§ 5 Conceptual and Jurisprudential Foundations of the Debate on Interpretive Methodology in Constitutional Law: An Argument for More Analytical Rigor

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I. Introduction

Methodological questions are questions of power ('Methodenfragen sind Machtfragen').[1] Following this insight, the fundamental debates about methodology in American constitutional law are not surprising. A great variety of different methodological camps compete with each other, but the core divide is between originalists and living constitutionalists.[2] Originalists, who are particularly concerned with the notion of objectivity,[3] argue that the written Constitution must be interpreted according to the meaning that its text conveyed to its drafters and ratifiers. In contrast, living constitutionalists deny that an originalist approach to constitutional interpretation is practicable or even possible in many cases. They maintain that the Constitution must adapt to changing times and to the changing values of the American people.

Until recently, this debate has unfolded with little attention to conceptual and jurisprudential concepts.[4] Especially the distinction between positivist and alternative accounts of law like those of natural law theory has been largely disregarded.[5] Neither proponents of originalism nor of the many varieties of living constitutionalism always articulate and defend their jurisprudential assumptions.[6] The pretension generally present on both sides of the debate is that the positions are commonsensical and without need for jurisprudential analysis or foundations.[7] Only in recent years have scholars begun to express their invocation of jurisprudence.[8]

The resulting lack of the debate's conceptual and jurisprudential rigor has led to a situation where originalists and living constitutionalists are regularly talking past each other. To clear up this indeterminacy and in

1 Bernd Rüthers, 'Wer schafft Recht? Methodenfragen als Macht- und Verfassungsfragen' [2003] JZ 995, 996.
2 It is important to note that there is not just disagreement among the participants of the debate. See Matthew D Adler, 'Interpretive Contestation and Legal Correctness' (2012) 53 Wm & Mary L Rev 1115, 1122–1123.
3 See Robert W Bennett, 'Objectivity in Constitutional Law' (1984) 132 U Pa L Rev 445.
4 See also Christopher R Green, 'Constitutional Truthmakers' (2018) 32 Notre Dame JL Ethics & Pub Pol'y 497, 498.
5 See André LeDuc, 'Paradoxes of Positivism and Pragmatism in the Debate about Originalism' (2016) 42 Ohio NU L Rev 613, 615.
6 See André LeDuc, 'The Ontological Foundations of the Debate over Originalism' (2015) 7 Wash U Jurisprudence Rev 263, 265.
7 See LeDuc (n 5) 621.
8 ibid 655.

order to make a more fruitful debate possible, this paper explores the theoretical background of the great methodological debate and makes three central claims:

First, labeling the debate as a dispute over constitutional interpretation is inaccurate. I argue that the great debate is, in fact, not a controversy about constitutional interpretation, but rather about what American constitutional law consists of. I will try to demonstrate this by distinguishing between theories of law, theories of interpretation, and theories of adjudication.

Second, one of the most dominant jurisprudential categorizations of originalism by non-originalists (living constitutionalists) does not stand up to scrutiny, namely the claim that originalism is a combination of a positivist conception of constitutional law and a formalist theory of adjudication.[9] In doing this, I will try to clarify what kind of theories legal positivism and formalism are, and what their relationship is. The questions to be answered are: does formalism follow from legal positivism (or vice versa), or does formalism – unlike legal realism, which is essentially predicated on a positivist conception of law – have no conceptual connection with legal positivism? I will argue that legal positivism is a theory of law which is linked to a formalistic theory of legal reasoning. Yet, it is incompatible with formalism as a theory of adjudication, which is itself indefensible. Thus, my claim is not only that there is no necessary or close connection between positivism and formalism. Instead, I will defend the proposition that the two theories are incompatible with each other.

Third, I will demonstrate which theories of constitutional law, constitutional reasoning, and constitutional adjudication originalism and living constitutionalism actually put forward. Regarding originalism, I will show that the modern mainstream of originalism does have a shared jurisprudential foundation in a positivist conception of the law. Furthermore, originalism is first and foremost a positivist theory of American constitutional law, and not – as 'old' originalism – primarily a theory of constitutional adjudication based on formalism. From modern originalism's positivist

9 See, eg, George Kannar, 'The Constitutional Catechism of Antonin Scalia' (1990) 99 Yale LJ 1297, 1307 & 1339 who speaks of Scalia's 'positivist formalism' and explains that 'Scalia's approach is not only positivist and textualist, but also formalistic, in many respects a throwback to more "mechanical" days', see also Johnathan O'Neill, *Originalism in American Law and Politics: A Constitutional History Originalism* (The Johns Hopkins Series in Constitutional Thought, The Johns Hopkins University Press 2007) 168.

conception of constitutional law follows a theory of legal reasoning, but not a fully developed theory of adjudication.

Regarding living constitutionalism, I will claim that theories of living constitutionalism are primarily theories of constitutional adjudication. While pointing out their implicit theories of law and legal reasoning, I will demonstrate that compared to originalism, non-originalist theories do not offer different theories of constitutional epistemology, but different accounts of American constitutional law. The fact that originalism and living constitutionalism do not share the same account of American constitutional law is in my view a decisive factor for the fruitlessness of the current methodological debate in the United States.

Before I can lay out my argument in more detail, I need to make three preliminary remarks, concerning, first, the reasons why we should care about the theoretical background of the great methodological debate, second, the assumptions this paper is based on, and, third, the central claims of today's originalism.

1. *Preliminary no 1: why we should care*

Before turning to a detailed discussion of the issues just mentioned, it makes sense to point out why it is important to unfold the theoretical structure and the jurisprudential assumptions of the great debate and especially of originalism. Can we not simply dismiss originalism as a legal instrument to promote conservative causes, as scholars like Reva Siegel, Robert Post, and others have done?[10] I do not agree with those liberal critics of originalism on this point and I think that to ask and answer this question is important because of three reasons:[11]

For starters, the attraction of originalism persists. The idea of the founding as a kind of constitutional 'Big Bang' that permanently established the framework of the American constitutional universe exercises a strong hold on the American imagination: 'A widely shared cultural premise of this sort simply cannot be ignored even when it is thought to be inappropriate.'[12]

10 See Robert Post and Reva Siegel, 'Originalism as a Political Practice: The Right's Living Constitution' (2006) 75 Fordham L Rev 545.

11 All three points were previously made by James A Gardner, 'Positivist Foundations of Originalism: An Account and Critique' (1991) 71 BU L Rev 1, 4–6.

12 ibid 4.

Furthermore, American courts continue to speak the language of originalism.[13] The US Supreme Court regularly engages in originalist reasoning and declares its unwillingness or lack of authority to substitute its judgment for that of the founders. Thus, the use of originalist vocabulary is simply obligatory for participants in the American legal system.[14]

Finally, criticizing originalism on its own terms may provide at least a limited alternative to the uncertainty left in the wake of fundamental hermeneutic critiques of legal interpretation by legal sceptics. Critics from this perspective typically argue that texts lack any fixed, objective meaning and that judges create the meaning of the Constitution each time they seek to interpret the text.[15] In this paper, it must suffice to note that it is not senseless to speak of norms with a fixed meaning (at least for core cases) and that serious philosophical and linguistic theories account for this observation.[16] A critique of originalism that does not also challenge the foundations of so many other important contemporary beliefs about the world may thus hold some appeal.[17]

2. *Preliminary no 2: some assumptions*

In this paper, I will not deal with other assumptions of the debate. I shall, eg, assume that a meaningful reconstruction of the original public meaning of the Constitution's text is possible, in just the ways that originalists suppose.[18] Further, I embrace the view that laws do not only function as the basis for predicting the decisions of courts or the actions of other legal officials, but as accepted legal standards of behaviour and that language is a

13 The situation is very different in other legal systems. The notion that the meaning of a constitution is 'fixed' at some point in the past and authoritative in present cases is rejected in most leading jurisdictions around the world. See Jamal Greene, 'On the Origins of Originalism' (2009) 88 Tex L Rev 1, 3.

14 See Gardner (n 11) 4–5.

15 For those who are pessimistic about the recoverability of the original meaning of the constitutional text, originalism is not necessarily flawed, but necessarily irrelevant to contemporary constitutional practice. See Keith E Whittington, 'Originalism: A Critical Introduction' (2013) 82 Fordham L Rev 375, 395.

16 See, eg, Frederick Schauer, 'Formalism' (1988) 97 Yale LJ 509, 520–525.

17 See Gardner (n 11) 5–6.

18 cf ibid 4.

significant factor in channelling behaviour through law. Thus, I reject linguistic nihilism[19] as well as 'rule-scepticism'[20] in their absolute variations.

3. *Preliminary no 3: a brief summary of today's originalism*

To be able to discuss originalism in a meaningful way, one needs to lay out a representative description of its claims. This is easier said than done, as originalism is commonly understood not as a single thesis but as a large family of theories.[21] In the following, I will try to point out the central components of originalist thought which most modern-day originalists share.

Originalism's core idea is that the discoverable public meaning of the US Constitution at the time of its initial adoption is authoritative for purposes of later constitutional interpretation.[22] The two crucial components of originalism are the claims that the constitutional meaning was fixed at the time of the textual adoption ('fixation thesis') and that the discoverable historical meaning of the constitutional text has legal significance and is authoritative, at least in most circumstances. Lawrence Solum has called the second claim the 'contribution thesis' – the idea that the linguistic meaning of the Constitution constrains the content of constitutional doctrine.[23]

While this 'new' originalism encompasses many features of the old version, there are also significant differences[24]: first, the terms of the debate

19 See Frederick Schauer, 'Easy Cases' (1985) 58 S Cal L Rev 399, 422–423.

20 See HLA Hart, *The Concept of Law* (3rd edn Oxford University Press 2012) 136 ('Yet "rule-scepticism", or the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them, can make a powerful appeal to a lawyer's candour. Stated in an unqualified general form […] it is indeed quite incoherent; for the assertion that there are decisions of courts cannot consistently be combined with the denial that there are any rules at all. […] In a community of people who understood the notions of a decision and a prediction of a decision, but not the notion of a rule, the idea of an authoritative decision would be lacking and with it the idea of a court.').

21 See Mitchell N Berman, 'Originalism is Bunk' (2009) 84 NYU L Rev 1, 16.

22 See Whittington (n 15) 377.

23 See Lawrence B Solum, 'District of Columbia v. Heller and Originalism' (2009) 103 Nw U L Rev 923, 954; see also Whittington (n 15) 378.

24 See Whittington (n 15) 409.

have shifted from talking about 'original intent' to 'original meaning'.[25] Second, old school originalists, like Judge Robert Bork,[26] argued for a narrow reading of constitutional provisions or 'strict construction', as they were strongly committed to judicial restraint,[27] while new originalism emphasizes the value of fidelity to the constitutional text as its driving principle. Its interpretive goal is, therefore, not to restrict the text to the most manageable, easily applied, or majority-favouring rules. Rather, the goal is to faithfully reproduce what the constitutional text requires.[28] Thus, there is agreement today on the separation between the interpretive approach (originalism) and judicial posture (judicial restraint).[29] Third, new originalism makes use of a variety of constitutional arguments, not just of only one. Nonetheless, also for today's originalists, the original meaning is the decisive interpretive criterion that cannot be overridden by other considerations when seeking to interpret the Constitution.[30]

II. Conceptual Clarifications: Theories of Law, Theories of Interpretation, and Theories of Adjudication

Beginning in 1997 with a paper by Gary Lawson[31] and continued by two illuminating articles by Mitchell Berman and Kevin Toh in 2013,[32] participants of the originalism vs living constitutionalism debate have laid the foundations for a more differentiated analysis by distinguishing between three different sets of theories, namely theories of constitutional

25 See ibid 378. The most influential author for this development was the former Justice of the US Supreme Court Antonin Scalia; see for an account of the development of originalist thought Steven G Calabresi, *Originalism: A Quarter Century of Debate* (Regnery Publishing 2007).

26 See Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (Touchstone Books 1990).

27 See Mitchell N Berman and Kevin Toh, 'On What Distinguishes New Originalism from Old: A Jurisprudential Take' (2013) 82 Fordham L Rev 545, 556.

28 See Whittington (n 15) 386.

29 See ibid 391–394; but see Berman (n 21) 14.

30 See Whittington (n 15) 407.

31 See Gary Lawson, 'On Reading Recipes ... and Constitutions' (1997) 85 Geo LJ 1823.

32 Berman and Toh (n 27); Mitchell N Berman and Kevin Toh, 'Pluralistic Non-Originalism and the Combinability Problem' (2013) 91 Tex L Rev 1739.

law, theories of constitutional interpretation (or constitutional reasoning), and theories of constitutional adjudication.[33]

The common starting point of Lawson, Berman, and Toh is the insight that labelling originalism and living constitutionalism as conflicting theories of interpretation is inaccurate. A theory of constitutional interpretation may be thought of as a theory of how to discover constitutional law, or as a theory of how judges should decide constitutional cases based on their findings of what the law consists of.[34] Articulating this insight first, Lawson subdivided the broad and undifferentiated terrain of theories of constitutional interpretation into (descriptive) theories of interpretation and (normative) theories of adjudication. For him, '[t]heories of interpretation concern the meaning of the Constitution', whereas '[t]heories of adjudication concern the manner in which decision-makers (paradigmatically public officials, such as judges) resolve constitutional disputes.'[35] Thus, theories of interpretation allow us to determine what the Constitution means, while theories of adjudication enable us to determine what role the Constitution's meaning should play in a particular legal decision made by an adjudicator.[36]

This conceptional distinction between theories of interpretation and theories of adjudication helps to explain why the great debate about originalism and living constitutionalism has been rather underproductive, as it is often unclear whether the respective participants are talking about interpretation or adjudication.[37] A prominent figure who has contributed to this confusion is Justice Antonin Scalia, who wrote two bestselling books that have the word 'interpretation' in their respective titles,[38] although his writings were predominantly concerned with developing a theory of adjudication. His aim was to sketch out an adjudicative theory about how to decide cases in the context of a specific legal system and on the basis

33 Scott Shapiro makes a similar distinction on the jurisprudential level. He proposes to distinguish 'legal reasoning' from 'judicial decision making'. See Scott J Shapiro, *Legality* (The Belknap Press of Harvard University Press 2011) 248.

34 See Berman and Toh (n 32) 1748.

35 Lawson (n 31) 1823; see also Gary Lawson, 'Did Justice Scalia Have a Theory of Interpretation?' (2017) 92 Notre Dame L Rev 2143, 2143–2149.

36 See Lawson (n 31) 1824; see also Berman and Toh (n 27) 546–547.

37 See Lawson (n 35) 2145.

38 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed), *A Matter of Interpretation*, (Princeton University Press 1997); Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (American Casebook Series, West Academic Publishing 2012).

of a certain conception of representative government and the role of the judiciary in a democracy.[39]

Berman and Toh drew one more theoretical distinction, assuming that constitutional interpretation — the activity that Lawson had already correctly distinguished from the broader activity of constitutional adjudication — aims at the Constitution's legal meaning ('what the law is'). Furthermore, they refined Lawson's distinction by shifting the focus from the question of how we should go about discovering the law, and therefore from theories of legal reasoning to what the law consists of, namely to theories of constitutional law. They convincingly argue for this shift of the debate by looking closely to elaborating what it means to engage in legal interpretation:

> Suppose (…) constitutional interpretation is a theory regarding how (…) persons (…) should go about discovering what the constitutional law is (…). (…) [S]uch a theory would aim to give guidance regarding how to conduct a particular inquiry. It would be a theory of legal or constitutional epistemology. Essential to appreciate is that such a theory must presuppose an account of what it is that we are trying to discover, which is to say that it must presuppose an account of what the law is or consists of.[40]

Thus, they claimed that a theory of constitutional interpretation must presuppose a theory of the law, ie, of the ultimate facts, principles, and criteria that determine or constitute American constitutional law. In fact, this presupposed account of fundamental legal principles or facts, they correctly claimed, is much more important than the respective epistemological theory.[41] To illustrate this point they give the example of an originalist theory of the law, according to which the constitutional law is fully determined by what a hypothetical reasonable person at the time of ratification of a provision would have understood the authors to have said. The corresponding originalist theory of legal reasoning would prescribe how decision-makers should go about determining what such a hypothetical reasonable person would have understood the authors to have said.[42] Against this backdrop, Berman and Toh, but also other authors

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39 See Lawson (n 35) 2158–2162. On the living constitutionalist side, the same criticism applies to Philip Bobbitt's important book *Constitutional Interpretation* (Blackwell Publishers 1991) which is predominantly concerned with developing and defending a theory of constitutional adjudication.

40 Berman and Toh (n 27) 550.

41 See also Green (n 4) 509 ('What the Constitution is comes first. Those who get that wrong are quite unlikely to get much else right.').

42 Berman and Toh (n 27) 551.

like Stephen Sachs, persuasively argue that most of the disputes over interpretation are, in fact, about the sources and the content of American constitutional law.[43]

To summarize: the issue of what judges should do in the course of resolving constitutional disputes (theory of constitutional adjudication) is distinct from the issue of what the ultimate determinants of legal content consist of (theory of the law), and also from the epistemological question of how to determine the content of the respective constitutional law (theory of interpretation/legal reasoning).[44]

III. Jurisprudential Reflections: Originalism is Not and Cannot be a Combination of Legal Positivism and Formalism

As mentioned above, originalism is frequently categorized by non-originalists as an amalgam of legal positivism and formalism. I disagree with this categorization on jurisprudential grounds. In what follows, I will sketch out the central features of legal positivism (1.) and formalism (2.), before analysing their relationship (3.). I will argue against a common misconception according to which formalism and legal positivism are necessarily linked. The classic objection to this claim alleges that both theories are discrete and completely unrelated: 'Whereas positivism is a theory of law, formalism is a theory of adjudication'.[45] However, I will go one step further and defend the proposition that legal positivism and formalism are, in fact, incompatible with each other.

1. Legal positivism

Legal positivism is a theory of law, ie, a theory about the nature of law. Such a theory aims to explain certain familiar features of societies in which law exists, and proposes to do so by analysing the 'concept' of law.[46] As there are numerous variants of legal positivism, we need to identify their

43 See Stephen E Sachs, 'Originalism as a Theory of Legal Change' (2015) 38 Harv J L & Pub Pol´y 817, 829; see also William Baude, 'Is Originalism Our Law' (2015) 115 Colum L Rev 2349, 2353–2354 (footnote 13).

44 See Berman and Toh (n 32) 1745.

45 See Brian Leiter, 'Positivism, Formalism, Realism' (1999) 99 Colum L Rev 1138, 1145.

46 ibid 1141.

common features to proceed with our analysis. The following three theses constitute the core of the concept of legal positivism:[47]

The most important common feature, the so-called 'Social (Facts) Thesis' holds that what counts as law in any particular society is fundamentally a matter of social fact, not value. By focusing upon social facts, legal positivism purports to account for law entirely on human terms, by human institutions and actions; notions of natural law are dispensed with.[48]

The second claim of legal positivism, the so-called 'Separability Thesis', states that what the law is and what the law ought to be are separate questions. Legal positivists argue that we cannot assume in advance that law will have any particular content or that its content will have any particular moral quality.[49] Thus, 'law' and 'morals' are regarded as distinct and should be separated for purposes of legal analysis.[50] In this regard, legal positivism is opposed to the natural law tradition, which is committed to some sort of proposition like *Lex iniusta non est lex* ('an unjust "law" ... is no law').[51] The positivist response is summed up in John Austin's aphorism, '[t]he existence of law is one thing; its merit or demerit is another',[52] and in Hart's insistence that 'it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though, in fact, they have often done so.'[53]

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47 These principles are the ones that most 'legal positivists' commonly advance. HLA Hart notes that the term 'positivism' is used 'to designate one or more' of five propositions and that major figures in the history of legal positivism – Jeremy Bentham, John Austin, and Hans Kelsen – neither held all five nor held the ones they shared in exactly the same form. See Hart (n 20) 302; see also Brian Leiter, 'Realism, Hard Positivism, and Conceptual Analysis' (1998) 4 Legal Theory 533, 534–535 (omitting the 'Sources Thesis').

48 See Jules L Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (Clarendon Law Lectures, Oxford University Press 2001) 152; see also LeDuc (n 5) 626.

49 See Richard Stacey, 'Democratic Jurisprudence and Judicial Review: Waldron's Contribution to Political Positivism' (2010) 30 Oxf J Leg Stud 749, 755.

50 See Edward A Purcell Jr, 'Democracy, the Constitution, and Legal Positivism in America: Lessons from a Winding and Troubled History' (2015) 66 Fla L Rev 1457, 1461.

51 Augustine and Robert P Russel (tr), *The Free Choice of The Will* (The Catholic University of America Press 1968) 426.

52 John Austin and Wilfrid E Rumble (ed), *The Province of Jurisprudence Determined* (Cambridge University Press 1995) 157.

53 Hart (n 20) 185–186; see also Jeremy Waldron, 'Can There Be a Democratic Jurisprudence' (2009) 58 Emory LJ 675, 697.

The so-called 'Sources Thesis' holds that law is necessarily based on an identifiable and authoritative source. That source is – according to Austin – the 'command' of a 'sovereign' or, – according to Hart[54] – the decision of an official who follows procedures and applies rules 'recognized' as authoritative. Furthermore, in order to be valid, any particular rule or decision must be traceable to such an authoritative legal source, independent of its substantive content. As Jeremy Waldron writes: 'the fundamental insight remains: a norm is law, not by virtue of its content, but by virtue of its source.'[55]

Although leading legal positivists said rather little about legal interpretation or adjudication[56], one finds the frequent claim in legal scholarship that legal positivism is committed to a jurisprudential conception often called 'legal formalism'[57]. Legal positivism is supposed to be committed to formalism because of the positivist thesis that the existence of the law never depends on moral facts. It is said that legal positivism treats legal reasoning as an amoral activity, and prohibits judges – just as formalism – to take into account considerations like fairness, justice, efficiency, and institutional design when deciding cases.[58] Before I can evaluate this claim in more detail, we need to have an idea of what formalism entails. Thus, in the next section, I will outline the central features of legal formalism.

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54 See Leiter (n 45) 1144–1145.

55 Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 33.

56 Hans Kelsen serves as an example, as he was rather uninterested in legal adjudication. Insofar as he tackled questions of legal adjudication, his approach was closer to legal realism than to formalism. See Horst Dreier, *Rechtslehre, Staatssoziologie und Demokratie* (fundamenta juridica, Nomos 1990) 145 f.

57 Classic authors arguing in favour of a connection between formalism and positivism are eg Roscoe Pound, *Law and Morals* (University of North Carolina Press 1924) 46–50; Morris R Cohen, 'Positivism and the Limits of Idealism in the Law' (1927) 27 Colum L Rev 237, 238; Felix Cohen, 'The Ethical Basis of Legal Criticism' (1931) 41 Yale L J 201, 215; Wolfgang Friedmann, *Legal Theory* (5th edn Stevens 1967) 289; Julius Stone, *The Province and Function of Law: Law as Logic, Justice and Social Control: A Study in Jurisprudence* (2nd edn William S Hein & Co 1973) 138–140. See eg Anthony J Sebok, *Legal Positivism in American Jurisprudence* (Cambridge Studies in Philosophy and Law, Cambridge University Press 1998) 108, for a more recent statement in favour of a connection between formalism and positivism ('Formalism [rightly understood] […] was a form of positivism.').

58 Shapiro further points out that this argument is supposed to attack positivism, as formalism is regarded – at least in the American legal academy – as an 'embarrassing and pernicious theory'. Shapiro himself opposes formalism. See Shapiro (n 33) 239–240 & 245.

2. Legal formalism

Legal formalism is understood as being primarily a theory of adjudication. Yet, there are widely divergent uses of the term. In the following, I cannot present an accurate account of all the varieties of modern-day formalism.[59] Rather, I will only set out the basic features of the theory.

a. The core of the theory: decision-making (only) according to rules

Following Frederick Schauer's insights,[60] the concept of decision-making according to rules lies at the heart of the theory of 'formalism'. Schauer explains that formalism is the way in which rules achieve their 'ruleness' precisely by doing what is supposed to be the failing of formalism, namely:

> screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover, it appears that this screening off takes place largely through the force of the language in which rules are written. Thus, the tasks performed by rules are tasks for which the primary tool is the specific linguistic formulation of a rule. As a result, insofar as formalism is frequently condemned as excessive reliance on the language of a rule, it is the very idea of decisionmaking by rule[s] that is being condemned (…) as a prescription for how decisionmaking should take place.[61]

What makes formalism formal is the fact that taking rules seriously involves taking their mandates as reasons for decision independently of the reasons for decision lying behind the rule. Rules, therefore, supply reasons for decision qua rules. When the reason supplied by a rule tracks the reasons behind the rule, then the rule is in a way superfluous in the particular case. Rules become interesting when they point toward a different result than do the reasons behind the rules. The refusal to abstract the rule from its reasons is not to have rules.[62]

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59 Formality was also the heart of Christopher Columbus Langdell's classic theory. The aspiration of Langdell's 'classical orthodoxy' was that the legal system be made complete through universal formality, and universally formal through conceptual order. See Thomas C Grey, 'Langdell's Orthodoxy' (1983) 45 U Pitt L Rev 1, 11.

60 See also Duncan Kennedy, 'Legal Formality' (1973) 2 J Legal Stud 351, 358–359 (offering another influential, and similar, conception of legal formality).

61 Schauer (n 16) 510.

62 See ibid 537.

Formalism so understood is the rival theory to legal functionalism. Functionalism focuses on outcomes, and especially on the outcomes which the particular legal decision-makers deem optimal. Rules get in the way of this process. Thus, functionalism can be perceived as a theory of legal decision-making that seeks to minimize the space between what a particular decision-maker concludes, all things considered, should be done, and what some rule says should be done.[63]

Formalism, therefore, impedes optimally sensitive decision-making and is in no way inherently 'just'.[64] Rather, it is inherently stabilizing and, therefore, conservative, in the nonpolitical sense of the word. By limiting the ability of decision-makers to consider every factor relevant to an event, rules make it more difficult to adapt to a changing future. A rule-bound decision-maker is precluded from taking into account certain features of the present case and can, therefore, never reach a more appropriate decision than a decision-maker seeking the optimal result for a case through a rule-free decision.[65]

On a closer look, however, formalism is only superficially about rigidity. More fundamentally, it is about the allocation of power.[66] Formalism disables decision-makers from considering factors that may appear important to them and allocates power to some decision-makers and away from others. Formalism, therefore, achieves its value when it is thought desirable to narrow the decisional opportunities and the decisional range of a certain class of decision-makers.[67] Thus, Schauer's formalism is a way of judicial decision-making that is completely amoral. Legal decision-makers, according to formalism, can only refer to rules, but not to moral considerations like fairness, justice, efficiency, etc. As Scott Shapiro sums up this theoretical framework: 'Economics and justice are for the legislature; logic and legal materials are for the courts.'[68]

b. The three key claims of formalism

When we go one more step to provide a slightly thicker account of formalism, the one most critics of originalism have in mind, we discover

63 See Schauer (n 16) 537.
64 Schauer (n 16) 539.
65 See ibid 542.
66 See ibid 543.
67 ibid 544.
68 Shapiro (n 33) 243.

that formalism is not only a theory of adjudication but also and maybe even predominantly a descriptive theory about the content of the law.[69] According to legal formalism, legal systems are consistent and complete normative systems. Thus, every legal question is supposed to have exactly one correct answer. Against this background, formalism's adjudicative theory states that the role of the judge is to find and apply this single right answer without resorting to moral considerations of any sort. Judges discover the law by locating a set of principles within the available legal materials and then, by using these norms, derive specific answers to legal questions. According to this concept, legal reasoning is solely an exercise in linguistic competence, conceptual analysis, and logical calculation.[70]

The previous paragraph can be fleshed out in the following three theses, which are broad enough to allow for competing interpretations of the central claims of formalism: first, judges are always under a duty to apply existing law. They are not allowed to disregard or modify the rules. Thus, judges must decide cases without resorting to moral reasoning, as they are supposed to use only 'logic', where logic is broadly construed to include the operations of deduction, induction, and conceptual analysis. One can call this feature of formalism the 'Mechanical Judging Thesis',[71] as judges are supposed to act like legal machines without any discretion.[72]

Second, law is entirely determinate: for every legal question, there is one, and only one, correct answer ('Determinacy Thesis'). Formalists thus deny that there are factual situations ungoverned by law, or 'gaps' in the law. Nor do they accept the possibility of legal inconsistencies, ie, factual situations governed by two or more mutually unsatisfiable rules.

For particular rules to cover all possible cases and therefore all factual situations, they would have to be infinite and in consequence not knowable for judges. Hence, formalism is – thirdly – committed to what Scott Shapiro calls 'Conceptualism'. Conceptualism claims that the mass of lower-level legal rules can be derived from a limited number of higher-order general principles containing abstract concepts. By knowing a limited number of top-level principles, a judge can derive the lower-level rules that enable him to correctly answer all legal questions and resolve all legal

69 The following discussion draws heavily on Grey (n 59) 6–11; Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 U Chi L Rev 1175; Schauer (n 16); Leiter (n 45) 1146–1147 and especially Shapiro (n 33) 239–242.

70 See Shapiro (n 33) 239–240.

71 But see Roscoe Pound, 'Mechanical Jurisprudence' (1908) 8 Colum L Rev 605 (offering a classic critique of this thesis).

72 See Shapiro (n 33) 242.

disputes.[73] Conceptualism carries with it a commitment to the notion of coherence of the law as an implicit organizational principle,[74] which itself implies the integration of single rules 'within a unified structure' in which 'the whole is greater than the sum of its parts, and the parts are intelligible through their mutual interconnectedness in the whole that they together constitute.'[75]

3. *The case against the compatibility of legal positivism with formalism*

Having outlined the central features of legal positivism and formalism, it becomes understandable why legal positivism is often associated with formalism. The argument goes that as legal positivism is committed to the idea that law is a matter of social fact alone and never of moral fact, interpreters of such social facts must not rely on moral facts. Only social facts are relevant, for only they determine legal content. Like formalism, then, legal positivism demands that legal interpretation be completely amoral. It is confined to the amoral operations of linguistic comprehension, induction, analysis, and deduction.[76]

All of this is true. Yet, the problem of this argument is that formalism is not a theory of legal reasoning, of discovering the law, but a theory of adjudication, ie, of judicial decision-making. Thus, formalism is not only concerned with pure legal epistemology, which – as based on legal positivism and, therefore, on the privileging of social facts – does in fact indicate that legal reasoning is amoral. Rather, formalism's claim is that judges must not rely on moral considerations to decide legal disputes and do not need to do that, because the law never runs out.

In what follows, I will show that formalism is unworkable and incompatible with legal positivism, as far as formalism is committed to the amorality of adjudication. (b.).[77] To begin with, I will try to rebut a different claim, made by Brian Leiter and others, that 'positivism, as a theory of law, has no conceptual connection with formalism' (a.).[78]

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73 See Shapiro (n 33) 241–242.
74 See Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press 2012) 42.
75 ibid 13.
76 See Shapiro (n 33) 245.
77 cf ibid 248.
78 Leiter (n 45) 1140.

a. Leiter argues that '[i]f positivism is one's theory of law, nothing substantial follows about one's theory of adjudication.' For him legal positivism entails

> no theoretically substantial claims about the nature of adjudication. A formalist about adjudication might be a positivist, but he could just as well be a natural lawyer. A positivist about the nature of law might think Realism gives the correct description of appellate adjudication. The two doctrines – positivism and formalism – exist in separate conceptual universes.[79]

I do not agree. Although Leiter and others[80] are certainly right that legal positivism is not committed to a distinctive theory of adjudication, adjudication must always be concerned (at least among other things) with the law, as long as adjudication is defined as 'legal' decision-making. Thus, a theory of law has always at least some implications for adjudication. As courts are forums created to resolve controversies on the basis of and to enforce the law, we are having a hard time to comprehend a court whose decision-making is entirely independent of the law.[81] Therefore, theories of adjudication and theories of law are, contrary to Leiter's claim, not fully independent of each other. Accordingly, I also disagree with Gary Lawson's claim that the 'relationship between interpretation and adjudication, even as an ideal matter, is decidedly contingent.'[82] Rather, theories of law and theories of legal interpretation on the one side, and theories of adjudication on the other side, can either be necessarily connected to, compatible with, or incompatible with each other.

b. My argument against formalism's compatibility with legal positivism is based on two considerations, the first of which was already articulated by HLA Hart, Hans Kelsen and Scott Shapiro. Especially HLA Hart insisted that positivism is a form of anti-formalism. He focused his critique on formalism's 'Determinacy Thesis' and argued that no legal system could be completely determinate, because complete guidance of conduct is impossible. As social facts cannot pick out norms that settle every possible question, the law will necessarily be moderately indeterminate. Against

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79 Leiter (n 45) 1151.

80 See, eg, John Gardner, 'Legal Positivism: 51/2 Myths' (2001) 46 Am J Juris 199, 211–214.

81 It is important to note that positivism does not entail a full fletched theory of the institutional function of courts. Rather, positivism regards the institutional function of a judge as a contingent legal position ultimately determined by social practice. See also Shapiro (n 33) 255.

82 Lawson (n 35) 2158.

this background, judges have to rely on moral consideration in at least some cases.[83] In the following, I will flesh out this argument in some more detail and try to demonstrate that positivism is also incompatible with formalism's commitment to conceptualism.

The starting point of the argument against the compatibility of formalism with legal positivism is formalism's claim that judicial decision-making is devoid of moral reasoning because social facts determine the content of the law. This thesis would only be correct if the law were in fact completely determinate. For only if every case is resolvable according to law, and the law is determined by social facts alone, every case is resolvable by social facts alone. Thus, only when the law resolves every issue will judicial decision-making (adjudication) be entirely taken up by legal reasoning.

Yet, the assumption that there is a legal rule for every case is simply indefensible.[84] Because the law has gaps and inconsistencies and is therefore at least in some cases indeterminate, a judge who is obligated to decide the case cannot successfully employ legal reasoning, and therefore has no choice but to rely on policy arguments in order to discharge his or her duty and resolve the respective legally unregulated dispute.[85]

The second argumentative step is to point out that legal positivism is not committed to the complete determinacy of the law. On the contrary, legal positivism is in fact committed to partial indeterminacy because transmitting standards of conduct to others to settle every contingency in advance is simply impossible.[86] Thus, the fact that language is partially indeterminate – for the abstract concepts of the law have an 'open texture' – entails that the law will be partially indeterminate. Hart himself distinguished between a 'core' of determinacy of legal texts, surrounded by a penumbra of indeterminacy.[87] Consequently, judges must look beyond the law and rely on other considerations to decide cases unregulated by law.[88]

As Scott Shapiro explains, by acknowledging the relative indeterminacy of the law, Hart was merely following the implications of his own commitment to legal positivism. For legal positivists, the social facts that alone determine the content of the law are those that concern actions guiding

83 See HLA Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 Harv L Rev. 593, 606–616; see also Shapiro (n 33) 247 & 260, for a lucid summary of Hart's position.
84 See Leiter (n 45) 1152; Shapiro (n 33) 247–248.
85 See Shapiro (n 33) 247–248.
86 ibid 248.
87 See Hart (n 20) 12, 123, 134 & 147–154.
88 See Shapiro (n 33) 250.

conduct. In the case of legislation, the guiding action is the selection of linguistic texts. The 'open texture'[89] of language guarantees that any finite linguistic text will be silent on a range of possible issues.[90] At some point, guidance by social facts, and hence the law, must run out, leaving judges without law to rely on to resolve disputes.[91] Accordingly, it follows from a positivist conception of the law that judicial discretion and, therefore, moral adjudication is inevitable in cases where there is no law to apply.[92] This so-called 'Discretion Thesis' is regarded by most positivists[93] (and non-positivists[94]) as yet another necessary feature of legal positivist theory.[95]

The second argument against formalism's compatibility with legal positivism focuses on formalism's commitment to conceptualism. Conceptualism insists on coherence as an organizational principle and this principle presupposes to a certain extent a natural law theory of law. Thus, formalism is not only a theory of adjudication but also implies a fragmentary theory of law. From the perspective of formalism, law (and not just adjudication) is partially autonomous and only intelligible as an internally coherent phenomenon. Against this backdrop, formalism – as an emphatically universal theory – is necessarily conjoined with natural law theory. Ernest J Weinrib, probably the most important modern-day theorist of formalism in North America, admits this. For him, formalism 'is not positivist', as it offers 'a conception of juridical relations that is prior to positive law', and

89 See Hart (n 20) 124–135.

90 See also Shapiro (n 33) 251 (pointing to Hart's claim that there are right answers to many legal questions, because general terms have core instances).

91 cf Hans Kelsen, *Pure Theory of Law* (University of California Press 1967) 351–352 ('If "interpretation" is understood as cognitive ascertainment of the meaning of the object that is to be interpreted, then the result of a legal interpretation can only be the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame. The interpretation of a statute, therefore, need not necessarily lead to a single decision as the only correct one, but possibly to several, which are all of equal value (…). From a point of view directed at positive law, there is no criterion by which one possibility within the frame is preferable to another.').

92 See Hart (n 20) 172; see also Shapiro (n 33) 250–251, for a summary of this view.

93 See, eg, Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1979) 182.

94 See, eg, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 17.

95 But see Kenneth Einar Himma, 'Judicial Discretion and the Concept of Law' (1999) 19 Oxf J Leg Stud 71, 73–82 (arguing against the 'Discretion Thesis' being one of legal positivism's core theses).

'conceptual categories that inform the content of law without themselves being posited by legal authority.'[96] He concludes by saying: 'In comprehending the social and historical arrangements established by positive law as the possible expressions of a coherent order, formalism does not ignore the history, positivity, and social reality of law. Rather, formalism claims to be their truth.'[97]

4. Conclusion

In this section, I tried to demonstrate why originalism cannot be – as is often argued – an amalgam of legal positivism and legal formalism: because the two theories are incompatible with each other. Under a positivist legal theory, law is determined by social facts alone and legal reasoning is necessarily amoral, but legal adjudication cannot be completely amoral, because the law runs out in some, typically hard cases, so that there will be no right answer, and judges will enjoy unregulated discretion to decide the respective case. Thus, the law is moderately indeterminate according to legal positivism and positivism, therefore, moderately anti-formalist.[98] Furthermore, formalism's commitment to conceptualism presupposes to a certain extent a natural law theory of the law.

After we have figured out what originalism is not in jurisprudential terms, it is time to unveil the actual jurisprudential foundations of originalism and its opponent, living constitutionalism. This is what I plan to do in the last part of the paper.

IV. Reconstructing the Great Methodological Debate with the Help of the Conceptual Distinctions and Jurisprudential Insights Identified

In the methodological debates between contemporary originalists and living constitutionalists, one gets the impression of radically divergent and conflicting positions. Whereas originalists argue that they give priority to the meaning of the Constitution's text, (pluralistic) living constitutionalists claim that legal decision-makers should not only interpret the writ-

96 Weinrib (n 74) 81.
97 Ernest J Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 Yale LJ 949, 1112.
98 cf Shapiro (n 33) 266–267.

ten words of the US Constitution but also use other legal tools, such as tradition, prudence, precedent, purposes, and related consequences, to find legal answers.[99] On a closer look, however, originalists and living constitutionalists offer answers to different questions. The originalist claim articulates a position about what constitutional law consists of, namely the meanings (the 'semantic facts') of the inscriptions in the text that is called the 'United States Constitution'.[100] The position of living constitutionalists, in contrast, claims to have an answer to the question of how judges should decide constitutional disputes and is, therefore, arguing primarily for a theory of adjudication. As a view on what constitutional law is or what it consists of does not by itself entail or presuppose a fully developed theory of how judges have to adjudicate constitutional disputes and vice versa, originalist and non-originalist positions can theoretically be compatible with each other. Notwithstanding, the actual proponents of these views are very likely to reject the other view. Originalists maintain that judges must enforce the written Constitution and most non-originalists reject the idea that constitutional law consists solely of the meanings of the constitutional text.[101] Thus, originalists and living constitutionalists, first and foremost, but implicitly, disagree on the content of American constitutional law.[102]

In the following, I will provide more details and sketch out the respective positions by using the three-layered taxonomy from above.[103] I will argue that although originalism may have been motivated by the particular practice and problems of judicial review,[104] especially 'new' originalism is

99 cf Berman and Toh (n 32).

100 Although Originalism is sometimes articulated also in a nonpositivist version, the positivist originalist line of the theory is very dominant today. See LeDuc (n 5) 615. It was also dominant in the past. See, eg, Henry P Monaghan, 'Our Perfect Constitution' (1981) 56 NYU L Rev 353 (arguing that the Constitution cannot be made perfect because it must be understood as it was adopted, because it is positive law); Bork (n 26) 144; Scalia (n 38) 45; Frank H Easterbrook, 'Textualism and the Dead Hand' (1998) 66 Geo Wash L Rev 1119 (arguing that we must privilege the original understandings of the constitutional text because they are the law).

101 See Berman and Toh (n 32) 1739–1740.

102 See Sachs (n 43) 821 & 833.

103 Non-originalists, who have frequently challenged the originalist position about what American constitutional law consists of, have themselves hardly ever specified their own account of US constitutional law. Furthermore, they have only rarely been explicit about whether what they are offering is a theory of legal reasoning or a theory of adjudication. See Berman and Toh (n 32) 1748.

104 See Whittington (n 15) 400.

neither predominantly a theory of constitutional reasoning nor a theory of constitutional adjudication. Rather, originalism is foremost a positivist theory of constitutional law.[105] This can be demonstrated by pointing to a representative passage for modern originalist thought in an article co-authored by two leading originalists, namely Steven Calabresi and Saikrishna Prakash,[106] where they argue: 'Originalists do not give priority to the plain dictionary meaning of the Constitution's text because they like grammar more than history. They give priority to it because they believe that it and it alone is law.'[107]

1. *Theories of constitutional law: what does American constitutional law consist of?*

Originalism's theory of constitutional law holds that there is an ontologically independent constitution.[108] It ultimately consists solely of (some form of) the fixed semantic meanings of the inscriptions in the constitutional text,[109] regardless of an evaluation of its content and, therefore, independent of its moral value.[110] Thus, originalism evokes basic tenets of legal positivism: the constitution consists of specific social facts ('Social Thesis'), and moral considerations are not sources of constitutional law.[111]

Originalism, so understood, does not rest on a normative or conceptual, but on a factual claim about the content of the constitutional law of the United States: the original Constitution was and, including any lawful changes pursuant to it, is still America's constitutional law.[112] Originalists argue it is a distinctive feature of the American legal system that it fixes a particular starting date – the Founding, ie, the ratification of the original

105 See André LeDuc, 'Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism' (2017) 16 UNH L Rev 51, 52-53; see also Berman and Toh (n 27) 546 ('In a nutshell, old originalism was (chiefly) a theory of adjudication, whereas new originalism is (chiefly) a theory of law'); see Purcell (n 50) 1487–1490, for a historical account of legal positivism in the jurisprudence of the US Supreme Court.
106 See Berman and Toh (n 32) 558–559.
107 Steven G Calabresi and Saikrishna B Prakash, 'The President's Power to Execute the Laws' (1994) 104 Yale LJ 541, 552.
108 See LeDuc (n 6) 269.
109 See Berman and Toh (n 27) 561.
110 See Adler (n 2) 1127–1128.
111 See LeDuc (n 5) 631.
112 See Sachs (n 43) 819 & 839.

Constitution – that separates the changes that do not need legal authorization from those that do.[113] In the American legal system, the original Constitution is taken as having a certain sort of prima facie validity, ie, it is regarded to be irrelevant for the validity of the original Constitution, whether it was lawfully created under the standards of some earlier time. Insofar, the ratification of the US Constitution represents a boundary in time, separating the present legal system from older systems.[114] Consequently, each change in American constitutional law since the Founding needs a justification framed in legal, and not just in social or political terms.[115] A change is legal when it complies with the 'rules of change' laid out at the Founding in Article V. The claim is that only such law that is rooted in the Founder's law is part of the American legal system.[116]

Overall, originalism's account of American constitutional law can be roughly summarized in three claims: first, all rules that were valid as of the Founding, except as lawfully changed, remain valid over time; second, a change was lawful if and only if it was made under Article V; third, no rules are valid except by operation of the first and the second claim.[117]

The commitment to this conception of American constitutional law is mirrored in many aspects of the American legal practice. For example, the Constitution is treated by legal actors as a binding legal text, originally enacted in the late eighteenth century. The ratification of the Constitution is regarded as the crucial historical event which established the ultimate criterion of legal validity.[118] Furthermore, legal actors reject any official legal breaks or discontinuities from the Founding.[119] Against this background and instead of showing that originalism is the normatively most appealing theory, many 'new' originalists argue that they are originalists because they are legal positivists, as positivism points towards originalism, at least in the American legal system.[120]

The originalist claim that American constitutional law consists (only) of the written Constitution, including its formal amendments, may appear

113 See ibid 820.
114 See ibid 845 & 849.
115 See ibid 821.
116 ibid 839–840 & 864.
117 ibid 845.
118 See Adler (n 2) 1129.
119 See William Baude & Stephen E Sachs, 'Grounding Originalism' (2019) 113 Nw U L Rev 1455, 1477–1478; Charles L Barzun, 'The Positive U-Turn' (2017) 69 Stan L Rev 1323, 1381.
120 See Baude (n 43) 2352.

obvious.[121] Yet, it is at least conceivable that the meaning of the constitutional text and the content of the rules of constitutional law are not identical. In other words, to equate the two is to take a substantive position.[122] Consequently, there is a broad range of hypothetical non-originalist alternatives, and many of them are, in fact, put forward in the debate.

The first alternative to the originalist account is a position of constitutional nihilism, according to which there is no such thing as an objective, independent constitution. Constitutional pragmatists like Richard Posner arguably hold such a view, as they focus on the merits of the outcome of constitutional decision-making.[123]

Besides this 'lawlessness alternative', but still opposed to an independent constitution is the claim that the constitutional law of the United States of America consists simply in the practices of the American legal system. Under such a theory, the most decisive practitioners are courts and administrative agencies, and the ultimately relevant practices the opinions of Supreme Court Justices in constitutional cases.[124] David Strauss's 'Common Law Constitutionalism' represents such an account of American constitutional law.[125]

The third alternative worth mentioning is a natural law account of constitutional law. According to modern natural law theory, moral facts are essential ingredients in determining legal content and must always supplement social facts, such as the provenance of an authoritative text or linguistic conventions that determine the text's plain meaning.[126] Among others, the two important proponents of non-positivist, natural law originalism, Justice Clarence Thomas and Randy Barnett have such an understanding of American constitutional law.[127] Whereas Thomas advocates for an interpretive natural law originalism that takes into account the natural

121 See LeDuc (n 6) 269.
122 See Solum (n 23) 953; see also Berman and Toh (n 27) 547.
123 See Richard A Posner, 'Bork and Beethoven' (1990) 42 Stan L Rev 1365, 1369; Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press 2003); for a similar assessment of Posner's position see LeDuc, (n 6) 331.
124 See LeDuc (n 6) 333.
125 David A Strauss, *The Living Constitution* (Inalienable Rights Series, Oxford University Press 2010).
126 See Shapiro (n 33) 238.
127 See for an account of the shortcomings of natural law originalism Mikolaj Barczentewicz, 'The Limits of Natural Law Originalism' (2017) 93 Notre Dame L Rev Online 115.

law principles enshrined in the Declaration of Independence,[128] Barnett pleads for a stronger form of natural law originalism, as he believes that the source of the rights protected by the Constitution is natural law, not positive law.[129]

A fourth alternative is a different positivist position that argues for the addition of other constitutional sources.[130] One might imagine a theory that regards the Declaration of Independence, the Federalist Papers and Abraham Lincoln's Gettysburg Address just as important constitutional facts, as the inscriptions of the US Constitution.[131] Similarly, a pluralist non-originalist (and not exclusively) positivist theory of decision-making, like the one Philip Bobbitt has influentially put forward,[132] implies that the Constitution's text is not the exclusive source of American constitutional law. Thus, pluralists implicitly claim that American constitutional law consists of multiple facts and considerations, namely of the meanings of the inscriptions in the constitutional text, the Framers' and ratifiers' intentions, judicial precedents, extrajudicial societal practices, moral values and norms of the American people and standards of prudence.[133]

The ontological pluralism of scholars like Bobbitt and Stephen Griffin ('the sources of American law are plural')[134] have to be distinguished from pluralistic conceptions of constitutional evidence (epistemic pluralism). Richard Fallon's 1987 Harvard Law Review article[135] offered such an epistemic pluralism. Similar to Bobbitt's account, Fallon sketched out five modes of constitutional argument, but unlike Bobbitt, who insists on the incommensurability of the different constitutional arguments ('modal-

128 See Clarence I Thomas, 'Toward a "Plain Reading" of the Constitution: The Declaration of Independence in Constitutional Interpretation' (1987) 30 How LJ 983, 985–986, 989.

129 See Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press 2004) 53–54; see for more details LeDuc (n 5) 645–648.

130 cf LeDuc (n 5) 667.

131 See for a step in this direction Akhil Reed Amar, *America´s Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books 2012) 245-275; see also Philip Bobbitt, 'The Constitutional Canon' in Jack Balkin and Sanford V Levinson (eds), *Legal Canons* (New York University Press 2000) 331.

132 See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press 1982); Bobbitt (n 39).

133 See Berman and Toh (n 32) 1751; Sachs (n 43) 830.

134 Stephen Griffin, 'Pluralism in Constitutional Interpretation' (1994) 72 Tex L Rev 1753, 1761.

135 Richard H Fallon Jr, 'A Constructivist Coherence Theory of Constitutional Interpretation' (1987) 100 Harv L Rev 1189, 1190.

ities'), Fallon proposed an algorithm to resolve intermodal conflicts. For him, the different constitutional arguments are simply different evidences. Thus, he does not argue for a Bobbitt-like ontological pluralism that assumes a pluralism of constitutional sources.[136]

2. *Theories of legal interpretation: how to determine the content of American constitutional law?*

From the common originalist position that American constitutional law consists solely of the semantic contents of the inscriptions in the constitutional text follows a certain epistemological position: in order to discover the relevant constitutional law, ie, to figure out what the constitutional law calls for, the semantic meanings of the inscriptions in the constitutional text (in their syntactical context) must be revealed, and by way of discovering the semantic meaning one also discovers its legal meaning, as the semantic meaning constitutes the law.[137] Any facts that bear on what the inscriptions mean are good evidence for beliefs about what the Constitution calls for.[138] Against this backdrop, constitutional disagreement must be understood as disagreement about the meaning of constitutional provisions.[139]

As originalists assume that words have an objective social meaning and that this meaning can typically be discovered by empirical investigation, the originalist epistemological position calls for strictly non-normative, empirical reasoning.[140] Consequently, constitutional reasoning, according to positivistic originalists, is a formalistic process.[141] Originalists do not evaluate whether the meanings of the respective constitutional provisions are prudent, sensible, or moral,[142] since moral considerations do not play a role in making legal statements true or false.[143]

136 See Green (n 4) 514-516.
137 See Berman and Toh (n 27) 547–48.
138 Berman and Toh (n 32) 1744.
139 See LeDuc (n 6) 268.
140 See Berman and Toh (n 32) 1744.
141 LeDuc (n 105) 93.
142 See LeDuc (n 6) 286.
143 See Baude (n 43) 2351; see also Berman (n 21) 22 (pointing out that originalism's notions of constitutional law and legal decision-making are well captured in Chief Justice Taney's notorious opinion in Dred Scott).

The epistemological position of (ontological) non-originalist pluralists is something like the following: in order to figure out what the constitutional law calls for, one should find out multiple kinds of facts or considerations, namely the ones that constitute American constitutional law (see above).[144]

For pragmatists like Richard Posner, who hold the view that an ontologically independent constitution does not exist, there is no such thing as a theory of interpretation or of legal reasoning. Consequently, they deny the existence of any 'truthmaker' external to the practice of judging, ie for them there is nothing that makes claims about 'the Constitution' true. Against this background, pragmatists reject expressions like 'correctly' or 'incorrectly decided cases', because from their point of view there exists no metric common to all people to decide which solution of a difficult constitutional case is right or wrong.[145]

3. Theories of adjudication: how must courts resolve constitutional disputes?

Originalists claim that the first and central task of constitutional decision-making is to interpret the Constitution.[146] When the meanings of the relevant inscriptions of the constitutional text are clear, judges must decide the cases before them according to the meanings of those inscriptions.[147] Thus, originalists are committed to the 'priority of interpretation', ie, the claim that constitutional adjudication must begin with the interpretation of the meaning of the constitutional text, as well as to the 'primacy of interpretation', namely the proposition that the reading of the constitutional text by means of interpretation provides a privileged ground on which to decide the case at hand.[148] Consequently, originalists, in contrast to non-originalists, do not accept doctrines that conflict with the meaning of the respective constitutional text. This 'dogma' is probably the most crucial point of disagreement between originalists and non-originalists.[149]

However, as we have seen above, the constitutional law is indeterminate in some cases, which is why formalism is indefensible and furthermore in-

144 See Berman and Toh (n 32) 1751–1752.
145 See Richard A Posner, 'A Political Court' (2005) 119 Harv L Rev 31, 41; see also Green (n 4) 513–514 (analysing 'truthmakerless constitutional theories').
146 See LeDuc (n 105) 65.
147 See Berman and Toh (n 32) 1746.
148 LeDuc (n 105) 61.
149 See Whittington (n 15) 408.

compatible with legal positivism. Nearly all of today's originalists acknowledge this:

> Uncertainty and indeterminacy are inherent in the originalist approach to constitutional interpretation. The evidence of the historical meaning of particular provisions of the constitutional text may often be inadequate to guide the modern interpreter. Constitutional provisions may have been vague in their original usage, leaving uncertainty about how they should be clarified or elaborated. The law may have gaps that do not adequately guide political actors, even when action is necessary. Such considerations suggest that there are limits to what constitutional interpretation can accomplish.[150]

It is precisely at this point that originalists differ among themselves on how best to respond to this uncertainty. Their positivist grounding does not give them any guidance on this issue, as legal positivism as a theory about the nature of law has nothing to say about legally unregulated cases. Thus, originalist's theories of legal reasoning and legal adjudication are not congruent concerning situations of legal indeterminacy, ie, although all coherent originalists agree on their theory of the law and their theory of legal reasoning, there is no such agreement on the issue of legal adjudication in legally indeterminate cases.

There are, in essence, two possibilities for originalists to supplement their theory of adjudication, as Keith Whittington has pointed out. First, they can supplement originalist constitutional interpretation with non-originalist constitutional construction. Constitutional construction characterizes the constitutional elaboration within the interstices of the discoverable meaning of the constitutional text, to permit constitutional decision-making.[151] In fact, most modern originalists believe that constitutional adjudication includes not only interpretation but also constitutional construction.[152] Notwithstanding, originalists stay committed to the priority of interpretation.

The second possible response to the indeterminacy problem is the usage of default rules. A particularly prominent default rule would be a rule that judges should defer to legislators on disputed constitutional questions

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150 See Whittington (n 15) 403; see also Lee J Strang, 'Originalism's Promise, and Its Limits' (2014) 63 Clev St L Rev 81, 96.

151 See Whittington (n 15) 403; see also Keith E Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press 2001) for a comprehensive analysis of this concept; see also Jack Balkin, *Living Originalism* (Harvard University Press 2011); Lawrence B Solum, 'Originalism and Constitutional Construction' (2013) 82 Fordham L Rev 453.

152 See Berman and Toh (n 27) 554.

whenever the constitutional meaning is unclear.[153] Following this option, courts would be limited to legal reasoning.[154]

Apart from the non-interpretive response to the indeterminacy problem, a theory of adjudication can have several other features, which are not predetermined by originalism's commitment to legal positivism, as for example what standard of certainty judges must reach before determining to act on their perception of a constitutional violation against the constitutional judgments of other government officials. Consequently, there is room for disagreement among originalists over how such questions should be answered, and there is as yet little agreement among originalists over such questions of constitutional adjudication.[155]

Concerning the theory of adjudication of non-originalists, the main difference to the respective originalist account is that non-originalists argue that even when the meanings of the relevant inscriptions of the constitutional text are clear, judges should decide the cases before them not merely according to the meanings of those inscriptions, but also in light of certain nonsemantic, including normative considerations.[156]

V. Conclusion

By distinguishing theories of law, theories of legal reasoning and theories of adjudication, I have tried to show – first – that the great debate is, in fact, not about constitutional interpretation, but about what American constitutional law consists of. Second, I have argued against the thesis of many non-originalists that originalism is a combination of a positivist conception of constitutional law and a formalist theory of adjudication, by showing that formalism is not only a flawed theory but also incompatible with positivism. Third, I have demonstrated that originalism is based on a positivist conception of American constitutional law, from which only an incomplete theory of adjudication follows, whereas living constitutionalism is primarily a theory of constitutional adjudication. The different versions of non-originalist living constitutionalism embrace a broad variety of different implicit theories of constitutional law that are all in conflict with the one originalism puts forward.

153 See, eg, Lee J Strang, 'The Role of the Common Good in Legal and Constitutional Interpretation' (2005) 3 U St Thomas LJ 48, 70–72.
154 See Whittington (n 15) 404 & 406.
155 See Whittington (n 15) 401.
156 See Berman and Toh (n 32) 1747.

It is important to note that positivist jurisprudence, by its terms, says nothing about whether, when, or why one ought to obey positivist law.[157] The originalist theory of positive constitutional law, therefore, needs to be based on a respective justification. To analyse whether a persuasive justification is provided by today's originalists or could at least theoretically be developed, is, however, a task for another paper.

157 See Jeffrey A Pojanowski and Kevin C Walsh, 'Enduring Originalism' (2016) 105 Geo LJ 97, 117.