our example, surely is unhappy to be investigated and prosecuted, especially if she is innocent but nonetheless convicted. Her unhappiness is understandable, even condonable, but no proof that she was treated immorally even should she be wrongly convicted because she cannot expect more than moral treatment by those who investigated and brought her to trial. That is why the legal adage is true: a defendant is entitled to a fair trial, but not a perfect trial. *U.S. v. Dominguez Benitez*, 542 U.S. 74, 83 n. 9 (2004); *Burton v. U.S.*, 391 U.S. 123, 135 (1968); *U.S. v. Márquez-Pérez*, 835 F.3d 153, 158 (1st Cir. 2016).

280. See *supra* Section 2-a.

281. Bayer I, *supra* note 13, at 896 (footnote omitted).

282. Waldron, *supra* note 217, at 1545 (discussing THOMAS HOBBS, *LEVIATHAN* 86-90, 117-21 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651)). Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal*

account, perhaps most notably espoused by John Locke, of why people would give up the unadulterated freedom of the state of nature understandably accents the desire for personal security, meaning, protecting one's life, one's family and one's possession from being taken or destroyed by those whose justification is that they are powerful, clever, and ruthless enough to do so.²⁸³

Certainly theorists such as Locke recognized both the moral imperatives underlying human conduct²⁸⁴ and that greater society must obey moral norms.²⁸⁵ It was Immanuel Kant, however, who more

Autonomy Rights, 48 U.C.L.A. L. REV. 85, 111 (2000) (quoting, John Locke, *Two Treatises of Government* 116, 121 (Mark Goldie ed., Everyman 1993) (1689) ("[John] Locke characterized the state of nature as "a state of perfect freedom [for men] to order their actions, and dispose of their possessions, and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man." In the state of nature, all men have equal authority to govern their own lives and to prosecute transgressions against them. Locke acknowledged the obvious problems that this level of freedom fostered and agreed with Hobbes's conclusion that the duty of civil government is to limit much of this freedom.")).

283. "Thus, Locke described the development of the civil society as the process of each individual vesting his natural right to complete personal autonomy into the hands of the government so that it may protect his "life, liberty, and estate." *Id.*, at 112.

284. Locke, "viewed the principles of natural law as the commands of God, dictates of the divine will, rather than expressions of divine reason. ... [Thus, m]oral truth was not only outside human nature, it was binding upon us by compulsion, rather than because of its reasonableness." Hill, *supra* note 31, at 212.

285. For example, Locke averred that, "legal institutions must satisfy certain conditions of justice required by the democratic ideal, which Locke articulates in terms of a hypothetical contract whereby persons retain certain inalienable rights, including the right to conscience. Democratic theory must distinguish those conditions of justice that are conditions of moral obligation from those that are not, ..." David A.J. Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 781 (1984). Locke urged as well the now familiar second moral requisite, "express or implied consent to abide by the laws in question, a moral undertaking like a voluntary promise that binds one in the future even when one disagrees with the merits or even justice of the law in question, excluding the injustices that release one from obligation." *Id.* For Locke, these two moral conditions satisfy Government's obligation to respect, "the moral sovereignty of the people. The condition of justice insures respect for the basic inalienable rights of the person constituting moral sovereignty, and the condition of agreement insures fair consent to bear whatever burdens cooperative political life may involve, including occasional mistakes of policy and errors of justice." *Id.*

Critics note weaknesses in Locke's formulation. Locke did not extrapolate essential "universal political rights" to protect against authoritarianism, an infirmity that can be corrected by augmenting his general standards with a litany of such rights. *Id.* at 782. More profoundly, the "social contract" metaphor was never satisfactory because, "We do not freely choose our legal institutions by any express or implied act analogous to the way we invoke the institution of promising by the use of 'I promise.' ... [A]s [Enlightenment philosopher David] Hume observed in his classic criticism of social contract theory, being

sublimely perceived that civil societies are not, “simply devices for a more efficient and peaceful coexistence among persons who unavoidably bump into each other while vying for scarce resources to fulfill chosen pursuits.”²⁸⁶ To the contrary, creating and fostering civil society is much more -- it is a moral imperative essential to every individual’s duty of moral comportment in all ways, at all times, regarding all endeavors. As Kant understood, to ensure that individuals respect others’ innate dignity by complying with the Categorical Imperatives, all persons must accept the dominance of some controlling social order -- a government -- validly and exclusively authorized to monitor its citizenry and guests through “a uniform system of laws vouchsafing dignity among social actors.”²⁸⁷ In this way, “Kant’s overarching emphasis on the pursuit of moral decency accords the social contract nobility and virtue exceeding Lockean concepts of pure security and the protection of possessions (although those latter considerations surely are relevant to liberty).”²⁸⁸

B. The Kingdom of Ends

The moral necessity to form civil society is the basis of Kant’s third Categorical Imperative (“CI₃”), known popularly as the “Kingdom of Ends,” describing the society -- the “Kingdom” -- wherein all persons, due to their innate dignity, are treated pursuant to CI₁ and CI₂ with proper respect as “Ends.”²⁸⁹ CI₃ admonishes, “Not to choose otherwise than so that the maxims of one’s choice are at the same time comprehended with it in the same volition as universal law.”²⁹⁰ To explain CI₃, one must begin

in a state is for many no more voluntary than being in a ship in mid-sea.” *Id.* at 782-83 (citing, D. HUME, *Of the Original Contract*, in *THEORY OF POLITICS* 193-214 (F. Watkins ed. 1951)).

Kant’s answer will be that just as Society and the governmental institutions that manage it must act morally -- comply with the CIs -- correspondingly, individuals have not simply a practical need but indeed a moral duty to form societies regardless whether, as a matter of personal penchant, they prefer the complete freedom of self-indulgence allowed in the state of nature.

286. Bayer I, *supra* note 13, at 896.

287. *Id.* at 903. See Ripstein, *supra* note 241, at 1417 (addressing Kant’s position that individual rights are meaningless unless they are accompanied by an established system of order that subjects each individual to the same rights and obligations).

288. Bayer II, *supra* note 17, at 361.

289. KANT, *supra* note 57, [4:400] (quoted in WOOD, *supra* note 33, at 66-67).

290. KANT, *supra* note 57, [4:400] (quoted in WOOD, *supra* note 33, at 66-67 (quoting Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in *Cambridge Edition of the Writings of Immanuel Kant* 4:400 (1992)).

with the obvious, aside from the very few who live as hermits, residing in caves or coves, scavenging for necessities and otherwise disconnected from human beings and their commodities, for each of us, human interactions are both necessary and inevitable. This means we need to have systems of sufficiently shared meaning so that others know what we want and we know what they want.²⁹¹

If we are persons of good will, we understand and are prepared to abide by moral precepts assuring the rightful -- moral -- creation and use

The prevailing opinion seems to be that indeed Kant espoused, “three such formulations of the categorical imperative.” Jeffrey K. Gurney, *Crashing into the Unknown: An Examination of Crash-Optimization Algorithms Through the Two Lanes of Ethics and Law*, 79 ALBANY L. REV. 183, 218 (2015-16). Specifically, as noted, CI₁ proscribes hypocrisy, CI₂ requires that all persons treat themselves and each other as not simply means, but as “ends in themselves,” and CI₃, setting the moral imperatives of the social order or “Kingdom of Ends.” Some, however, aver that the third formulation actually comprises two categorical imperatives. In that regard, the formulation of a social order derives first from a CI₃, “the principle of autonomy,” that states, “that we should always act as if we are making universal rules: Act as ‘a will legislating universally through all its maxims[.]’” Anne Marie Lofaso, *Workers' Rights As Natural Human Rights*, 71 U. Miami L. Rev. 565, 611-12 (2017) (quoting, Immanuel Kant, *Groundwork for the Metaphysics of Morals* 50 (Allen W. Wood ed. trans., Yale Univ. Press 2002) (1795) (emphasis in original)). CI₃ is augmented by CI₄, addressing the “kingdom of ends,” instructing, “us to act as if we were the legal official of some universal law-making body: ‘Act in accordance with maxims of a universally legislative member for a merely possible realm of ends’” *Id.* at 612 (quoting, Kant, *Groundwork*, at 56 (internal citations omitted)).

Whether viewed at one or two categorical imperatives, the important point is, as next explained, Kant sought to expound how and why governments must act in conformance with CI₁ and CI₂.

291. The quest for and problems confounding such shared meanings long has been the fodder of language theorists and jurists. For example, the brilliant expositions of Ludwig Wittgenstein aver that, “language must be shared to have meaning ...” Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex Discrimination*, 92 CAL. L. REV. 147, 213 note 93 (2004) (citing, Ludwig Wittgenstein, *Philosophical Investigations* para. 355 (G.E.M. Anscombe trans., 2d ed. 1967); see also, e.g., Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1138 (1988) (“Does Wittgenstein’s deconstruction which recognizes the individual’s inevitable participation in the perpetuation of shared meaning as well as in the reactivation and expansion of the range of interpretation mean that her involvement is merely subjective?”).

To offer one instance, if I actually want to buy a newspaper (rather than access one online), I need to know how the society in which I find myself identifies what I understand to be newspapers, how newspapers are made available to the public (for instance, stores, vending machines or other outlets), and what process is appropriate to obtain a newspaper (likely using currency to purchase from a willing seller).

of such systems of shared meaning.²⁹² Certainly, on their own respective initiatives, discrete individuals can both discern relevant moral maxims *via* impartial reason and construe how those maxims apply to their various dealings with others. Nonetheless, persons of good will might find themselves disagreeing about the substance and application of moral precepts, and unable to reach cordial agreements. If so, as an alternative to the anarchy of the state of nature, individuals must establish legitimate government to, “put[] an end to [such] conflict by replacing individual judgments with the authoritative determinations of positive law.”²⁹³ Through rational communal commands of formal government offices, individuals know how to manage interpersonal relations. Government’s public purpose, then, is maintaining the pursuit of happiness for all individuals -- Kant’s “universal principle of justice” -- in ways consistent with Kant’s dignity principle.²⁹⁴ Thus, “Rather than have a war of discrete, individual wills -- each ‘the judge of his or her own entitlements, doing what seems right and good in his or her own eyes,’ -- we need the external control of a State.”²⁹⁵

Although the foregoing certainly is sensible, the sublime depth of Kant’s explanation clarifies that potential conflicts -- disagreements -- among individuals regarding moral duties is not the sole nor crucial justification for Government. For example, upon conferring as part of initiating dealings, individuals happily might find that they not only share identical moral maxims, but also agree on those maxims’ applicability to transactions -- formal or informal, business or pleasure -- in which those individuals jointly participate.²⁹⁶ Or, if initially disagreeing, they may be able to reach some accord informally, volitionally and calmly. Further, they might decide to abide by that accord in future dealings and even convince similarly situated others to do so as well. Indeed, every one of the various points where interacting parties either initially agreed or came

292. Of course, regardless of good will, all persons are obliged to respect the innate dignity of themselves and others by comporting with the moral requisites encapsulated in and derived from the Categorical Imperatives. See, *supra* Section 3-d-4.

293. Waldron, *supra* note 217, at 1545.

294. See, *supra* Sections 3-d-1, 2, 3.

295. Bayer I, *supra* note 13, at 905 note 172 (quoting, Weinrib, *supra* note 233, at 808 (citing Kant, *supra* note 57, at 455-56 [6:312])). See also Ripstein, *supra* note 241, at 1414-27.

296. To state obvious examples, individuals might initially accept that, to reach agreements, they should bargain rather than engage in physical combat and that, if thereafter one claims a breach of agreement, they should resolve the dispute peacefully rather than hold a duel.

to an eventual peaceful agreement may be morally sound. That is, whether the relevant actors knew so or not, all aspects of their individual dealings might comply fully with the Categorical Imperatives;²⁹⁷ thus, these actors not only accomplished what they wanted, they sought to and indeed performed in a moral fashion.

At first blush, it seems difficult to fault these actors who, through peaceful means, resolved their disagreements both amicably and morally, and, who extrapolated from their experiences so that their future dealings, and those of others who know these actors, likewise will be peaceful, productive and moral. Nonetheless, Kant explained that while such peaceful coexistence is better than violence, these individuals relied upon their best judgments *but not upon corroborative, external authoritative basis* to discern if, indeed, their mutual agreements comport with moral strictures. Without binding neutral authority, such accord is simply the product of individual wills, each "the judge of his or her own entitlements, doing what seems right and good in his or her own eyes."²⁹⁸

297. One might argue, contrarily, that a person who fortuitously acts morally is acting immorally because she is obligated to understand to some reasonable extent why her acts are moral. Therefore, in the above example, only those who chose their actions based on *properly* apprehending and applying moral reasoning actually acted morally. By contrast, those who acted intuitively or consequentially, but nonetheless happened to conform with deontological precepts, did not take into account the dignity of those with whom they interacted; therefore, due to impure motives, they acted immorally.

298. See Weinrib II, *supra* note 263, at 808 (citing Kant, *supra* note 70, at 455-56 [6:312]). See also Ripstein, *supra* note 241 at 1414-27. Accordingly, that persons in a state of nature act morally neither legitimizes any given act nor repeated identical interactions. As respected jurisprude John Finnis explained,

Morally good dispositions can lay claim to dignity, just because they and only they afford to rational creatures participation in giving universal laws and thus fit such creatures to be members and legislators in a possible kingdom of ends. The maxims of rational choosers (i.e., their rationales for their choices) have dignity only when those maxims could harmonize with a possible kingdom of ends, by treating not only other persons but also each of the choosers themselves (i.e., their own rational nature) as no mere means but also an end.

J.M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 441 (1987).

Thus, the capacity of individual actions legitimately to be embraced by the Kingdom of Ends is necessary but not sufficient to a social order. Rather, such legitimate actions must be part of an actual Kingdom of Ends, commemorated and confirmed by the good and proper legal formalities set forth by the given Kingdom -- that particular government -- thereby replacing the fortuitous moral happenstance of discrete, independent individual wills with the formalized general will, united to exert proper coercive authority on unwilling others.

Thus, even in situations of pure uprightness, “there must be a process through which all can come to an accord -- the formation of a united rational will -- resulting in codification of rational impositions and implementing a system of societal-wide enforcement.”²⁹⁹ Absent that uniform, “united rational will,” human interactions, no matter how serene and productive, comprise *ad hoc* agreements of what are the applicable moral standards and how those standards should be applied. Even if correct in all regards, such agreements cannot be proven correct without the honest imprimatur of a neutral, formal regulating system un-swayed by biases either in favor of or against any of the respective individuals involved in the given interactions. *That is because moral bona fides are impossible to prove if those espousing them operate as well as their own advocates, judges and juries.* We form governments, then, with the sole lawful authority to discern and enforce through violence if necessary, moral standards throughout the given State for two reasons. First, to resolve disputes among those who cannot agree. Second, and equally if not more importantly, only a neutral, formal societal structure can reliably discover moral standards; anything else is simply the battle of individual wills that have no inherent right to impose themselves on others as binding authority. Even if those individual wills agree and even if they properly discerned and applied relevant moral precepts, their agreement alone is no proof of rightness, absent the imprimatur of neutral society through laws enacted and enforced by formal government.

Needless to say, like the people it governs, government itself must conform to the Categorical Imperatives lest its structure and operations offend the innate dignity of those who come under its jurisdiction. To preclude despotism and thereby vindicate the legitimacy of government, the morality constraining individual behavior likewise constrains the State.³⁰⁰ “Just as individual free will is constrained by ‘practical reason’ -

299. Bayer I, *supra* note 13, at 904 (footnote omitted).

300. Benson, *supra* 229, at 565-67; *see also, e.g.*, Samuel Freeman, *Frontiers of Justice: The Capabilities Approach vs. Contractarianism* *Frontiers of Justice: Disabilities, Nationality, Species Membership*, by Martha C. Nussbaum. Cambridge, Ma: Harvard University Press, 2006. Pp. 487. \$35, 85 Tex. L. Rev. 385, 406 (2006) (“A Kingdom of Ends for Kant is a society in which sincere and conscientious moral agents unanimously agree to and legislate the moral principles that govern moral relations.”) (citing, Immanuel Kant, *Grounding for the Metaphysics of Morals* 39-41 (James W. Ellington trans., Hackett Publ'g Co. 1981) (1785)); Anthony Paul Farley, *The Dream of Interpretation*, 57 U. MIAMI L. REV. 685, 709 (2003) (“Hierarchy produces logic and reason and duty as its obstacle and its vehicle. This vehicle, logic and reason and duty, takes us to the edge of a place where fair is fair and all are equal, and tells us to transform the world in the name of this

- the capacity to understand *a priori* morality -- and must be exercised pursuant to the Categorical Imperative, so too must the collective will -- the law -- be bound."³⁰¹ As Professor Ripstein explained, government's primary and exclusive authority, "the use of force needs to be rendered consistent with the independence of each person from others. Mandatory forms of social cooperation -- notably the State -- are justified only if they serve to create and sustain conditions of equal freedom in which ordinary forms of social cooperation are fully voluntary."³⁰² Comparatively Professor Benson aptly summarized, "according to Kant, there is a metaphysics of morals because both law and morality are grounded in one supreme principle, autonomy of the will."³⁰³

In that regard, Kant proved the counterintuitive proposition that, when rightly configured, government is not coercive even though it is the sole lawful societal authority to demand compliance and to use violence to enforce its edicts.³⁰⁴ To legitimately fulfill its function ensuring any and

transcendental ideal, this kingdom of ends.); Dr. Kim Treiger-Bar-Am, *In Defense of Autonomy: An Ethic of Care*, 3 NYU J.L. & Liberty 548, 591 (2008) ([T]he kingdom of ends is for Kant a moral ideal.") (footnote omitted); *generally*, Finnis, *supra* note 303; *but see* Fletcher, *supra* note 244, at 534 ("While the prevailing view today treats law and morality as intersecting sets of rules and rights, the Kantian view treats the two as distinct and nonintersecting."); *see also Id.* at 542-43 (discussing the Kantian distinctions between law and morality). Given the principles described both above in the text and in the immediately following text, it is difficult to agree with Professor Fletcher, at least from a pragmatic perspective of how a legitimate government would have to function under a Kantian system.

301. Bayer I, *supra* note 13, at 907 n. 175 (citing, Benson, *supra* note 229, at 568-77).

302. Ripstein, *supra* note 241, at 1437. *See also*, Weinrib II, *supra* note 263, at 797 (explaining how private law such as property and contract must respect the dignity principle).

303. Benson, *supra* note 229, at 575. Thus, Government as a discrete entity -- a person, albeit arguably an "unnatural" person -- shares natural persons' moral duties and expectation of moral treatment. Of course, further proof of Government's duty of moral comportment arises from the logical proposition that individuals may not escape their moral duties by forming "unnatural" persons such as corporations and governments, and, committing through those humanly-created entities acts that, as individuals, they could not morally perform.

304. Kant, then, calls into question Jefferson's seemingly logical but hasty calculus of morality, "What is true of every member of society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of individuals." 5 THE WRITINGS OF THOMAS JEFFERSON 115, 116 (Paul L. Ford ed., 1895) (quoted in Greg Sergienko, *Social Contract Neutrality and the Religion Clauses of the Federal Constitution*, 57 OHIO ST. L. J. 1263, 1283 n. 98 (1996)). If only social order formalized through Government -- official, authoritative process and laws that may originate from no other societal person, natural or artificial -- can legitimize individuals' attempts to enforce through specific performance or restitution violations of moral precepts, then there

all governmental conduct comports with the Categorical Imperatives, “Society and its laws are legitimate only when consistent with the dignity principle, the product of a universalized will -- something to which all rational persons would consent -- that respects innate dignity by treating each person as an end rather than as a mere means.”³⁰⁵ Because abandoning the state of nature to form a legitimate Government is not a choice but rather a moral requisite,³⁰⁶ forming a legitimate society -- one that enforces moral precepts -- is not coercive because “every rational will, equally our own and that of other rational beings . . . in obeying the objectively valid moral law, [may] regard[] itself as at the same time giving that law.”³⁰⁷

Along this line, commentators argue that, although many of the processes are the same, Kant really did not embrace the idea of a “social contract.” Because forming a proper -- moral -- social order is not discretionary, it is not a contract in the sense that persons volitionally agree for their mutual benefits; rather, it is compulsory.³⁰⁸ Even if we somewhat carelessly use the convenient term “social contract,” we nonetheless understand that because forming proper social orders is compulsory if

are certain “rights” attendant with the use of force that inure to governments but not to those over whom governments exercise jurisdiction. Similarly, the obverse is true in that there are a small class of moral duties incumbent on governments that do not constrain others. See, *infra* note _ discussing Government’s “perfect duty” to expend funds to feed the destitute.

305. Bayer I, *supra* note 13, at 905.

For example, law rationally may require that certain professionals be licensed, including mandating educational requirements, special examinations, and fees not imposed on other workers. While such laws use licensees as means in that, prior to offering their services, they must prove their capabilities, when other types of workers need not, one could rationally mandate that persons who would engage in highly technical, often dangerous occupations first satisfy Society of their apparent competence to perform such work. After all, a person who without training nonetheless chooses to engage in a highly skilled profession is so dangerous that she is treating her clients purely as means, even if she informs them that she has insufficient education.

Id. at 905 n. 171.

306. Ripstein, *supra* note 241, at 1417. Here again we see how Kant has found a deeper meaning than did Locke. While moral concerns play a role, Locke concluded primarily that individuals give up the freedom of the state of nature to protect their rights from encroachment by those whose justification for doing so is that they can. By contrast, “The core of Kant’s argument is that the right to enforce rights cannot be enjoyed in the state of nature. The right that Locke imagines people trading away is one that can only be enjoyed through the rule of law.” *Id.*

307. WOOD, *supra* note 33, at 76; see also Thomas Hill, *supra* note 215, at 58-59.

308. Mulholland, *supra* note 231, at 278-81, 289-90 (discussing Kant’s view of property and why Kant was not really a “social contractualist”).

people are to fulfill their unalienable duties under the first two Categorical Imperatives, leaving the state of nature is not wrongfully coercive even if some individuals are made to do something they do not want to do.

C. Perfect and Imperfect Duties --

Interestingly, some scholars aver that Kant did not actually conceive the State as enforcing moral duties, although individual human actors holding official offices must obey the Categorical Imperative lest governmental action be illegitimated.³⁰⁹ Professor Fletcher argued that “[w]hile the prevailing view today treats law and morality as intersecting sets of rules and rights, the Kantian view treats the two as distinct and nonintersecting”³¹⁰ thus commentator ought not “conflate” the two, as Kant did not believe that a person has a “right” to enforce another person’s moral “duty.”³¹¹

Professor Benson, among several others, strongly disagrees, urging as especially persuasive Kant’s assertion that the Government must offer formal legal process through which parties can sue to enforce contracts. Such, of course, is based on the principle that because, as a moral command, promises must be kept, individuals correctly believe that they have the right to obtain performance or restitution from those who breach their promises. As we now know, even if complicit with moral precepts, *ad hoc* individual dispute resolution lacks the legitimacy of civil governance because law “must be the product of the common will, not simply the *ad hoc* wills of the particular contracting parties whose dispute happens to be under judicial review.”³¹² Therefore, individuals turn to greater Society to provide offices and procedures for the peaceful, impartial resolution of such disputes based on laws of generally applicability.³¹³

309. Fletcher, *supra* note 244, at 552.

310. *Id.* at 534, 542-43 (discussing the Kantian distinctions between law and morality).

311. *Id.* at 543-45, 553-58; *see also, e.g.*, JACOB WEINRIB, DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW 29-31 (2016) (although Weinrib offers in subsequent chapters some reimagining of Kantian principles that substantiate many of the propositions presenting in this article.)

312. Bayer I, *supra* note 13, at 907 (discussing, Benson, *supra* note 229, at 565-67).

313. Such, naturally, comprehends nearly the entire spectrum of personal interactions involving contracts, property and even tort as intentional and negligent civil wrongs offend the innate dignity of the victims. For example, causing an automobile accident through speeding treats the victims not as ends in themselves whose safety is protected by reasonable traffic laws, but merely as means, that is, objects that got in the way of the speeder who

Laws, legal process and official offices, of course, must themselves be moral because, as we have learned, commensurate with individual free will, any collective free will, including government, must comport with “practical reason,” which is the capacity to understand *a priori* morality as effectuated by the Categorical Imperative.³¹⁴ Thus, while some of Kant’s writings may be taken otherwise, it seems incorrect and illogical that Kantian moral theory separates law and morals. As Professor Benson summarized, “According to Kant, there is a metaphysics of morals because both law and morality are grounded in one supreme principle, autonomy of the will.”³¹⁵ At the very least, a sensible neo-Kantian perspective finds the Benson approach authentic and steadfast.³¹⁶

Governmental power, of course, is not limitless. With regard to legitimate exercise of governmental authority, Kant argued that the law may only address “perfect” or “juridical” duties, rather than compelling individuals to obey “imperfect” duties or “duties of virtue.” Imperfect duties urge us to maximize “[o]ur own perfection, and the happiness of others”; but such is volitional under Kantian morality.³¹⁷ Accordingly, a “duty is imperfect if no one is in a position to demand by right that it be complied with.”³¹⁸ Indeed, “we may live selfish lives, acquiring for

deliberately or carelessly did not consider obeying the speed limit to be a moral requisite under law.

314. Benson, *supra* note 229, at 568-77.

315. *Id.* at 575.

316. Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C.L. REV. 837, 891 (1990) (“In his attempt to overcome the muddle of natural law theory, Kant had separated law from morals and had limited it strictly to the regulation of external acts. *Thus, Kant had defined law as the conditions under which the freedom of one individual can coexist with the freedom of other individuals.*”) (emphasis added; citing I. KANT, *METAPHYSIK DER SITTEN* 230-31 (Akademie Textausgabe 1902) (1797)). Weinrib II, *supra* note 263, at 797 (noting “As a philosopher working within the tradition of natural right—indeed, as perhaps its greatest expositor — Kant gives a detailed non-distributive account of the principal features of private law, especially of property and contract. Developing corrective justice in terms of his own metaphysics of morals, Kant portrays private law as a system of rights whose most general categories give juridical expression to the coexistence of one person’s action with another’s freedom under a universal law.”).

317. WOOD, *supra* note 33, at 166-67; *see also* Korsgaard, *supra* note 278, at 20 (distinguishing between nonobligatory duties of virtue and duties of justice, which are strict obligations that require particular actions).

318. Murphy, *supra* note 39, at 34-35. For instance, we may pursue happiness by leading selfless lives, depriving ourselves for the sake of charity, and dedicating our waking hours to worthy pursuits. From a consequentialist perspective, such actions embody a good life. But, one could not rationally will an immutable duty to ensure the happiness of others because such violates the “duty of rightful honor.” *See, supra* notes 263-67 and accompanying text discussing the duty of rightful honor. An immutable duty to make

ourselves as much as we can with no thought of sharing so long as . . . the pursuit of happiness as selfishness [does] not denigrate anyone's innate dignity."³¹⁹

Imperfect duties, then, are discretionary, create no rights enforceable by others, and, therefore, are illegitimate subjects for formal legal commands, but rather, "are to be fulfilled through inner rational constraint."³²⁰ After all, forcing a person to meet an imperfect duty infringes her innate dignity by mandating that she do what she is not morally required to do.³²¹

In stark apposition, perfect duties, "are moral imperatives that must be fulfilled because they 'spring from the very idea of external freedom: a world in which everyone's rights are respected is a world in which complete external freedom is achieved.'"³²² A perfect duty enforces the Categorical Imperative.³²³ Therefore, as such duties are compulsory, Government should, arguably must enact legally enforceable measures to assure that persons satisfy their perfect duties.³²⁴ Indeed, there are even

others happy essentially enslaves us to the personal wills of those others who, in turn, are virtual slaves to our personal wills -- simply, we would have to do whatever is necessary to assure others' happiness and they would have to do likewise for us. Thus, there is no moral duty either to perfect ourselves (such a duty would be self-enslavement) or to maximize another's happiness. Bayer I, *supra* note 11, at 908 (citing, W WOOD, *supra* note 33, at 167; Murphy, *supra* note 39, at 35 ("[N]o one can demand by right that I make him happy, can regard himself wronged if I fail to make him happy."), and, Ripstein, *supra* note 241, at 288 (explaining how each person has their own private right to best accommodate their purposes, and how publicizing such rights would "systematically cancel the effects that one person's choices had on others ... [which] would preclude the exercise of private freedom").

319. Bayer II, *supra* note 17, at 364 (footnote omitted).

320. WOOD, *supra* note 33, at 220.

321. Murphy, *supra* note 39, at 36-37 (clarifying that "the [person] who is simply unhappy has no... claim against me. I have not violated his freedom. I have merely exercised my right to leave him alone.").

322. Bayer I, *supra* note 13, at 909 (quoting Korsgaard, *supra* note 278, at 21); *see also*, e.g., Amelia J. Uelmen, *Crime Spectators and the Tort of Objectification*, 12 U. MASS. L. REV. 68, 97-103 (2017) (explaining perfect and imperfect duties); Bailey Kuklin, *Private Requisites*, 64 CLEVELAND ST. L. REV. 965, 971-72 (2016).

323. Murphy, *supra* note 39, at 35 (discussing the general duty to keep promises, "one may not fraudulently enter into a contract because doing so treats the promisee purely as a means; having been duped, the promisee cannot know either the promisor's true goals or the actual nature of the bargain.").

324. E.g., Ekow N. Yankah, *Virtue's Domain*, 2009 U. ILL. L. REV. 1167, 1202 (footnotes omitted) ("Kant argues that the nature and justification of state law is to enforce perfect duties to others, the duties of external performance that interfere with the rights of others. It is the external act of a person that interferes with the freedom of another that justifies State coercion."); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 519 (1987). As though anticipating the progression of American constitutional

instances where Government *qua* government has perfect duties not incumbent on individuals, groups and corporations.³²⁵

The foregoing review of deontological morality and its Kantian explications completes, as one might expect, the deontological aspect of Deontological Originalism. Before applying that metatheory to American constitution law, the project of this writing's Part II, we must turn to the second element, Originalism. The next section, then, explains why assessing the deontological aspect of our Constitution must be performed in an originalist milieu; or, as that section is entitled, "Why Originalism?"

IV. WHY ORIGINALISM? --

Having shown that morality is deontological and having argued that Kantian theory provides the most complete extent explication of deontological morality, this writing now turns to the theory of constitutional interpretation popularly called Originalism. I agree with theorists who claim that Originalism is only proper framework to interpret and to apply the Constitution of the United States. Accordingly, this section demonstrates why an originalist perspective is necessary for legitimate constitutional understanding. However, as we will see, prevailing, competing forms of Originalism, even those recognizing that moral values animate the Constitution, are inadequate because they do not recognize that the Constitution is predicated on the deontological morality of natural law, and that Kantian morality fulfills the Framers' and the Reconstruction Congress' intent that the best available moral philosophy must inform the Constitution's enforcement of natural rights emanating from natural law.

law, Kant saw separation of powers and due process of law as Government greatest perfect duties. Bayer II, *supra* note 17, at 365-68 (discussing that Kant embraced the notion that the republican state was based upon three main principles: freedom, due process, and equality; and describing Kant's endorsement of the separation of powers).

325. Bayer I, *supra* note 13, at 865 (while individuals have no inherent duty to care for the poor and needy, there is a perfect duty upon Government to use its funds to feed and otherwise help the destitute.)

A. Originalism's Core Precept --

Originalism is a metatheory which avers that the United States Constitution, "should be interpreted according to its original meaning."³²⁶ Professor Keith Whittington likewise expressed Originalism's major premise: "the discoverable meaning of the Constitution at the time of its initial adoption [is] authoritative for purposes of constitutional interpretation in the present."³²⁷ Such is the apparently agreed-upon core of Originalism: loyalty to the originally intended meaning, usually expressed as the intent of this Nation's founders. The rub, of course, is to decipher what is the relevant original intent.

B. Originalism's Influence

As Professor Bret Boyce noted two decades ago, "Originalism . . . has gained increased prominence in recent years."³²⁸ Barry Friedman and Scott Smith likewise observed with admirable understatement, "There has been a great deal of talk lately in the circles of constitutional law and theory about 'fidelity' to the Constitution."³²⁹ Indeed, "[t]here has been" and

326. Jeffrey M. Shaman, *The End of Originalism*, 47 SAN DIEGO L. REV. 83, 83 (2010) (criticizing Originalism).

327. Whittington, *supra* note 15, at 599; see also, e.g., Ozan O. Varol, *The Origins and Limits of Originalism: A Comparative Study*, 44 VAND. J. TRANSNAT'L. L. 1239, 1248 (2011) (footnote omitted) ("In simple terms, originalism is a method for interpreting a constitutional provision by seeking to uncover its meaning at the time of its adoption."). Prof. Varol explicated as follows:

At its inception, originalism focused on original intention. Prominent from the 1960s to the mid-1980s, intentionalism sought to interpret the Constitution by determining the subjective intentions and expectations of its drafters. Intentionalism focuses on what the framers "intended -- or expected or hoped -- would be the consequence" of the language they used in a specific constitutional provision. Intentionalism . . . was one of the interpretive presuppositions of the Constitution; the framers expected that their intent would govern how their posterity interpreted the Constitution. *Id.* at 1248-49.

328. Bret Boyce, *Originalism and the Fourteenth Amendment*, 33 WAKE FOREST L. REV. 909, 910 (1998) (footnotes omitted).

329. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 3 (1989) (citing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* vii-xiii (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 395 (1995) (proposing 'a theory to explain how new readings of the Constitution may maintain fidelity with past understandings of the document's meaning and purpose'); Symposium, *Fidelity in Constitutional Theory*, 65 FORDHAM L. REV. 1247 (1997) (presenting various articles and commentary on fidelity to the Constitution). See generally

continues to be “a great deal of talk” -- vehement, adamant, impassioned scholarly talk -- as we celebrate the two-hundred-thirty years since the Constitution’s original ratification.³³⁰ Few if any modern philosophies of constitutional interpretation have captured the attention and imagination of today’s commentators as has “Originalism,” or, perhaps more accurately, the mix of partially compatible stances that fall under the rubric “Originalism.” Surely, Professor Richard Primus aptly observed, “Originalism is a family of ideas and practices ...”³³¹ One might cynically expound that, in fact, Originalism is a somewhat feuding family,³³² particularly notorious for the divergent nature of its many offshoots, all claiming to best achieve Originalism’s paradigmatic function: loyalty to the intent of the Constitution’s original meaning.

While the designation is relatively young within constitutional jurisprudence,³³³ the concern raised by Originalism is as longstanding as is

Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J.L. & PUB. POL’Y 237-531 (1996).

330. A Westlaw search conducted on December 28, 2016, revealed that from 1987 through 2016, law schools had published roughly 400 law review articles with the word “Originalism” in their titles. This, of course, does not include articles that extensively discuss and critique Originalism but do not incorporate that word into their respective headings. By contrast, a similar search of the term “critical legal” found approximately 140 articles from 1982 through 2015 with that term in their titles, a search for the term “legal realism” in titles disclosed 130 articles from 1941 through 2016, and, a search for the term “positivism” in titles shows about 120 articles from 1951 through 2016. This set of searches, doubtless at best quasi-scientific and surely incomplete, arguably evinces that as of this writing, Originalism is filling the pages of current law reviews more so than other theories of constitutional meaning.

331. Richard A. Primus, *When Should Original Meanings Matter?*, 107 MICH. L. REV. 165, 186 (2008).

332. Cf., Thomas Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L. J. 239, 306 (2009).

333. “The origins of originalism are intriguing and in some ways surprising. The term was first used by Paul Brest in an article that purported to be, and in some ways seemed to be, devastating to the whole idea.” Cass R. Sunstein, *Originalism*, 93 NOTRE DAME L. REV. 1671, 1673 (2018) (citing, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980)).

Some scholars trace Originalism to the jurisprudence of the Hon. Hugo Black arguably the first Supreme Court justice to propose formally that,

the text of the Constitution means what it originally was intended to mean. ... Black’s version of this philosophy was that the original meaning should be found by looking at the text of the Constitution as it would have been publically understood when written. ... Although earlier justices had occasionally used historical materials to argue about the original meaning of this or that provision of the Constitution, Hugo Black was the first justice to frame originalism as a

the Constitution itself. Originalism's "question seems to be whether it is sensible, or even possible, to remain faithful to a constitution written more than 200 years ago and amended only sporadically thereafter."³³⁴ Given what is at stake -- the very meaning of the Constitution and whether its original meaning is worth preserving -- it is not surprising that during its relatively brief duration, Originalism and its offshoots' proponents and decriers comprise as imposing a roster of formidable experts and aspiring virtuosos of all shades and temperaments as one is apt to find in any constitutional jurisprudence, fresh or hoary.

Therefore, anyone proposing an interpretation of the United States Constitution, however modest, is now essentially obligated to offer some stance, if only brief, on where Originalism fits as part of the proposed framework for constitutional analysis.³³⁵ That *de facto* obligation, of course, becomes *de jure* when one seeks to confront Originalism directly either on its own merits or as a necessary facet to support an argument of substantive constitutional law.³³⁶ Accordingly, those attempting an enquiry involving Originalism, especially for the first time, must proceed with respect, humility and caution, as the volume and depth of material is daunting to say the least; and, one cannot be expected to exhaust that

definitive constitutional theory and to explain how and why he was using it. In this sense, Black was the inventor of originalism.

NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 143 (Twelve, Hatchette Book Group 2010) (footnote omitted).

Other scholars see Originalism as a disavowal of the "liberal" jurisprudence of the Supreme Court under the chief justiceship of Earl Warren. Lee J. Strang, *Originalism and The Aristotelian Tradition: Virtue's Home in Originalism*, 80 FORDHAM L. REV. 1997, 2003 (2012) ("Originalism began as a scholarly movement in the 1970s, the aim of which was to criticize the Warren Court's perceived excesses.") (citing, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696-97 (1976); other citations omitted); see, *infra* Section 4-C.

334. Friedman & Smith, *supra* note 334, at 3 (footnote omitted).

335. "For the last several decades, the primary divide in American constitutional theory has been between those theorists who label themselves as 'originalists' and those who do not." Colby & Smith, *supra* note 337, at 241 (footnote omitted).

336. One commentator expressed that reality with laudable conciseness, "Originalism is an important interpretive methodology, although many in legal academe have spent much time assailing it." Brandon Simeo Starkey, *Inconsistent Originalism and The Need for Equal Protection Re-Invigoration*, 4 GEO. J. L. & MOD. CRITICAL RACE PERSP. 1, 7 (2012) (footnote omitted).

material yet still find time to write.³³⁷ With what I hope is fitting deference, I enter this scrimmage.

C. Originalism's Revolt against "Living Constitutionalism" --

1. Living Constitutionalism Defined --

As initially conceived, originalist scholarship boldly challenged the apparently then-prevalent orthodoxy of "Living Constitutionalism," particularly inspired by Supreme Court jurisprudence under Chief Justice Earl Warren during whose tenure, it is claimed, that doctrine took especially strong and far reaching hold.³³⁸ Living Constitutionalism proposes that, regarding any discrete issue or matter, constitutional meaning may be informed, but is never constrained by either the ostensible intent of the Framers or *stare decisis*. Rather, while the past surely is often informative, the Constitution can only be understood by and applied through "the evolving standards of decency that mark the progress of a maturing society."³³⁹ Although initially espoused by a plurality, the Judiciary has and continues to apply *Trop's* "evolving standards of decency" paradigm vigorously as controlling constitutional law.³⁴⁰ Thus, Living Constitutionalism posits that the "dead hand" of the past, epitomized by the prejudices, misperceptions and incomplete knowledge of the Founders, must not restrain the Constitution's growth and maturation when confronting both age-old issues in contemporary contexts and

337. Certainly, such may be asserted for virtually any field of law: there are too many possibly informative sources and not enough hours to review them all. Deborah L. Rhode, Legal Scholarship, 115 HARV. L. REV. 1327, 1339 (2002) ("According to most recent scholarship on scholarship, the real problem is not that we have too much nonlegal or theoretical work, but rather that we have too much work of all types that is of poor quality").

338. Strang, *supra* note 338, at 2003 (citing, *inter alia*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 696-97 (1976)).

339. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (interpreting the "cruel and unusual punishments" portion of the Eighth Amendment, U.S. CONST. amend. VIII).

340. *E.g.*, *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (quoting *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014)); *Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015) (citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (execution of "intellectually disabled" persons contravenes the "evolving standards of decency" under the Eighth Amendment)); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (the prison conditions under review did not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment); *Hunt v. Warden*, No. 16-16639, 2018 WL 4191016, at *4 (11th Cir. Aug. 31, 2018); *Boyd v. Warden, Holman Correctional Facility*, 856 F.3d 853, 866 (11th Cir. 2017).

modern issues essentially unfamiliar to the Framers.³⁴¹ Professor Varol explained,

Living constitutionalism envisions a constitution that evolves over time to meet the changing norms and needs of a modern society. As Professor [Jack] Balkin put it, living constitutionalists “fear that chaining ourselves to the original understanding will leave our Constitution insufficiently flexible and adaptable to meet the challenges of our nation's future.” Thus, living constitutionalists (or non-originalists) advocate an evolutionary approach to constitutional interpretation and recognize the permissibility of constitutional change via judicial interpretation, not solely by constitutional amendment.³⁴²

With sweeping prose alluding to the very “human dignity” that we will see properly animates the entirety of fundamental constitutional rights,³⁴³ the Supreme Court recently reaffirmed the aspirational focus of the Living Constitutionalism that Professor Varol described:

To enforce the Constitution’s protection of human dignity, this Court looks to the “evolving standards of decency that mark the progress of a maturing society.” [Such] protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be. This is to affirm that the Nation’s constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees retain their meaning and force.³⁴⁴

341. Steven Semeraro, *Interpreting the Constitution's Elegant Specifics*, 65 BUFF. L. REV. 547, 560-61 (2017) (“Critics, of course, argue that originalists would enable the dead hand of an unenlightened and undemocratic past to dictate modern law.”); Ethan J. Lieb, *The Perpetual Anxiety of Living Constitutionalism*, 4 CONST. COMMENT. 353, 359 (2007) (“Living constitutionalists are plagued by anxiety about the dead hand of the past -- and think we need to update and affirm the document's underlying principles if it is to be binding on anyone living today.”).

342. Varol, *supra* note 332, at 1251 (quoting Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); other citations omitted).

343. See Bayer, *supra* note 23, Part II.

344. Hall v. Florida, 134 S.Ct. 1986, 1992 (2014) (invalidated Florida rule presuming that any death row inmate with an I.Q. score of more than 70 is mentally fit for execution and, thus, may not present any further evidence on that issue) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)); see also, e.g., Brumfield v. Cain, 135 S.Ct. 2269, 2274 (2015) (death row inmate wrongly denied opportunity to present post-conviction evidence that he is unfit for execution due to mental disability); Graham v. Florida, 560 U.S.

Accordingly, Living Constitutionalism accents that over the intervening two and a half centuries, as inevitably it must, America has changed significantly in almost all measurable regards. It is larger in population and territory, intensely industrialized, the most powerful among the small number of nuclear weaponized nations, extraordinarily wealthy, and, remarkably culturally diverse. To remain relevant, while the basic “meaning[s]” may persist, applications of constitutional law to discrete issues must comport with the change the United States has and will continue to experience. If maintaining relevance requires that the resolution of constitutional issues change with changing times, so be it, says Living Constitutionalism.

Importantly, Living Constitutionalism’s paradigmatic precept, “the evolving standards of decency that mark the progress of a maturing society,”³⁴⁵ is not understood to imply the existence of one immutably true concept of “decency,” but rather a panoply of competing ideas none of which are *inherently* more apt than the others, although their societal relevance and benefit may change as America changes.³⁴⁶ Thus, as Professor Prakash lately observed,

I suspect that most who endorse living constitutionalism do so because it has been, in the recent past, a successful mechanism for imposing certain aspects of their morality on the entire country. Should living constitutionalism become a consistent means of imposing disfavored moralities, most of its current champions would disdain, rather than

48, 58 (2010) (juvenile who did not commit a homicide may not be sentenced to life imprisonment without possibility of parole).

345. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *see supra* notes 59-64 and accompanying text.

346. A Westlaw search of “*living constitutio!*” /50 (*Kant immut! deont!*), conducted on November 2, 2017, designed to find articles asserting immutable or deontological truth as part of a living constitutionalist framework, found no assertions that living constitutionalists embrace deontological morality. To the contrary, typical finds within this search include, “Under one school of thought, ours is a “living Constitution,” the meaning of which changes with the times. Under another, the Constitution sets forth immutable principles of fundamental law that must never be altered by mere government officials.” Michael Stokes Paulsen, *The War Power*, 33 HARV. J.L. & PUB. POL’Y 113, 120 (2010). Robert E. Shapiro, *Whither the Supreme Court?*, 36 LITIGATION 63, 65 (2010) (noting that constitutional meaning “seems to be between, in today’s vernacular, the so-called originalists and those who believe in a living Constitution. The argument is often presented this way: Does the Constitution state certain immutable principles that are to be applied to all issues, including the seemingly new and complex issues of modern society? Or is it something meant to change or evolve over time as society does? In the former case, what are those principles? In the latter, according to what standards?”).

esteem, novel rights claims. Most living constitutionalists are of the sunshine varietal.³⁴⁷

Nonetheless, as earlier quoted, proponents urge that, “the Nation’s constant, unyielding purpose must be to transmit the Constitution so that its precepts and guarantees *retain* their meaning and force.”³⁴⁸ The word “retain” certainly implies that there are originating “precepts and guarantees” that constrain living constitutionalists from simply importing into the Constitution’s text any meaning they wish. In that regard, one can sense an originalist foundation tempering Living Constitutionalism. Living constitutionalists, therefore, often contend that their paradigm actually is originalist in that, “historical evidence suggests that the Framers in fact intended for future generations not to interpret the Constitution according to their intent -- thus requiring the paradoxical conclusion that the only way to follow the intent of the Framers is not to follow the intent of the Framers.”³⁴⁹ However, unlike the Deontological Originalism espoused in this writing, living constitutionalists do not assert as part of their originalism that the Framers’ intended future constitutional interpretations steadfastly to conform to immutable, *a priori* moral truth.

2. *Living Constitutionalism’s Postmodern Origin --*

Living Constitutionalism’s just discussed anti-deontological metatheory is hardly startling because that doctrine emerged in large part from the progressivism of Postmodernism,³⁵⁰ specifically, utilitarian theory

347. Saikrishna Bangalore Prakash, *A Fool for the Original Constitution*, 130 HARV. L. REV. 24, 35 (2016).

348. *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014) (emphasis added); *see also, e.g.*, *Hurst v. State*, 202 So. 3d 40, 72 (Fl. 2016) (Pariente, J., concurring).

349. Colby & Smith, *supra* note 337, at 248 (citing, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-22 (1980) and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907 (1985) (arguing that, “original intention is a self-defeating philosophy”)); *see also* Varol, *supra* note 332, at 1249.

350. Scott Dodson, *A Darwinist View of the Living Constitution*, 61 VAND. L. REV. 1319, 1320, 1328 (2008) (“The [living constitution] metaphor arose and gained initial force during the Progressive Era and has been at the forefront of the debate on constitutional interpretation ever since. . . . The metaphor of a ‘living’ Constitution did not arise before Darwin, despite the long history and influence of the concept of the ‘living law.’ When living constitutionalism did arise, it was promoted by advocates like Woodrow Wilson, who were heavily influenced by Darwinist evolutionary thought.”) (discussing as well how Living Constitutionalism differs from classic Social Darwinism); *see also, e.g.*, Bruce

reflecting the early Twentieth Century Progressive Era's skepticism against the existence of moral truth.³⁵¹ Professor Scott Broyles provides a cogent historical perspective:

Perhaps the most sophisticated and direct critique of the Founders' natural rights understanding of the first principles of government was made by Progressive-era thinkers at the turn of the twentieth century. Prominent scholars and politicians increasingly came to embrace the tenets of Progressivist theory and their concomitant rejection of the Founders' natural rights philosophy. As Professor Thomas West observed, "[t]he Progressives repeatedly repudiated natural rights and natural-law as unjust, ignoble, and untrue."³⁵²

Advancements in science and technology coupled with the forces of history and the progression of scholarship disputed "modernity," the Enlightenment metatheory uniting deontological morality, liberal political theory and unbiased reason³⁵³ that the Founders originally galvanized into

Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1794-1801 (2007); cf., Saikrishna B. Prakash, *The Misunderstood Relationship Between Originalism and Popular Sovereignty*, 31 HARV. J. L. & PUB. POL'Y 485, 487 (2008).

351. "[T]he twentieth century has seen a decline in the faith in natural justice that sparked the Declaration [of Independence], in favor of law unapologetically based on the partiality of the American people arguably without regard to whether such preferences conform with deontological moral principles." Broyles, *supra* note 96, at 353 (quoting, THOMAS G. WEST, *The Universal Principles of the American Founding*, in THE AMERICAN FOUNDING: ITS INTELLECTUAL AND MORAL FRAMEWORK 64 (Daniel N. Robinson & Richard N. Williams eds., 2012) and generally citing, AMERICAN PROGRESSIVISM (Ronald J. Pestritto & William J. Atto eds., 2008); CHALLENGES TO THE AMERICAN FOUNDING: SLAVERY, HISTORICISM, AND PROGRESSIVISM IN THE NINETEENTH CENTURY (Ronald J. Pestritto & Thomas G. West eds., 2005)).

352. *Id.*; see also, e.g., Charles W. Carey, *Natural Rights, Equality, and the Declaration of Independence*, 3 AVE MARIA L. REV. 45, 67 (2005) ("Many of the contemporary controversies surrounding the Declaration and its place within the American political tradition are, to a large extent, due to the disparagement of the natural law, or even a denial of its existence, that began seriously in the United States in the nineteenth century and continued with increasing force throughout the twentieth.").

353. Timothy P. Lendino, *From Rosenberger to Martinez: Why the Rise of Hyper-Modernism Is a Bad Thing for Religious Freedom*, 33 CAMP. L. REV. 699, 701 (2011) (comment) (first quoting DAVID LYON, CONCEPTS IN SOCIAL THOUGHT: POSTMODERNITY 27 (University of Minnesota Press 1999); and then quoting Hunter Baker, *Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation*, 20J. L. & REL. 97, 98 (2004-2005) (explaining that "in the beginning, '[m]odernity started out to conquer the world in the name of [r]eason.' ... The period of modernity is commonly referred to as the Enlightenment.")). Tayyab Mahmud, *Geography and International Law:*

the Constitution.³⁵⁴ In modernity's place came postmodernity espousing, "incredulity towards metanarratives' that is, general accounts of human nature and history that purport to be independent of time, place, culture, and other contextual influences, and that determine how knowledge and truth are constituted."³⁵⁵

Accordingly, postmodernism denies the actuality of metaphysical truth, particularly objective moral reality:

When Enlightenment displaced Christianity, one grand account of the world was substituted for another. When postmodernism dissolved Enlightenment, it did not replace it with yet another grand account, but with many, little accounts, because postmodernism rejects the possibility of all grand accounts. The contemporary world -- or, at least, the contemporary West -- is now characterized by multiple, local, and irreconcilable accounts of truth. "Truth," in other words, has been replaced with "truths."³⁵⁶

Especially influential on the Progressive Era was "social Darwinism,"³⁵⁷ the attempted application of Charles Darwin's scientific

Towards A Postcolonial Mapping, 5 SANTA CLAE J. INT'L L. 525, 530 (2007) (recognizing "the Enlightenment, as the animating motor of modernity").

354. Indeed, the entire gravamen of this article's forthcoming Part II, *see supra* note 23, is that the Framers both circa 1787 and circa 1868 were right and Progressive Era anti-modernism was and remains wrong.

355. Frederick Mark Gedicks, *Spirituality, Fundamentalism, Liberty: Religion at the End of Modernity*, 54 DEPAUL L. REV. 1197, 1198-99 (2005) (quoting Stanley Fish, *Postmodern Warfare*, July 2002, at 33, 34.). Lendino, *supra* note 358, at 703 (first quoting STANLEY GRENZ, *A PRIMER ON POSTMODERNISM* 42 (Eerdmans Publishing 1996)) and quoting, Hunter Baker, *Competing Orthodoxies in the Public Square: Postmodernism's Effect on Church-State Separation*, 20 J. L. & RELIG. 97, 97-98 (2004-2005)). (expounding that "Postmodernism has been termed the 'anti-Enlightenment' because it represents a new way of thinking, which calls into question the beliefs of linear progress, absolute truth, and the standardization of knowledge. From the postmodern viewpoint, 'knowledge no longer appears to be certain' and individuals are 'incapable of viewing the world objectively, but instead live in a cage constructed of [their] own experiences, culture, language, and temperament.'").

356. Frederick Mark Gedicks, *Religions, Fragmentations, and Doctrinal Limits*, 15 WM. & MARY B. OF RTS. J., 25, 31 (2006) (citation omitted).

357. Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 314-15 (1993) ("During the 1950s and 1960s, American intellectual historians heavily reified Social Darwinism in their writing about the Gilded Age and the Progressive era.").

principles of evolution -- “natural selection”³⁵⁸ -- to societal phenomena. Specifically, “The starting point for Darwinian analysis of the human individual is the environment. Both the human organism and its behavior are a product of the environment, shaped over many generations. The organism’s choices are determined by the situation around it.”³⁵⁹ According to Professor Broyles, postmodernists, “maintained that [America’s] Founders’ understanding was outdated, specifically because it predated ‘the theory of evolutionary development.’ In particular, ‘[n]atural rights being conceived of as eternal and immutable, the theory of natural rights did not permit of their amendment in view of a change in conditions.’”³⁶⁰ Accenting that idea, Thomas West added, “The influential scholar John Dewey ridiculed the natural rights thinking of the Founding generation as follows: ‘Natural rights and natural liberties exist only in the kingdom of mythological social zoology.’”³⁶¹

In addition to its post-modernistic bent of denying deontological moral norms, sad historical actuality teaches that many Social Darwinists distorted whatever neutral scientific methods basic Darwinism espoused by routinely promoting partisan political outcomes, typically premised on asserted white-male Protestant superiority.³⁶² Not surprisingly, a popular

358. Joan Vogel, *Biological Theories of Human Behavior: Admonitions of a Skeptic*, 22 VT. L. REV. 425, 427 (1997) (footnote omitted) (“The publication of [Charles Darwin, *The*] *Origins of the Species* [by Means of Natural Selection or the Preservation of Favored Races in the Struggle for Life (1859)] and Darwin’s concept that all life evolved was a critical advance in biology. Evolution is the major paradigm in modern biology.”).

359. Hovenkamp, *supra* note 362, at 306 (explaining that “the central principle of Darwinism is the theory of evolution by natural selection. Because nature produces many more offspring than each niche in the environment can accommodate, individuals of a particular species must compete to survive. Purely at random each individual acquires from its parents a set of characteristics that are different from those of any other individual. Those who inherit characteristics that give them a competitive advantage tend to live long enough to have offspring of their own. They pass these characteristics on to future generations, who then continue the struggle.”)

360. Broyles, *supra* note 96, at 353 (quoting, FRANK J. GOODNOW, *The American Conception of Liberty*, in AMERICAN PROGRESSIVISM 62 (Ronald J. Pestritto & William J. Atto eds., 2008)).

361. Thomas G. West, *The Constitutionalism of the Founders Versus Modern Liberalism*, 6 NEXUS 75, 86 (2001) (quoting, JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 27 (Prometheus Books, 2000) (1935)).

362. Hovenkamp, *supra* note 362, at 319 (“[Social] Darwinism engendered a right-wing ideology ... that emphasized the individual in struggle with others for survival and that regarded the outcome of that struggle as essential for the betterment of the human race. Attempts to interfere in the struggle, such as through state redistribution of wealth, could lead only to retardation of the evolutionary process or perhaps even to degradation.”) (footnote omitted); see also Vogel, *supra* note 340, at 427.

strain of legal historical analysis claims that the worst of Social Darwinist postmodernity strongly influenced early and mid-Twentieth Century law, particularly constitutional doctrine striking labor laws and economic regulations designed to protect workers and consumers.³⁶³ Professor Hovenkamp, by contrast, argues that Social Darwinism's sway has been and remains overstated by commentators who fail to take into account the influence of competing, possibly compatible theories, particularly "marginalism" which posits "the human being" not simply as a leaf blown by the combined winds of hereditary and communal inducements, but largely, "as an autonomous decision maker."³⁶⁴ Even accepting that Social Darwinism's influence has been overestimated by many analysts,³⁶⁵ this writing agrees with critics who urge that Postmodernism correctly accepted the inevitability of science but mistakenly denied any corresponding inevitability of moral truth, which provides a dichotomy contrary to the Founders' Enlightenment-inspired philosophy.³⁶⁶ Indeed, postmodernist principles defy essentially all that the Founders circa 1787 and 1868 understood and embraced³⁶⁷ because, "Postmodernity is the end of Enlightenment. It is the end of modernity's promise of an objective understanding of the world that would enable our control of it. History and

363. Hovenkamp, *supra* note 362, at 315 ("Social Darwinism is still the fashionable paradigm for explaining liberty of contract and the Supreme Court's general laissez-faire position after the turn of the century.") (footnote omitted).

364. *Id.* at 306 ("Each individual has a certain amount of wealth and a collection of wants, but as his desire for some particular thing is fulfilled, his wish for more of that thing diminishes. The individual then maximizes his satisfaction by purchasing goods in such quantities so that, at the margin, the amount of satisfaction each gives him is precisely the same.") (citing, WILLIAM S. JEVONS, *THE THEORY OF POLITICAL ECONOMY* 1-2 (Oxford, 1871)).

365. *Id.* at 315 (footnotes omitted). ("[O]ne viewing mainstream legal writing during [the early and mid-Twentieth Century] is struck by the absence of explicit references to Social Darwinist rhetoric. Historians have been quite willing to assign Darwinism as the cause of the legal revolution of the turn of the century, even though this theory has only the thinnest support in the writings of the period's legal scholars themselves."). Samuel R. Olken, *Justice George Sutherland and Economic Liberty: Constitutional Conservatism and the Problem of Factions*, 6 WM. & MARY BILL OF RT. J. 1, 30 (1997) ("Neither laissez-faire economics nor Social Darwinism was the principal basis of constitutional decision making during the height of economic substantive due process." Rather, although arguably misperceiving and misapplying relevant theories, purportedly Social Darwinist "judges' more paramount concerns [sounded in] equality and the relationship between private rights and public authority.").

366. Broyles, *supra* note 96, at 353 (quoting Goodnow, *supra* note 342, at 62) ("maintain[ing] that the Founders' understanding was outdated, specifically because it predated 'the theory of evolutionary development.'").

367. See *infra* note 23, Part II, at Section 1.

the social sciences have laid aside their pretense to objectivity and universality.”³⁶⁸

This article hopes that previous Sections 2 and 3 may help restore the original understanding of the Founders by debunking postmodernist skepticism averring that law and morality are merely and exclusively partisan constructs -- a skepticism that permeates modern legal scholarship.³⁶⁹ Therefore, I have strived to prove that “yes” is the answer to the question, “perhaps the news of modernity’s death, accompanied by the supposed advent of postmodernity, has been greatly exaggerated?”³⁷⁰

3. *Living Constitutionalism’s Myth of Neutrality* --

Originalists quarrel not only with Living Constitutionalism’s premise that constitutional meaning evolves over time, but also with its methodology. Living constitutionalists understandably claim that their methods are strict, reliable and neutral. In that regard, the Supreme Court has earnestly urged that apprehending “evolving standards of decency”³⁷¹ requires applying “objective factors,”³⁷² typified by identifying applicable contemporary community opinions concerning constitutional imperatives such as the Eighth Amendment’s ban against “cruel and unusual punishments.”³⁷³ Living constitutionalists claim to agree with judicial rulings opining that faithful adherence to historical or scientific empiricism dissuades judges from mistaking their personal sentiments for constitutional law. Nonetheless,

368. Gedicks, *supra* note 360, at 1205. Günter Frankenberg, *Down by Law: Irony, Seriousness, and Reason*, 83 NW. L. REV. 360, 372 (1989) (characterizing postmodernity as “a revolt against institutionalized modernity and ... a radicalization of the linguistic turn.”).

369. Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI-KENT L. REV. 415, 435 (1999) (“Very few contemporary legal academics believe that there are internally-right answers to all moral-rights questions. The majority ... claim that there are no internally-right answers to any moral-rights questions. Indeed, ... [they] argue that there are no internally-right answers to moral-rights questions whose answers are socially contested.”).

370. Lendino, *supra* note 358, at 699 (citing JAMES K.A. SMITH, INTRODUCING RADICAL ORTHODOXY: MAPPING A POST-SECULAR THEOLOGY 31-32 (Baker Academic 2004)).

371. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *see also, e.g., Brumfield v. Cain*, 135 S.Ct. 2269, 2274 (2015); *Graham v. Florida*, 560 U.S. 48, 58 (2010).

372. *E.g., Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (“those evolving standards [of decency] should be informed by objective factors to the maximum possible extent.”); *see also, e.g., U.S. v. LaFond*, 892 Fed.Appx. 242, 245 (6th Cir. 2017); *U.S. v. Reingold*, 731 F.3d 204, 211, 215 (2d Cir. 2013); *Norris v. Morgan*, 622 F.3d 1276, 1287 (9th Cir. 2010).

373. *Rhodes*, 452 U.S. at 368 (citing cases).

[L]iving constitutionalists insist that the legitimacy of the [Constitution] cannot be fully defended if our first-order approach to it draws exclusively upon the historical. This requires that at the first-order level of constitutional interpretation and first-order derivation of the document's underlying principles themselves much more than history must be in play. The entire matrix of the various modalities of constitutional interpretation is fair game to enable an authentic dynamicism that can contribute to contemporary legitimacy.³⁷⁴

Consistent with Professor Lieb's assessment, the Supreme Court recently admonished that discerning "evolving standards of decency" may be informed by, but never depends on conformity with "a historical prism."³⁷⁵ Such apparent latitude prompts critics' now well-known concern that the very idea of a "living constitution" coupled with Living Constitutionalism's free-wheeling methodology invites judges, consciously or inadvertently, to conflate their political partisanship and subjective moral principles with objectively discerned evolving community "standards of decency," thus implanting their personal constitutional philosophy as abiding constitutional law.³⁷⁶ That propensity becomes especially worrisome when, as often is the case, several plausible principles compete for the prevailing "standard of decency."³⁷⁷ Indeed, one incensed commentator lashed out that living constitutionalists and other

374. Lieb, *supra* note 346, at 360.

375. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (mandatory life imprisonment without the possibility of parole imposed on persons who, when they committed their crimes, were under 18-years-old, is a *per se* violation of the Eighth Amendment); *see also* *U.S. v. Hunter*, 735 F.3d 172, 174 (4th Cir. 2013).

376. *E.g.*, *Montgomery v. Louisiana*, 136 S. Ct. 718, 742 (2016) (Scalia, J., with Thomas and Alito, JJ., dissenting, complaining that the Court wrongly has, "empowered and obligated federal (and after today state) habeas courts to invoke this Court's Eighth Amendment 'evolving standards of decency' jurisprudence to upset punishments that were constitutional when imposed but are 'cruel and unusual,' ... in our newly enlightened society"); *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., with Thomas, J., concurring, decrying what they perceived as a, "proliferation of labyrinthine restrictions on capital punishment, promulgated by this Court under an interpretation of the Eighth Amendment that empowered it to divine 'the evolving standards of decency that mark the progress of a maturing society,' a task for which we are eminently ill suited." (citation omitted)).

377. *Exxon Mobile Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (quoting, Hon. Patricia N. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)) (critiquing the use of legislative history by stating that "judicial investigation ... has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'").

“nonoriginalists actually have little respect for law, at least insofar as law might be a genuinely operative constraint on the Court or on their own arguments about what the Court should, must, or may do.”³⁷⁸

These emphatic, almost frantic complaints about Living Constitutionalism’s methods seem irrelevant. All theories, including Originalism, may be corrupted by unfaithful adherents who abuse neutral methodology. Regarding any jurisprudence, researchers can investigate the *bona fides* of the relevant rationale supporting a particular outcome to discern whether the given judge or commentator faithfully depicted the factual record and reliably presented applicable legal theory. To be credible and honest, judges and commentators cannot review the expanse of theories and arguments to merely “pick[] out [their] friends”³⁷⁹ without considering the risk that diligent reviewers will discern such dishonesty, thereby rightly tarnishing, possibly irrevocably, the particular judge or commentator’s reputation for veracity. Regardless, Originalism, with its emphasis on respecting the Framers’ original intent and meanings discerned through supposedly impartial empirical and historical methods, arose as a counterpoint to the perceived errors and excesses of Living Constitutionalism, not the least of which is purportedly replacing “the rule of law” with “the rule of judges.”³⁸⁰

378. Lillian R. BeVier, *The Integrity and Impersonality of Originalism*, 19 HARV. J.L. & PUB. POL’Y. 283, 287 (1996) (footnotes omitted) (“The hypocrisy of many of the nonoriginalists’ arguments, the deliberate masking of their real agenda, the lack of candor, the absence of respect for (or even acknowledgment of) law as a constraint -- all of these features exert a corrupting influence on the enterprise, on the very idea of law itself. Thus, in response, an important function of Originalism is to exemplify, to enforce, and to sustain the rule of law.”).

379. *Roper v. Simmons*, 543 U.S. 551, 617 (2005) (Scalia, J., dissenting).

380. *Regents of the U. of Michigan v. Titan Ins. Co.*, 791 N.W.2d 897, 916 n. 11 (2010) (Justice Young of the Michigan Supreme Court wrote, “and, as the public is no doubt aware, ‘common sense’ is not so common and [any given judge] has no greater fund of common sense than anyone else. If for no other reason, that is why simply ‘following the law’ is the best course for any serious jurist committed to the ‘rule of law’ rather than the ‘rule of judges.’”); *Joseph v. Auto Club Ins. Assoc.*, 491 Mich. 200, 815 N.W.2d 412 (2012); *see also, e.g., U.S. v. U.S. Coin and Currency*, 410 U.S. 715, 727 (1971) (Brennan, J., concurring) (the dissent’s “argument ... has nothing whatever to do with the rule of law. It exalts merely the rule of judges by approving punishment of an individual for the le semajeste of asserting a constitutional right before we said he had it.”).

D. Deontological Originalism Rightly Avers that the Constitution Is Sacred Not Because of that Document's Status as a Constitution, but Because the Constitution Duly Ordains Moral Comportment as America's Highest Law

Despite their disagreements over methodology, Originalism and Living Constitutionalism share a fundamental justification for existence. Both philosophies hope to provide legitimacy in requiring and justifying obedience to the Constitution.³⁸¹ As Professor Lieb astutely commented, "it is only our Constitution because it is suffused with and supported by contemporary assent."³⁸² Attaining "contemporary assent," in turn, has become contentious because, as earlier noted, "the question, raised persistently as we move further and further from the time of the Founding, is whether we realistically can, or should, continue to remain faithful to the Founders' written Constitution."³⁸³ Arguably, Originalism's answer to Friedman and Smith's question, of course, is a resounding, "yes."³⁸⁴

As the previous discussion suggests, for living constitutionalists, however, the answer is a qualified "yes." Professor Lieb encapsulated Living Constitutionalism's stance nicely:

Living constitutionalism takes the threat of basic illegitimacy very seriously. *Although the document needn't be considered profane, neither can it be treated as sacred.* Our civic life together is not a religious covenantal community that requires adherence to our governing document just because it happens to exist and happens to help constitute us as a people. The document and our life under it always stands [*sic*] in need of moral, practical, and political justification -- and living constitutionalism always requires us to ask for that justification at the very moment when we ask for the meaning of the document and its provisions. This is why living constitutionalists

381. Lieb, *supra* note 346, at 364; accord, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONSTITUTIONAL COMM. 427, 437 (2007) (quoting Lieb).

382. Lieb, *supra* note 346, at 360.

383. Friedman & Smith, *supra* note 334, at 3-4 (footnote omitted).

384. Not surprisingly however, although dedicated to venerating the Constitution, the disagreements among various subcategories of Originalism concern each offshoot's claim to have discerned which ideas, standards, or principles emanating from the Constitution are inviolate, thus unconditionally binding on future generations. See *infra* Section 4-G.

cannot give history pride of place and require a much more eclectic approach to first-order inquiries in its interpretive mechanics.³⁸⁵

Nearly a century ago, Professor Howard Lee McBain expressed the postmodernist perspective glibly: the Constitution “was not handed down on Mount Sinai by the Lord God of Hosts. It is not revealed law. It is no final cause.”³⁸⁶

Thus, according to Living Constitutionalism and similar paradigms, although the Constitution *technically* is America’s highest governing law, constitutional meaning cannot be obdurate. Rather, as the Constitution’s text must be pliable to fit the needs of an ever-changing America, there are neither unalterable textual meanings nor unalterable textual applications even if research reveals that the Founders’ original stances on such meanings or applications effectively are beyond debate.³⁸⁷ Original meanings, then, are worthy of both respect and apt consideration, but not adoration because, under Living Constitutionalism, original meanings are purely utilitarian. That is, original meanings are enforceable only to the extent that, in the view of living originalists, they generate the best possible resolutions of constitutional dilemmas. If the purportedly best resolutions of such dilemmas arise from non-original meanings, then such new meanings become the Constitution’s meaning no matter how divorced or disconnected such new meanings may be from the original understanding.

Deontological Originalism fully agrees that the Framers did not intend that their collective beliefs, preferences and opinions, or those of their greater communities, would be the sole legitimate basis upon which to resolve any given constitutional issues. Such a position, as further explicated in Part II, would ascribe to the Founders an implausible vanity, arrogance and indifference to the best interests of the very nation they founded. Even assuming meticulous research disclosed apparent consensus among the Founders regarding any particular constitutional

385. Lieb, *supra* note 346, at 364 (emphasis added).

386. HOWARD LEE MCBAIN, *THE LIVING CONSTITUTION: A CONSIDERATION OF THE REALITIES AND LEGENDS OF OUR FUNDAMENTAL LAW* 272 (1927) (quoted in Lieb, *supra* note 346, at 364 n. 25).

387. Actually, living constitutionalists might agree that there are two unalterable constitutional meanings. First, pursuant to earlier discussed theory, Living Constitutionalism can be understood to hold that the Framers’ operative original meaning is that they imposed no original meaning; rather, the Constitution’s meaning accords with how contemporary interpreters would resolve contemporary issues based on contemporary mores. Second, living constitutionalists very likely would agree that, unless amended, the Constitution is America’s highest law.

dilemma, there is no convincing evidence that they wished to constrain their successors. The Founders knew that they could not anticipate every tribulation that would confront the United States, much less actually discern correct solutions to every arising problem.³⁸⁸ The Supreme Court summarized the proposition well:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.³⁸⁹

That being said, Deontological Originalism does not agree with Living Constitutionalism's proposition that the Framers intended the Constitution's text to be open to any and all interpretations based on the then-popular or prevailing "moral, practical, and political justification[s]",³⁹⁰ even assuming such "justifications" are sincere, well-intended and unselfish. Rather, Deontological Originalism recognizes that the Framers' and the Reconstruction Congress' foremost, and likely primary intent was to enforce through the Constitution, the natural law principles set forth in the Declaration of Independence.³⁹¹ Moreover, that primary intent is not controlling merely because it emanated from the Framers. Rather, Deontological Originalism avers that to be legitimate, a constitution or similar charter of governance must be predicated upon -- must elevate as highest law -- deontological morality as defined earlier in

388. See Bayer, *supra* note 23, Part II, Section 3-C presents detailed arguments that the Founders neither expected nor wanted the Constitution to be interpreted pursuant to an originalist framework holding that the only correct outcome to any constitutional issues is that which comports as closely as possible with how the Founders or their communities would resolve the given matter.

389. *Lawrence v. Texas*, 539 U.S. 558, 578–579 (2003) (states may not criminalize acts of homosexual intercourse performed in private by consenting adults). See also, *Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir. 2014) (quoting *Lawrence*); *Raich v. Gonzales*, 500 F.3d 850, 865 (9th Cir. 2007) (same).

390. Lieb, *supra* note 346, at 364.

391. See Bayer, *supra* note 23, Part II, Sections 2–4.

this writing.³⁹² Therefore, regarding the Constitution, the Framers' primary intent is enforceable as the framework for all constitutional meanings because they rightly instructed that such meanings abide by the Natural Law principles of the Declaration. *Accordingly, the originalist aspect of Deontological Originalism is limited to one and only one proposition that the Framers and the Reconstruction Congress properly designated that any and all meanings and applications of the Constitution must comport with deontological principles. Therefore, all acts of American government, at all levels and by all offices, must be moral.*

In stark contrast, the infirmity of Living Constitutionalism is that by rendering our national charter a device that can mean anything at any time, the Constitution degenerates into a purely instrumental empty vessel. It becomes a tool for promoting the possibly sincere, but consequentialist, rather than deontological-based goals of living constitutionalists. In so doing, Living Constitutionalism robs our Constitution of its most essential, almost miraculous characteristic: the Constitution is not merely an instrument, a *means* of attaining goals, but rather, the Constitution actually *is an end in itself, an end that if attained, assures morality as America's controlling law.*

Therefore, obedience to the Constitution is an incontrovertible obligation of all persons and offices under the jurisdiction of the United States -- attaining the goals and purposes of the Constitution *is itself an end* and not simply a means to attain some other goal or set of goals. Ironically then, Living Constitutionalism correctly understands that, in some extra-human capacity, *the Constitution is alive* -- it is a living thing that commands how the entire American order should exist. But what makes the Constitution a living entity is not that its meaning can change as living constitutionalists (or some other group) see fit. Rather, it is those principles of the Constitution that are immutable -- that *cannot legitimately* be changed even through the amending process -- that constitute the constitutional life force. Ignore those principles in the name of living constitutionalism (or of some other philosophy) and you have either killed the Constitution or changed it into a different, inferior lifeform. *In short, like the morality it enforces, the Constitution rules us, we do not rule it.*

392. See WOOD, *supra* note 279, at 302; *supra* Sections 2-a, b, c, d and Section 3 (explaining why morality is deontological and arguing that among deontological theories, the philosophy of Immanuel Kant provides the best available precepts, thus, Kantian morality must instruct, indeed regulate the behavior of individuals and governments alike.).

Therefore, in one hugely significant aspect, Living Constitutionalism as encapsulated by McBain is mistaken. *The Constitution must be considered "sacred" in a secular sense, because it properly mandates as law the immutable principles of moral governance set forth in the Declaration of Independence.* In that regard, true constitutional originalism does not perforce elevate as supreme law the Framers' answer, if discernable, regarding any discrete matter. To the contrary, by commanding governmental moral comportment at all times, from all offices, at all levels, under all conditions, the only present effect the Framers can mandate on contemporary America is that its Government does no wrong. While reasonable minds might differ whether the particular law or conduct under constitutional review reflects sound political, economic or social policy, such policy disputes are immaterial to constitutional challenges. Rather, if the challenged law or conduct is moral, it is constitutional, thus, the Government in fact has done no wrong.³⁹³

Therefore, Deontological Originalism safeguards against the corrosive effects of the Framers' "dead hands" while simultaneously refuting Living Constitutionalism's erroneous anti-originalist premise that the Framers' "original intent" must not dominate constitutional law.³⁹⁴ The refutation of Living Constitutionalism leads us to the essential point of Deontological Originalism: *Originalism's emphasis on original intent is correct not because the Framers' original intent, whatever it may be, is per se enforceable, but because by designing the Constitution to enforce the natural rights principles of the Declaration, the Framers' original intent is morally sound, thus a viable and appropriate basis upon which to judge the legitimacy of American governmental actions of all kinds, by all offices, at all levels.*

393. See *supra* notes 30-78 and accompanying text. A moral policy of some level of American government might nonetheless be unwise policy. In that regard, the given policy is not "good;" but, because it is moral, the bad policy is not wrongful. Such is the pivotal distinction between the "right" and the "good" in moral theory.

394. It is worth re-emphasizing that while it avers that the right answer to any constitutional dilemma is that which promotes the morally correct outcome, Living Constitutionalism fails because it denies that morality is deontological. Thus, the purportedly moral outcomes Living Constitutionalism promotes are based on human constructs, not unbiased reason which is precisely how true morality is not constituted.

E. If Morality Is Deontological, Why Bother with Originalism at All? --

The foregoing proposition raises an important methodological question regarding Deontological Originalism: if the Constitution's legitimacy is based on whether it properly requires all offices of American government to act morally, and if morality is deontological -- that is, moral truths pre-exist and are unalterable by Humankind -- then why does Originalism matter at all? According to this article's theory, the deontological construction of the Constitution must prevail even if the Framers circa 1787-1791 and 1866-1868 never intended their Constitution to foster deontological morality, much less mandated, for instance, that Government accord to same-sex marriage the same rights and privileges accorded to opposite-sex unions.³⁹⁵ If indeed a deontological Constitution dominates all other interpretive methods of constitutional law, then a critic might ask, "Why spend valuable journal space attempting the originalist task of linking moral theory to the Framers' mindset? Why not just prove that morality *is* deontological, find the proper moral precepts, and apply those deontological precepts to discrete constitutional matters?"

Such questions are sensible because, after all, if the Framers did not intend a deontological constitution, they were wrong; therefore, their intent becomes completely irrelevant to what the Constitution actually should mean and how it should be applied in discrete circumstances. Alternatively, if the Framers intended a deontological constitution, that is well and good, and speaks glowingly of their perceptiveness; but, arguably tells us nothing urgent because any specific or particular viewpoints the Framers held explicating moral philosophy in general or resolving discrete constitutional dilemmas may be informative, but are not mandatory, and certainly unworthy of actual enforcement if modern-day analysis reveals their moral analyses to be infirm. That is, the rightness of any specific, discrete moral judgments attributable to the Framers cannot be presumed -- cannot be applied simply because the Framers held them -- but, rather must be tested pursuant to the best moral theory currently available even if such modern theories were unknown during the Framers' time.³⁹⁶ Because

395. See, *supra* note 23, Part II, Section 6-c-6 (explaining why the Supreme Court's recent substantive due process jurisprudence predicate on "human dignity" and specifically requiring all levels of American government to treat same-sex marriages equally with opposite-sex marriages is eminently correct).

396. See *supra* notes 393-94; *supra* note 23, Part II, Section 3-c. Perceptive and forthright, the Founders understood and accepted the proposition that their successors might

any purported moral stance of the Framers would have to be verified and not, as some strains of Originalism asserts, simply adopted as the right answer to any relevant constitutional matter, one may wonder whether what Originalism “brings to the party” is not profundity, but rather a facade of jurisprudential and historical legitimacy through claimed but essentially meaningless loyalty to original intent?

1. Without an Originalist Link, Constitutional Interpretation and Application Cannot Be Legitimate --

Yet, there is an unmistakable allure -- an apt compellingness -- to the fundamental idea of Originalism that makes us want to link to the Framers' wisdom even if doing so were not essential to proving our theories. As one of originalist theory's leading analysts, Jack Balkin, cunningly accented in his pivotal volume, *Living Originalism*, “Most successful political and social movements in America's history have claimed authority for change ... either as a call to return to enduring principles of the Constitution or as a call for fulfillment of those principles.”³⁹⁷ Such allure stems from the significant, arguably critical truth of Originalism's most basic concept -- a core idea upon which the entire family of otherwise often discordant originalists agree: *a viable, legitimate theory of the Constitution must be grounded on the intent of the originators -- the Framers*. That is why Profs. Bennett and Solum aptly concluded, “We are all originalists now.”³⁹⁸

A dismayed Prof. James Fleming responded, “If we define originalism inclusively enough, we might say that we evidently are all originalists now. Indeed, we might just define originalism so broadly that even I would no longer hope that we are not all originalists now!”³⁹⁹ Professor Fleming is

discern more complete, more correct moral precepts than did the Founders themselves. Therefore, rather than constrain the Constitution with their “dead hands,” the Founders expected that charter's provisions to be understood and enforced pursuant to the better moral comprehension of ensuing generation.

397. JACK BALKIN, *LIVING ORIGINALISM* 11 (The Belknap Press of Harv. U. Press 2011).

398. Robert W. Bennett & Lawrence B. Solum, *Constitutional Originalism: A Debate*, CORNELL UNIV. PRESS, 360, 361 (2011).

399. James E. Fleming, *Are We All Originalists Now? I Hope Not*, 91 TEXAS L. REV. 1785, 1781 (2013); see also, Prakash, *supra* note 352, at 32 (confirming Fleming's concerns, during her confirmation hearings, then-Solicitor General, now Associate Justice, Elena Kagan testified, “[W]e are all originalists.”) (quoting The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 62 (2010), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf>

right that the label “Originalism” could subsume *any* theory of constitutional meaning to the extent that such theory avers *some* bond to the will of the Framers or the Framers’ greater society. Accordingly, we might all be originalists yet “persist in most of our theoretical disagreements -- it is just that we would say that the disagreements are among varieties of so-called originalism. And the debates concerning interpretation and construction, thus recast or translated, would go on much as before.”⁴⁰⁰

But, the possibility -- indeed the essential certainty that all but the most radical constitutional theorists will seek to legitimize their paradigms by appealing to the Founders does not render Originalism meaningless because claiming is not proving. *To win the war of competing theories, any self-styled originalist is obliged to demonstrate that her brand of Originalism truly comports with the intentions of the Framers; and, surely not all such claims, particularly when incompatible, rightfully can be so attributed.* Indeed, I hope to prove that Deontological Originalism is the only reliable exponent of the originalist project.⁴⁰¹ Therefore, it is crucial that this writing’s proposed deontological understanding of the Constitution is consistent with the overarching intent of the Framers both circa 1787 and 1868 when the Declaration’s natural rights foundations were formally applied as constitutional law applicable to the States. Were it not, America would have to re-ratify that charter (or ratify some newly drafted document) expressly linking constitutional mandates to the natural rights principles of the Declaration.⁴⁰²

Intriguingly then, Originalism’s first inquiry is not: What exactly was the “intent of the Framers?” Discerning the specifics of original intent, if indeed such is discernable,⁴⁰³ is not Originalism’s first, but rather the

[<https://perma.cc/2XDE-ZNBT>] (statement of Elena Kagan, Solicitor Gen. of the United States)).

400. Fleming, *supra* note 404, at 1788.

401. I have proven that morality is deontological (and that Kantian morality best explicates morality’s deontology). See, *infra* Sections 2-3. I am about to prove that any valid theory of constitutional meaning and interpretation must be originalist. Thus, by the end of this writing’s Part I, I will have proved that Deontological Originalism is the proper originalist theory.

402. Thereafter, in the forthcoming Part II, see *supra* note 23, I will show that indeed the Founders and the Reconstruction Congress embraced Deontological Originalism and that such informs most, but not all, modern substantive due process jurisprudence. Accordingly, such current due process analysis that denies Deontological Originalism is infirm.

403. Some critics argue that Originalism is a hopeless paradigm because there cannot actually be a concrete, single shared intent among a divergent and political group as were

second concern. The first concern of Originalism is proving *why only an originalist framework* can verify the legitimacy of the Constitution to vindicate our communally invested faith, trust and belief in that charter. As Professor Balkin aptly noted, “Constitutional construction changes by arguing about what we already believe, what we already are committed to, what we have promised ourselves as a people, what we must return to, and what commitments remain to be fulfilled.”⁴⁰⁴

To that effect, Profs. Pojanowski and Walsh summed up Originalism’s major considerations of which the last is pivotal:

On normative grounds, many originalists claim that it is good, as a matter of political morality, for courts to be originalist. This could be because originalism reins in platonic guardians, promotes popular sovereignty, maximizes liberty, or is good rule-consequentialism. Others argue, on conceptual grounds, that a proper philosophical understanding of legal authority or interpretation entails an originalist methodology.⁴⁰⁵

While providing useful lists of legitimate concerns, Originalism’s core principle is what Pojanowski and Walsh described as, “a proper

the Framers of the Constitution. Colby & Smith, *supra* note 337, at 248 (arguing that “the theory of original intent was met with savage criticism, focusing most prominently on two fundamental weaknesses. First, it is nearly impossible to ascertain a single collective intent of a large group of individuals, each of whom may have had different intentions.”) (citing Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209-22 (1980) and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907 (1985)).

404. LIVING ORIGINALISM, *supra* note 402, at 11.

405. Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L. J. 97, 102 (2016) (emphasis added; citing RAOUL BERGER, *GOVERNMENT BY JUDICIARY* (2d Ed. 1977) and ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990)). Similarly attempting an encapsulation, Professor Lieb offered attributes that, not surprisingly, infer that absent Originalism, constitutional interpretation lacks legitimacy. Lieb, *supra* note 346, at 357-58 (emphasis added) (highlighting that the core attribute -- Originalism’s *sine qua non* -- within Lieb’s list:

“[Originalism] has all kinds of benefits, which is why originalism is attractive to so many: It is parsimonious; it gives us ground to debate hard questions at some remove from our personal political and moral preferences; it may keep judges in check so they don’t impose their preferences upon us; it may allow our confirmation battles to be less explosive (assuming everyone bought in); *and it may be the best way (or only way!) to get at the very meaning of the text itself*. This is why some originalists think originalism is simply the pragmatic choice: it is, perhaps, a lesser evil, there is no good and coherent competitor, and democratic legislatures and social movements will function better if we embrace its elegant minimalism.”)

philosophical understanding of legal authority or interpretation,” and Lieb denoted as the, “the best way (or the only way!) to get at the very meaning of the text itself.” They are correct because, absent an originalist commitment, the Constitution has no grounding to accord its text any meanings, basic or intricate. *Without established meanings to gird it, the Constitution becomes essentially a chameleon of delineations susceptible to change depending on the sentiments, well-intended or otherwise, of those who enforce it.* Absent a valid foundation attributable to the original authors, there are no underpinnings girding the statutes, regulations, judicial decisions and governmental edicts purportedly based on and consistent with constitutional provisions. *Thus, theories such as Living Constitutionalism when understood to purport that constitutional text essentially means what subsequent generations -- or more likely, their elite powers -- prefer that text to mean might render the Constitution technically enforceable but effectively meaningless for it conveys nothing timeless, nothing compulsory, nothing from the past binding on the future, thereby rendering the text itself ungrounded, unmoored, and unsubstantiated by anything other than the egocentrism of the now.*

Without such girding, constitutional meaning is *ad hoc* -- perhaps, as Living Constitutionalism would have it, reflecting the best contemporary understandings, possibly, as cynics respond, promoting the corrupt preferences of elites who control of the modes of interpretation -- but always subject to change based on the caprice of those individuals or groups holding power enough to set the constitutional meaning *de jour*. The Framers surely did not intend and the Constitution cannot be an insincere shell, subject to constant redefining based on the political power of whomever seeks to dominate the American soul. As Justice Antonin Scalia properly concluded, “It does seem to me that a constitution whose meaning changes as our notions of what it ought to mean change is not worth a whole lot.”⁴⁰⁶

406. Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 594 (1989/1990).

a. The Supreme Court's Affirmation, "We Must Never Forget, That It Is a Constitution We Are Expounding" Expresses the Heart of Originalism.

A reasonable person might respond: What if the Constitution is an empty vessel? What is the harm in a fluid charter which, as Living Constitutionalism urges, liberates the Constitution from the shackles of uncritical application of original intent thereby allowing its extensive and often necessarily vague provisions momentous contemporary meanings?⁴⁰⁷

First year law students, if not before, learn the answer from Chief Justice John Marshall who, speaking for a unanimous Court, wrote one of the most celebrated and imperative observations in the annals of constitutional law, "We must never forget, that *it* is a constitution we are expounding."⁴⁰⁸ Marshall memorably explained the fundamental meaning of his ambitious assertion: a constitution, "contain[ing] an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."⁴⁰⁹ The *McCulloch* Court's insight that, by its nature, a constitution is something much more profound and significant than a common legal code, surely is among the most critical of any proposition of American law. Writing at the twilight of his remarkable career as scholar, teacher, lawyer and Supreme Court justice, "[Felix] Frankfurter called Chief Justice Marshall's admonition the 'most important, single sentence in American Constitutional Law.'"⁴¹⁰ Frankfurter did not indulge hyperbole because, indeed, there must be something unique about a constitution that

407. Joseph Grcic, *The Supreme Court Decision: Consensus or Coercion?*, 54 FED. LAWYER 52, 54 (2007) (citing AKHIL AMAR, *AMERICA'S CONSTITUTION*, 7-28 (New York: Random House, 2005) and quoting Amar at 34) ("Many have argued that the Constitution must be vague and indeterminate in part to be relevant and useful in future unforeseen and, to the framers, unforeseeable circumstances. Even Justice William Rehnquist stated, 'The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly unchanging environment in which they would live. ... They [gave] latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen.'" Quoted from, William H. Rehnquist, *The Notion of A Living Constitution*, 29 HARV. J.L. & PUB. POL'Y 401, 402 (2006)).

408. *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis in original).

409. *Id.*

410. Alex Glashauser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1245 n. 7 (2005) (quoting FELIX FRANKFURTER, *FELIX FRANKFURTER REMINISCES* 166 (1960)).

demarcates it from all other law -- something that, as Chief Justice Marshall accented, requires it not to assume “the prolixity of a legal code.”⁴¹¹

The demarcating principle certainly is no secret. Again quoting *McCulloch*, under American theory, a constitution is Society’s governing charter, not designed as a comprehensive regulatory scheme, but instead, commemorating the “great outlines” and “important objects” of that society.⁴¹² As such, all other law is inferior to the Constitution and must fall if incompatible therewith.⁴¹³ Chief Justice Marshall explained that our Constitution comprises, or perhaps better put by borrowing from its very term, *constitutes* the supreme law⁴¹⁴ -- the overarching legally enforceable framework by which all lesser law, no matter how important and profound, is subordinated -- principles unsurprisingly still heralded by today’s Judiciary.⁴¹⁵ One would expect no less from the document that comprises the written embodiment of an actual “social contract,”⁴¹⁶ commemorating the essential principles underlying the social order that it governs.⁴¹⁷ It is not surprising, then, that acknowledging and preserving constitutional

411. *McCulloch*, 17 U.S. at 407.

412. *Id.*

413. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (quoting, *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (per Marshall, C.J.)) (“Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land.’”); *see also, e.g.*, *Hughes v. Talen Energy Marketing, LLC.*, 136 S.Ct. 1288, 1297 (2016); *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1594-95 (2015) (referencing Art. VI).

414. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (the Constitution is “the fundamental and paramount law of the nation”); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (holding that the U.S. Constitution is the supreme law of the United States).

415. *Hughes v. Talen Energy Mkt’g, LLC.*, 136 S. Ct. 1288, 1297 (2016) (“The Supremacy Clause makes the laws of the United States ‘the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’” U.S. CONST., art. VI, cl. 2); *Shelby County, Alabama v. Holder*, 133 S. Ct. 2612, 2623 (2013) (“State legislation may not contravene federal law.”); .

416. Simon, *supra* note 63, at 1484-85.

417. Lieb, *supra* note 346, at 364 (suggesting that, “admittedly, it is somewhat unfashionable these days to believe that political obligation, our obligation to obey the law of the Constitution, stems from any social contract theory of the traditional liberal form. Still, underlying many versions of both originalism and living constitutionalism remains some view that the Constitution’s legitimacy as binding law derives, in part, from its role as our organizing social contract.”)

Consistent with the foregoing, we have learned thanks to Immanuel Kant that the social contract is not simply a convenient heuristic device to explain why individuals would wish to sacrifice complete liberty for the security of greater Society. Rather, entering into what conveniently if not fully accurately may be denoted a social contract actually is a moral imperative to justify how individuals routinely and consistently interact with one-another under a communal system of laws. *See supra*, Section 3-d-5-A.

supremacy is the primary reason Originalism dominates all other theories of constitutional interpretation.⁴¹⁸ The gist is worth repeating: *a constitution is not the supreme law unless the original understanding controls lest the foundation of the given society be simply up for grabs, changeable day-to-day based on political power.*⁴¹⁹ Supreme status is a mere technicality if a constitution can connote anything at any time for, as earlier stressed, absent some reliable, significant permanence of constitutional meaning, the governed society has no intelligible principles explaining its past, securing its present and guiding its future -- it is a society completely adrift, subject to whatever political whims prevail at any given moment.

To provide the stability of guiding principles -- to avoid government predicated solely on political caprice -- the *McCulloch* Court further explicated that our Constitution is “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”⁴²⁰ Two years after *McCulloch*, Chief Justice Marshall explicated that if a document so designated indeed is worthy to be a constitution, it deserves perpetual life:

A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter.⁴²¹

Marshall’s construction, still vibrant today,⁴²² led the early Twentieth Century Supreme Court to agree that the quest for *immortality* does not mean that a given constitution may be so vague or wanting in connotation that it will endure not because its substance remains true over time, but because it lacks substance at all. The Court explained:

418. Simon, *supra* note 63, at 1484-85.

419. *Id.* at 1484.

420. *McCulloch*, 17 U.S. at 415.

421. *Cohens v. Virginia*, 19 U.S. 264, 387 (1821) (emphasis added).

422. *E.g.*, *United States v. Comstock*, 560 U.S. 126, 149 (2010); *Sw. General, Inc., v. N.L.R.B.*, 796 F.3d 67, 69 (D.C. Cir. 2015) (noting *McCulloch*’s invocation of “the various crises of human affairs” describes, “problems that arise when our Constitution confronts the realities of practical governance.”).

In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas.⁴²³

Professor Nelson correlated the foregoing understanding of an enduring constitution with how the Framers obviated the objection that their “dead hands” would unduly constrain the development and progress of the young United States:⁴²⁴

Their awareness of the “dead hand” problem, though, did not lead most members of the founding generation to conclude that the Constitution’s meaning should continually be subject to reinterpretation. Instead, it affected what the framers chose to put into the Constitution in the first place. Except for a few provisions that were seen as temporary expedients (and that therefore were drafted to expire of their own force), the Constitution was seen as the home of “permanent” rules, cast in terms that “would not need to be adapted flexibly to circumstances.” As Philip Hamburger has carefully demonstrated, “(r)ules that had to be mutable” were not thought to belong in the Constitution.⁴²⁵

Along similar lines, Professor David A. Strauss nicely captured the Constitution’s structural brilliance,

423. *Weems v. United States*, 217 U.S. 349, 373 (1910). Contemporary courts recognize the wisdom of *Weems*. E.g., *Browning-Ferris Indus’s of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 274 and note 19 (1989); *United States v. Gonzales*, 922 F.2d 1044, 1052 (2d Cir. 1991); *Dawson v. State*, 554 S.E.2d 137, 140 (Ga. 2001); *Williams v. Ragland*, 567 So. 2d 63, 66 (La. 1990).

424. See *supra* notes 331-54 and accompanying text discussing, *inter alia*, Living Constitutionalism’s claim to resolve the problem of the Framers’ “dead hands.”

425. Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 542 (2003) (quoting, Philip A. Hamburger, *The Constitution’s Accommodation of Social Change*, 88 MICH. L. REV. 239, 287, 275 (1989)) (“[B]oth Federalists and Anti-Federalists distinguished rules whose formulation would need to change with the circumstances (and that therefore were relegated to the domain of ordinary law) from rules that were “immutable” (and that therefore were eligible for inclusion in the Constitution). During the ratification debates, indeed, supporters of the Constitution repeatedly used this distinction to explain why certain provisions were or were not in the Constitution.”).

The genius of the Constitution is that it is specific where specificity is valuable, general where generality is valuable -- and that it does not put us in unacceptable situations that we can't plausibly interpret our way out of. ... Edmund Randolph gave essentially this advice to the Committee on Detail at the Constitutional Convention: "[T]he draught of a fundamental constitution," he said, should include "essential principles only; lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events."⁴²⁶

In sum, the Framers "proposed to solve the ['dead hands'] problem not by inviting future generations to read new meanings into the Constitution, but rather by writing a Constitution whose permanent and fixed meaning would be 'calculated for all circumstances.'"⁴²⁷

Accordingly, by "*adopt[ing] permanent, not evolving, values*"⁴²⁸ as law⁴²⁹ supreme over all other law, our Constitution demarcates the "great outlines" of the society it governs, and, simultaneously frees American society to develop in ways unforeseen and possibly unwanted by the Framers. The applications may change and vary, but to be constitutional, they must be premised on the immutable meaning -- the moral meaning as we now know -- of the Constitution. Such is America's very "framework for governance."⁴³⁰ That is how our Constitution attains legitimate "immortality."

Indeed, Originalism exponent Justice Antonin Scalia accurately accented that, "Originalists interpret the Constitution by reference to its original meaning because the purpose of the Constitution 'is to prevent change -- to embed certain rights in such a manner that future generations cannot readily take them away.'"⁴³¹ Therefore, as Justice Scalia rightly concluded 170 years after the Court issued *McCulloch*, to last for the ages

426. David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle*, 112 YALE L. J. 1717, 1736 (2003) (quoting SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 183 (James H. Hutson ed., 1987)).

427. Nelson, *supra* note 430, at 543 (quoting *Eliot's Debates: Volume 2*, TEACHINGAMERICANHISTORY.ORG <http://teachingamericanhistory.org/ratification/elliott/vol2/newyork/> (last visited December 18, 2017)).

428. Varol, *supra* note 332, at 1248 (emphasis added) (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989)).

429. *E.g.*, LIVING ORIGINALISM, *supra* note 402, at 14.

430. *Id.* at 35.

431. Varol, *supra* note 332, at 1248 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (Amy Gutmann ed., 1997)).

and to be applicable in an uncertain, unforeseen future, the meaning of the Constitution must be premised on some understanding that withstands the ebbs and flows of time.⁴³² Professor Balkin echoed in almost spiritual tones the sublime importance of Justice Scalia's insightful claim: the Constitution, then, is "a repository of ideals morally superior to ordinary law and towards which ordinary law should strive. *It makes the Constitution an object of political and moral aspiration and offers a potential for redemption.*"⁴³³

The "redemption" of which Professor Balkin speaks is, I believe, the earlier proven mandate that Government always must act morally. Indeed, in the above quote, Balkin rightly sees our Constitution as "an object of political and moral aspiration." Thus, in a very real sense, the Constitution is "sacred."⁴³⁴

b. The Complementary Aspect of Originalism --

Originalism's legitimating process is additionally profound because it is complementary, meaning, by defining the Constitution as the paradigm for America, we, in turn, more completely define ourselves as individuals, as members of respective groups, and, as the citizenry of a nation. Just as "we endeavor[] to implement its scheme of governance and make it successful in practice,"⁴³⁵ *so too do we, both individually and as a society, become defined by and understand ourselves to be living embodiments of our Constitution's principles.* Once again, in words worth quoting at length, it was Professor Balkin who vividly recapped the formidable link uniting a valid constitution, its effect on the people it governs, and, an originalist perspective:

432. Scalia, *supra* note 411, at 596.

433. LIVING ORIGINALISM, *supra* note 402, at 62.

434. *Id.* (claiming that the Constitution is "a repository of ideals morally superior to ordinary law and towards which ordinary law should strive"). While passionate, Prof. Balkin's conception is a tad off because, as we have learned, no truly moral idea is "superior" to any other truly moral idea. See *supra*, Section 2. Under the Constitution, all "ordinary law" must be moral; accordingly, what Balkin means, I hope, by "morally superior" is that the Constitution's "ideals" are moral and, given their status as constitutional mandates, "superior" in ranking to "ordinary law" that must, of course, comport with constitutional morality just as constitutional morality must comport with deontological morality.

435. *Id.* at 36.

For the Constitution to be “our law,” it must do two things simultaneously. First, it must connect past generations to present ones through a process of narrative identification. It must allow us to see ourselves as part of a larger political project that stretches back to the [past] and forward to the future. The Constitution succeeds as our law when we can identify ourselves with those who framed it and adopted it -- we [then] are able to see ourselves as part of them and them as part of us.

Second, the Constitution must allow us to identify our present principles and commitments with the principles and commitments of those who lived before us. ... This understanding of the past frames our present situation and explains how we should go forward into the future. This identification between the past and present allows us to say that we are continuing the work of those who came before us when we apply the Constitution’s text and principles in light of our current circumstances.”⁴³⁶

Addressing the famous words of the Constitution’s Preamble, Professor Bruce Ackerman conveyed those ideas in his energetic yet slightly plaintive response, “to the question: Who are ‘we the people of the United States’? My proposal, and I certainly am not a constitutional revolutionary, is [that] ... we are constituted in significant, if diminishing part, by our constitutional narrative, and this is a very distinctive feature of American identity.”⁴³⁷ My only disagreement is with Ackerman’s wistful assertion that “our constitutional narrative” is an ever “diminishing part ... of [our] American identity.” While the path to liberty is not and never has been smooth, rulings such as *Brown v. Board of Education*⁴³⁸ and,

436. *Id.* at 63. Regarding what I bracketed in the quote, I believe the book’s text inadvertently printed the wrong words; thus, I offered in brackets what I take to be the right substitutes. Specifically, I substituted the word “past” for “present,” the word found in the text, because the phrase “stretches back to the present” makes no sense as one cannot go “back” to the present, except from the future, which is not what I take Balkin to be saying. For the second bracket, the word in the text is “when” which clearly is a typographical error for “then.”

437. *Fidelity as Synthesis: Colloquy*, 65 *FORDHAM L. REV.* 1581, 1581 (1997) (comments of Professor Bruce Ackerman).

438. *Brown v. Board of Ed.*, 347 U.S. 483 (1954) (holding that mandatory racial segregation of students in public elementary schools violates the Equal Protection Clause of the Constitution).

ultimately, *Obergefell v. Hodges*⁴³⁹ evince the triumph of constitutionally mandated moral decency over untoward prejudice. I join those who believe that, as important as they are, it is neither its territory, nor its wealth, nor its power, but rather, its steadfastness to *liberty* not as largesse, *but as highest law*, that has been and remains both the quintessential definition of America and the quintessence of our identification as Americans.⁴⁴⁰ Seven years ago, I tried to summarize these principles,

439. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that government must treat same-sex marriages equally with opposite-sex marriages). See, Bayer *supra* note 23, Part II at Section 5-e-6-F.

440. Cf. Fowler Harper, *American Demagogues etc.*, 64 YALE L. J. 620 (1955) (book review) (explaining that this Nation's chronicled past and present evinces that while claiming fidelity to liberty principles, American demagoguery tends to emphasize military might, the accumulation of wealth, and adoration of symbols, particularly the Flag, while castigating "excessive" free speech, "excessive" due process, "excessive" limits on police powers and other purported constitutional excesses that shield radicals, criminals, traitors, foreigners, and other "bad hombres" who desecrate "traditional American values.") Jacobs v. Barr, 959 F.2d 313, 315 (D.C. Cir. 1992) (emphasis added) (citations omitted) (observing that, "[Congress] authorized three years of investigation by a Commission on Wartime Relocation and Internment of Civilians. The Commission's conclusions, presented to Congress in a December 1982 report called *Personal Justice Denied*, relied on hundreds of thousands of documents and testimony from over 750 witnesses. *Id.* at vii, 1. *The Commission found unambiguously that Executive Order No. 9066 and the military orders affecting Japanese Americans [during World War II including detention of law-abiding citizens in 'camps'] were the products of prejudice and demagoguery, rather than military necessity. Personal Justice Denied at 4–6, 27–46. But it also found that "no mass exclusion or detention, in any part of the country was ordered against American citizens of German or Italian descent," and that actions against German or Italian aliens were "much more individualized and selective than those imposed on the ethnic Japanese."*).

Very recently, in a different yet arguably related setting, the Hon. Stephen Reinhardt despondently observed while concurring in the Court's decision that the deportation at issue was legal under prevailing statutes:

President [Donald J.] Trump has claimed that his immigration policies would target the "bad hombres." The government's decision to remove Magana Ortiz shows that even the "good hombres" are not safe. Magana Ortiz is by all accounts a pillar of his community and a devoted father and husband. It is difficult to see how the government's decision to expel him is consistent with the President's promise of an immigration system with "a lot of heart." I find no such compassion in the government's choice to deport Magana Ortiz.

We are unable to prevent Magana Ortiz's removal, yet it is contrary to the values of this nation and its legal system. Indeed, the government's decision to remove Magana Ortiz diminishes not only our country but our courts, which are supposedly dedicated to the pursuit of justice. Magana Ortiz and his family are in truth not the only victims. Among the others are judges who, forced to participate in such inhumane acts, suffer a loss of dignity and humanity as well. I concur as a judge,

To be a true constitution, that which a society calls its constitution must enforce values so imperative, so fundamental, that the constitution comprises not only a way to live but more profoundly, a reason to die. ... Pursuant to the character of true and legitimate constitutions, the Constitution of the United States defines who we are, what we are and, most importantly, why we are. Our Constitution purports to set the governing minima without which no society may be legitimate.⁴⁴¹

In that manner, the pursuit of immorality by memorializing as highest law unchanging liberty rights based on “permanent ... values” is not only the Framers’ quest but our quest -- every American’s quest for all generations. “[I]t is not enough that the American Constitution serves as basic law ... or as higher law ... *It must also be our law.*”⁴⁴² Jack Balkin again provides the explanation,

Treating the Constitution as our law today means that we adopt its plan for governance and that we implement and build on it in ways that are consistent with the plan, including any amendments authorized by the plan. *Fidelity to the Constitution as law requires that we view ourselves as endeavoring to implement its scheme of governance and make it successful in practice.*⁴⁴³

While the Framers’ quest becomes our quest, it is vital to re-emphasize that our quest is not to promote the detailed minutiae the Framers might have espoused in discrete laws, essays, speeches, letters and other communications. Such particulars, as Chief Justice Marshall so ably explained, are not what comprise constitutions. Rather, constitutions are

but as a citizen I do not. *Ortiz v. Sessions*, 857 F.3d 966, 967 (2017) (Reinhart, J., concurring) (footnote omitted).

I will note in passing that, based on the vast bulk of his policies and actions, both alone and in combination, Donald J. Trump as President presents the single greatest threat to the principles of Deontological Originalism ever inflicted by a sitting president. His fascistic ways, unless fully repudiated, promise to replace the moral edicts of American constitutional law with tyranny.

441. *Bayer II supra* note 17, at 289-90.

442. LIVING ORIGINALISM, *supra* note 402, at 60 (emphasis added); *see also, e.g.*, Simon, *supra* note 63, at 1486 (explaining that, “the United States Constitution is authoritative, because major American institutional actors (e.g., legislative bodies, courts, and agencies) and a large segment of the population have the appropriate attitude — that is, they regard the Constitution as a source of legally controlling rules and norms.”).

443. *Id.* at 36 (emphasis added).

metatheories, enforcing large ideas -- paradigmatic ideas⁴⁴⁴ -- as indeed does our Constitution. Thus, again we see that America's quest cannot be to follow uncritically "dead hands" -- how the Framers might have resolved such-and-such specific, intricate, discrete constitutional problems. Rather, we are guided by the Framers' still living hands when we enforce *via* the Constitution, the bravura principles of *liberty*. Such is, I urge, Deontological Originalism's straightforward premise, consistent with, as shown above, the true validity of originalist theory.

F. To Be a Valid Constitution, Its Premises Must Be Correct --

It is therefore understood, indeed overt in the nature of our Constitution, that its status as supreme law -- as the "legal text that constitutes a framework of government"⁴⁴⁵ -- entails the concurrent confidence that its strictures, at least in their largest sense, truly are correct.⁴⁴⁶ Regarding the uniqueness of a constitutional system of societal governance, Professor Simon noted, "First, it might be claimed that it is implicit in the concept of a written constitution (or at least ours) that the original understanding provides the authoritative source of constitutional meaning, and that this meaning can be authoritatively changed only by amending the Constitution through the processes that are themselves set out in the document."⁴⁴⁷ Accordingly, "*there is something normatively special about the role, status, or institutions of the origination.*"⁴⁴⁸ The "something normatively special" to which Simon alludes cannot simply be formalistic; the specialness of the Constitution inspiring, indeed commanding obedience as the highest law cannot arise merely because we have designated the document to be a *constitution*. *Rather, the specialness of its "origination" must be proven, that is, the given constitution must*

444. See generally, Bayer II *supra*, note 7.

445. LIVING ORIGINALISM, *supra* note 402, at 36.

446. By "correct," I mean, as explicated in this article's previous Sections, the provisions of the Constitution are moral in that they require moral comportment at all times, of all organs of government. See, *supra* Sections 2-3. While there is no single governmental structure that alone ensures governmental morality, among the many alternatives, the one adopted by our Constitution fulfills the duty of morality incumbent on Government.

447. Simon, *supra* note 63, at 1484-85 (emphasis in original) (noting that this idea apparently is based on some aspect of contract -- contractarianism -- that by actual or social contract it is understood that the originators' meaning must control.).

448. *Id.* (emphasis added).

earn the respect, loyalty, and obedience attendant to "the role, status, or institutions of" being highest law. It earns that respect by being correct.

This is not to deny, of course, that the Founders themselves understood that their perceptions and understandings were incomplete, even infirm in part.⁴⁴⁹ Accordingly, future discrete applications of constitutional bedrock might confound the susceptibilities of the Founders themselves. Nonetheless, the legitimacy of the Constitution depends on our justified faith that the Constitution's foundational principles are fundamentally correct, therefore proper bedrock upon which to build a complete and intricate structure of civil and criminal law.⁴⁵⁰ Thus, honest repudiations of the Founder's specific preferences and predilections in favor of a better understanding of the Constitution's paradigmatic principles reflect exactly what the Founders, as our metaphorical parents,⁴⁵¹

449. See, *supra* note 23, Part II, at Section 3-c. Indeed, *Lawrence v. Texas*, 539 U.S. 558, 578–579 (2003) accenting that “had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.” See also, Hon. Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 2 YALE L. & POL’Y REV. 329, 336 (2004) (quoting *Lawrence*).

450. I leave for another writing the problem of immoral constitutional provisions; that is, how to deal with any discrete part of our Constitution that by its own terms is immoral. There seem to be two possible outcomes for immoral constitutional provisions. The first is to declare any immoral commands void and unenforceable. The second, one might say “positivistic” method, is to hold even immoral provisions enforceable unless and until rescinded or properly altered through the Constitution’s formal amendment procedures.

Based on the Natural Law principles of the Declaration of Independence, the better argument seems to be the former, although precedent implies the latter. To date, the established standard is that a court, “as interpreter and enforcer of the words of the Constitution, is not empowered to strike the document’s text on the basis that it is offensive to itself or is in some way internally inconsistent.” *New v. Pelosi*, 2008 WL 4755414, *2 (S.D.N.Y. Oct. 29, 2008) (internal quotation marks and citation omitted), *aff’d*, 374 Fed. Appx. 158 (2d Cir. 2010) (quoted in *Hassan v. Fed. Elections Comm’n.*, 893 F. Supp. 2d 248, 257 (D.D.C. 2012) (ratification of the Fifth Amendment’s Due Process Clause did not impliedly repeal U.S. CONST., art II, sec. 1, cl. 4’s proscription that the President of the United States must be a natural born citizen)); see also *Hassan v. Colorado*, 870 F. Supp. 2d 1192, 1200-01 (D. Col.) (Fourteenth Amendment’s Equal Protection and Due Process Clauses do not impliedly repeal or otherwise render unenforceable U.S. CONST., art II, sec. 1, cl. 4’s proscription that the President of the United States must be a natural born citizen, nor is that proscription inherently too absurd to be enforced).

451. *Town of Greece, NY, v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (“[T]he line we must draw between the permissible and the impermissible is one which accords with history

sought and inspired.⁴⁵² In that way, as Professor Balkin explained,⁴⁵³ constitutional meaning derives from our identification with the Framers and, through that identification, we compose interpretations and applications (proper, one hopes) of the enduring values -- the correct moral concepts -- those constitutional meanings imbue in our national charter.

Thus, we now comprehend more fully the important truth of the assertion that, if we cannot find legitimacy in the Constitution by linking the present to the past, then constitutional interpretation and application become simply a set of *ad hoc* determinations, purporting to, but actually unmoored from binding, rightful principles set forth at the founding and augmented by amendment. As James Madison fittingly wrote, “[if] the sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable [government], more than for a faithful exercise of its powers.”⁴⁵⁴ Accordingly, to fulfill sensibly its “immortality,”⁴⁵⁵ the Constitution’s assertion of supremacy is legitimate only because we can prove its premises are legitimate.

In sum, Originalism, as an overarching matter, is correct while Living Constitutionalism and similar theories are not because, although “Originalism is a murky term,”⁴⁵⁶ and although it has fractured into a host of competing, divergent sub-theories,⁴⁵⁷ Originalism’s paradigm -- the

and faithfully reflects the understanding of the Founding Fathers”) (citing “*School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

452. See Bayer II, *supra* note 17, at 342-46.

453. *Supra* note 441 and accompanying text.

454. Simon, *supra* note 63, at 1484 n. 13 (quoting 9 J. MADISON, THE WRITINGS OF JAMES MADISON 191 (G. Hunt ed. 1900-10)).

455. See *supra*, notes 426-35 and accompanying text.

456. Colby & Smith, *supra* note 337, at 241 n. 1.

457. *Id.* at 306 (quoting, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989)) (critiquing divisions between originalists, the authors opined:

[O]riginalism does not “by and large” represent a coherent approach. And because the shared principles that can be said to animate all of its various iterations are remarkably broad, it is an “agreed-upon point of departure” only in the way that Chicago’s O’Hare Airport is a point of departure: because there are so many flights on so many airlines to so many different places, you can use it to get virtually anywhere you want to go. . . .

If all that originalism entails is agreement on a point of departure that can still take judges wherever they want to go, then it surely fails to live up to its lofty claims and promises.

Id.

Were sarcasm argument, Colby and Smith’s position would be unassailable. Doubtless, Originalism may not fulfill each and every among “its lofty claims and

basic concept upon which all its family members seemingly agree -- is compellingly and fundamentally correct: as the Nation's highest law, the United States Constitution, "should be interpreted according to its original meaning."⁴⁵⁸ Captivatingly then, Originalism's arguably most controversial yet eminently correct premise is, "the notion that the Constitution has a fixed meaning that does not change with the passage of time."⁴⁵⁹

G. The Arc of Originalism --

A review of extant theories of Originalism is not absolutely necessary; rather, this work could move to Part II, first verifying that the Founders and the Reconstruction Congress embraced Deontological Originalism, and second, reviewing the development of substantive due process jurisprudence in deontological originalist terms. Nonetheless, I offer a very brief review of some of Originalism's major strands to demonstrate a perhaps unsurprising trend -- indeed, a conceptual arc -- starting from uncritical adherence to the Framers' preferences but soon progressing towards, but still falling short of the very deontological bent that, I think, properly defines Originalism.⁴⁶⁰

promises;" but then, few paradigms do. However, insofar as it demonstrates why the meaning and the very legitimacy of the Constitution must be traced back to its founding, Originalism serves jurisprudence extremely well.

458. Shaman, *supra* note 331, at 83 (criticizing Originalism).

459. *Id.*; see also, e.g., Rebecca E. Zeitlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FL. L. REV. 483, 486, 495 (2012); Nelson, *supra* note 430, at 539-40.

460. Acknowledging the hearty scholarship to the contrary, I believe that the Framers and the society they represented indeed shared meanings and ideas sufficiently that, albeit imperfectly, we can say that they understood each other. Indeed, the historical record proves that both the Framers of 1787 and the Reconstruction Congress of 1868 believed in the deontological morality of natural law described in the Declaration of Independence and incorporated into the Constitution. See, Bayer *supra* note 23, Part II, Sections 1-2.

As a prelude to that historical analysis, I urged in this writing's discussion of Deontology that the human capacity to reason permits individuals to escape their prejudices and personal preferences imperfectly but sufficiently to conceive and to apply abstract moral precepts. This capacity equally enables individuals to communicate their ideas not flawlessly, but at least intelligibly to others. Likewise, the groups individuals form to advocate and to advance their chosen goals can communicate their members' shared ideas and opinions to other individuals and groups. See, *supra* Sections 2-c, e. Again, if communications are imperfect, they are reliable enough so that both within and among groups, individuals can grasp competing ideas sufficiently to either embrace or to reject them in whole or part. E.g., Leonard M. Fleck, Ph.D., *Last Chance Therapies: Can A Just*

1. *Original Forms of Originalism* --

As thousands of pages of law reviews and books evince, if the Constitution has a “fixed meaning,” originalists are not of one mind on what that “fixed meaning” is, nor, indeed, whether that “fixed meaning” controls in all instances. In its simplest incarnation, an incarnation that is out of favor with most purported originalists, Originalism actualizes what then-President Thomas Jefferson warned against: the machinations of

“Crafty individuals ... who feel themselves something in the present order of things, and fear to become nothing in any other. These persons inculcate a sanctimonious reverence for the customs of their ancestors; that whatsoever they did, must be done through all time; that reason is a false guide and to advance under its counsel, in their physical, moral, or political condition, is perilous innovation; that their duty is to remain as their Creator made them, ignorance being safety, and knowledge full of danger ... anti-philosophers, who find an interest in keeping things in their present state, who dread reformation, and exert all their faculties to maintain the ascendancy of habit over the duty of improving our reason, and obeying its mandates.”⁴⁶¹

Promoting Jefferson’s admonition is Originalism in its most rigid form, Intentionalism or Original Intent Originalism (“OIO”), which accents a “focus on original intent. The original intent of a constitutional provision was the meaning that the provision’s framers intended it to mean.”⁴⁶² Rather than discerning a paradigm for constitutional meaning, OIO seemed to instruct that the solution to every discrete constitutional issue is that which the Framers would personally have embraced. Professor Varol nicely described OIO,

and Caring Society Do Health Care Rationing When Life Itself Is at Stake?, 2 YALE J. HEALTH POL’Y, L. & ETHICS 255, 264 (2002) (explaining the process, Dr. Fleck opined, “Shared understandings of health care justice articulated through a shared process of rational democratic deliberation are needed, the details of which I sketch below. The virtue of such shared understandings achieved through a shared deliberative process is that they constrain morally objectionable arbitrariness by plan administrators, shift the power to make rationing decisions to those directly affected by those decisions, and protect our liberal commitments to value pluralism.”).

461. Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J. L. & PUB. POL’Y. 489, 493 (2004) (quoting THOMAS JEFFERSON, *Second Inaugural Address* (Mar. 4, 1805), in THOMAS JEFFERSON: WRITINGS 518, 520-21 (Merrill D. Peterson ed., 1984)).

462. Strang, *supra* note 338, at 2005.

At its inception, originalism focused on original intention. Prominent from the 1960s to the mid-1980s, intentionalism sought to interpret the Constitution by determining the subjective intentions and expectations of its drafters. Intentionalism focuses on what the framers “intended -- or expected or hoped -- would be the consequence” of the language they used in a specific constitutional provision. Intentionalism ... was one of the interpretive presuppositions of the Constitution; the framers expected that their intent would govern how their posterity interpreted the Constitution.⁴⁶³

The infirmities of OIO are at once apparent and serious. As highly regard scholar Cass Sunstein recently explained, “Whether fairly or unfairly, many of the critics of originalism took it to be politically motivated and result-oriented, notwithstanding its claim of neutrality. Importantly, and in response to some serious objections, there was a shift from a focus on ‘original intent’ to a focus on ‘original meaning.’”⁴⁶⁴ Accordingly, despite OIO’s surface appeal, even the most “conservative” or cautious theorists had to balk at uncritically applying to any given constitutional dilemma the outcome preferred by the Framers (if, indeed, such an outcome could be discerned from among this nation’s founders who where not often of one mind on any given matter and who, despite their vaunted precience, did not and could not speak on every likely and unlikely issue arising from the newly ratified charter of government).

OIO, then, essentially gave way to Original Methods Originalism (“OMO”), which Professor Fleming encapsulated as “discovering and applying the original meaning using the original methods that the founders used and accepted as legitimate.”⁴⁶⁵ Professor Varol similarly précised, “Under that approach, the Constitution is interpreted using the ‘interpretative rules that the enactors expected would be employed to understand their words.’ According to Profs. McGinnis and Rappaport,

463. Varol, *supra* note 332, at 1248-49 (quoting ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 115-16 (Amy Gutmann ed., 1997); other citations omitted); *see also, e.g.*, RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 4 (2d ed. 1997), ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1137 (2003).

464. *See*, Sunstein, *supra* note 338, at 1674.

465. James E. Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 522 (2004) [hereinafter “Fleming I”] (discussing, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 14-15, 81-99, 116-38 (2013)).

some of the founders' interpretive rules and methods support the use of original intent and others support the application of original meaning."⁴⁶⁶ Therefore, whether or not it actually engenders good or just outcomes, early incarnations seemingly proposed that, "originalism is what interpretation just is."⁴⁶⁷

OIO and OMO immediately suggest serious anomalies, particularly involving constitutional provisions that use identical terms but were ratified at different times. Specifically, the Constitution's guarantee of "due process of law," which applies to the federal level *via* the Fifth Amendment, ratified in 1791, did not constrain states and localities *via* the Fourteenth Amendment, until ratified in 1868 shortly after the Civil War. As commentators plausibly aver, during those intervening seventy-seven years, specific meanings and applications of due process had changed.⁴⁶⁸ If indeed the basic meaning of "due process" had transformed between 1791 and 1868, the question arises: pursuant to OIO and OMO, does "due process of law" under the Constitution only mean what it did in 1791, or only what it did in 1868, or does it mean that regardless whether outcomes will differ, under essentially identical facts, "due process" as applied to the states can be different from due process applied at the federal level?⁴⁶⁹ Not surprisingly, the Judiciary holds, perhaps if only for convenience's sake, that the meanings of the due process clauses of the Fifth and Fourteenth Amendments are identical.⁴⁷⁰ Similarly, even ardent strict originalists

466. Varol, *supra* note 332, at 1251 (quoting, John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 751-53 (2009)).

467. Fleming I, *supra* note 470, at 522.

468. E.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L. J. 408, 415-16 (2010) (arguing that, unlike the Reconstruction Congress that drafted the Due Process Clause of the Fourteenth Amendment, the drafters of the Fifth Amendment did not understand "due process" to include "substantive due process," a concept, Williams argues, that only developed in the years after ratification of the Bill of Rights but was widely understood by the time of the Civil War). Professor Williams posited that,

By 1868, the background context against which the Due Process Clauses would have been understood had changed dramatically. Interpretations of "due process" by this date were informed by the extensive body of substantive due process decisions issued by state and federal courts during the early decades of the nineteenth century as well as by the rhetorical invocations of the Fifth Amendment Due Process Clause by both proslavery and abolitionist forces."

Id. at 512.

469. James E. Fleming, *The Balkinization of Originalism*, 2012 U. ILL. L. REV. 669, 681-82 (2012) [hereinafter "Fleming II"].

470. E.g., *Welsh v. U.S.*, 136 S. Ct. 1257, 1261-62 (2016); *Dusenbery v. U.S.*, 534 U.S. 161, 167 (2002).

demur that, despite what history may teach, constitutional theory must presume that “due process” as applied to the federal level means the same thing when applied to state and municipal offices.⁴⁷¹

Given OIO’s and OMO’s inflexibility and almost unthinking adherence to the Founders’ “dead hands,” as noted and not surprisingly, “Few academic originalists maintain th[ese] position[s],”⁴⁷² feeling that such an stubborn, indeed crabbed understanding of this Nation’s charter will not work. Professor Varol summed up the criticisms:

Four primary intellectual objections led to the demise of original-intent originalism. First, the identification of a “single coherent shared or representative intent” where the drafters are multiple in number presented methodological problems (the “summing problem”). Second, the ascertainment of subjective original intent was difficult also because the intention of the founders on a given constitutional provision is often ambiguous. Third, critics of intentionalism argued that the founders did not intend their personal intentions to bind future generations. And fourth, critics also pointed to the undesired consequences of being ruled by the dead hand of the past in a modern, evolving society.⁴⁷³

Similarly, Jefferson Holt chastised,

Given that the Framers disagreed among themselves and at times changed their own minds, it is not difficult to conclude that a collective original intent is all but impossible to come by. Thus, the principal flaw

471. *E.g.*, Fleming II, *supra* note 474, at 681-82 (discussing the originalist theories of Antonin Scalia and Robert Bork). See Williams, *supra* note 476, at 504-05 (arguing that “it is not clear why the understandings of the ratifying public in 1868 as to the meaning of “due process of law” in the Fifth Amendment should be allowed to trump the understandings of that phrase shared by members of the ratifying public at the time of the Fifth Amendment’s enactment in 1791. If the language of the two Due Process Clauses reflected some sort of actual conflict such that the competing understandings of the two generations of ratifiers could not be honored simultaneously, there would be a fairly strong argument that the meaning of the later-enacted provision should control. But this is not the case. The Fourteenth Amendment Due Process Clause, by its express terms, is limited to the actions of state governments; while the Fifth Amendment Due Process Clause, though phrased in general terms, has long been construed to apply only to the federal government.”)

Deontological Originalism, of course, obviates this problem because the meaning of “due process of law,” as the Framers *circa* both 1791 and 1868 intended, comports with deontological morality arising from unbiased moral reason and, thus, never changes.

472. Jamal Greene, *Selling Originalism*, 97 GEO. L. REV. 657, 662 (2009).

473. Varol, *supra* note 332, at 1249 (footnotes collecting sources omitted).

of original intentionalism is that it requires a judicial imagination that is as unreasonable as it is creative. For the method to work, the interpreter must first establish what a particular Framers or group of Framers intended the Constitution to be, then assume that no one disagreed with that position, and finally picture that same Framers today “at 300 years old, having lived the entire course of American history with unchanged views.”⁴⁷⁴

In addition to the general claim that, “it is nearly impossible to ascertain a single collective intent of a large group of individuals, each of whom may have had different intentions[.]”⁴⁷⁵ some critics argue that the Framers, exercising a laudable sense of sardonicism, sought not “to clarify, but rather to obfuscate in order to confuse the electorate,” because they “self-consciously believed that they had to hide what they were doing in order to win ratification.”⁴⁷⁶ Justice William Brennan accented this historical assertion as a reason to question any strict form of originalism, “[T]he Framers did not agree about the meaning or application of specific constitutional provisions and ‘hid their differences in cloaks of generality,’ ... [accordingly,] ‘it is far from clear whose intention is relevant -- that of the drafters, the congressional disputants, or the ratifiers in the states?’”⁴⁷⁷

474. Jefferson A. Holt, *Reading Our Written Constitution*, 45 CUMB. L. REV. 487, 509-10 (2014-2015) (quoting, FRANK B. CROSS, *THE FAILED PROMISE OF ORIGINALISM* 86 (2013)).

475. Colby & Smith, *supra* note 337, at 248 (citing, Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209-22 (1980) and H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 907 (1985)). For instance, the important question whether the then-recently ratified Constitution allows Congress to create a national bank, “suggests the Framers did not agree about the meaning of the Constitution among themselves. Madison and Hamilton, to name only two, held opposing views during the debate over the First Bank of the United States.” Holt, *supra* note 455, at 509 n. 125 (citing, LIVING ORIGINALISM, *supra* note 402, at 89 (2011)); *see also*, e.g., STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 16-17 (1995) (the framers were not of one mind regarding church-state issues); *but see*, e.g., David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 NOTRE DAME L. REV. 987, 990 (1999) (review of and response to STEPHEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995)) (“While Professor Smith argues that the framers did not agree on any principle of religious liberty, I believe that the framers found some common ground with respect to church-state issues.”).

476. Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 445 (1996).

477. Ronald Turner, *On Brown v. Board of Education and Discretionary Originalism*, 2015 UTAH L. REV. 1143, 1152 (2015) (quoting JUSTICE WILLIAM J. BRENNAN, JR., *Speech to the Text and Teaching Symposium* (Oct. 12, 1985), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE 58 (Steven G. Calabresi ed., 2007)).

Indeed, this explanation emanating from Realpolitik, the provable lack of consensus among the Founders regarding precise issues, and Living Constitutionalism's plausible claim that the Founders did not want their descendants to be constrained by the specific policy and dogmatic preferences, goes far toward explain why they did not produce detailed suggested applications – a “users’ manual.” As it were – to influence subsequent generations.⁴⁷⁸

To answer these concerns, some theorists proposed consulting not the Framers themselves, but the societies that would ratify the draft constitution. “New Originalism,” aka “original meaning originalism,” aka “original expected meaning originalism,” (“OEMO”)⁴⁷⁹ aka “Originalism 2.0”⁴⁸⁰ offers:

With these objections gaining widespread acceptance, the focus of originalism gradually shifted in the early 1990s from original intent to original meaning ... New originalism seeks to discern, not the subjective original intentions or expectations of the founders, but the objective meaning that a reasonable observer would have assigned to the constitutional provision when it was enacted. ... [T]he goal is to ascertain the objective meaning of the text, which is the medium through which the drafters conveyed their intentions to their audience.⁴⁸¹

Given its different but related incarnations, OEMO apparently is also known as, or certainly is comparable to, Original Public Meaning Originalism (“OPMO”), which “inquire[s] into the ‘conventional’ meaning of constitutional language ‘in context’ at the time of adoption and ratification.”⁴⁸² As Professor Solum explained, “Public Meaning

478. Nelson, *supra* note 430, at 548 (quoting Keith E. Whittington, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 181 n. 59 (Kansas 1999)). (“[A]t least on its face, the Constitution gives interpreters only a few scattered instructions, none of which includes ‘a general directive as to interpretive methodology.’”).

479. Varol, *supra* note 332, at 1250-51 (citing LIVING ORIGINALISM, *supra* note 402 at 297-98).

480. *Id.* at 1249 (noting the various names of this form of Originalism).

481. *Id.* at 1249-50 (footnotes collecting sources omitted); Strang, *supra* note 338, at 2007-09.

482. Ryan C. Doerflinger, *Who Cares How Congress Really Works?*, 66 DUKE L. J. 979, 1027 (2017) (quoting Lawrence B. Solum, *Semantic Originalism* 2 (Ill. Pub. Law & Legal Theory Research Papers Series, No. 07-24, Nov. 22, 2008), <http://ssrn.com/abstract=1120244> [<https://perma.cc/JV9H-QQ4E>]).

Originalists believe that the communicative content of the constitutional text is fixed at the time of origin by the conventional semantic meaning of the words and phrases in the context that was shared by the drafters, ratifiers, and citizens.”⁴⁸³ Aside from the constitutional text itself, new originalists consult the text and meaning of state constitutions, the Federalist Papers, notes of state ratifying conventions, contemporary dictionaries, newspapers and other “extraneous sources.”⁴⁸⁴

Of course, one might lodge the same concerns against New Originalism/OPMO/OEMO as are brought against OIO and OMO, that ascertaining any truly reliable shared meaning is problematic as a matter of language theory,⁴⁸⁵ as a matter of empiricism, as a matter of politics,⁴⁸⁶ and indeed because the proposed system of government was so new and unfamiliar even if the theories predicated that system were widely known.⁴⁸⁷

Moreover, Prof. Sunstein, among others, notes that OEMO and OPMO aver, at least,

On a very thin view, [that] what governs is the original semantic meaning, understood as the meaning of the words in the English language at the time. Call this Semantic Originalism. If the words “domestic violence” did not originally mean spousal abuse, then they cannot mean spousal abuse today. If the words “equal protection” originally had nothing to do with condoms, then they cannot now have anything to do with condoms. If the English language changed radically, so that “due” meant “awesome,” “cruel” meant “wonderful,” and “vested” meant “wearing a vest,” the meaning of the Constitution

483. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 459 (2013).

484. Varol, *supra* note 332, at 1250.

485. As Madison accented during the ratification debates, “even superhuman drafters could not have produced a perfectly precise document, since ‘no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas.’” Nelson, *supra* note 430, at 526 (quoting, THE FEDERALIST NO. 37 (Madison), in THE FEDERALIST 231, 236 (Wesleyan 1961)).

486. *E.g.*, Strang, *supra* note 338, at 2006; *see also supra* notes 106, 174-76 and accompanying text.

487. Nelson, *supra* note 430, at 526 (citing *Letter from James Madison to Spencer Roane* (Sept 2, 1819), in 3 THE LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (J.B. Lippincott 1865)).

would not change, because the original semantic meaning is what governs.⁴⁸⁸

Most adherents to OMO, understandably, eschew such a “thin view” in favor of what Sunstein characterized as:

a much thicker view[in that] the original meaning is not limited to semantic meaning. It captures what the relevant English speakers, at the time, would have understood the words to mean in their context. The much thicker view is that the original meaning goes beyond the original semantic content of the constitutional text and includes an understanding of the historical context, used to eliminate ambiguity. Call this Historical Context Originalism, to which most contemporary originalists subscribe.⁴⁸⁹

Of course, the “thicker view” is fraught with peril, not the least of which is how to handle legal meanings that may have changed from the Constitution’s original ratification date to the early *post-Bellum* period.⁴⁹⁰

But, while such critiques seem to be pertinent, even compelling, they are irrelevant. If any of these forms of Originalism actually did reflect the intent of the Framers, judges and commentators would have but two choices. The first is, so long as the Constitution remains operational, courts must enforce that intent regardless of outcomes and regardless of how technically difficult, indeed questionable it may be to discern correct resolutions of discrete constitutional issues. As the first portions of this discussion of Originalism proved, the only legitimate interpretation of the

488. Sunstein, *supra* note 338, at 1675 (citing works of Prof. Jack Balkin, particularly *Living Originalism*, *supra* note 402).

489. *Id.* at 1676. Prof. Sunstein explicated, “Suppose, for example, that “the freedom of speech” did not include commercial advertising or libel and that “the equal protection of the laws” had nothing to do with school segregation or sex discrimination. If so, originalists would be inclined to say that the issue is at an end.” *Id.*

490. See, *supra* notes 473-76 and accompanying text. Indeed, as we will see momentarily, for that reason and because the outcome of OMO can be extraordinarily unpopular and unpalatable, the majority of originalists sensibly retreat from the “thicker view.” “We might think that if the Equal Protection Clause was not originally understood to forbid racial segregation or sex discrimination, then that is the end of the matter, ... But another view ... now held by most originalists, is that originalism does not necessarily entail that constitutional interpretation is settled by the originally expected applications, which are evidence of original meaning but not decisive.” Sunstein, *supra* note 338, at 1671 (footnote omitted).

Constitution is to follow the intent of the Framers.⁴⁹¹ Accordingly, if the first choice -- strict enforcement -- is unpalatable, the second choice is not to ignore the intent of the Framers, but rather, to draft and ratify a new constitution reflecting an original intent that courts can accept.⁴⁹²

2. *Faint Hearted Originalism* --

The truth of the above claim is demonstrated by some jurists' and commentators' response to the broad, damning and hardheaded premise of the foregoing original manifestations of Originalism that, based on the known intent of the Framers, a substantial portion of highly significant constitutional law rulings are wrong, something judges knew or should have known when they rendered those decisions. As Professor Simon briskly noted, "The originalist critique of constitutional law is not a modest one, for it argues that almost all the constitutional decisions of the Supreme Court have been improper."⁴⁹³

Rather than advocating either overturning such erroneous rulings or replacing the Constitution with a charter conforming with such otherwise infirm constitutional law, a conspicuous cadre of theorists, "attempt to make peace with precedents that are not consistent with original meaning as they conceive it."⁴⁹⁴ Famously, one fountainhead of Originalism, Justice Antonin Scalia, somewhat humorously conceded to his dedication as "faint-hearted"⁴⁹⁵ because he could not bring himself to advocate reversal

491. See *supra* notes 400-49 and accompanying text. Nelson, *supra* note 430, at 525-29, 535 (noting that Madison, among others, believed the meaning of the Constitution would and become "fixed," essentially becoming immutable.) Arguably, Madison's concept of a "fixed" meaning harbors the same infirmities as do the just discussed modes of Originalism unless, of course, Madison was alluding to meaning "fixed" by reference to immutable moral precepts, an explication of Madison not reflected in Professor Nelson's or other articles I have uncovered to date.

492. Bret Boyce, *The Magic Mirror of "Original Meaning": Recent Approaches to the Fourteenth Amendment*, 66 ME. L. REV. 29, 39 (2013) (quoting, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 714 (2011)) (explaining that OPMO and its ilk, "have rendered modern originalism so indeterminate as to sacrifice 'any pretense of a power to constrain judges to a meaningful degree.'").

493. Simon, *supra* note 63, at 1482 (footnote omitted).

494. Fleming I, *supra* note 470, at 522 (discussing, JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 2, 154-96 (2013)).

495. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) ("I hasten to confess that in a crunch I may prove a faint-hearted originalist.").

of all precedents that arguably espouse non-originalist reasoning.⁴⁹⁶ Indeed, journalist and attorney Jeffrey Toobin reported Scalia's brusque retort to claims that he may be betraying his integrity by voting to uphold decisions that he believes are wrong or otherwise contrary to judicial competence: "I am an originalist, but I am not a nut."⁴⁹⁷

Respecting the time-honored principle of *stare decisis*,⁴⁹⁸ Scalia justified such feints validating purportedly non-originalist decisions as "pragmatic," necessitated by the reality that to preserve its legitimacy, the Judiciary cannot simply reject important precedents followed, respected and relied upon by the citizenry. Indeed, as the concept of *stare decisis* avers, individuals would neither respect nor obey courts whose rulings are or appear to be *ad hoc*, politically motivated, and, subject to change based on the whims and preferences of whatever majority happens to sit in review at any given time. Likewise, one of Originalism's earliest and most ardent exponents, Hon. Robert Bork, noted that realistic judges must accept and apply judicial precedents expressing now accepted constitutional meanings although defying the original understanding of either the Framers or their greater society.⁴⁹⁹

Accordingly, as its integrity and legitimacy would otherwise be jeopardized, the Judiciary will not, and ought not, adopt wholesale revocations of precedents that have become essentially embedded in the

496. *Id.* at 861-64 (1989); see also Fleming I, *supra* note 470, at 520 (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Gutmann ed., 1997)).

497. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 103 (2007) (Justice Scalia explaining the difference between his understanding of Originalism and that of his Supreme Court colleague, Justice Clarence Thomas, who would reverse purportedly erroneous precedents). Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL. REV. 325, 340 (2009) (quoting Dep't of Revenue v. Davis, 128 S. Ct. 1801, 1821 (2008) (Scalia, J., concurring in part); and citing Gonzales v. Raich, 545 U.S. 1, 57 (2005) (Thomas, J., dissenting); United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring); and, Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 443 (2001) (Scalia, J., concurring in the judgment)) Prof. Greene offered that Justice Scalia, "seems unsympathetic with Justice Thomas's apparent willingness to restore the Commerce Clause to its neutered pre-New Deal state. Justice Scalia is also willing to apply dormant commerce clause jurisprudence even though he regards it as 'an unjustified judicial invention,' and he has swallowed hard and applied punitive damages doctrine that he disagrees with."

498. Scalia, *supra* note 500, at 861.

499. E.g., Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986).

annals of constitutional law;⁵⁰⁰ thus, Originalism be damned.⁵⁰¹ Faint-hearted Originalism recalls Shakespeare's wisdom, "Thus conscious does make cowards ..."⁵⁰²

Indeed, the gripping irony of the Scalia-Bork posture certainly has not been lost on Originalism's detractors. If, as Justice Scalia and Judge Bork asserted, "Faint-hearted" originalism is an unfortunate necessity to ensure the legitimacy of the Judiciary, it likewise connotes the demise of original forms of Originalism as a practical constitutional frameworks. Scalia himself admitted that the seemingly widespread acceptance of faint-heartedness in response to Living Constitutionalism,⁵⁰³ "accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions."⁵⁰⁴ In that light, Professor Greene explained why Originalism, then, may have scant real-world effect on constitutional law: "For originalism of this sort to continue to prosper it needs to feed continually on issues of first impression, and those cases are hard to come by."⁵⁰⁵ In light of this reality along with the other numerous criticisms of unadulterated Originalism, Professor Sanford Levinson caustically suggests that regardless whether it is correct in whole or part, as a practical matter, "Originalism is less important than it is sometimes cracked up to be."⁵⁰⁶ If the "faint hearted" approach is correct, Originalism may have been rendered, "a tale ... full of sound and fury, signifying nothing."⁵⁰⁷

500. ANTONIN SCALIA, RESPONSE, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Guttman ed., Princeton U. Press 1997) (discussed in LIVING ORIGINALISM, *supra* note 402, at 125).

501. Thomas A. Schweitzer, *Justice Scalia, Originalism and Textualism*, 33 *TOURO L. REV.* 749, 762 n. 92 (2017) (quoting Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 *U. CIN. L. REV.* 7, 12-13 (2006)) ("Justice Scalia is simply not an originalist' because 'he asserts a strong role for precedent, even where it is inconsistent with the original meaning of the text.' . . . contrary to [Scalia's] professed skepticism about the legitimacy of judicial review, this stance puts prior opinions of mere judges above that of the Constitution.").

502. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc.1.

503. LIVING ORIGINALISM, *supra* note 402, at 116 ("Most originalists -- at least those sufficiently mainstream to obtain jobs on the bench -- accept the modern constitutional regime and find ways to live within it.").

504. Scalia, *supra* note 500, at 862.

505. Greene, *supra* note 502, at 340.

506. Sanford Levinson, *The Limited Relevance of Originalism in the Actual Performance of Legal Roles*, 19 *HARV. J.L. & PUB. POL'Y.* 495, 503 (1996).

507. WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5, 27-28 (explaining that unlike Macbeth's assessment of "life," Originalism is not "told by ... idiot[s]."). .

As the earlier discussion of Originalism's essential correctness shows,⁵⁰⁸ Levinson is wrong to assert that "Originalism is less important than it is sometimes cracked up to be." To the contrary, constitutional interpretation and application *sans* Originalism is illegitimate. Therefore, it is not Originalism that is overblown; but rather, the simple actuality is that "faint-hearted" originalism cannot legitimately inform constitutional adjudication. If Originalism is correct because *only Originalism* renders that charter meaningful by linking the Constitution's past to its present -- thus, as Professor BeVier opined, Originalism's utmost importance is that it is the only legitimate understanding of American constitutional law because all else is partisan politics⁵⁰⁹ -- then the only specie of Originalism that can fulfill Originalism's singular legitimate purpose is a specie that *rightfully and provably* admits no exceptions whatsoever. Such is this article's proposed Deontological Originalism, the only Originalism, this writing avers, that can legitimize Originalism. Because faint-hearted originalism is more exceptions than actually Originalism, it cannot "fit the bill" -- it cannot be correct.⁵¹⁰

3. Moral Reading Originalism --

In response to the infirmities of strict originalist theory and the duplicity of faint hearted forms, Professor McConnell, among others, argues that few reputable theorists embrace an Originalism that, to the extent it is discernable, habitually applies the Framers' preferred resolutions of specific constitutional dilemmas:

The problem with this argument is that no reputable originalist, with the possible exception of Raoul Berger, takes the view that the Framers' "assumptions and expectations about the correct application" of their

508. See *supra* notes 400-49 and accompanying text.

509. BeVier, *supra* note 383, at 287 (footnotes omitted) ("[A]n important function of Originalism is to exemplify, to enforce, and to sustain the rule of law.").

510. Furthermore, as with OMO, OIO and the amalgams of New Originalism, Justice Scalia's faint-hearted originalism lacks workable premises. Specifically, we have no reliable, even if necessarily somewhat imprecise standards to determine which precedents contrary to the Framers' apparent intent to accept and why is not clear. Logically, originalists cannot accept a standard that validates precedents contrary to the apparent intent of the Framers if the given originalists think such precedents reflect good policy. Such a standard would be as apparently arbitrary as the "living constitutionalism" Originalism arose to oppose, the standard "that every generation has the right to govern itself." *DeBoer v. Snyder*, 772 F.3d 388, 418 (6th Cir. 2014) (discussing the "living constitution").

principles is controlling. Robert Bork, for example, wrote in 1986 that his position “is not the notion that judges may apply a constitutional provision only to circumstances specifically contemplated by the Framers. In such a narrow form the philosophy is useless.” ...

Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong. ... [T]hey believe that “[w]e are governed by what our lawmakers said -- by the principles they laid down -- not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.”⁵¹¹

McConnell’s observations rightly recognize that the Framers’ intent warrants an overarching or paradigmatic approach to meaning and interpretation which avoids adopting without thought or critique the precise resolutions of discrete constitutional issues the Framers or the greater social order apparently would have preferred, assuming such are discernable empirically with any reasonable degree of reliability. This has led to a broad swath of originalism that might be labeled: Moral Reading Originalism (“MRO”), into which my proposed Deontological Originalism arguably falls. MRO extolls what original forms of Originalism eschew: that the Framers intentionally and knowingly incorporated into the Constitution’s text explicitly moral duties of Government. As Professor Fleming correctly concluded,

Originalism, old and new, makes a virtue of claiming to exile moral and political theory from the province of constitutional interpretation. That is neither possible nor desirable, nor is it appropriate in interpreting our Constitution, which establishes a scheme of abstract aspirational principles and ends, together with a general framework of structures and powers, rather than a code of detailed historical rules. Interpreting our Constitution with fidelity requires judgments of moral and political

511. Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1284 (1997) (citing DWORKIN, *supra* note 12, at 14 (quoting, Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 *SAN DIEGO L. REV.* 823, 826 (1986))).

theory about how those principles, frameworks, and structures are best understood.⁵¹²

Perhaps the most highly regarded of the moral originalists is Ronald Dworkin who encapsulated MRO as, “we all — judges, lawyers, citizens — interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice”⁵¹³ Similarly, Professor Fleming stated,

By “moral reading” and “philosophic approach,” I refer to conceptions of the Constitution as embodying abstract moral and political principles -- not codifying concrete historical rules or practices -- and of interpretation of those principles as requiring normative judgments about how they are best understood -- not merely historical research to discover relatively specific original meanings.⁵¹⁴

That is because the Constitution’s text, both literally and in spirit, is imbued with specific moral principles requiring contemporary interpretations to be meaningful in contemporary society.⁵¹⁵ Therefore, whether they admit it or not, American judges cannot help but understand

512. Fleming I, *supra* note 470, at 533.

513. DWORKIN, *supra* note 12, at 2-4.

514. Fleming I, *supra* note 470, at 516-17 (“I reject all forms of originalism, old or new, concrete or abstract, living or dead. Instead, I defend what Ronald Dworkin has called a ‘moral reading’ of the Constitution and what Sotirios A. Barber and I have called a ‘philosophic approach’ to constitutional interpretation.”). I must disagree with Professor Fleming because, as proved earlier, *see supra* notes 400-49 and accompanying text, as with any constitutional framework, a moral reading must be “originalist” in that it comports with what the Framers intended. Otherwise, it fails to link our present-day applications with the original understanding, thus rendering our Constitution groundless, subject to changing meanings based on the whims of decisionmakers.

515. Jacob Nebel, *Does Dworkin’s Moral Reading Rest On a Mistake?*, J. JURIS 25, 25 (2013) (discussing, Ronald Dworkin, *Law’s Empire* 2-13). Not surprisingly, Dworkin accents the Bill of Rights and the due process and equal protection clauses as archetypal examples of constitutional morality. DWORKIN, *supra* note 12, at 2-3, 7-8 (explain that “the First Amendment, for example, recognizes a moral principle — that it is wrong for government to censor or control what individual citizens say or publish—and incorporates it into American law. So when some novel or controversial constitutional issue arises — about whether, for instance, the First Amendment permits laws against pornography — people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography.”).

the Constitution's commands to be the moral imperatives that require moral reasoning to solve the moral dilemmas those commands engender.⁵¹⁶

While the basic premise of MRO is correct, along with the bulk of commentators and jurists,⁵¹⁷ most moral readers erroneously reject the idea that there are deontologically correct moral answers, averring, rather, that, "Given the range of legitimate disagreement about the requirements of political morality, the 'correct' or 'authoritative' interpretation will often depend on the interpreter."⁵¹⁸ Perhaps straddling a middle position, the late Ronald Dworkin, arguably MRO's most highly respected promoter, believed that there are correct moral answers to moral dilemmas;⁵¹⁹ but, such answers derive from empirical reviews of Americanism under the Constitution, a process Dworkin called "constitutional integrity."⁵²⁰ The moral meaning must come from the Constitution itself and be consistent with the fabric of interpretations of earlier courts as well as with American history and values.⁵²¹ This means, "the moral reading [asks judges] to find the best conception of constitutional moral principles ... that fits the broad story of America's historical record."⁵²² Consequently, a moral reading of

516. *Id.* at 2-4; Ronald Dworkin, *LAW'S EMPIRE* 15-17 (1986) (explaining that due to politics "it would indeed be revolutionary for a judge openly to recognize the moral reading, or to admit that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back, and try to find other, usually metaphorical, descriptions of their own practice.") This hypocrisy is based on jurists' erroneous belief that to admit to such an obviously actual and true practice would simultaneously be to admit that law is nothing more than judges inflicting their personal, selfish moral precepts in the guise of unbiased interpretations of law.

517. See *supra* notes 83-123 and accompanying text.

518. Simon, *supra* note 63, at 1487.

519. Ara Lovitt, *Constitutional Confusion? Freedom's Law: The Moral Reading of the American Constitution*, by Ronald Dworkin., 50 *STAN. L. REV.* 565, 570 n. 35 (1998) (citing, RONALD DWORKIN, *A MATTER OF PRINCIPLE* 119-145 (1985) (arguing against what Dworkin calls the "no-right-answer thesis")) ("[E]ven though Professor Dworkin acknowledges that arguments over morality are uncertain, he does not believe it follows that there are no right answers to hard moral questions. Quite to the contrary, one of Dworkin's most famous jurisprudential and philosophical claims is that there really are right answers to hard cases.").

520. DWORKIN, *supra* note 12, at 10.

521. *Id.* at 10-11. As Dworkin explicated, judicial decisions must be principled, not based on politics and compromises. To assure this, rulings must be both vertically and horizontally sound. Regarding the former, "a judge who claims a particular right of liberty as fundamental must show that his claim is consistent with the bulk of precedent, and with the main structures of our constitutional arrangement." Additionally, "integrity holds horizontally: a judge who adopts a principle must give full weight to that principle in other cases he decides or endorses."

522. *Id.* at 11.

the Constitution concerns not only the Framers' general understanding of applicable morality, but as well past legal and political understandings that may not fully comport with the Framers' beliefs.⁵²³ In that way, even if a judge believes her deeply and earnestly held principles are moral *minima*, she cannot inflict those as the meaning of due process and equal protection.⁵²⁴

Regarding the morality of the Constitution itself, Professor Dworkin opined,

I believe that the principles set out in the Bill of Rights [which include the Reconstruction Amendments], taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are

523. The framers of the Fourteenth Amendment, for instance, intended to make as highest law a forceful principle of equality while, at the same time, the enacting Congress endorsed racially segregated public schools in the District of Columbia over which Congress exercises legal authority. Interpreters must discern that highest level of meaning, therein the principle of equality. (But, there must be limiting principles lest the highest meaning is so abstruse that it allows almost any subordinate, more specific application, thus allowing judges to substitute their personal morality.) DWORKIN, *supra* note 12, at 8-10. *See also*, e.g., Gregory Bassham, *Freedom's Politics: A Review Essay of Ronald Dworkin's Freedom's Law: The Moral Reading of the American Constitution*, 72 NOTRE DAME L. REV. 1235, 1244 (1997) (book review) (citing, *inter alia*, Dworkin, *supra* note 12, at 72-73) ("So, for example, even if historical investigation were to show conclusively that the Fifth and Fourteenth Amendment due process clauses were originally understood only to guarantee lawful procedures, constitutional history, Dworkin claims, has long excluded that as an eligible interpretation of the clauses.".)

524. DWORKIN, *supra* note 12, at 11 ("The moral reading asks [judges] to find the best conception of constitutional moral principles -- the best understanding of what equal moral status for men and women really requires ... that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record."). Dorf, *supra* note 46, at 138 (emphasis added) ("Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. *They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality*, and they must take care to see that what they contribute fits with the rest."). *See also* Bassham, *supra* note 528, at 1245.

indispensable to those ends, including but not limited to the more specifically designated in the document, ...⁵²⁵

As we see, then, Dworkin's MRO accepts the reality of correct moral answers to discrete constitutional questions. In fact, Professor Fleming has accented that he and Dworkin are not "postmodernists," meaning, they are not skeptical regarding the existence of "moral reality, right answers, best interpretations, and all things Dworkonian ..."⁵²⁶ Professor Dorf understands Dworkin to, "believe[] that finding the interpretation that best hangs together with everything we take to be true about the law means finding a truth that really is out there. [Some call this] so much metaphysical nonsense."⁵²⁷ Arguably, Dworkin basically admits that morality is extra-human – that moral truth "really it out there," meaning, not inherently within us but discoverable through reason.⁵²⁸ Still, Professor Dworkin did not address at the meta-theoretical level, immutable, unbiased deontological morality, so far as I can tell from his elucidations in his pivotal works, *Freedom's Law* and *Law's Empire*. Indeed, his constant references to the American experience and "America's historical record" imply that morality is more a matter of experience and sensible preferences, not abstract principles discerned from impartial reason, informed by but ultimately unmoored from politics and unconcerned with whether the resulting outcomes are good or bad. For instance, regarding the Bill of Rights and the Reconstruction Amendments, Dworkin stated, "Taken together, these principles define a political ideal: they construct the constitutional skeleton of a society of citizens both equal and free ... [protected by] broad and abstract principles of political morality, which together encompass, in exceptionally abstract form, all the dimensions of political morality that in our political culture can ground an individual constitutional right."⁵²⁹

525. DWORKIN, *supra* note 12, at 7-8 (clarifying that the Bill of Rights includes the Reconstruction Amendments is found at 72).

526. Fleming II, *supra* note 474, at 677 (discussing how Jack Balkin's concept of "living originalism" is in large measure identical to Dworkin's moral reading principles.).

527. Dorf, *supra* note 46, at 138.

528. Patrick Neal, *LIBERALISM AND ITS DISCONTENTS* 162-170 (1997) ("noting that both Rawls and Dworkin propounded weaker version of deontology in later works") (quote from, Nirej S. Sekhon, *Equality and Identity Hierarchy*, 3 NYU J.L. & LIBERTY 349, 422 n. 108 (2008)).

529. DWORKIN, *supra* note 12, at 72, 78.

While his phrasing is, to me at least, pleasingly grandiose and stirring, I do not see deontological morality premising Dworkin's morality of the American spirit,⁵³⁰ nor framing his assertions that, as earlier quoted, the Constitution accords all persons "equal moral and political status ... [and] equal concern [by enforcing] whatever individual freedoms are indispensable to those ends",⁵³¹ and therein lies the abiding infirmity that Deontological Originalism cures. My quarrel is not necessarily with his proposed answers to those constitutional dilemmas to which Dworkin put his incisive mind.⁵³² Rather, what is incurably problematic is his lack of a deontological framework to assess what he considers to be the applicable American culture *cum* experience with which to judge whether any challenged official action promotes or offends "a society of citizens both equal and free."⁵³³ In that significant regard, as edifying and compelling as his analyses of liberty issues may be, Professor Dworkin's MRO is incomplete and, if deontological principles would compel changes in his discrete issue resolutions of particular matters, his MRO is incorrect.

4. *Virtue Ethics Originalism --*

One offshoot of MRO is found in Lee J. Strang's embrace of "virtue ethics" which he bases on Elizabeth's Anscombe's article on that topic.⁵³⁴ Simply put, virtue ethics falls under the general category of "practical philosophy," that is, moral theory "guiding human action," as opposed to "theoretical" or "speculative" philosophy that seeks to discern "truth about reality."⁵³⁵ Because, "virtue ethics eschews rules in favor of elastic

530. LAW'S EMPIRE, *supra* note 521, at 35 (criticizing as implausible natural rights theory that holds immoral laws are *per se* illegitimate); *cf.*, McConnell, *supra* note 516, at 1271-76 (noting that Dworkin's quest for "right answers" might be at odds with his definition of "integrity").

531. DWORKIN, *supra* note 12, at 7-8.

532. *Id.* at chs. 1-6 (discussing, *inter alia*, abortion, "right to die," and free speech matters).

533. *Id.* at 72.

534. Strang, *supra* note 338, at 2014 (discussing, G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 3-6, 9, 13-16 (1958)).

535. *Id.* at 2016 (footnotes omitted)(arguing that there is an impasse between Consequentialism (arguing that morality is humanly created, based on what generate the best outcome in any given scenario) and Deontology (arguing that morality is a priori, transcendent and based on principles discerned from reason dictating the right moral answer to any particular dilemma)). Strang is right that many theorists stubbornly cling to Consequentialism; however, there is no actual impasse in that Deontology is correct,

concepts like character and virtue,”⁵³⁶ Professor Strang is focusing on one aspect of practical philosophy and virtually no meta-theoretical philosophy.⁵³⁷ Indeed, Strang admits that virtue ethics lacks a foundation -- a metatheory -- such as the natural law principles⁵³⁸ to make its real-world guidance more understandable.⁵³⁹

Absent a defining metatheory, virtue ethics attempts to identify what attributes constitute good and decent human character.⁵⁴⁰ “[V]irtue is ... something that makes its possessor good; a virtuous person is a morally good, excellent, or admirable person who acts and reacts well, rightly, as she should -- she gets things right.”⁵⁴¹ Thus, the thrust of “virtue” is acquiring the “habit” of a personal “disposition of character” that “makes its possessor good; a virtuous person is a morally good, excellent, or admirable person who acts and reacts well, rightly, as she should -- she gets

Consequentialism is not. *See infra* note _____. Nonetheless, Strang’s use of value ethics is a useful interlude in this debate.

536. Strang, *supra* note 338, at 2028.

537. *Id.* at 2017.

538. *Id.* at 2023-24, 2027.

As Strang noted,

Natural law is the body of norms that identifies which actions are, and which are not, conducive to human flourishing. Natural law norms are natural because they are tied to human nature: they identify which actions are right and wrong by reference to a being with human characteristics. Natural law precepts are tied to human nature via the goods that natural law norms direct humans to instantiate.

Primary among the characteristics of humans is both a rational and animal nature. St. Thomas Aquinas, *Summa Theologica*, I-II, Q. 90, art. 2 (Fathers of the English Dominican Province trans., Benziger Bros. 1947) (quoted in *id.* at 2040).

We now can intuit what Bayer, *supra* note 23, Part II, Section 5, will prove: a Kantian rather than Aquinian approach better describes Natural Law because the moral precepts derived therefrom are based on, to use the Founder’s apt phrasing, “Nature and Nature’s God,” not “human nature” or “human characteristics.”

Therefore, if Strang would choose St. Thomas’ paradigm, he would construct an inapt deontological base for his understanding of Virtue Ethics.

539. Strang, *supra* note 338, at 2023, 2029 (“[A] frequent criticism lodged against virtue ethics is that its purported lack of normative rules disables it from offering sufficient ethical guidance. ... [Still,] virtue theorists, while acknowledging the fuzziness of some of virtue ethics’ concepts, have argued that virtue ethics also prescribes rules of conduct.”).

540. *Id.* at 2018 (discussing, Rosalind Hursthouse, *On Virtue Ethics* (1999)) (“In virtue ethics, the fundamental issue is not action: it is character. Virtue theorists argue that the focus of ethical inquiry should be the instantiation and exercise of virtue, not an algorithm of right action.”).

541. Rosalind Hursthouse, *On Virtue Ethics* 13 (1999).

things right.”⁵⁴² Desired “virtues include: theoretical wisdom,⁵⁴³ practical wisdom,⁵⁴⁴ justice-as-lawfulness,⁵⁴⁵ temperance,⁵⁴⁶ and fortitude.”⁵⁴⁷ Virtue ethics maximizes “human flourishing,” but only in a rational fashion because only humans among all animals, have the capacity for complex and thorough reasoning. The virtues of a good judge – likely applicable to all human endeavors to a greater or lesser extent – help guide persons to rationally maximizing their human flourishing, meaning acting excellently in a world of others while pursuing happiness.⁵⁴⁸

Of course, such praiseworthy attributes as virtue ethics stresses are not inimical to Originalism.⁵⁴⁹ In particular, because judges have a duty to abide by originalist tenets, Strang urges that virtue ethics can help judges decide how to handle nonoriginalist precedents, “and therefore nonoriginalist precedent will not erode the original meaning’s pride-of-place.”⁵⁵⁰ From this, Professor Strang concludes, “Accepting the continued

542. *Id.*

543. Strang, *supra* note 338, at 2019 (“Theoretical wisdom” is “the intellectual firepower” to understand and to apply the abstract ideas of law such as “cases, statutes, regulations, legal principles, and legal practices that are pertinent to the case before the judge.”) (footnote omitted).

544. *Id.* at 2020 (“Practical wisdom is the intellectual virtue that enables its possessor to perform two tasks well: first, identify those goods that are valuable and therefore worth pursuing; and second, perceive the means most conducive to pursuing those identified goods. Practical wisdom, in the context of judging, is primarily concerned with the second task. Practical wisdom provides the capacity to articulate legal doctrine that mediates legal meaning and the facts presented in cases.”)

545. *Id.* at 2021 (“Justice-as-lawfulness is the virtue of giving one’s society’s laws their due.” Strang is unclear about what this means, but, it seems it is the ability of the judge to act like a judge even when the judge dislikes having to enforce a given outcome.”).

546. *Id.* at 2022 (“A temperate judge will hold in check his sensual appetites [such as resisting bribes]. ... Courage is the firmness of mind that enables one to react appropriately to danger, and a courageous judge will rule according to the law even in the face of potential harm to his reputation, career, or even family and life.”).

547. *Id.* at 2019 (citations omitted).

548. *Id.* at 2022-23.

549. *Id.* at 2027 (“For example, fortitude, in the context of judging, bears on whether or not a judge has the courage to articulate the Constitution’s original meaning, not whether or to what extent the Constitution’s meaning was fixed at the point of ratification.”)(footnote omitted).

550. *Id.* at 2030, 2034 (Specifically, “a judge must utilize three factors to decide whether to overrule a nonoriginalist precedent: (1) the extent of the precedent’s deviation from the Constitution’s original meaning; (2) the harm to Rule of Law values caused by overruling the precedent; and (3) the extent to which the precedent creates a just social ordering. However, this opens originalism to the second nonoriginalist criticism: that originalism gives judges too much discretion. Virtue ethics enables originalism to adequately address this critique.”).

viability of some nonoriginalist precedent will not, therefore, undermine originalism, and originalism can more easily fit this facet of our legal practice.”⁵⁵¹ That conclusion, of course, is encouraging but quixotic. The very premise of Originalism, as earlier argued, is that only by keeping faith with original intent can present applications of constitutional provisions be legitimate.⁵⁵² Despite Strang’s optimism, it is unclear how virtue ethics salvages Originalism if Virtue Ethics Originalism does not require strict originalist comportment.

Perhaps Virtue Ethics does this much: integrity prevents judges from using “faint hearted” principles as a ruse to issue any constitutional edict they like.⁵⁵³ But, as we will see, under Deontological Originalism, the proper originalist framework, any incorrect constitutional decision is *per se* immoral. As there can be no justification for the perpetuation of immoral standards and conduct, the very idea that virtue ethics can justify the continuation of anti-originalist precedents is fatally flawed.⁵⁵⁴

Indeed, virtue ethics has excited much interesting legal commentary.⁵⁵⁵ Nonetheless, as stressed above and as Professor Strang

551. *Id.* at 2030.

552. *See supra* Sections 4-E, F.

553. *See supra* notes 498-515 and accompanying text.

554. Strang, *supra* note 338, at 2032 (“The aim of every political constitution is, or ought to be, first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous, whilst they continue to hold their public trust”) (quoting THE FEDERALIST NO. 57 (Madison))

Doubtless, virtue ethics are useful, particularly for choosing among moral options – “guns” of what type and quantity as opposed to “butter” of what type and quantity – which is the function of most elected and appointed officials in the executive and legislative branches. However, as explained *infra* at Bayer, *supra* note 23, Part II, Sections 2-3, the Founders’ overarching concern both at the outset of the American Revolution, and at the original drafting of the Constitution, and at its pivotal amending in 1868, was to assure that the new government would always enforce and preserve the natural rights arising from natural law that inures to each human being. Such is the theme repeated in The Federalists, in other writings and carried over in the enactment history of the post-Bellum amendments. As such, Madison’s seeming emphasis on virtue ethics in his phrasing, “The aim of every political constitution is, or ought to be, first, ...” does not place virtue ethics above the deontology that defined and continues to define the Revolution and the meaning of the Constitution.

555. *E.g.*, Justice Jeff Brown, “A Scout Is Trustworthy”: Applying Virtue Ethics to Lawyer Professionalism, 3 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 2 (2013); Michael S. McGinniss, *Virtue Ethics, Earnestness, and the Deciding Lawyer: Human Flourishing in a Legal Community*, 87 N.D. L. REV. 19 (2011); Heidi L. Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI. KENT L. REV. 1431 (2000).

forthrightly admitted, virtue ethics lacks a metatheory explaining whether the characteristics it embraces are the product of human imagining or the natural order of things over which human beings have no control. Absent a determination on this issue, we cannot be sure what purported virtues truly belong in the catalog of virtue ethics and whether they can change based on new circumstance, human whim or both.⁵⁵⁶

5. *Liberal Originalism --*

Of all the forms arguably falling under the heading of Moral Reading Originalism, one rather close to the Deontological Originalism urged here is Liberal Originalism. As Lisa Parshall encapsulated, “The reconciliation of original meaning with changing circumstances is exemplified by the doctrine of ‘liberal originalism’, which seeks to apply the enduring values of individual liberty and limited government expressed in the Declaration of Independence to contemporary constitutional questions.”⁵⁵⁷

Liberal Originalism rightly begins by noting that because so many of its terms are vague and otherwise not self-defining, “constitutional interpretation simply must have some reference beyond the plain text in order to make any sense of the document.”⁵⁵⁸ The most logical source is the Declaration of Independence because it, “is a timeless principle, framed in the Constitution, ... applicable to changing circumstances, depending not on an organic national history, but instead on assent to principle.”⁵⁵⁹ Hence, unlike “leftist” concepts of a “living constitution,” liberal originalism is based on “unchanging principles underlying the Constitution” set forth in its text but informed -- given depth and meaning -- by the principles of the Declaration.⁵⁶⁰ In this way, liberal originalism is

556. Logically, the very idea of virtue ethics implies Deontology over Consequentialism because surely that which is virtuous and, thus, endemic of proper human character are not mere political bagatelles, subject to change. The implication favoring Deontology, however, is not proof; therefore, Originalism needs to be predicated on one of the two possible bases of morality, of which, this article argues, Deontology is the correct choice.

557. Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away from a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 30 (2007).

558. Sandefur, *supra* note 466, at 497.

559. *Id.* at 508 (footnote omitted) (“The Declaration is adaptable to new circumstances.”).

560. *Id.* at 508-09; see also Scott D. Gerber, *Liberal Originalism: The Declaration of Independence and Constitutional Interpretation*, 63 CLEV. ST. L. REV. 1, 4 (2014).

faithful to the Framers and to the Constitution by avoiding “subjectivism on a large scale.”⁵⁶¹

Liberal originalists rightly recognize, as they must, the Enlightenment origins of the Declaration and the Constitution.⁵⁶² But, as useful and adept as it is, works such as Sandefur’s do not address how those principles have been taken to important depths by Immanuel Kant who is not mentioned in Sandefur’s work and who, even more than Locke, understood that forming legitimate government is not simply convenient, nor simply important to secure rights, but predominately a moral imperative in and of itself.⁵⁶³ Granted, much, but certainly not all, of what Kant explicated with depth and significance can be found in Lockean moral theory. As one scholar stated, “Locke was a proto-Kantian.”⁵⁶⁴

Still, for whatever reasons which certainly did not include a lack of intellectual capacity, Locke declined to develop a full -- a “robust enough moral theory ... Locke only mentioned that all of us must abide by the law of nature, independently of positive or civil law. Locke did not develop an ethical position and in places explicitly endorsed a hedonistic view of values.”⁵⁶⁵

Accordingly, building on his predecessors, “Immanuel Kant developed the best-known deontological theory.”⁵⁶⁶ Kant brought the concept of personal and governmental morality to greater heights and fully detail than did his forebears, particularly through the Categorical

561. Sandefur, *supra* note 466, at 509.

562. *Id.* at 516 (“[T]he Lockean theory underlying the Declaration saw man as essentially rational, and from that rationality, it devised the notion of inalienable rights.”) In particular, and not surprisingly, liberal originalism recognizes that the Founders were greatly influenced not only by John Locke, but also by other leading Enlightenment thinkers and their highly-regarded predecessors of which Aristotle looms large. The Founders saw and adapted the intersection of these philosophers’ ideas.

563. Gerber, *supra* note 565, at 5 (discussing, SCOTT D. GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* (1995)) (predicating his interpretation of the Constitution on “the Lockean political philosophy of the Declaration of Independence.”).

564. Short, *supra* note 266, at 25 (explaining that like Kant, Locke believed human beings are imbued with an innate dignity that requires them to be treated not as objects but as persons worthy of regard. Accordingly, consistent with what Kant later would argue, individuals, alone or collectively, cannot impugn their own dignity through, for instance, suicide or by, “agree[ing] voluntarily to a tyrannical/autocratic government.”).

565. Tibor R. Machan, *Considerations of the Libertarian Alternative*, 2 HARV. J.L. & PUB. POL’Y 103, 108 (1979) (citing, J. LOCKE, *II AN ESSAY CONCERNING HUMAN UNDERSTANDING* 2 (1706)).

566. Kuklin, *supra* note 39, at 497.

Imperatives and proof that forming governments is a moral requisite to formalizing individual interactions, particularly regarding claims demanding specific performance or restitution from broken promises.⁵⁶⁷

Indeed, despite appeals to Locke, there seems to be scant formal moral theory underlying Liberal Originalism. True, Professor Sandefur discusses several important moral dilemmas addressed by the constitution such as “Sexual Freedom and Public Morality,”⁵⁶⁸ but he declines to provide a set of moral precepts to enliven Liberal Originalism aside from averring in a distressingly conclusory manner that the principles of the Declaration seemingly speak for themselves.⁵⁶⁹ For instance, Sandefur discusses the right of homosexual conduct as follows:

567. Rakesh K. Anand, *Legal Ethics, Jurisprudence, and the Cultural Study of the Lawyer*, 81 TEMPLE L. REV. 737, 757 (2008) (footnote omitted) (observing that “Genealogically speaking, Kant lies at the foundation of liberalism’s moral theory (which is itself the foundation of liberal politics). The liberal moral discourse of personhood, common morality, and associated terms begins with Kant’s critical ethics, and his ideas of autonomy, individual moral worth, purposiveness, and related concepts. If we examine Kant’s ethical philosophy, we see that Kant organized his ethical thinking around the conviction that a fundamental value lies in the universalizability of a rule.”)

I note in passing that Anand argues that Kant never proves that universal rules actually exist or that the universality of Kant’s rules rightly define deontological precepts. I strongly disagree on both claims. This writing’s Section 2, particularly the discussion of value monism, explains the inevitability of universal rules.

As for Anand’s second critique, Kant’s Categorical Imperatives, discussed in Section 3, premised on the innate dignity of Humankind explains why and when personal desire must give way to the moral regard of others. Anand asks, among other questions, “Why, for example, shouldn’t individual desire -- or at least the actions of an unsubordinated will -- trump a universal obligation?” Thereafter simply concluding without more that, “There is, of course, no reason why they shouldn’t, which is why any argument for the pure objectivity of Kant’s critical ethics does not stand. Neither, then, does an argument for the objectivity of a moral framework rooted in it.” *Id.*

However, I do agree with Anand that the state of nature is a moral environment in which to exist. But, the justification for the state of nature, as the previous discussion shows, is based solely on the selfish predilections of each actor coupled with each actor’s fortuitous ability to take whatever she wants, from whomever she wants, whenever she wants, wherever she may be. Kant recognized that moral justification requires unmooring a claimed moral precept from subjective desires. I am satisfied with Kant’s proof that a social order based on what popularly is called “the law of the jungle” cannot arise from unbiased reason. Even though we understand why a person might wish to run the risk of being one of the few “kings” of such a “jungle,” no rational person using unbiased reason could rationally will a system where persons may be enslaved, killed at will for no cause other than the gratification of others’ wishes, robbed of their goods, tortured for the pleasure of others, or otherwise treated merely as “means.”

568. Sandefur, *supra* note 466, at 522-32.

569. Lee J. Strang, *Originalism, The Declaration of Independence, and The Constitution: A Unique Role in Constitutional Interpretation?*, 111 PENN ST. L. REV. 413, 436 (2006)

The Declaration secures the concept of personal autonomy in the phrase “the pursuit of happiness.” As all people are entitled to this right, nobody, and no government, may deprive another of it; one person’s right to swing his fist ends where another’s nose begins. The Declaration protects the right of people to seek their own happiness, even in ways that others find distasteful, so long as they respect each others’ right to do so. In Thomas Jefferson’s words, “the legitimate powers of government extend to such acts only as are injurious to others.”⁵⁷⁰

Sandefur’s analysis is conclusory because, while I agree with his upshot on sexual freedom, he lacks a paradigmatic set of principles to prove that homosexual conduct does not actually cause harm and, in particular, that general distaste and approbation are insufficient bases to regulate conduct. Even presuming the correctness of the proposition that to maximize the right to pursue happiness, “the legitimate powers of government extend to such acts only as are injurious to others,”⁵⁷¹ how does Sandefur know that Jefferson is right? How does he know that mere “distaste” is an insufficient harm to justify governmental regulation, perhaps prohibition, of the distasteful conduct, especially if opponents’ distaste is deep and widespread while proponents’ fondness is mild and sparse? I think Sandefur is correct, but his Liberal Originalism does not prove it.

More urgently, with the example of homosexuality as prelude, Sandefur draws his bold but brash and patently incorrect supposition that,

(quoting, SCOTT D. GERBER, *TO SECURE THESE RIGHTS: THE DECLARATION OF INDEPENDENCE AND CONSTITUTIONAL INTERPRETATION* 58-59, 169, and generally referencing 64-195 (1995)) (“Gerber does not, however, delineate how a judge ‘appl[ies] the fundamental [Lockean] moral and political principles on which this nation is based to issues of present-day concern.’ Instead, he reviews different provisions of the Constitution and suggests the correct interpretation of the law in those areas ‘in light of’ the Declaration. ... [For example, r]eferring back to his ‘liberal’ originalist methodology, Gerber summarily claims that the Equal Protection Clause ‘was intended to embody the broad principles of equality and natural rights articulated in the Declaration.’”).

See also Gerber, *supra* note 537 ([M]y approach to constitutional interpretation is grounded in political theory, rather than history. Admittedly, mine is a theory that identifies the relevant political theory by appealing to history, but I do not use history in the same narrow sense that a conservative originalist such as Professor Strang would prefer.”).

570. Sandefur, *supra* note 466, at 526 (quoting THOMAS JEFFERSON, *Notes on the State of Virginia*, reprinted in THOMAS JEFFERSON: WRITINGS 123, 285 (Merrill D. Peterson ed., 1984)).

571. *Id.* at 526.

There are many forms of human flourishing, but there is no single best form of human flourishing period. Rather, there is only the best form of human flourishing for an individual.... *Since there are no a priori, universal rules that dictate the proper weighting of the goods and virtues of human flourishing*, a proper weighting is only achieved by individuals having practical insight at the time of action. They need to discover the proper balance for themselves.⁵⁷²

The above quote is a perfect expression of everything this article's earlier discussion of Deontology disproved. Sandefur is wholly mistaken. True, *within the bounds of moral conduct* "there is no single best form of human flourishing," that is, individuals are free to pursue their own happiness, but, as we now know, only in a moral fashion. Individuals may not pursue happiness by treating either others or themselves merely as means and not as ends in themselves. Thus, to rephrase properly Sandefur's text,

There is [only one] single best form of human flourishing period. ... [T]here are a priori, universal rules that dictate the proper weighting of the goods and virtues of human flourishing, ... [and the very purpose of Society is to assure that] a proper weighting is only achieved by individuals having [not merely] practical insight [as to their wants and desires] at the time of action [but as well practical reason to discern if their goals and means are moral]. They need to discover the proper balance for themselves [but society, through criminal and civil laws, will assure that "the proper balance" for them is not immoral.]⁵⁷³

I choose to presume that if pushed, Sandefur would have to agree.

6. *Enlightened Originalism* --

As noted in the Introduction,⁵⁷⁴ Professor Ian P. Farrell very recently published what he denotes as a, "novel and unique theory of constitutional interpretation ... [that he] call[s] ... 'enlightened originalism.'"⁵⁷⁵ Farrell

572. *Id.* at 529-30, (emphasis added) (quoting, DOUGLAS B. RASMUSSEN, *Why Individual Rights?*, in *INDIVIDUAL RIGHTS RECONSIDERED: ARE THE TRUTHS OF THE U.S. DECLARATION OF INDEPENDENCE LASTING?* 113, 119-26 (Tibor R. Machan ed., 2001)).

573. Sandefur, *supra* note 466, at 529-30 (emphasis mine, Sandefur's emphasis removed).

574. See *supra* notes 20-23 and accompanying text.

575. Farrell, *supra* note 20, at 571.

premises “enlightened originalism” on some important but hardly “novel and unique” ideas. I agree completely with Farrell’s assertions that there are immutable principles of morality -- thus correct moral answers to any moral dilemma -- that are discerned from reason rather than humanly created.⁵⁷⁶ Farrell again is correct that moral truths have been commemorated in the Declaration of Independence as principles of legitimate governance⁵⁷⁷ and thereafter “incorporated” into the Constitution as this Nation’s highest and controlling law.⁵⁷⁸ And, again, Farrell is on solid ground by concluding that moral truths “are not fixed by what the framers or ratifiers believed the answers to be,”⁵⁷⁹ Based on his principles, Farrell aptly argues that *Obergefell v. Hodges* was rightly decided.⁵⁸⁰ So far, Farrell is apt but not really “novel and unique.”

Indeed, Enlightened Originalism might have obviated the need for this article’s Deontological Originalism if Professor Farrell had substantiated his copious correct but unproven points. However, as he candidly declared, Farrell is not now inclined to prove his claims:

I shall not present a comprehensive argument for the truth of the Moral Right Answer Thesis in this Article. Much has been written on both sides about this issue; the literature is sophisticated, complex, and insightful. Many moral philosophers of note support the Moral Right Answer Thesis, and people generally treat questions of morality as having objectively true answers. ... The fact that most people’s intuitions are that morality is objective, and the fact that we generally employ moral language in a manner that presumes the objectivity of morality, places the burden of persuasion on those who deny that morality is objective. ... I will proceed on the basis that there are, in

576. *Id.* at 571, 577-88 (“there are right answers to questions of morality. There is a ‘true’ meaning of, say, equality -- a ‘fact of the matter’ about equality -- that is independent of what the majority of competent users of the language believe at any given time.”)

577. *Id.* at 601 (footnote omitted) (“The Declaration’s description of equality as a self-evident truth reinforces my claim that the Founders considered moral equality to be a matter of objective truth. Since equality is self-evident, by definition it needs no justification; it goes without saying. We can think of the Declaration, then, as installing the concept of equality as an axiom of the American politico-legal system.”).

578. *Id.* at 594-98.

579. *Id.* at 599, 618 (explaining that “I agree with [Ronald] Dworkin that there are right answers to moral questions, and therefore that there are right answers to legal questions that turn on moral concepts.”).

580. *Id.* at 619-30 (“I suggest *Obergefell* is a powerful example of enlightened originalism in practice.”).

*fact, unique answers to questions of morality which are not fixed by what people believe those answers to be.*⁵⁸¹

As a threshold point, Farrell certainly does not substantiate his reckless and illogical claim: "The fact that most people's intuitions are that morality is objective, ... places the burden of persuasion on those who deny that morality is objective."⁵⁸² Consensus alone surely is no basis to assume that the particular consensus at issue is empirically correct.⁵⁸³ If that were so, criminal defendants would bear the burden of proof to show that they are not guilty because they are being prosecuted by "the State." This would infer that the people of that State, which surely outnumber the given defendant and her supporters, are convinced of that defendant's guilt.⁵⁸⁴

It may be true that in many instances a "challenger" does carry the responsibility to prove the *bona fides* of the particular challenge.⁵⁸⁵ And herein, because Farrell describes his Enlightened Originalism as a, "novel and unique theory of constitutional interpretation,"⁵⁸⁶ he must assume that responsibility because, by his own admission, his theory enjoys no consensus support.⁵⁸⁷ Thus, Farrell's refusal to prove his claims is hypocritical as well as methodologically improper and simply disappointing.

Accordingly, although providing some correct and useful approaches, Professor Farrell: (1) does not define morality; (2) nor provide and prove the specific deontological moral framework he claims defines moral truth;

581. *Id.* at 589-90 (emphasis added) (promising that he will explicate many of his assertions in future writings.)

582. *Id.* at 589 (asserting that the consensus is predicated on "intuition," not an informed basis, and it ought not merit any substantial weight, especially given the importance of the subject matter to the meaning of morality.)

583. Hon. Patricia M. Wald, *ADR and the Courts: An Update*, 46 DUKE L. J. 1445, 1467 (1997) ("Of course, consensus alone would not insulate a rule that was facially unreasonable, or that lacked substantial evidence to support a key factual predicate, but it might weigh in to counter an allegation of arbitrariness in a close case.").

584. An equally unconstitutional and untoward procedure would be to hold some sort of pre-trial public polling to determine whether there is a popular consensus about a given defendant's probable guilt or innocence as the basis to determine which party, the defendant or the State, assumes the burden of proof.

585. For instance, few would quarrel with the moral *bona fides* of the familiar rule that a plaintiff in a civil action assumes the burden of at least production, if not persuasion that the given defendant committed the unlawful act set forth in the plaintiff's formal complaint.

586. Farrell, *supra* note 20, at 571.

587. E.g., Wim Raven, *The Biography of Muhammad: The Issue of the Sources*, 15 J. OF L. & RELIGION 627, 631 (2000-2001) (book review) (Authors' "scholarly duty [is] to show how they came to their results.").

(3) nor explain why, if morality is the basis, one should spend any time addressing Originalism at all -- why be originalist; (4) nor describe and prove the correctness of the Declaration of Independence's moral framework; (5) nor explicate the inextricable link between the Declaration and the drafting and ratification of the Constitution, 1787-91; (6) nor verify that, by enacting and championing the ratification of the *post-Bellum* Amendments, the Reconstruction Congress likewise embraced the moral deontology of the Declaration as the overarching legal basis of the Constitution; (7) nor present an historical and analytical recounting of the substantive due process that he uses to support his discussion of "marriage equality."

I respectfully aver that all of the above and more are needed to substantiate the philosophy, which both Professor Farrell and I support intensely and staunchly. I believe my writing goes far to proving what needs to be proved.⁵⁸⁸

CONCLUSION --

Part I of this article proves that morality is deontological, and that Kantian moral theory best explains the mechanics of deontological morality. In addition, Part I elucidates why, to be valid, any theory of constitutional law must be originalist. Accordingly, this Part has presented in the abstract, Deontological Originalism. The forthcoming Part II, *Deontological Constitutionalism and the Ascendancy of Kantian Due Process*, will prove that both the original Founders (the drafters of the Declaration of Independence and the original Constitution) and the Reconstruction Congress (which drafted, *inter alia*, the Thirteenth and Fourteenth Amendments) embraced Deontological Originalism by enforcing through the Constitution as America's supreme law, the Natural Law principles of the Declaration.

Additionally, Part II recounts the development of the Supreme Court's substantive due process jurisprudence, which at present, actually espouses two distinct and incompatible constitutional frameworks. The first, known as the "deeply rooted traditions" approach, holds that governmental actions

588. Therefore, it bears repeating that such detailed proof validates the length of this writing. Professor Farrell filled roughly fifty law review pages to present his largely unsupported theory. Filling the numerous gaps requires detailed analysis which, of necessity, means an unusually long article.

comport with “due process of law” if, as an empirical matter, they advance popular traditions and customs. This standard purports not to substitute the personal partialities of judges for the wisdom of the American people. In so doing, the courts eschew making moral judgments regarding the governmental actions under review.

The second substantive due process standard avers that governmental action violates “due process of law” if it offends innate “human dignity.” This “human dignity” paradigm seems steeped in Kantian morality although it declines to acknowledge formally either its Kantian source or any other Enlightenment origin. Despite its lack of attribution, I will argue that the “human dignity” approach comports with Deontological Originalism, as intended by the Founders and the Reconstruction Congress. Accordingly, that paradigm is correct and the “deeply rooted traditions” framework should be abandoned.⁵⁸⁹

589. In that regard, I was considering entitling Part II either *Deontological Originalism - The Deontologists Strike Back* or *Deontological Originalism -- Revenge of the Framers*. However, I decided my dedicated and hard-working editors would not be amused.