A Pragmatic Model of Law

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While all of us are pragmatic in an informal or colloquial sense in many instances in daily life, pragmatism as applied to law has a deeper, jurisprudential sense. The author suggests that modern legal pragmatism presents a model of law that avoids the serious philosophical errors of the traditional model of law, which is based upon assumptions that are untenable in light of fundamental developments in twentieth century thought. The traditional model justifies law by grounding law in eternal, immutable and transcendental foundations. All modern legal pragmatists reject the notion that transcendental foundations sustain law.

Modern legal pragmatism arose in two stages. The first, largely negative phase, critical pragmatism, rejected foundationalism, thereby undermining the very legitimacy of law under the traditional model. Eventually, a second strand of legal pragmatism, prudentialism, emerged to construct an alternative model of law. The prudentialists attempt to restore legitimacy to law by appealing to tradition rather than to foundations.

To a large extent, modern legal thought has finally reached the stage where most scholars and jurists now share common basic assumptions about the nature of legal knowledge and normative theory. Pragmatism thus potentially signals a new stage for modern legal thought. At the same time, however, legal pragmatism also contains some ominous prospects of a return to a sometimes oppressive past. Combining elements from both camps of pragmatism, the author then charts a middle course that attempts to accommodate the prudentialists' respect for tradition and the critical pragmatists' emphasis on diversity and pluralism.

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INTRODUCTION

All of us have at times submitted to the urge to be pragmatic, to cast aside reflection and do whatever works to achieve some immediate objective. No doubt there are many instances in daily life when it is unobjectionable or even appropriate for anyone, including lawyers, to act pragmatically in this informal, colloquial sense. Some commentators seem to harbor the lurking suspicion that legal pragmatism, a jurisprudence that seems now to include virtually all scholars and jurists, may be no more than this approach as applied to law.

If legal pragmatism were merely an ad hoc, result-oriented approach to law, then from a jurisprudential point of view, it would be at best trivial and incomplete, and at worst, dangerous and alarming.

1. See, e.g., Thomas C. Grey, Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory, 63 S. CAL. L. REV. 1569, 1590 (1990) ("[P]ragmatism is the implicit working theory of most good lawyers."); see also Thomas C. Grey, Holmes and Legal Pragmatism, 41 STAN. L. REV. 787 (1989) [hereinafter Holmes and Legal Pragmatism]. The inescapable conclusion seems to be that "we are all pragmatists now." Joseph W. Singer, Should Lawyers Care About Philosophy?, 1989 DUKE L.J. 1752, 1753. Even Professor Ronald Dworkin, who has flatly rejected pragmatism and even "bad-mouths" it, see Richard Rorty, The Banality of Pragmatism and the Poetry of Justice, 63 S. CAL. L. REV. 1811, 1811 (1990), has recently been recast as a pragmatist himself. See Steven D. Smith, The Pursuit of Pragmatism, 100 YALE L.J. 409, 411 (1990).

2. Thus, Judge Richard Posner writes that pragmatism is:
   a grab bag of methods, both of investigation and of persuasion. It includes anecdote, introspection, imagination, common sense, intuition . . . , empathy, imputation of motives, speaker's authority, metaphor, analogy, precedent, custom, memory, "induction" (the expectation of regularities, related both to intuition and to analogy), and "experience." Richard A. Posner, The Jurisprudence of Skepticism, 86 MICH. L. REV. 827, 838 (1988); see also Daniel A. Farber & Philip P. Frickey, Practical Reason and the First Amendment, 34 UCLA L. REV. 1615, 1646 (1987) (pragmatism denotes "an overall humility" to legal theory); Smith, supra note 1, at 411 (pragmatism is an attitude, an "exhortation about theorizing").

Others, such as Ronald Dworkin, have been accused of reducing pragmatism to a "crass instrumentalism," that attenuates pragmatism to an endorsement of whatever works to achieve a particular purpose, the simplistic and unacceptable view that the ends justify the means. See Margaret J. Radin, The Pragmatist and the Feminist, 63 S. CAL. L. REV. 1699, 1722 (1990). For views describing the current disarray in pragmatism and jurisprudence generally, see P. John Kozyris, In the Cauldron: The View From Within the Stew (unpublished manuscript, on file with the Washington Law Review).

3. Some suggest that legal pragmatism is essentially trivial. See, e.g., Richard A. Posner, What Has Pragmatism to Offer Law?, 63 S. CAL. L. REV. 1653, 1653 (1990) ("[T]he great weakness of Pragmatism is that it ends by being of no use to anybody."); Rorty, supra note 1, at 1811 (pragmatism is "[essentially] banal in its application to law"); Smith, supra note 1, at 424 ("[I]f everyone is . . . a pragmatist, then it seems that pragmatism is not a distinct legal theory at
After all, law involves fundamental normative questions of power and coercion. Where there is law, human conduct is made in some sense nonoptional or obligatory. Courts deprive people on a basis of property, liberty, and even life, all because they have broken some law or violated someone's legal rights. We need to justify the political and moral obligation to obey law in a way that distinguishes the legitimate coercion of the law from tyranny or arbitrary power.

A conception of legal pragmatism as either a judge's nonrational intuition about the appropriateness of a judicial outcome or a judge's sense that the outcome would advance a favored objective is inadequate because it fails to distinguish law from arbitrary power. Any satisfactory account of law must explain why a legal outcome embodies more than the personal preferences of the legal decisionmaker. If legal pragmatism is indeed a significant new development in jurisprudence rather than a platitudinous label, then it must be more than simply a nonreflective, crassly instrumentalist approach to law.

In this Article, I explore a deeper, jurisprudential version of legal pragmatism. Under traditional legal thought, a dominant, orthodox model of law accounted for the legitimacy of legal obligation and legal reasoning. This model of law is grounded on the bedrock of two distinct features of philosophical foundationalism: a foundationalist ontology to justify legal obligation and a foundationalist epistemology to drive legal reasoning and argumentation. I argue that legal pragmatism offers an alternative model of law that avoids the significant philosophical errors of the traditional model. That model embodied by the natural law and legal positivist theories was based upon assumptions that are no longer tenable in light of fundamental developments in twentieth century intellectual thought. I suggest that legal pragmatism offers both a better descriptive account of legal reasoning as well as a better normative account of legal obligation.

Part I of this Article sets forth the main features of the traditional model of law. Parts II and III of the Article then set forth the first of two stages in the rise of legal pragmatism. This first stage, critical pragmatism, was largely negative in character and impact. Relying on all.


5. See Dworkin, supra note 4, at 13–16 (concepts of law and legal obligation support society's warrant to punish and coerce); see also RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 9 (1992) (equating naked power with lawlessness as opposed to the legitimate normative authority of law).
developments in twentieth century philosophy, critical pragmatists urged the rejection of both foundationalist features of the traditional model of law.

Taking an extreme position, the arguments of some critical pragmatists, the critical legal scholars, challenge the legitimacy of the traditional model in two ways and raise the specter of anarchism and nihilism. Part II addresses their rejection of ontological foundationalism, which seems to leave us with no normative basis to justify law or to distinguish legal coercion from arbitrary power. Part III addresses their rejection of epistemological foundationalism, which seems to entail the serious erosion of determinacy in legal reasoning.

If law is as radically indeterminate as these scholars proclaim, then laws do not bind judges and judges do not follow the law, but always create it. If judges act arbitrarily and enforce their own will, then law becomes tyranny.

Parts IV turns to the second phase of pragmatism, prudentialism, which begins the reconstruction of an alternative model of law in a post-foundationalist world. Legal pragmatists offer both a normative account of law and an account of determinacy in legal reasoning, but without an appeal to foundations. Drawing upon the works of classical and modern philosophers, the prudentialists construct a cautious, conservative respect for tradition and inherited culture to restore determinacy in legal reasoning and textual interpretation.

Part V explores the critical and prudential pragmatists’ normative account of law. Using a pragmatic, deontological approach, legal pragmatists explain the basis of the political and moral obligation to

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7. For a fuller discussion of this point, see infra text accompanying notes 110-20.

8. By “conservative,” I refer to an epistemological feature of prudentialism. For the purposes of this Article, I do not mean to suggest that prudentialists are affiliated with any political party, currently elected politicians, or any known political agendas. While I believe that prudentialism has flaws, one type of argument that I do not consider in this Article is whether the prudentialists are being less than candid and seek to advance hidden political objectives in the guise of legal theory. Cf. Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. ILL. L. REV. 399, 420-33 (suggesting that some prudentialists have a hidden substantive agenda). To be sure, a conservative theory of legal knowledge has political consequences for our society. To be epistemologically conservative means to consider coherence with an existing web of legal knowledge to be the test of legal knowledge. What counts as a valid legal argument tends to be that which most fully coheres with the existing body of legal doctrine and with existing legal institutions. For a legal system, preservation of existing legal institutions becomes a virtue. See infra text accompanying notes 141-44.

9. See infra text accompanying notes 165-77, 184-88.
obey law without ontological foundations. When we examine normative theory, it becomes clear that what ultimately divides the critical and prudential pragmatists are the conflicting norms favored by each camp. An examination of pragmatic normative theory also exposes some deeply ominous prospects. Some prudentialists, ensconced in positions of high authority and power, appear to seek a return to a sometimes callous past that was often insensitive to certain disempowered and disadvantaged groups. I suggest an approach to pragmatic normative theory that steers a middle course and combines key elements of both prudential and critical pragmatism. This approach may stem the rising prudentialist tide so that the promise of a new stage for modern legal thought does not become a dark regression to an unenlightened past.

I. THE TRADITIONAL MODEL OF LAW

The traditional model of law contains both a normative theory explaining the political and moral obligation to obey law and an account of legal reasoning. Law is legitimate if the axioms or supralegal norms underlying law are true, if the logical tools of legal reasoning and textual interpretation are valid, and if the tools are correctly applied. By "legitimate," I refer to the classical liberal concept that when a law is legitimate, we owe a political allegiance to that law and have a prima facie moral obligation to follow it.¹⁰

A. Ontological Foundations

The traditional model invokes extralegal or suprapolitical axioms or norms to justify legal obligation and to distinguish law from arbitrary power.¹¹ These norms are found in an immanent normative order embedded within the ontological structure of the universe itself.¹²

¹⁰. See John Rawls, Legal Obligation and the Duty of Fair Play, in LAW AND PHILOSOPHY 3 (Sidney Hook ed., 1964) ("[T]here is, at least in a society such as ours, a moral obligation to obey the law, although it may, of course, be overridden in certain cases by other more stringent obligations."). As used here "liberal" does not refer to any existing political parties or known politicians, but instead refers to a political philosophy that emphasizes the moral authority of individual autonomy. This view is associated with Locke, Hume, Mill, and recently John Rawls and Robert Nozick. See also infra notes 15-16 and accompanying text.

¹¹. See Posner, supra note 5, at 5 ("Even the simplest society has norms, tacit or explicit, that evolve from the needs of the society before there are judges or other officials. . . . [N]orms precede formal legal systems.").

¹². See Lloyd L. Weinreb, Natural Law and Justice 42 (1987); see also Edward A. Purcell Jr., The Crisis of Democratic Theory: Scientific Naturalism & the Problem of Value 3-12 (1973) (discussing the rationalistic belief that there exist certain immutable metaphysical principles that explain the true nature of reality and that form the basis of the ethically good).
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These extralegal norms, part of the structure of reality itself, legitimate or supply the binding authority of positive law—laws promulgated by legislatures, courts and other governmental bodies. This view of law requires a theory that identifies the extralegal norms that drive the engine of law. Two traditional theories have emerged: natural law and legal positivism.

1. Natural Law

Under the theory of natural law, extralegal norms consisted of a natural set of comprehensive directives for human conduct. To the extent that positive law reflected this natural law, positive law was legitimate and thereby imposed upon human subjects a prima facie moral obligation of obedience.

Natural law represented a realm of higher law, a transcendental, ontological foundation for concepts of individual autonomy and moral freedom in the eighteenth century, elaborated by Immanuel Kant and later developed by Locke, Mill, and Bentham, among others. In the Descartes-Kant-Locke tradition, this higher law provided the moral foundations for the liberal democracy embedded in the United States Constitution, and would ultimately trump a countervailing...

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13. See Posner, supra note 5, at 5.
14. See Weinreb, supra note 12, at 61.
15. During the eighteenth century, the ruling scientific framework was Newtonian determinism, which posited a completely deterministic universe, set within a framework of absolute time and space, like a great clock set in motion by God at the beginning of time and left undisturbed. See Stephen W. Hawking, A Brief History of Time 53 (1988); see also J. Bronowski, The Ascent of Man 249 (1973); Heinz R. Pagels, The Cosmic Code: Quantum Physics at the Language of Nature 18-19 (1982). From the standpoint of moral philosophy, Newtonian determinism was deeply problematic. In a completely deterministic universe, where all matters, including human conduct, are predetermined down to the finest detail, moral freedom seemingly becomes impossible or, at best, illusory. Kant addressed this problem in his Critique of Practical Reason, which explored the conditions of moral freedom. Kant posited that in addition to being objects of experience, human beings are also transcendental subjects who inhabit an intelligible, supersensible or noumenal world, wholly independent of the laws of nature, where we are capable of acting according to laws we give ourselves and thereby become morally autonomous. See Immanuel Kant, Critique of Practical Reason (Lewis W. Beck trans., 1949); see also Michael J. Sandel, Liberalism and the Limits of Justice 8-9 (1982) (discussing Kant and determinism).
16. For a discussion of Locke’s influence on the drafters of the Constitution, see Thomas C. Grey, Do We Have An Unwritten Constitution?, 27 STAN. L. REV. 703, 715-16 (1975) (concept of natural rights was deeply held by framers of Constitution). See also 1 Merle Curti, et al., An American History 137, 157 (1950) (discussing the influence of Locke on Jefferson); Louis Hartz, The Liberal Tradition in America 5-14 (1955) (discussing the deep hold of the Lockean creed on American liberal tradition); G. Edward White, Patterns of American Legal Thought 24-28, 30 (1978) (discussing the influence of natural law on founding generation); 26 The American Nation: A History 96-98 (Albert B. Hart ed., 1907) (Locke’s emphasis on social contract under which the majority must rule and the people must ultimately
tradition of classical republicanism, which emphasized civic virtue over individual self-interest.17 For the generation of Americans who witnessed the American Revolution, these "immutable principles of natural law and abstract justice"18 were the source of all positive law.

2. Legal Positivism

The second major theory identifying supralegal norms is legal positivism. Legal positivists claim that a dominant sovereign authority exists within each civil society to promulgate laws.19 Thomas Hobbes, be sovereign "fell in with the preferences of the colonists"); PURCELL, supra note 12, at 5 ("During the nineteenth century Americans had generally accepted the validity of democratic government with neither qualms nor qualifications. The democratic ideal was the unquestioned American ideal, and it was widely accepted as an axiom of life."). 17. For a discussion of republicanism and its recent revival, see Frank I. Michelman, Forward: Traces of Self-Government, 100 HARV. L. REV. 4, 18 (1986) (describing republicanism as the willingness to subordinate private interests to public good); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. Rev. 543, 550-62 (1986) (describing the shift from classical republicanism to Lockean liberalism in the political consciousness of the generation that drafted the Constitution). 18. See MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1768-1860, at 246 (1977). Within a setting in which scientific and moral knowledge had been firmly grounded in immutable foundations, the American nation held a deep belief that it had an exceptional destiny in "God's eternal plan." DOROTHY ROSS, THE ORIGINS OF AMERICAN SOCIAL SCIENCE 26 (1991). As "nature's nation," and as God's, "America could more easily be seen as the domain of eighteenth century natural law . . . ." See id.; see also PERRY MILLER, NATURE'S NATION (1967). During this period, there was a belief that there was an "American exceptionalist vision" that viewed America as singled out by nature and God for a special destiny. See Ross, supra this note, at 22-50; see HARTZ, supra note 16, at 35-66 (suggesting that in 1776, Americans viewed themselves as "the Chosen People"). 19. By the nineteenth century, American courts had begun gradually to shift from an exclusive reliance on natural law in favor of a theory of law as a transformative instrument of human will. Professor Morton Horowitz attributes this shift from natural law to the judicial abhorrence of common law crimes. See HOROWITZ, supra note 18, at 9-16 (1977). Because natural law underwrote positive law, including common law, a defendant could be convicted of a common law crime if the act contravened some natural law. Courts uniformly rejected the notion of criminal liability not linked to a statute. See id. at 9-12. As a result, by the second decade of the eighteenth century, lawyers no longer viewed natural law as the exclusive source of positive law. See id. at 30. The view that law was a political instrument of human will rather than a manifestation of divine or natural law found fresh support in Darwin's discovery of the theory of evolution. Darwin espoused a scientific naturalism that challenged the deterministic dream of a universe created or directed to some overall purpose; it also challenged the long-esteemed belief in a world of fixed structures, governed by universal, timeless laws that controlled natural development. See PURCELL, supra note 12, at 5-10. Randomness, chance, contingency, and variability were also significant features of the world. For the philosophers Charles Pierce, William James, and John Dewey, the chief lesson of Darwinism was that thought and inquiry were experimental and purposive. "The rational meaning of every proposition lies in the future," wrote Pierce, and that meaning is "that form in which the proposition becomes applicable to human conduct." CHARLES S. PIERCE, WHAT PRAGMATISM IS IN PRAGMATISM: THE CLASSICAL WRITINGS 113 (H.S. Thayer ed., 1982). James would later propose a pragmatic theory of truth in 1898, and Dewey would later further expand and disseminate a pragmatic,
for example, believed that norms found in nature authorized the sovereign to issue binding commands. While natural law theorists such as Thomas Aquinas believed that the universe contained an entire code of natural laws that were reflected in legitimate positive law, legal positivists such as Hobbes used a few fundamental laws of nature to justify the power and authority of the sovereign to enact binding, positive laws. Thus, the legitimizing element of law under legal positivism is not the content, but the source or pedigree of the law. Hobbes's theory was later expanded by John Austin, who exerted an enormous influence on legal thought.

Despite the differences, both classical theories of law—natural law and legal positivism—were foundationalist. Both theories ultimately trace the binding authority, and thus the legitimacy, of law to transcendental, ontological foundations.

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20. The legal theory of “Hobbes . . . purport[s] to start from a theory of natural law.” George C. Christie, Jurisprudence 293 (1973). Hobbes purported to derive the principle of the authority of the sovereign from a small set of natural laws. For example, Hobbes starts out with the assertion that the fundamental precept of the natural law is that the individual should do everything he possibly can to stay alive. From this Hobbes derives the view that the individual will join a civil society and will renounce any right to base his conduct upon the law of nature and will obey the laws of the sovereign. See id.

21. Thomas Aquinas set forth the first comprehensive, foundationalist natural law theory in the thirteenth century. Aquinas believed that a providential God created an orderly universe that displays God's purpose throughout in the form of a systematic normative order underlying all reality. See Weinreb, supra note 12, at 60.

22. Austin held that law was a set of rules embodying the desire of the sovereign expressed in a command that others behave in a certain way, backed by the sovereign's power and will to sanction disobedience. See 1 John Austin, Lectures on Jurisprudence 90–92, 99–100, (Robert Campbell ed., 4th ed. 1873) (1832); John Austin, The Austiniian Theory of Law 1–30 (W. Jethro Brown ed., 1906). Professor H.L.A. Hart's version of legal positivism set forth in The Concept of Law is now generally recognized as the most powerful version of the theory. See Jeffrie G. Murphy & Jules L. Coleman, The Philosophy of Law 31 (1984). For a discussion of Hart's version of positivism, see infra note 286. As defined, legal positivism includes social contract theories, which also derive their normative authority from social agreement or consensus. The classic social contract theory is set forth in John Locke, Two Treatises of Government (1960).
B. Epistemological Foundations

The traditional model of law also contains a foundationalist epistemology related to the foundationalist ontology just explored.23 Because the traditional model viewed law as sustained by ontological foundations, legal reasoning and legal knowledge consisted of determining when positive law accurately reflected or pictured these foundations. This foundationalist epistemology, sometimes called the “picture theory” of knowledge, held that language actually provides objective or logical “pictures” of reality.24 Justice Story explained the Supreme Court’s foundationalist epistemology in Swift v. Tyson,25 a landmark in classical legal thought. “[I]t will hardly be contended,” wrote Justice Story, “that the decisions of courts constitute laws. They are, at [the] most, only evidence of what the laws are, and are not of themselves laws.”26 Swift posited “a transcendental body of law,”27 which, “[like] a brooding omnipresence in the sky,”28 was already extant in some platonic heaven, waiting to be discovered.29

23. These two features comprised the metaphysics of classical legal thought. According to the Kantian tradition of Western philosophy, metaphysics is concerned with final questions and is the most basic and lofty of all branches of knowledge because metaphysics explores the very conditions of existence that make all other branches of knowledge possible. See IMMANUEL KANT, CRITIQUE OF PURE REASON 46 (Norman K. Smith trans., 1929). Metaphysics is concerned with ontology, a theory of what exists or what there is, and with epistemology, a theory of knowledge. See D.W. HAMLYN, METAPHYSICS 1–10 (1984); Roger Hancock, History of Metaphysics, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 289 (Paul Edwards ed., 1967); Michael S. Moore, The Interpretive Turn in Modern Theory: A Turn for the Worse?, 41 STAN. L. REV. 871, 874 (1989).

24. The “picture theory” can be traced to Plato. See PLATO, THE REPUBLIC bk. 6, pt. VII (Desmond Lee trans., 1955). Actually, the term “picture theory” of knowledge is associated with Bertrand Russell, but more often with his one-time pupil, Ludwig Wittgenstein. Early in his career Wittgenstein developed a highly sophisticated realist or foundationalist epistemology referred to as the “picture theory” of language, see LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS (D.F. Pears & B.F. McGuinness trans., 1961) [hereinafter TRACTATUS LOGICO-PHILOSOPHICUS], but later abandoned that view in favor of a more pragmatic conception of knowledge. See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953).


26. Id. at 18.


29. Swift seems inconsistent with the positivist positions taken by Justice Story just eight years earlier in his COMMENTARIES ON THE CONFLICT OF LAWS, which seems to be a clear erosion of the natural law tradition. Justice Story’s maxims of the conflict of laws held that law is a result of territorial sovereignty, power, and consent, not natural law. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19, 21–22 (1834). This inconsistency has led commentators to suggest that Justice Story might have harbored other goals, such as a quest for a uniform commercial law, for the decision in Swift. See HOROWITZ, supra note 18, at 249–52.
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I. Logical Argumentation

Classical legal thought viewed legal reasoning as a form of logical deduction that proceeded in a formal manner from the law's basic axioms or norms. The logical connection between an established norm and a new legal result insured the legitimacy of the result. In judicial decisionmaking, once it was established that a certain legal decision logically followed from some accepted norm, then the decision became a legal precedent and later judicial decisions sought to adhere as closely as possible to the precedent.

Foremost among the traditional tools of logical argumentation employed in law are the syllogism and reasoning by analogy. Taking the syllogism as his model, one classical scholar argued that "[e]very judicial act resulting in a judgment consists of a pure deduction." So compelling is this form of reasoning that lawyers and judges often try to make all legal reasoning seem syllogistic. The rule of law is the major premise, the facts are the minor premise, and the judgment is the conclusion, which is compelled by the rules of deductive logic. Traditional legal thought views legal reasoning as proceeding in a discursive, linear fashion, much like the links of a chain.

The syllogistic nature of legal reasoning, in turn, requires the identification of an applicable rule of law that can serve as the major premise of the syllogism. One method of identifying this rule is applying the logical tool of analogy on existing positive law. Since positive law—prior judicial decisions and statutes—embodied or reflected valid suprapllegal norms, rules of law embedded in positive law represent potential rules of law that can serve as the major premise of the new syllogism needed to resolve the issue at hand. Because all legal rules logically derived from positive law are valid, the applicable rule is the one that encompasses all relevant features of the factual situation at hand. For example, the common law rule of capture confers ownership rights upon the first to reduce wild animals to possession. The rule of capture, applicable by analogy to any number of fugitive

Nevertheless, Swift gave rise to an entire jurisprudence striving to distinguish between local questions and general questions subject to this general, federal common law. See 19 C. Wright et al., Federal Practice and Procedure § 4502, at 6-8 (1982).

resources such as oil and gas, became the major premise of the new syllogism needed by common law courts to resolve cases of first impression in favor of the party who first "captured" the resource in question.31

2. Textual and Statutory Interpretation

Under classical legal thought, judges and lawyers extract rules from statutes or previous decisions and use these rules as the major premise of a syllogism to determine the outcome of a case. The process of extraction itself is not deductive, but is "archeological."32 The meaning of a legal text or statute is fixed on the date of its enactment and the task of the interpreter is to recover or reconstruct some objective meaning buried in the text.33 This approach assumed a high degree of determinacy of meaning and relied heavily on the "picturing" metaphor of classical foundationalist epistemology. The statutory language actually pictured some fixed, objective meaning that is separate from and beyond the text itself and could be accessed through the text. Although there are many variants of the traditional approach to statutory interpretation, all operate within the archeological metaphor.34 Under the traditional approach, statutory interpretation assumed the air of a mechanistic exercise in logic.

The traditional approach to both textual interpretation and logical argumentation as formal, deductive reasoning is illustrated by United States v. Butler.35 At issue before the Supreme Court was the constitutionality of the Agricultural Adjustment Act of 1933, which authorized the Secretary of Agriculture to impose certain taxes on farmers in

31. See Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73, 75 (1985) ("[A]nalogies to the capture of wild animals show up time and again when courts have to deal on a nonstatutory basis with some 'fugitive' resource that is being reduced to property for the first time."). In Hammonds v. Central Ky. Natural Gas Co., 75 S.W.2d 204 (Ky. 1934), overruled by Texas Am. Energy Corp. v. Citizens Fidelity Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987), a gas company injected gas into a cavity under Mrs. Hammonds' land without first securing a lease from her. She argued that the gas company committed trespass by injecting its property under her land. Applying the rule of capture by analogy, the court held that the gas company owned the gas only so long as the gas remained in its possession, but once the company released the gas to its natural habitat in underground reservoirs, the gas returned to a state of nature. Because the company no longer owned the gas under Mrs. Hammonds' land, there was no trespass. In another case, the defendant even argued that news and information is also a fugitive resource that should be subject to the rule of capture. See International News Serv. v. Associated Press, 248 U.S. 215 (1918).


33. See id. at 21-22.

34. See id.

35. 297 U.S. 1 (1936).
furtherance of a federal acreage and production reduction scheme. The Secretary argued that Article I, Section 8 of the Constitution authorized the Act because it conferred upon Congress power "[t]o lay and collect Taxes, Duties, Imposts and Excises, to . . . provide for the . . . general Welfare of the United States." Justice Roberts found that constitutional and statutory interpretation was a simple exercise in logic. He argued that the Court's sole judicial task was "to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former . . . and having done that, its duty ends." Justice Roberts' approach assumes that the text of the Constitution and the statute contain indisputable, objective meanings and, like applying axioms in a geometric proof, the judicial task is to "square" the statute with the Constitution. Having found that nothing in the Constitution authorized the federal regulation of agriculture through taxes or otherwise, Justice Roberts struck the statute down.

3. The Autonomous Nature of Law

Classical legal thought viewed legal reasoning as a species of objective, artificial reasoning, accessible only to those with specialized training in law. Law itself was viewed as an autonomous discipline. It had well-defined limits, clearly distinct from, although related to, other disciplines such as moral theory and politics. Unlike politics, which reflects majoritarian preferences of the present, law reflected timeless and universal norms. Unlike morality, which is individualistic, law transcended the personal preferences of the judge, but was grounded in underlying, eternal foundations. Thus, rules of law could, and often were expected to, operate in ways that were inconsistent with the moral or political views of the legal decisionmakers. Indeed, this feature was deemed to be one of the supreme virtues of law: it was above and apart from personalities and politics.

37. 297 U.S. at 62–63.
38. Id. at 78. As we shall later see, legal pragmatists argue that no one ever rigidly adhered to the traditional model and that statutory interpretation, despite claims to the contrary such as those of Justice Roberts, has always proceeded in a non-foundationalist, pragmatic fashion.
II. LEGAL PRAGMATISM AND THE REJECTION OF ONTOLOGICAL FOUNDATIONS

Beginning early in the twentieth century, influential movements in modern science and philosophy began to challenge the validity of ontological foundations.40 One powerful branch of philosophy, logical positivism, used the logical analysis of language to demonstrate that all metaphysical statements that purported to describe a supersensible, transcendental reality, including statements about ontological foundations, were utterly meaningless.41 Although no longer a viable movement,42 logical positivism was a "revolutionary force in philosophy"43 and has left a legacy of antipathy to metaphysics in twentieth century legal thought44 and in contemporary philosophy. For example, the pragmatic philosopher Richard Rorty admonishes us that there is simply nothing "out there" that we can point to or hold up in order to

40. Until the twentieth century, the prevailing scientific framework was Newtonian determinism, which postulated a completely deterministic universe within a framework of absolute space and time. In the early twentieth century, Einstein's discovery of the theory of relativity eventually shattered the Newtonian paradigm. See HAWKING, supra note 15, at 33; PAGELES, supra note 15, at 19–20, 27. Einstein's revolution led the logical positivists to rethink the whole concept of scientific knowledge. For a history of logical positivism, see LOGICAL POSITIVISM (A.J. Ayer ed., 1959).

41. Abstracting the language of science into its most basic form, that of mathematical logic, the logical positivists sought to expose the spurious nature of some traditional philosophical problems, such as those of metaphysics, and refocus philosophy on genuine theoretical issues. See Rudolf Carnap, The Elimination of Metaphysics Through Logical Analysis of Language, in LOGICAL POSITIVISM 60 (A.J. Ayer ed., 1959). The logical positivists demonstrated that traditional metaphysics, such as problems concerning some transcendent reality beyond all possible sense experience or being in itself, actually consists of cognitively or theoretically meaningless statements. Metaphysical problems were the result of imperfections in ordinary language and a logically perfect language would allow the elimination of all traditional metaphysics. See id. For a more detailed discussion of this point, see Chow, supra note 6, at 242–47.

42. See FREDERICK SUPPE, Introduction to THE STRUCTURE OF SCIENTIFIC THEORIES 4 (Frederick Suppe ed., 1974) (logical positivism is no longer accepted as the paradigm for science); see also HILARY PUTNAM, REASON, TRUTH AND HISTORY 187 (1981) (logical positivism "began to disintegrate by 1950").


44. The logical positivists influenced the legal realist movement, which rejected abstract concepts in favor of concrete, hard facts. See, e.g., Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935). Logical positivism's influence continues to be felt today because legal realism is an ancestor of the law and economics movement in modern legal thought. For a further discussion of the influence of logical positivism on legal realism, see Chow, supra note 6, at 247–51.

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justify a particular norm or principle.45 These views have deeply influenced modern legal pragmatism.

Another branch of philosophy, existentialism, stressing humanistic concerns, scorned the notion that transcendental foundations can serve as a moral compass for human conduct. Existentialist philosophers, particularly Jean-Paul Sartre, warned that reliance on such truths is a form of self-deception, a misconceived and impossible escape from human responsibility.

Sartre explored these themes in The Wall, a short story about the imprisonment and torture of an ardent resistance fighter during the Spanish Civil War. The central metaphor of the story is the executioner's wall where prisoners face the firing squads of the ruling fascist government. When confronted with death, the story's protagonist, Pablo Ibbieta, realizes that there are no eternal foundations supporting his once cherished values.46 Just as the wall signals the end of mortal life, the path to eternity also is blocked by an impenetrable “wall.” “At that moment I felt that I had my whole life in front of me and I thought, 'It's a damned lie.' . . . I had spent my time counterfeiting eternity, I had understood nothing.”47 Feeling betrayed by a false belief in eternity, Ibbieta's revolutionary zeal vanishes and his ardent desire for life dissolves into indifference, even in the face of threats of imminent death.48 The story’s ironic ending punctuates the absurdity of a life guided by belief in moral foundationalism.49

Like other existentialists, Sartre emphasized the themes of human freedom, responsibility and choice in a world without foundations. At the same time, he warned his audience about the self-deceiving search


47. Id. at 292.

48. Id. at 293–94. “In the state I was in, if someone had come and told me I could go home quietly, that they would leave me my life whole, it would have left me cold: several hours or several years of waiting is all the same when you have lost the illusion of being eternal.” Id.

49. Gambling with his life during an interrogation by government soldiers concerning the whereabouts of Ramon Gris, a leader of the resistance, Ibbieta invents a story that Gris is hiding in a local cemetery. As it turns out, Gris, who has had an argument with his protectors, had set out on his own to hide in the cemetery. The soldiers find and kill Gris and, as a result, spare Ibbieta's life. See id. at 298–99.
for illusory, eternal truths. These existential themes would foreshadow similar themes in critical pragmatism.

A. The Rise of Critical Legal Pragmatism

Critical legal pragmatism assimilates these insights into a critique of law. Although these scholars defy rigid classification, all critical pragmatists share a common orientation: they reject the existence of ontological foundations that justify supraregional norms. Once we reject ontological foundations and the inevitability of existing legal norms, the undesirable effects of these norms upon the legal system are no longer natural and inevitable. Rather, these effects are revealed to be choices made by the empowered and law is exposed as a device to disguise the moral and political nature of the choices made. Beyond this common focus, critical legal pragmatists divide into three groups: critical legal studies, critical race scholarship, and critical feminism. Each group views the flaws of the traditional model of law from a different perspective.

1. Critical Legal Studies

The critical legal studies movement attacks traditional legal thought as based on a false belief in ontological foundations. Critical legal scholars scorn the traditional view that rules of law mirror or represent some external, pleronic legal rules or concepts "sitting out there ready for us to pick up, like manna from heaven." Critical legal scholars, such as Professor Joseph Singer, urge us "[to] give up the idea that the legal system has a foundation, a 'rational basis.' " Once we realize that law is not sustained by ontological foundations, the traditional model of law is exposed as an attempt to disguise the reality that law is the result of illegitimate hierarchies. Thus, law is not


51. Singer, supra note 6, at 29.


53. See Singer, supra note 6, at 68-69. Gary Peller argues that in the early twentieth century, the liberty of contract cases promulgated the view that inequalities in socio-economic status were a given and natural part of human nature. See, e.g., Coppage v. Kansas, 236 U.S. 1, 17 (1915),
the justifiable use of power, law is naked power. Once we demystify law, then we become empowered because we are free to determine our own destiny rather than constrained by law that reinforces the status quo.\(^4\)

2. Critical Race Scholarship

Critical race scholarship "refers to the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law."\(^5\) Critical race scholars reject objective, immutable foundations for law and argue that, as a consequence, social inequities caused by the legal system are not natural and inevitable but are the results of choices made by the empowered majority.\(^6\) This insight allows us to use law to redress, rather than reinforce, the inequalities of the past and present.

A central feature of critical race scholarship is the concept of the voice of color.\(^7\) Rooted in oppression, this voice, even with its sometimes conflicting messages,\(^8\) possesses a singular insight and even

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overruled by NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (social and economic inequalities are the natural and legitimate result of the exercise of contract rights). See Peller, supra note 52, at 1193–1219 (discussing how liberty of contract cases enforced inequalities of wealth, education and status as natural features of society).

54. See Singer, supra note 6, at 62.


56. See, e.g., Crenshaw, supra note 55, at 1351–52, 1354 (supposedly neutral, immutable standards subordinate minorities); Does Voice Really Matter?, supra note 55, at 100–01 (existing merit criteria for scholarship may be source of bias rather than neutral instruments); The Imperial Scholar, supra note 55, at 566 (legal academy systematically excludes minority scholarship on civil rights).


58. The voice of color is not monolithic but contains different dialects, including even a dialect that has incorporated majoritarian standards. See Johnson, supra note 55, at 2009, 2111. Johnson refers to this dialect of the voice of color subscribing to majoritarian standards as the "Hierarchical Majoritarian" variation of the voice of color. So long as the speakers draw on
moral authority on certain race related issues. Speaking in this voice, critical race scholars tell us that law is actually permeated by an overriding hidden social standard, or point of comparison, and that standard is white. Whatever complies with the standard is viewed as normal and whatever does not is viewed as subordinate, inferior, or deviant.

For example, in Voices of America, Professor Mari Matsuda explores the legality of the practice of some employers who deny employment to applicants who speak with an accent. She argues that the notion that some Americans speak with an accent whereas other Americans do not presupposes a hidden norm of non-accent, a linguistic impossibility since there is no vantage point of a neutral, standard pronunciation. The notion of a standard, generic American accent actually describes the pronunciation of a small group of the white upper-class. Due to their disproportionate power and influence, this elite sets the standard for what is normal for everyone else. All pronunciation that deviates from the pronunciation of the white upper-class is deemed to be accented, as opposed to standard, speech. As a result, many nonwhite, ethnic, regional, and lower-class forms of pronunciation are deemed to be subnormal and, thus, accented speech.

Unless one can say based upon some transcendental, objective norm, that one accent is correct, there is no justification for hierarchy in accent. To the extent that differences in accent are placed into a

their experiences and insights gained as persons of color, they speak in the voice of color even if they have "determined that the best strategy to achieve progress . . . is via an 'integrationist,' mainstream approach that embraces the so-called 'neutral' evaluative norms of the dominant cultural group." See id. at 2016. Johnson suggests that Professors Randall Kennedy and Stephen Carter speak in this new dialect. See Stephen L. Carter, The Best Black, and Other Tales, in 1 RECONSTRUCTION No. 1 (1990); Kennedy, supra note 57.

By contrast, the more generalized voice of color is the "Monistic" dialect associated with Professors Delgado and Matsuda. See Johnson, supra note 55, at 2011. The Monistic voice stresses the perspective of those who have been oppressed and this is often associated with low socioeconomic class. See id. at 2027, 2035. Both of these variations of the voice of color share the common goal of eradicating racism in law. See id. at 2052–53 ("There is no doubt . . . [of] the worthiness of the battle. Carter and Matsuda, Kennedy and Delgado—the fight goes on.").


60. See Crenshaw, supra note 55, at 1369; Voices of America, supra note 55, at 1361.

61. See Voices of America, supra note 55, at 1361.

62. Accent refers to intonation, stress, and rhythm in the pronunciation of words. See id. at 1360.

63. See id. at 1375.
hierarchy, the hierarchy reflects the values of the empowered. By according weight and respect to the voice of color, society can correct the otherwise unjust and often iniquitous consequences of social and racial hierarchies.

3. Feminist Legal Scholarship

Feminist legal scholarship seeks to expose the unstated patriarchal norms underlying law. In *Justice Engendered*, Martha Minow argues that like other fields, law purports to be based upon objective and neutral foundations, but since such foundations are impossible, law actually embodies a hidden male norm or perspective. So powerful and entrenched that it often becomes the unstated default reference point, this norm defines men as the starting point of comparisons. Women’s differences from men thus make women inferior, deviant, or exceptional. Feminist theory seeks to expose these unstated reference points by revealing that the purportedly neutral

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66. See Minow, supra note 64, at 39–45. For one example, see H. GROSS, *CRIMINAL INVESTIGATIONS* 62–65 (1924) (arguing that biological differences between men and women make men much more reliable and credible witnesses).

67. See Minow, supra note 64, at 39.

68. Under the assumptions of foundationalism, these results were often presented as natural and inevitable. For example, *In re Goodell*, 39 Wis. 232 (1875), the Wisconsin Supreme Court refused the admission of Lavinia Goodell to the bar, stating:

The law of nature destined and qualified the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature.

*Id.* at 245. See also Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141–42 (1873) (holding that the Fourteenth Amendment’s Privileges and Immunities Clause did not entitle Myra Bradwell to a license to practice law because “[t]he paramount destiny and mission of woman are to fulfill the noble and benificent office of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things.”).
and uncoerced status quo actually hides the implicit norms of the ruling patriarchy.69

For example, employment laws often assume implicitly that the workplace is designed for men or non-pregnant persons.70 Given the male norm as a starting point, a principle of equal treatment would accord identical rights to both men and women.71 Because pregnancy is a condition of women only, courts may view this condition as being different from the norm of non-pregnancy and may refuse to grant legal protection to pregnant women because this would constitute special treatment.72 Pregnant women, however, are different only by implicit comparison to the male norm.

In other areas, such as cases involving divorce and child custody, women are compromised by an implicit judicial assumption that women have the same resources and career options as men.73 Indeed, the unstated male norm can become so well-established that it becomes embedded and disguised in language itself. For example, take the seemingly neutral category “mother.”74 Categories like “unwed mother” and “working mother” modify the general category “mother” and indicate that the default reference point is a married housewife.75 The default reference point generates an implicit prototype that structures expectations and influences values. At the same time, it goes unstated and is assumed to be based upon the natural foundations of human nature.76

B. Pragmatism and Legitimacy

These pragmatic critiques of the traditional model raise disturbing questions. At their most fundamental level, the critiques are conceptual and philosophical rather than empirical. Under the traditional model, the political and moral obligation to obey law was sustained by

69. These arguments are made especially forcefully by Professor Catherine MacKinnon. See MacKINNON, supra note 65.
70. See Minow, supra note 64, at 40–41.
71. See Scales, supra note 65, at 1374 (“In this country, the engine of the struggle for equality has been Aristotelian: Equality means to treat like persons alike, and unlike persons unlike.”).
72. See Geduldig v. Aiello, 417 U.S. 484 (1974) (exclusion of pregnant women from unemployment benefits is not sex discrimination under the Equal Protection Clause). Geduldig was superseded by statute. See Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983); see also Minow, supra note 64, at 43.
73. See Minow, supra note 64, at 43.
74. Minow adopts this example from GEORGE LAKOF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987). See Minow, supra note 64, at 44.
75. See Minow, supra note 64, at 44.
76. See id.
ontological foundations. The critical pragmatists’ rejection of ontological foundations undermines the justification of legal obligation and, unless an alternative justification is proposed, law and arbitrary power are indistinguishable. If the traditional model of law is like an edifice with an elaborate ontology as its foundation, once the foundation is destroyed, it follows that the whole edifice crumbles. As we shall see in the next part, not only do legal pragmatists reject ontological foundationalism, but many also reject epistemological foundationalism. The rejection of epistemological foundationalism potentially undermines the legitimacy of law in a second way by raising the possibility that the tools of legal reasoning are flawed by a high degree of indeterminacy.

As we shall see in the last two parts of this Article, legal pragmatists also offer a positive, normative account of law, but they avoid the use of both ontological and epistemological foundationalism. Before examining the pragmatists’ positive account and reconstruction of law, however, I complete the examination of the pragmatists’ critique of the traditional model of law by exploring the second prong of the pragmatists’ critique: the rejection of epistemological foundationalism.

III. PRAGMATISM AND THE REJECTION OF EPISTEMOLOGICAL FOUNDATIONALISM

Modern pragmatists reject epistemological foundationalism—the view that beliefs constitute true knowledge when they actually reflect or mirror some fixed, external substratum of reality. Rather, pragmatists measure the validity of a belief by assessing how well that belief coheres with other beliefs. All legal pragmatists adopt some version of a pragmatic, coherentist epistemology.

A. The Cornerstone of Epistemological Foundationalism

Epistemological foundationalism has venerable roots in Western intellectual thought, traceable to Plato. In its modern period since Descartes, Western philosophy has sustained epistemological

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77. See Consequences of Pragmatism, supra note 45, at xxviii.
78. See supra note 24; see also Williams, supra note 30, at 433.
79. Descartes initiated a new period of philosophical rationalism by rescuing Europe from the darkness of religious and philosophical skepticism. See Richard H. Popkin, The History of Skepticism From Erasmus to Spinoza 1–66 (1979); Myles Burnyeat, Introduction to The Skeptical Tradition (Myles Burnyeat ed., 1983). Descartes insisted that it was possible to overcome all possible doubt to arrive at a single indubitable truth, the cogito, as well as the criteria of truth, clarity and distinctness. See Rene Descartes, Discourse on Method and Meditations 24–25 (Laurence J. Lafleur trans., 1960). “On [Descartes’] view the human mind is like a mirror that reflects what there is when it has been wiped clean.” H.B. Action, Idealism.
foundationalism by relying heavily upon a distinction explained by Immanuel Kant in his *Critique of Pure Reason*. Kant posited a fundamental cleavage between analytic and synthetic judgments. Analytic judgments are true by virtue of linguistic meanings whereas synthetic judgments are true or false by virtue of the test of experience. The analytic statement, “all bachelors are unmarried” is true by virtue of linguistic meanings and the denial of its truth is self-contradictory. Whether the synthetic statement “Oliver is a bachelor” is true or false cannot be determined without an empirical investigation.

Expressed in many ways throughout Western intellectual history, the analytic/synthetic distinction is, as Richard Rorty notes, “the central presupposition of Philosophy: that true sentences divide into an upper and a lower division—the sentences which correspond to something and those which are ‘true’ only by courtesy or convention.” Since this distinction explains how objective knowledge of the world is possible, it is also the cornerstone of epistemological foundationalism.

A foundationalist epistemology must give an account of how we can have objective knowledge independent of language because language is a social convention. The analytic/synthetic distinction achieves that result. The truth of each statement depends on a linguistic and/or an empirical investigation.

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80. See *Kant, supra note 23; see also* IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS (Carnes trans., 1950) (restating many of the themes of the *Critique* in a shorter and more accessible form). For a good general introduction to Kant, see S. KORNER, KANT (1955).

81. Kant wrote:

In all judgments in which the relation of a subject to the predicate is thought ... [] this relation is possible in two different ways. Either the predicate B belongs to the subject A, as something which is (covertly) contained in the concept A; or B lies outside the concept A, although it does indeed stand in connection with it. In the one case I entitle the judgment analytic, in the other synthetic.

*KANT, supra note 23, at 48.*

82. David Hume made a similar distinction between relations of ideas and matters of fact, and Leibniz contrasted truths of reason and truths of fact. See WILLARD VAN ORMAN QUINE, *Two Dogmas of Empiricism, in From a Logical Point of View* 20 (1953). Other thinkers have distinguished the semantic and the pragmatic, the linguistic and the empirical, and theory and observation. *See* CONSEQUENCES OF PRAGMATISM, *supra* note 45, at xviii.

83. *Consequences of Pragmatism, supra* note 45, at xviii.

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extra-linguistic, factual component. Analytic statements, such as the theorems of mathematics and logic, are true by virtue of linguistic meanings or logical form alone. They fall into the lower echelon of true sentences because they convey truths about the conventions of language or about logical form; about the world, however, they “say nothing.” In the case of synthetic statements, the factual component determines the truth of the statement. Synthetic statements, such as the laws of physics and biology, fall into the upper echelon; they are true because they correspond to the world.

B. Undermining Epistemological Foundationalism

In *From a Logical Point of View*, published in 1953, the pragmatic philosopher W.V.O. Quine challenged epistemological foundationalism in the Kant-Descartes tradition by attacking the analytic/synthetic distinction itself. Quine begins with a devastating attack on traditional attempts to give a satisfactory account of analyticity and argues that such an account is impossible. Quine then rejects the notion underlying synthetic judgments, that each of our statements can individually be tested by experience. Rather, Quine makes the “countersuggestion . . . that our statements about the external world face the tribunal of sense experience not individually but only as a corporate body.” Rejecting the foundationalist metaphor of knowledge as an edifice built on a foundation, Quine offers instead the metaphor of knowledge as a web of beliefs. He suggests that the test for truth is not one of correspondence, as the foundationalists would maintain, but one of coherence. The truth of any statement depends on how it coheres with other established beliefs rather than how that statement corresponds to a unique set of sense data.

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85. See Quine, *supra* note 82, at 36–37, 41.
87. See Quine, *supra* note 82, at 20–37.
88. See id. at 37–42.
89. *Id.* at 41. Quine states:
The totality of our so-called knowledge or beliefs, from the most causal matter of geography and history to the profoundest laws of atomic physics or even of pure mathematics and logic, is a man-made fabric which impinges on experience only along the edges. Or, to change the figure, total science is like a field of force whose boundary conditions are experience.
*Id.* at 42.
For example, suppose someone claims to have refuted the law of gravity and persuades observers to witness an experiment in which a dropped object does not fall to the earth but remains suspended in mid-air. Despite this demonstration, observers are unlikely to reject the law of gravity. Rather, given an experience that is inconsistent with our system of beliefs, we may revise related beliefs in order to maintain consistency within the system. Quine explains:

A conflict with experience at the periphery occasions readjustments in the interior of the field . . . . Reevaluation of some statements entails reevaluation of others, because of their logical interconnections—the logical laws being in turn simply certain further statements of the system, certain further elements of the field . . . . But the total field is so underdetermined by its boundary conditions, experience, that there is much latitude of choice as to what statements to reevaluate in light of any single contrary experience.91

Since we choose which beliefs to revise based upon pragmatic considerations, we are unlikely to revise fundamental beliefs that will have a rippling effect throughout the entire system. The law of gravity is so deeply embedded in our structure of beliefs and so many other beliefs depend on it that we are reluctant to abandon it in the face of a single recalcitrant experience. We would likely revise other beliefs concerning what we were witnessing. Thus, we might wonder whether invisible wires are suspending the object or whether we are being misled by some other ingenious trick that creates the illusion. There is no single belief, such as the law of gravity, that is uniquely associated with this event that we are required to reject as being false.

It follows as a corollary from this position that no statement is true in any absolute sense and that any statement is subject to revision.92 We could reject even axioms of geometry, such as a straight line is the shortest distance between two points or arithmetic truths such as “15 + 36 = 51.” We choose to adhere to these beliefs because their rejection would entail massive changes throughout our entire system of beliefs, not because these statements display some epistemic quality that guarantees their truth.

Conversely, any statement may be held true come what may if we are willing to make enough adjustments within our system of beliefs.93 For example, the early astronomer Ptolemy conceived of a geocentric universe, with a stationary earth in the center and the sun and planets

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91. See Quine, supra note 82, at 42–43.
92. Id. at 43.
93. See id.
rotating around the earth in perfect concentric circles. As centuries passed, inconsistencies in observation challenged this system. Ptolemaic astronomers responded by introducing increasingly elaborate conceptual modifications to the basic theory. When Copernicus introduced a heliocentric theory, all of the deviations from the basic geocentric theory were explained by the simple hypothesis that the sun was in the center of the solar system and the earth revolved around the sun in an elliptical orbit. Still, the Copernican theory was not able to predict the movement of the planets in a way that was demonstrably superior to the Ptolemaic theory. Ptolemaic theory remained accurate so long as further complications were added to the theory. What finally convinced the scientific community to adopt the Copernican theory was the pragmatic consideration of its simplicity and elegance. Nothing, however, prevented science from maintaining the Ptolemaic theory if scientists were willing to fill the entire sky with an immense and unwieldy conceptual gadgetry.

According to Quine, "[o]ur standard for appraising basic changes of conceptual scheme must be, not a realistic standard of correspondence to reality, but a pragmatic standard." Given this view, Quine asserts that it "becomes folly" to maintain the analytic/synthetic distinction. There are two effects of abandoning the distinction. First, there is a blurring of the supposedly distinct boundaries separating the various disciplines of knowledge. Thus, for example, natural science, once viewed as a discrete discipline with unique epistemological status, differs only in degree and not in kind from ancient mythology. We now prefer empirical science to ancient myths or cultural legends, but only because science has proved to be more efficacious for managing the flux of experience. This tenet of post-analytic epistemology is expressed by legal pragmatists who reject the notion that law is a self-contained, autonomous discipline characterized by the

94. The following account is derived from THOMAS S. KUHN, THE COPERNICAN REVOLUTION (1957) and THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962).
95. See Quine, supra note 82, at 79 ("Elegance can make the difference between a psychologically manageable conceptual scheme and one that is too unwieldy for our poor minds to cope effectively. Where this happens, elegance is simply a means to the end of a pragmatically acceptable conceptual scheme.").
96. Id.
97. Id. at 43.
98. See id. at 20.
99. See id. at 44–45.
100. See id. at 44. Einstein’s theory and Homer’s gods are on the same footing as “neither better nor worse except for differences in the degree to which they expedite our dealings with sense experiences.” Id. at 45.
artificial use of reason, peculiar to law as opposed to other fields.\textsuperscript{101} The second effect of abandoning the analytic/synthetic distinction is the abandonment of a foundationalist epistemology and "a shift toward pragmatism."\textsuperscript{102} The following section explores this shift toward epistemological pragmatism.

C. A Pragmatic, Coherentist Epistemology

One implication of a coherentist epistemology is that all knowledge is radically pluralistic and relativistic. That Quine's position seems to lead to radical skepticism or irrationalism is clear and continues to be a popular interpretation of Quine.\textsuperscript{103} The pluralist argues that Quine paints "a picture of all inquiry as a more or less useful kind of myth making."\textsuperscript{104} Under a pluralistic conception of knowledge, we construct many different versions of the world, those of science, of common sense, music, literature, but none of these versions is closer to reality or a more accurate representation of it than others. There are as many versions of reality as we wish to construct and find to be useful.\textsuperscript{105}

From extreme pluralism and relativism, it is a single step to radical and nihilistic skepticism.\textsuperscript{106} If all knowledge is a social construct, including our immediate knowledge of the world, then it follows that we can never say anything true about the world nor hope to describe the world accurately. Since all that passes for knowledge is a mental

\textsuperscript{101} Critical pragmatists often invoke emotion, introspection, and personal narratives in support of their positions. See, e.g., Voices of America, supra note 55, at 1331 (using eclectic methods of personal experience, emotion and desire alongside logic and analysis in arguing against discrimination based on accent); see also Singer, supra note 6, at 66-69. On the other hand, prudential pragmatists also acknowledge the same insight. For example, Judge Posner has stated that law is "a mixture of applied logic, rhetoric, moral and political philosophy, economics, and familiarity with a specialized vocabulary and a particular body of texts, practices, and institutions." See Richard A. Posner, Conventionalism: The Key to Law as an Autonomous Discipline?, 38 U. TORONTO L.J. 333, 345 (1988) [hereinafter Conventionalism]; see also Posner, supra note 39, at 762. To be sure, other developments, such as application of other fields, especially economics and philosophy, to law, the diversity in the composition and political beliefs of current law faculties, and a series of setbacks, including a flawed bankruptcy code, have all contributed to the decline of law as an autonomous discipline. See id. at 766-67, 769-70. No doubt the political turmoil and social upheaval of the 1960s also had some influence. See Mark Tushnet, Critical Legal Studies: A Political History, 100 YALE L.J. 1515, 1530-34 (1991).

\textsuperscript{102} See QUINE, supra note 82, at 20.

\textsuperscript{103} CHRISTOPHER HOOKWAY, QUINE 51 (1988).

\textsuperscript{104} See id.

\textsuperscript{105} See id. at 52.

\textsuperscript{106} ERNST CASSIRER, LANGUAGE AND MYTH 7 (Susanne K. Langer trans., 1946) ("[I]t is but a single step to the conclusion which the modern skeptical critics of language have drawn: the complete dissolution of any alleged truth content of language, and the realization that this content is nothing but a sort of phantasmagoria of the spirit.").
construct that has no necessary tie to the external world, objective knowledge that actually represents states of affairs in the world is, on this view, impossible.

1. Skepticism and Indeterminacy

As articulated by modern thinkers, radical skepticism includes the view that language is radically indeterminate. This view is advanced by such modern philosophers as Jacques Derrida, and is a major feature of modern critical scholarship. Under the foundationalist or “picture theory” of language, the meaning of language is fixed and determinate. Indeed, the “picture theory of language,” developed by Bertrand Russell and Ludwig Wittgenstein, asserted that synthetic statements actually provide logical pictures of reality whereas analytic statements provide pictures of the logical form of language. Once we reject the analytic/synthetic distinction, we must also abandon the notion that the meaning of words is a logical picture or fixed by external referents. Instead, under a coherentist epistemology, the meaning of language is determined by the coherence of words with other words or propositions within our socially constructed web of beliefs. Since it is impossible to trace all of the myriad interconnections of words throughout the entire system of beliefs, it is not possible to achieve closure on the meaning of any word or sentence. Thus, according to Derrida and modern critical scholars, the meaning of language always remains indeterminate in varying degrees.

2. Indeterminacy and the Problem of Legitimacy

Earlier, we saw that the rejection of ontological foundations potentially undermines the legitimacy of the traditional model of law. By

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107. Jacques Derrida, a leading skeptical critic of language, argues that the goal of modern criticism should be the deconstruction of all texts, the exposure of the indeterminacy and contingency of purportedly foundational truths. Derrida has been called “the modern father of deconstruction” who “has danced on the graves of all our hallowed certainties.” MODERN MOVEMENTS IN EUROPEAN PHILOSOPHY 113 (Richard Kearney ed., 1986). Derrida argues that every text subverts its own claim to determinacy. Derrida undermines traditional notions of thinking and denies that there is a cleavage between philosophical, rationalist discourse and aesthetic discourse. See Jacques Derrida, Dissemination (1972); Jacques Derrida, Glas (1974); Jacques Derrida, Margins of Philosophy (1972); Jacques Derrida, Of Grammatology (1967); Jacques Derrida, Writing and Difference (1967). Derrida has deeply influenced critical legal scholarship. See, e.g., Crenshaw, supra note 55, (using Derrida’s techniques to expose racism in mainstream legal thought); Peller, supra note 52 (using Derrida’s deconstructionist techniques to critique classic legal thought and some strands of legal realism).

108. See supra note 24 and accompanying text.

109. See Peller, supra note 52, at 1167–68. For further discussion of the indeterminacy thesis in critical scholarship, see infra text accompanying notes 110–20.
rejecting epistemological foundationalism as well, the critical pragmatists raise a second challenge to the legitimacy of the traditional model: the problem of indeterminacy.

Critical legal scholars often assert that in any given legal doctrine, almost every legal rule is opposed by one or more equally applicable counterrules. Since the rule and the counterrules support divergent and often opposite results and since there are no meta-rules determining how to choose the applicable rule, the judge's discretion in choosing which rule to apply, not legal doctrine, determines the outcome of cases.\(^1\) In other variants of this argument, critical legal scholars argue that for every legal rule, there are numerous exceptions that a judge is free to invoke.\(^1\) Moreover, the existence of general principles of constitutional or common law that nullify specific rules potentially renders every legal decision indeterminate.\(^1\)

A second type of argument used by critical scholars is that all legal rules are to some extent open textured or lack closure. This allows significant, even uncontrolled, manipulation by the decisionmaker.\(^1\) Not only are broad legal rules such as "be fair" or "liability is based on fault" plainly ambiguous, but, so are other seemingly clear rules. Professor Duncan Kennedy cites the supposedly clear directive that a contract will be rescinded for mutual mistake going to the "substance" or "essence" of the transaction, but not for a mistake going to a "mere quality or accident" even though that quality may have been the sole reason for the transaction.\(^1\) In the name of this rule, however, courts engage in a balancing of equities, freeing judicial discretion to determine the outcome of the case.\(^1\)

Even the most seemingly clear text, such as the constitutional provision requiring a minimal presidential age of thirty-five, is indeterminate.

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\(^1\) Professor Duncan Kennedy gives the following example from contract law. Agreements that gratuitously increase the obligations of one contracting party are unenforceable for want of consideration unless the judge can find an implied rescission of the old contract and the formation of a new one incorporating the unilaterally onerous terms. This allowed skillful judges to vitiate any contract by accounting for duress in the process of renegotiation, but the rule merely caused confusion when skill was lacking. See Form and Substance, supra note 52, at 1700.

\(^1\) See Singer, supra note 6, at 17.

\(^1\) Joseph Singer cites the example of trespass. No matter how clear we make the rules of trespass, the availability of a vague public policy exception means that a judge can always use the public policy exception to justify any particular case of trespass. See id. at 17–18.

\(^1\) See id. at 14–19; see also Form and Substance, supra note 52, at 1700 (existence of rules and counterrules applicable to identical situations allow judges to manipulate results).

\(^1\) See Form and Substance, supra note 52, at 1700.

\(^1\) See id.
According to Professor Gary Peller, rather than being an intrinsically significant age, the age of thirty-five might have signified a certain level of maturity to the Framers. If so, it is unclear whether the equivalent level of maturity in our modern social universe is attained at the same age. An earlier age might be appropriate if one emphasizes the worldliness of our children in a mass media world, or a later age may be more suitable given the relative lack of social responsibility given to children today. The choice between these and other possible functional interpretations of the constitutional text is indeterminate.

Another argument that critical legal scholars often assert is that legal doctrine is indeterminate because it is incoherent. Law can be incoherent because it embodies circular or contradictory assumptions. For example, in contract law, and elsewhere, law attempts to reconcile the fundamentally contradictory principles of selfish individualism and paternalistic altruism, or individual autonomy and social community, but ultimately only repeats the contradiction in legal reasoning. If laws are radically or even largely indeterminate, then they do not bind the judge. If the law does not bind the judge, then a judge never merely follows the law but always creates it. Rather than enforcing the law, then, the judge is enforcing personal will and acting arbitrarily. Law becomes unjustified coercion and no different from brute force or naked power. The authority of law dissolves into the dictates of a willful tyrant. Under the assumption of radical indeterminacy, law and illegitimate power become inseparable.

3. Indeterminacy and the Need for Reconstruction

Some mainstream legal scholars charge that by rejecting both ontological and epistemological foundationalism, critical legal studies would require us to give up law altogether in favor of a utopia where

116. See Peller, supra note 52, at 1174.
117. See id.
118. Opting for a literal interpretation is no solution to the indeterminacy problem since the choice between “literal” or “functional” interpretation is also indeterminate. See id.
law is unnecessary. Others see a darker consequence. If we give up law, we do not ascend to some utopia, but instead abandon ourselves to anarchism and nihilism. In such a world, “anything goes” and brute force becomes the final arbiter of human affairs.

Critical race scholars have also derided “the Crits’ positive aim . . . to establish a Utopia in which true community would prevail.” For example, Professor Richard Delgado censures critical legal scholars for being too idealistic and “ethereal.” Delgado and Professor Kimberle Crenshaw argue that law, if allowed to serve purely majoritarian goals, may oppress minorities, but minorities have also achieved tangible benefits from law. “A court order directing a housing authority to disburse funds for heating in subsidized housing may postpone the revolution . . . . In the meantime, the order keeps a number of poor families warm.” Critical legal scholars are “condescending and misguided” and “[i]t smacks of paternalism to assert that the possibility of revolution later outweighs the certainty of heat now.”

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121. See, e.g., Phillip E. Johnson, Do You Sincerely Want to Be Radical?, 36 STAN. L. REV. 247, 249 (1984) (critical legal studies leads to a form of “mystical utopianism”); Louis B. Schwartz, With Gun and Camera Through Darkest CLS-Land, 36 STAN. L. REV. 413, 426 (1984) (critical legal studies is a form of “utopianism” that imagines an “impossible Eden”). Indeed, many critical pragmatists seem to have their moments when they dream of a utopia where law is unnecessary. See Singer, supra note 6, at 65 (suggesting that in place of law, we have conversations with each other); Voices of America, supra note 55, at 1333, 1403 (“I conclude with my personal utopian vision, which I believe is also an American utopian vision” and suggesting that by “dismantling the false hierarchies that place one culture over another, it may come to pass that we live together in celebration and peace.”).

122. For a further description of nihilism, see Chow, supra note 6, at 234–35, 284–87.

123. See, e.g., Owen M. Fiss, The Death of the Law?, 72 CORNELL L. REV. 1, 16 (1986) (critical legal studies spells “the death of the law, as we have known it throughout history, and as we have come to admire it”). One response of the legal academy, then, is to shun the critical legal scholars by banishing them from the legal academy. See, e.g., Paul D. Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222, 227 (1984); see also Johnson, supra note 121, at 248 (“If this is all the Critical scholars have to say, why should we bother reading them?”); Schwartz, supra note 121, at 413–15 (critical legal studies cannot be taken seriously). But see Mark Tushnet, Critical Legal Studies: A Political History, 100 YALE L.J. 1515, 1519 (1991):

Law faculties believe that it is generally a good thing to have one (but not more than one) cls advocate in the building . . . . One reason for this degree of acceptance lies in the hierarchical politics of the legal academy. There are now enough cls people at leading law schools that some of the authority flowing from hierarchy has attached to cls work.


125. See Crenshaw, supra note 55, at 1356–57; Delgado, supra note 124, at 305–06.

126. See Delgado, supra note 124, at 307–08.

127. Id. at 305.

128. Id. at 308.
Delgado would enthusiastically embrace certain rules, bureaucracies, and other formal, highly structured, rule-bound environments as useful deterrents against racism.\textsuperscript{129} He distrusts informal, "structureless processes [that] affirmatively increase the likelihood of prejudice."\textsuperscript{130} Crenshaw has noted that the civil rights movement has achieved reforms eliminating most formal public barriers and public symbols of subordination, providing real, if only partial, relief to minorities.\textsuperscript{131} Similarly, some feminists have argued that law can serve the interests of women.\textsuperscript{132} These critical pragmatists acknowledge the need for legal reasoning, law, rules, and formal structures after the first, negative phase of critical legal studies.\textsuperscript{133}

IV. PRUDENTIALISM AND EPISTEMOLOGY WITHOUT FOUNDATIONS

As we have seen, critical pragmatists reject the traditional view that ontological foundations sustain the legitimacy of the law's coercive power. Moreover, by rejecting epistemological foundationalism, some critical pragmatists argue that even if there are objective norms, the tools of legal reasoning are so flawed and manipulable that law is simply the exercise of arbitrary power. While the critique of both forms of foundationalism seems penetrating and is supported by fundamental developments in twentieth century intellectual thought, critical pragmatists themselves acknowledge the need for an alternative account of law to replace the traditional model. If we want to give up on foundationalism without giving up on law, what do we do next?

I turn now to the pragmatists' reconstruction of an alternative model of law without either epistemological or ontological foundations. This part first examines the pragmatists' use of a coherentialist epistemology to restore determinacy to legal reasoning and textual interpretation. I examine epistemology first because pragmatic nor-

\textsuperscript{129} Id. at 318; see also id. at 305:

Even if rights and rights-talk paralyze us . . . . , might they not have a comparable effect on public officials, such as the police? Rights do, at times, give pause to those who would otherwise oppress us; without the law's sanction, these individuals would be more likely to express racist sentiments on the job.

\textsuperscript{130} Id. at 315.

\textsuperscript{131} See Crenshaw, supra note 55, at 1377–78.

\textsuperscript{132} See, e.g., Minow, supra note 64.

\textsuperscript{133} See Voices of America, supra note 55, at 1403 (calling for the "last reconstruction" of law). One critical legal scholar has suggested that some versions of feminism and critical race scholarship are particular forms of critical legal studies that will bear the critical enterprise into the future. See Tushnet, supra note 123, at 1517–18 ("At present one might describe the political location of critical legal studies as occupied by certain feminists ('fem-crits') [and] certain theorists concerned with the role of race in law (critical race theorists) . . . .").
mative theory cannot be understood without first understanding the prudentialists' new coherentist epistemology. In Part V, I suggest that legal pragmatists use the approach developed in connection with legal reasoning as the basis of a pragmatic, deontological approach to normative theory.

A. The Virtue of Prudence

While the rejection of a foundationalist epistemology led certain critical pragmatists to extreme skepticism, others used the new coherentist epistemology to replicate the constraints placed on judges by foundational epistemological theories without creating new foundations. Under this approach, later adopted by Quine himself, prudentialists emphasize that while a coherentist epistemology can lead to skepticism, it also leads to a cautious respect for tradition, existing social structures, and beliefs.134

Virtue I is conservatism. In order to explain the happenings that we are inventing it to explain, the hypothesis may have to conflict with some of our previous beliefs; but the fewer the better. Acceptance of a hypothesis is of course like acceptance of any belief in that it demands rejection of whatever conflicts with it. The less rejection of prior beliefs required, the more plausible the hypothesis—other things being equal.135

An illustration of this approach as the basis of a philosophy of law is provided by the work of Professor Anthony Kronman.136 Kronman assails what he describes as rationalism, or what I have been calling foundationalism—the derivation of principles of justice or programs of reform through reason and abstract philosophical reflection, untainted by an appeal to facts.137 The rationalist emphasis on abstract philosophical reflection as the means for solving legal problems is the very antithesis of prudence.138 Prudence combines both an intellectual

134. QUINE, supra note 82, at 44 (“[O]ur natural tendency [is] to disturb the system [of beliefs] as little as possible . . . .”); see also id. at 46 (discussing conservatism as an element of pragmatism).


137. See Alexander Bickel's Philosophy of Prudence, supra note 136, at 1570.

138. Id. (advocating an approach based on “good practical wisdom”) (quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 23 (1975)). Though Kronman's version of prudential pragmatism draws upon the thought of Bickel and Edmund Burke, see Precedent and Tradition, supra note 136, at 1047–64 (explaining Burke's traditionalism), prudentialism finds its ultimate source in Aristotle. See ARISTOTLE, NICOMACHEAN ETHICS, bk. VI, chs. 5–11 (J.E.C Weldon
capacity and a certain kind of character or temperament.\textsuperscript{139} The intellectual capacity associated with prudence is the capacity to discern the complexity of the existing human and institutional setting and to devise successful strategies to advance favored principles.\textsuperscript{140} The temperamental quality of prudence refers to the sense of respect, an attitude of reverence or even "wonder,"\textsuperscript{141} for complex, historically evolved institutions. Change should always occur within a framework that emphasizes the value of existing institutions.\textsuperscript{142} The prudent person exhibits a sense of modesty, even humility, when considering reform and always adopts the cautious stance of gradual, incremental reform in place of dramatic and radical changes.\textsuperscript{143} Sudden shifts in frameworks, even when justified, are to be viewed with apprehensive concern and only used as a means of last resort.\textsuperscript{144}

The prudentialist respect for existing institutions is greatly deepened by a sense of traditionalism.\textsuperscript{145} Kronman finds contemporary accounts of legal precedent to be inadequate because they all assume a timeless point of view and argue that precedent should be followed only if it satisfies some instrumental end, such as utilitarianism, or a deontological principle such as equality.\textsuperscript{146} Instead, he seeks to explicate the notion that we should honor the past, within limits, for its own sake.\textsuperscript{147}

Drawing upon the work of Edmund Burke, Kronman explains that as human beings, we are biological creatures who share a common

\textsuperscript{139} See Alexander Bickel's Philosophy of Prudence, supra note 136, at 1569.
\textsuperscript{140} See id.
\textsuperscript{141} Id. (quoting ALEXANDER M. BICKEL, REFORM AND CONTINUITY 2 (1971)).
\textsuperscript{142} See id. at 1609-10.
\textsuperscript{143} Kronman draws this lesson from Alexander Bickel. See id. at 1609.
\textsuperscript{144} See id. at 1610; see also QUINE & ULLIAN, supra note 90, at 66-68 (even where the truth is radically remote from our present system of beliefs, prudence and sound judgment counsel a long series of short conservative steps, adjusting our system of beliefs incrementally, rather than one rash leap, which poses the possibility of serious error).
\textsuperscript{145} See Precedent and Tradition, supra note 136, at 1047-68.
\textsuperscript{146} See id. at 1036-47. Contemporary accounts argue that following precedent is desirable for utilitarian reasons because doing so increases the sum total of social welfare by enhancing the law's predictability, conserving judicial resources, and increasing the prestige of legal institutions. See id. at 1038-39. Following precedent also promotes the deontological principle of equality. The judicial system should treat as alike two cases that are in all relevant respects comparable except that one of the cases arises at a later point in time. See id. at 1039.
\textsuperscript{147} Id. at 1043. While all prudentialists may not share Kronman's view that the past desires respect for its own sake, they do share a strong traditionalism. For example, a reverence for tradition is displayed in the work of the philosopher Hans Gadamer, who has influenced prudential pragmatism, see infra text accompanying notes 163-77, as well as in the opinions of Justice Antonin Scalia, a prudentialist judge. See infra text accompanying note 192.
metabolic world with all other creatures. Each generation of all crea-
tures, including human beings, duplicates exactly the biological cycle
of every other generation. Unlike all other creatures, however, human
beings also inherit a culture, a world of artifacts created by earlier
generations, which has outlasted its creators. This cultural world is
marked by two features: it is cumulative and, at the same time, perish-
able. Each generation accumulates and builds upon the culture that
it inherits. This cumulative feature allows humans beings to accom-
plish something unique among all creatures: projects that can span
many lifetimes, such as the cathedrals of medieval Europe. At the
same time, culture is also perishable, not only because we may inten-
tionally destroy it, but because if it is not purposefully maintained and
nurtured, it will eventually fall prey to neglect, decay, and ultimately
ruin. Adopting an attitude of conservation or trusteeship toward
the past, then, is constitutive of our humanity in the first place.

Kronman suggests that lawyers can assume the trusteeship of legal
culture through the development of prudence, the lawyer's supreme
virtue. Prudence can be achieved through the development of judg-
ment, a key but elusive concept, which refers to a combination of cer-
tain intellectual abilities and traits of character. The distinguished
lawyer, sought by clients and admired by peers, possesses more than
rote doctrinal knowledge and argumentative skill. Rather, he or
she is recognized as a person of good judgment, the highest compli-
ment known to the practicing bar.

Good judgment is not reducible to powers of deductive or analytic
reasoning so valued by the traditional model of law. Sound judgments
are neither derived from mechanical formulas nor the result of mathe-
matical proof. Rather, it is precisely those situations where the dic-
tates of deductive reasoning are counterpoised, where logical analysis
seems to pull in many directions or in no direction at all, that judg-
ment comes into play. Yet, at the same time, judgment is also not a
species of intuition, which is non-reflective in nature and brings all
inquiry to a halt. Instead, Kronman argues that judgment is a con-
junction of sympathy and detachment. In choosing between alterna-

148. See Precedent and Tradition, supra note 136, at 1051–54.
149. See id. at 1051–52.
150. See id. at 1052–53.
151. Id. at 1066.
152. See Living in the Law, supra note 136, at 847–61.
153. See id. at 861.
154. See id. at 862 n.44 (citing tributes to lawyers admired by the profession).
155. See id. at 848.
156. See id. at 849.
tives, the person of good judgment takes an internal, sympathetic perspective of what it would be like to live one's life according to one of the posed alternatives. At the same time, he also maintains a certain detachment so as to be able to choose between alternatives. In other words, the truly wise counselor must be at once both compassionate and objective.

The concept of judgment may seem elusive and obscure, but this is troubling only if we adhere to the foundationalist view of legal knowledge and reasoning as primarily deductive and formalistic. Under the traditional model of law, the exemplary practitioner is the lawyer who has mastered existing doctrine and who possesses consummate command of the tools of logical argumentation as well as the mechanical formulas for divining future judicial results. I believe, however, that Kronman's account of judgment is best understood as the application to legal theory of the conservative strand of the new coherentist epistemology, which views our existing legal knowledge as a web of beliefs.

What makes a counselor wise rather than merely clever is a sense of which legal doctrines capture the sense of the enduring, underlying values of the legal community as opposed to legal precedents or doctrines that the legal community seems ready to abandon. To return to the web metaphor, the good lawyer will sense which legal doctrines are relatively centrally located within the web and which doctrines, once at the core, have gradually shifted to the web's periphery. In this way, the prudent counselor will find the confluence between his clients' needs and the interests of the legal community. The wise judge will reach decisions that gain the acceptance and respect of the bench and bar. This cannot be accomplished by the use of abstract reason alone. If anything, the formalistic, deductive reasoning extolled by the traditional model may be insensitive to the complexity and balance of the existing web of beliefs and may dictate results that ride roughshod over principles and institutions that have been honed by human experience.

Good judgment may be the wise counselor's most salient virtue, but, as Kronman acknowledges, good judgment in law is no different from judgment developed and used in other professions or even outside the arena of work in personal relations. In this sense, Kronman's

157. See id. at 851–52.
158. See id. at 852–53.
159. See id. at 866.
160. See id. at 863 ("There are . . . fields of endeavor other than the law in which good judgment is required and that tend, in turn, to foster it. There are also many people who learn good judgment outside the arena of work . . . .").
account of prudential pragmatism shares with critical pragmatism the basic tenet of the new pragmatic epistemology that rejects a rigid demarcation between law and legal reasoning and all other branches of knowledge. Rather than viewing the contingency and contextuality of law as delegitimating factors, then, Kronman views them as virtues of the law. Law becomes the supreme achievement of society and prudent lawyers become society's invaluable counselors.

B. Prudentialism as a Method of Legal Reasoning

The shift to a coherentist epistemology marks a shift from the traditional model of law articulated in Part I of this Article to a pragmatic model. In the sections that follow, I illustrate a pragmatic approach to legal reasoning and textual and statutory interpretation.

1. Logical Argumentation

The shift to a coherentist epistemology has significant ramifications for legal method. It results in a shift from the traditional emphasis on a deductive, syllogistic process to a process that emphasizes coherence with a web of beliefs. This shift in method may have contributed to a perception that pragmatism is an anti-intellectual, ad hoc, instrumentalist approach to law. To the extent that pragmatism emphasizes using arguments based upon weight rather than logical necessity, pragmatism is at odds with traditional views of legal reasoning and does resemble the type of informal approach that we often use in daily life.

Legal pragmatism does not hold that logical, discursive reasoning is no longer appropriate at all, but that it should no longer be considered the exclusive paradigm of legal reasoning. Under the new epistemology, legal reasoning does not necessarily have to proceed in a linear, discursive fashion like the links of a chain. Instead, legal reasoning seeks a result that best coheres with an interpretive context. The relevant important values and beliefs within that context severally cooperate to support the result, not like the links of a chain, but like

judgment than some other endeavors and shows a special tendency to call it forth. See id. Another pragmatist states:

[Kronman] does not show how any of these traits is special to law or helps to distinguish legal reasoning from other practical reasoning. The traits he points to are as important in a business man or politician as in a lawyer or judge . . . [O]ne is left wondering what really are the distinctive attributes of lawyers besides familiarity with legal materials. Conventionalism, supra note 101, at 351–52.

161. Cf. Posner, supra note 2, at 830–36 (suggesting that deductive, syllogistic reasoning is still useful within an overall pragmatic approach to law).
the legs of a chair. Illustrations of this approach, applicable to legal reasoning in general, are provided by cases involving textual or statutory interpretation.

2. Textual and Statutory Interpretation

Prudentialist scholars reject the foundationalist, archeological approach to textual and statutory interpretation that formed part of the traditional model of law in favor of non-foundationalist theories of interpretation. One such hermeneutics, much admired by some prudentialists, has been developed by a leading contemporary philosopher, Hans Gadamer, in his major work, Truth and Method.163

Gadamer acknowledges that interpretation is a creative process in which the interpreter projects a meaning upon the text. At this point, Gadamer confronts the specter of subjectivism: if a reader projects a meaning on the text, what distinguishes interpretation from opportunistic exegesis and idiosyncratic fancy? Like Kronman, Gadamer believes that historical tradition “represents [our] inheritance” and is constitutive of our very identity. We project a future on the basis of the situation that the past has created for us. According to Gadamer, all readers approach a text with certain “prejudices” or “pre-understandings” since we are “thrown” into a given world full of history and tradition. The issues and concerns that we bring to interpretation are not merely our own preoccupation, but are those that have developed within the historical tradition to which we belong. At the same time, the text itself is associated with a certain set of historically generated assumptions.

The reader's context, consisting of his own pre-understandings and the historical and interpretive context of the text, form “interpretive horizons.” The process of interpretation is a fusion of those hori-

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162. See John Wisdom, Gods in Logic and Language, supra note 43, at 195 (in legal reasoning, “the process of argument is not a chain of demonstrative reasoning. It is a presenting and representing of those features of the case which severally co-operate in favor of the conclusion . . . . The reasons are like the legs of a chair, not the links of a chain.”); see also Farber & Frickey, supra note 2, at 1637, 1640–42 (rejecting the tower building metaphor of foundationalism in favor of identifying mutually reinforcing elements of a web of beliefs or values in legal reasoning).


164. See id. at 267 (“A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges.”). See also Georgia Warnke, Gadamer: Hermeneutics, Tradition and Reason 74 (1987).

165. Warnke, supra note 164, at 79; see Gadamer, supra note 163, at 265–307.

166. See Warnke, supra note 164, at 39.

167. See id. at 78.
By this, Gadamer means the integration of one’s interpretation of the text with one’s own circumstances. As a result, the original meaning of the text cannot be differentiated from the meaning of the text for oneself. From this description, we can see that the process of interpretation is historically conditioned, dynamic, dialectical and interactive. For example, compare a current reader of Shakespeare with a reader who was a contemporary of Shakespeare. The current reader has different pre-understandings, including different cultural and intellectual interests. That reader may, for example, attempt a Freudian analysis of Hamlet’s relationship with his mother. At the same time, the perspective or horizon of the text has also changed or evolved through history. A sixteenth century reader of Shakespeare might find diversion in the work of a struggling local playwright. A current reader, at least initially, understands Shakespeare the way his predecessors did, but also brings to the task of interpretation certain assumptions that Shakespeare’s work will deal with abiding human problems and meet high standards of scholarly and aesthetic excellence.

To avoid the danger of unmoored, free-wheeling subjective interpretations by the interpreter, Gadamer insists on the use of traditions, which limit the influence of both the interpreter’s personal beliefs and the interpretive context of the text. Nevertheless, these traditions do not compel complete closure of interpretation. Indeed, the interpreter’s personal beliefs may so overwhelm the interpretive process as to prove decisive. Gadamer responds to this objection by invoking the “hermeneutic circle,” the notion that the individual parts of the text are part of an integral whole. To avoid capricious interpretations, the interpreter must accord the text a presumption that it forms a unity, an internally consistent whole. The interpreter can use this presumption to test the adequacy of the initial projection. One must accord the text an “anticipation of completeness,” a presumption that the text has something to teach us that includes a presumption in favor of the truth of the text. The text is given a certain normative

168. William N. Eskridge, Jr., Gadamer/Statutory Interpretation, 90 COLUM. L. REV. 609, 620 (1990) (A horizon is “the range of vision that includes everything that can be seen from a particular vantage point.”) (quoting GADAMER, supra note 163, at 332).
169. See WARNKE, supra note 164, at 69.
170. See id. at 78.
171. See id.
172. See id. at 80–81.
173. See GADAMER, supra note 163, at 291.
174. See WARNKE, supra note 164, at 83.
175. See id. at 87.
A Pragmatic Model of Law

authority. Only by doing so can one test the adequacy of one's initial projections about the text. 176 Although we accept the provisional truth of any text, including a legal text, the way we interpret the text for any particular situation or case necessarily concretizes and modifies tradition in line with our circumstances. 177 Given these presumptions, the interpreter projects his meaning on the text and then adjusts that projection to take into account the integrity of the text. Thus, for example, an initial projection that a particular statute is remedial in nature can be revised and rejected in light of a more advanced study of the statute and the statutory scheme of which it is a part.

a. The Rejection of Foundationalist Approaches to Statutory Interpretation

Like the critical pragmatists, prudentialist scholars explicitly reject any form of foundationalism as a viable theory of statutory interpretation. Foundational theories are all variants of "originalism," the view that statutory interpretation must proceed to recover some single source embedded in the original statute itself. 178 Current originalist theories emphasize the primacy of the intentions of the drafters ("intentionalism"), the purpose of the statute ("purposivism"), and the text of the statute ("textualism"). 179

In Statutory Interpretation as Practical Reasoning, 180 Professors William Eskridge and Philip Frickey deconstruct each of these foundationalist theories in a manner resembling the approach of critical pragmatists. Intentionalism is based on the flawed assumption that a large group of legislators has a single, discernible intent concerning specific legislation. Recent studies of the legislative process indicate that not only is such an intent often indeterminate, but it may well be nonexistent. 181 Purposivism assumes that legislation is carefully crafted by deliberate, thoughtful legislators to reach specific, purposive results. Modern public choice scholarship indicates that legislation is often the result of a potpourri of conflicting interests created by interest group politics and reelection-minded politicians. 182 Finally, textu-

176. See id. at 86–87.
177. See GADAMER, supra note 163, at 307–41.
178. This term, and its variants mentioned in the text, can be traced to Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204 (1980).
180. Id. at 321; see also Farber & Frickey, supra note 2 (rejecting the use of foundationalism as an adequate account of first amendment jurisprudence).
181. See Eskridge & Frickey, supra note 179, at 326–27.
182. See id. at 334–36.
alism ignores the recent developments in philosophy of language indicating that there is no timeless, objective, correct interpretation of a text. 183 All forms of originalism are incoherent and indeterminate.

b. Dynamic Statutory Interpretation

In place of foundationalism, Eskridge and other prudentialist scholars advocate a pragmatic or dynamic account of statutory interpretation based on a coherentist epistemology that draws heavily from Gadamer's hermeneutics. 184 Dynamic statutory interpretation should seek the result that best coheres with an existing "web of beliefs." That "web" is a set of legal materials consisting of the text of the statute, its history, and current policies and societal values. 185 In order to curb the dangers of unmoored, free-wheeling, and arbitrary interpretation, Eskridge invokes Gadamer's view that tradition plays an important role in constraining the interpreter's consideration of the statute's text and history. 186 However, although the text of the statute and the intent of the drafters are generally given primary importance, dramatic shifts in societal conditions and values may shift weight to current values and policy. In a number of different contexts, these scholars have argued that a dynamic approach offers a better descriptive and normative account of the interpretation of legal texts. 187 These scholars emphasize that textual interpretation is not archeological, deductive and formalistic like the links of a chain, but eclectic, appealing simultaneously to a number of different values in a web of

183. See id. at 340–43.

184. For representative works, see Eskridge, supra note 168; see also William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. PA. L. REV. 1479 (1987) [hereinafter Dynamic Statutory Interpretation]; Eskridge & Frickey, supra note 179.

185. See Eskridge & Frickey, supra note 179, at 348 ("The pragmatistic idea that captures this concept is the "web of beliefs" metaphor. We all accept a number of different values and propositions that, taken together, constitute a web of intertwined beliefs about, for example, the role of statutes in our public law."); Farber & Frickey, supra note 2, at 1641 ("[W]e don't have a tower of values, with free speech somewhere toward the middle, and more basic values underneath. Instead, we have a web of values, collectively comprising our understanding of how people should live."); Dynamic Statutory Interpretation, supra note 184, at 1483.

186. See Eskridge, supra note 168. Eskridge attempts to fashion a guide to the pragmatic interpretation of statutes based upon Gadamer's hermeneutics. As an example, he argues how a deportation statute applied in 1964 by the Immigration and Naturalization Service to deport a Canadian citizen because he was gay might presently be interpreted to avoid such a result. See Boutilier v. INS, 387 U.S. 118 (1967). Eskridge argues that the horizon of the statute has evolved as a result of historical changes in social attitudes as well as the government's own changes in policy and administration of the statute. See Eskridge, supra note 168, at 654–59.

beliefs. Recently, Judge Richard Posner has endorsed this pragmatic approach to legal reasoning.

c. Judicial Assimilation of the New Pragmatic Epistemology as Applied to Statutory Interpretation

A growing cadre of judges, led by Justice Antonin Scalia, seems to subscribe to the conservative strand of the new pragmatic epistemology, especially as applied to statutory interpretation. The following section provides a brief sketch of the views of these judges. Although it focuses on the views of Justice Scalia, others, such as Judge Frank Easterbrook, also share similar views.

i. An Outline of Justice Scalia’s Jurisprudence

Justice Scalia’s jurisprudence seeks to constrain judicial discretion to the greatest extent possible. Two features of his jurisprudence serve to curtail judicial discretion: his emphasis on textual exegesis in legal interpretation and his traditionalism.

188. Eskridge and Frickey believe that legal arguments resemble the threads of a cable rather than the links of a chain. See Eskridge & Frickey, supra note 179, at 350–52.


190. Justice Scalia has been widely influential although he has been on the Supreme Court for only a short period, and there is already extensive literature on his jurisprudence. See, e.g., William N. Eskridge Jr., The New Textualism, 37 UCLA L. REV. 621 (1990); Daniel A. Farber & Phillip P. Frickey, Legislative Intent and Public Choice, 74 VA. L. REV. 423 (1988); Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 VA. L. REV. 1295 (1990); Symposium, The Jurisprudence of Justice Antonin Scalia, 12 CARDOZO L. REV. 1583–1867 (1990). Justice Scalia draws admiration even from those who find his views troublesome. See, e.g., Eskridge, supra this note, at 690.

191. See, e.g., Thompson v. Thompson, 484 U.S. 174, 192 (1988) (It is “dangerous to assume that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor.”); see also Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 863 (1989)(“[T]he main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.”); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1180 (1989) (favoring rules over balancing tests because “[o]nly by announcing rules do we hedge ourselves in”).
Justice Scalia believes that the actual text of a statute, as opposed to its legislative history, is the only legitimate source of statutory interpretation.\textsuperscript{192} "If the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity."\textsuperscript{193} He states:

The meaning of terms on the statutebooks ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the \textit{whole} Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any \ldots historical and legislative material \ldots or all of it combined, to lead me to a result different from the one that these factors suggest.\textsuperscript{194}

Justice Scalia's approach is at odds with much current Supreme Court practice. Under the traditional intentionalist approach, the meaning of any statute is determined by the intentions of the legislative body.\textsuperscript{195} The intent of the legislators is fixed as of the time the statute was enacted and the goal of the interpreter is to recover that buried meaning through the "archeological" approach of reconstruct-

\begin{footnotesize}
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\item \textsuperscript{193} INS v. Cardoza-Fonseca, 480 U.S. 421, 452 (1987).
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ing legislative intent. Although statutory language is strong evidence of legislative intent, the actual intent may be beyond or behind the statutory language and may be accessed through its legislative history. Under this approach, the Supreme Court often engages in exhaustive review of legislative history even though the Court already has found the statutory text to be clear. Occasionally, the Court will use legislative history to trump a clear statutory text.

Justice Scalia rejects the archeological approach for a number of reasons, including epistemological reasons that are anti-foundationalist. He notes that the intentionalists' use of legislative history presumes the possibility of recovering a collective legislative intent. This approach is flawed because the very concept that the entire body of Congress with 535 members entertained a single collective intent is incoherent. Moreover, legislative intent is indeterminate. Even assuming a collective legislative intent, it seems impossible to discern this intent with any degree of reliability through the study of legislative history. Justice Scalia's views are forcefully presented in numerous opinions.

For example, in Wisconsin Public Intervenor v. Mortier, the Supreme Court held that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") did not preempt state regulation of pesticides. Perusing the statute's legislative history, the Court found that because the two principal congressional committees responsible for the bill disagreed over whether the FIFRA preempted the field, pre-emption was not established by the clear and manifest intent of Congress and therefore did not lie. Justice Scalia concurred in the judgment, but argued that the structure of the statute and its text settled the preemption issue. Examining the structure of the statute, Justice Scalia reasoned that if there were field preemption then the statute

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196. See, Aleinikoff, supra note 32, at 21.
197. See id. at 22–23.
198. The classic example is Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (finding an exception based upon legislative history despite unequivocal statutory language).
199. "That a majority of both houses of Congress . . . entertained any view with regard to [interpretive] issues is utterly beyond belief. For a virtual certainty, the majority of Members were blissfully unaware of the existence of the issue much less had any preference as to how it should be resolved." Eskridge, supra note 190, at 652 n.118 (quoting Antonin Scalia's speech on use of legislative history); see also Pennsylvania v. Union Gas Co., 109 S. Ct. at 2296 ("It is [not] our task . . . to enter the minds of the Members of Congress—who need have nothing in mind in order for their votes to be lawful and effective . . . ").
202. See 111 S. Ct. at 2484.
would not be understood as restricting certain state activities, but as authorizing certain types of local regulation. Justice Scalia would have concluded all inquiry at this point without proceeding to pour over the legislative history.

Nevertheless, Justice Scalia turned to an examination of legislative history to illustrate his point about the dangers of its use as an interpretive aid. Turning to the reports of the House Agriculture Committee and the Senate Agriculture Committee, he found that they both clearly supported the conclusion that the FIFRA did preempt the field. The Senate Commerce Committee proposed an amendment to the bill, giving local governments the authority to regulate pesticides beyond state and federal requirements. The Senate Agriculture Committee rejected this amendment. If anything, then, the statute’s legislative history supported a result opposite to that reached by the majority.

According to Justice Scalia, all of this may be an indication of what the committees thought, but it says nothing about what Congress as a whole thought. It is unlikely that the members of Congress even read the lengthy committee reports, totaling almost 200 pages, much less pondered the specific issue of field preemption. While there was at least a vote in the Senate on the amendment by the Senate Commerce Committee to permit local regulation, it is impossible to determine why it was rejected. Senate members might have disagreed with the Commerce Committee’s proposed policy, might have thought the amendment superfluous, might have been unaware of the whole dispute, or three different minorities had each of these respective reasons. What Congress as a whole may have intended

[w]e have no way of knowing; indeed, we have no way of knowing that they had any rational motive at all. All we know for sure is that the full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that the text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law.

Justice Scalia also has argued that the primary materials of legislative intent often are unreliable evidence of congressional intent. Com-

203. See id. at 2488.
204. See id.
205. Id. at 2489 (quoting S. Rep. No. 92–970, at 27).
206. See id.
207. See id.
208. Id.
committee reports only indicate at best the views of a few members of Congress as opposed to the entire body. Legislative materials often are written by committee staff members, not legislators, and are rarely read. Individual legislators or staff members may manipulate legislative materials to accommodate lobbyists or interests groups by strategically planting directives on how certain issues are to be interpreted, even when these groups have failed to gain a majority vote on the issue. Statements made on the floor during debates are more apt to represent the views of individual legislators, rather than the consensus of the entire legislative body. Judicial use of legislative history will only encourage the bar to engage in a time consuming and wasteful expenditure of resources. Recent public choice scholarship in political science adds fresh support for this view. Justice Scalia finds additional support for his rejection of legislative history in views that he claims to derive from the Constitution. When a court inter-

209. See id. ("Assuming that all the members of the three committees in question . . . actually adverted to the interpretive point at issue here—which is probably an unrealistic assumption—and assuming further that they were in unanimous agreement on the point, they would still represent less than two-fifths of the Senate, and less than one-tenth of the House. It is most unlikely that many Members of either chamber read the pertinent portions of the Committee Reports before voting on the bill . . . ."); see also Green v. Bock Laundry Mach. Co., 109 S. Ct. 1981, 1994 (1989) (no more than a handful of members of Congress could have been aware of interpretive issue).


211. See id.

212. See id.

213. See INS v. Cardoza-Fonseca, 480 U.S. 421, 453 (1987) ("I am concerned that [the Court’s use of legislative history] will be interpreted to suggest that similarly exhaustive analyses are generally appropriate (or, worse yet, required) in cases where the language of the enactment at issue is clear.").

214. Justice Scalia’s skepticism of the fiction of a single legislative intent is bolstered by recent public choice theory, which casts into considerable doubt the accuracy of any prediction of how legislators would have voted. Rather than rational and deliberate, the process of legislative choice is seen as the unpredictable outcome of a potpourri of conflicting interests of lobbyists and reelection minded politicians. See Farber & Frickey, supra note 190 (describing public choice theory). Some scholars believe that public choice theory undermines the legal process school, which emphasized a rational, deliberate purpose behind statutory enactments. See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1414–15 (tentative ed. 1958) (unpublished materials). Professors Farber and Frickey argue that the conclusions of public choice theory do not require that we completely abandon legislative intent as an interpretive aid. See Farber & Frickey, supra note 190, at 430–35.

215. Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2490 (1991) ("[T]he full Senate adopted the text that we have before us here, as did the full House, pursuant to the procedures prescribed by the Constitution; and that text, having been transmitted to the President and approved by him, again pursuant to the procedures prescribed by the Constitution, became law."); see also Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) ("Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for a bicameral vote upon the text of a law and its presentment to the President.").
interprets a duly enacted legislative text, rather than plumbing legislative history, the court remains faithful to the bicameralism and presentment requirements of Article I of the Constitution. Moreover, under a textualist approach, a court adheres to a constitutional principle of separation of powers, which forbids the judiciary from engaging in lawmaking and thus usurping the legislative power entrusted to a bicameral legislature and an executive overseer. Where judicial inquiry is free to scour through a voluminous set of legislative materials, the court will inevitably find some snippet to advance whatever position it happens to advocate. The use of legislative history greatly increases the likelihood that judges will substitute their own views for those of the legislature, usurping legislative power and subverting the democratic process.

b. Traditionalism

Justice Scalia’s views on legal reasoning also are characterized by a deep respect, even reverence, for traditionalism. Justice Scalia’s traditionalism is most prominently displayed in the area of constitutional adjudication, but, as we shall see, it is a underlying feature of his overall jurisprudence.

A good example is Burnham v. Superior Court. Burnham, a New Jersey resident, was served with a divorce petition while briefly in California for a business trip and visit with his children, then living with his estranged wife. He moved to quash the summons on the ground that the California courts lacked personal jurisdiction over him.

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216. See U.S. Const. art. I.
217. See Begier v. IRS, 110 S. Ct. 2258, 2269 (1990) (Scalia, J., concurring) (criticizing the majority opinion for “scouring the legislative history for some scrap that is on point (and therefore ipso facto relevant, no matter how unlikely a source of congressional reliance or attention)’’); see also Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol’y 59, 62–65 (1988) (when courts move away from statutory text, judicial discretion and hence judicial power is greatly increased).
218. See, e.g., Chisom v. Roemer, 111 S. Ct. 2354, 2376 (1991) (Scalia, J., dissenting) (“When we adopt a method that psychoanalyzes Congress rather than reads its laws, when we employ a tinkerer’s toolbox, we do great harm . . . . Our highest responsibility in the field of statutory construction is to read the laws in a consistent way, giving Congress a sure means by which it may work the people’s will.’’). When Congress has created an executive agency and has committed authority to the agency to resolve statutory ambiguities, the Supreme Court must extend great deference to the decisions of the agency. See Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516. For a discussion of constitutional problems associated with judicial deference to administrative decisions, see Sanford N. Caust-Ellenbogen, Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era, 32 B.C. L. Rev. 757 (1991).
220. Id. at 2109.
because he lacked "minimum contacts" with the state as required by due process. Writing for a plurality, Justice Scalia examined the practice of "tag" jurisdiction and concluded that such a procedure has long been part of the traditions of American jurisdictional practice. He found that "[d]ecisions in the courts of many States in the 19th and early 20th centuries held that personal service upon a physically present defendant sufficed to confer jurisdiction, without regard to whether the defendant was only briefly in the State or whether the cause of action related to his activities there." Having found that tag jurisdiction was consistent with tradition, Justice Scalia abruptly ended all further judicial inquiry. He stated:

We have conducted no independent inquiry into the desirability or fairness of the prevailing in-state service rule . . . ; for our purposes, its validation is its pedigree, as the phrase "traditional notions of fair play and substantial justice" makes clear . . . . Where . . . a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal for the judgment that it is "no longer justified." [A] doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets the standard.

Subsequently, Justice Scalia suggested that tradition has nearly dispositive weight in constitutional adjudication. In Schad v. Arizona, a jury convicted Schad of first degree murder. Under Arizona criminal law, first degree murder was defined as either premeditated murder or murder committed during a felony. Arizona did not consider premeditation or the commission of a felony to be independent elements of first degree murder, but treated both as a means of satisfying the requirement of mens rea. Thus, the jury instruction did not require the jury to agree on whether Schad committed premeditated murder or felony murder, but allowed the jury to find that he committed either offense. Schad complained that it was possible that only six jurors believed that he intended to kill and six believed that he was

221. See id.
222. See id. at 2109-13.
223. Id. at 2111.
224. Id. at 2116-17; see also Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2748 (1990) (Scalia, J., dissenting) ("[A] venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle . . . devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed.").
participating in a robbery.\textsuperscript{227} He argued that procedural due process required a unanimous jury verdict on one of the alternative theories of first degree murder.

In a plurality opinion, Justice Souter reasoned that the defendant's ultimate complaint was that premeditated murder and felony murder were two separate crimes and not alternative elements of the single crime of first degree murder.\textsuperscript{228} The Court, then, had to consider the scope of due process limits on the authority of a state to define criminal conduct.\textsuperscript{229} The plurality first found that Arizona's approach was consistent with a long tradition of state court practice.\textsuperscript{230} This tradition was strong evidence that this practice comported with procedural due process, but Justice Souter added "neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack."\textsuperscript{231} Justice Souter then turned to a critical examination of whether the two mental states involved were morally equivalent and concluded that they were.\textsuperscript{232} In his concurrence, Justice Scalia argued that the plurality should not have inquired into the fundamental fairness of the Arizona statute.\textsuperscript{233} The Court should have halted all judicial inquiry after identifying the state law tradition treating first degree murder as a single offense:

It is precisely the historical practices that define what is "due [process]." "Fundamental fairness" analysis may appropriately be applied to departures from traditional American conceptions of due process; but when judges test their individual notions of "fairness" against an American tradition that is deep and broad and continuing, it is not the tradition that is on trial, but the judges . . . . Unless we are here to invent a Constitution rather than enforce one, it is impossible that a practice as old as the common law and still in existence in the vast majority of States does not provide that process which is "due."\textsuperscript{234}

In support of this approach, Justice Scalia explained, "I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American peo-

\textsuperscript{227} See 111 S. Ct. 2491, 2506 (1991) (Scalia, J., concurring in part).
\textsuperscript{228} Id. at 2496.
\textsuperscript{229} Id. at 2497.
\textsuperscript{230} See id. at 2502.
\textsuperscript{231} Id. at 2503 (quoting Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991)).
\textsuperscript{232} See id. at 2503–04.
\textsuperscript{233} See id. at 2506–07.
\textsuperscript{234} Id. at 2507.
ple, rather than those favored by the personal . . . philosophical dispositions of a majority of this Court.\textsuperscript{235}

Justice Scalia set forth the limits of traditionalism in \textit{Pacific Mutual Life Insurance Co. v. Haslip}.\textsuperscript{236} A jury found an insurance company liable for fraud and awarded a number of policy holders punitive damages against the company. At issue before the Supreme Court was whether the award of punitive damages violated due process. The majority opinion found no due process violation for two reasons. First, the Court found that awarding punitive damages has a long pedigree in the history of Anglo-American practice and had consistently withstood due process attacks in both state and federal court.\textsuperscript{237} Nevertheless, the Court continued, “This, however, is not the end of the matter. It would be just as inappropriate to say that, because punitive damages have been recognized for so long, their imposition is never unconstitutional.”\textsuperscript{238} The Court then engaged in a critical examination of awarding punitive damages and found that it satisfied the “fundamental fairness” test of due process.\textsuperscript{239}

In his concurrence, Justice Scalia asserted that the long history and tradition of awarding punitive damages was conclusive of the due process issue. “[A] process that accords with such a tradition . . . necessarily constitutes ‘due process’. . . .”\textsuperscript{240} Once the Court finds that a challenged practice accords with tradition, the Court should find the practice constitutional unless it is prohibited by the clear meaning of textual provisions of the Constitution, such as the Bill of Rights, that are “thought to have some counterhistorical content.”\textsuperscript{241} If a tradition is not so prohibited, the Court should refuse to conduct an independent inquiry into the fairness or reasonableness of the practice.\textsuperscript{242}

From \textit{Pacific Mutual Life} and other cases\textsuperscript{243} emerges a general approach to the role of tradition in informing the meaning of ambigu-

\textsuperscript{237.} \textit{Id.} at 1043.
\textsuperscript{238.} \textit{Id.}
\textsuperscript{239.} Justice Blackmun’s majority opinion found that fundamental fairness was satisfied because the jury’s discretion in awarding punitive damages was limited by (1) the guidance provided to the jury by the court’s jury instructions and (2) the availability of judicial review of the damages award. \textit{See id.} at 1043–46.
\textsuperscript{240.} \textit{Id.} at 1047.
\textsuperscript{241.} \textit{Id.} at 1054.
\textsuperscript{242.} \textit{See id.} at 1052. Unfortunately, according to Justice Scalia, the Court had recently departed from a tradition and historically based analysis to a balancing test in which the Court independently determines the fundamental fairness of a questioned practice. \textit{See id.}
ous constitutional text.244 In practice, this appeal to tradition results in a two step inquiry. First, Justice Scalia would determine whether the practice was consistent with tradition. In determining the relevant tradition, Justice Scalia would “refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”245 Then, Justice Scalia would determine whether any clear textual command of the Constitution prohibited the tradition. If the answer is no, the challenged practice is necessarily constitutional.246

From this brief sketch of Justice Scalia’s jurisprudence, he emerges as a prudentialist judge in the mold of Burke and Bickel. To complete this sketch, I continue to examine his views in light of some recent critiques suggesting that Justice Scalia’s approach is a return to epistemological foundationalism.

d. Justice Scalia and Epistemological Foundationalism

Commentators acknowledge that Justice Scalia’s rejection of the use of legislative history is essentially an anti-foundationalist argument. Nevertheless, they argue that his approach is simply another, albeit more interesting, form of epistemological foundationalism. As we shall see, however, this characterization of Justice Scalia’s jurisprudence significantly underestimates its sophistication.

i. Textualism’s Objectivity

Commentators have challenged what they describe as the textualists' foundationalist belief in meaning as “an object lurking in the text waiting to be ‘discovered’ by the subject.”247 Critics have argued that

244. See id. at 2748.
245. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). In that case, Michael H. attempted to establish his paternity of a child born to a woman married and living with another man. His efforts were precluded by a California statute creating a presumption that a child born to a wife living with her husband is a child of that marriage. This presumption was rebuttable, but only by the husband or wife and then only in limited circumstances. The plaintiff raised a due process challenge to the statute arguing that he had a protected liberty interest requiring an evidentiary hearing. In his plurality opinion, Justice Scalia rejected that challenge. Justice Scalia framed the issue at the narrowest “level of generality”: is there a tradition of allowing adulterous fathers paternity rights? Id. On the other hand, Justice Brennan framed the issue much more broadly as “whether parenthood is an interest that historically has received our attention and protection.” Id. at 139 (Brennan, J., dissenting).
246. See 111 S. Ct. at 1047.
247. See Eskridge, supra note 190, at 691. Others have suggested that the new textualism is a type of “foundational formalism,” see Farber & Frickey, supra note 190, at 425, and that “one fundamental flaw in the Scalia-Easterbrook conception is its assumption that statutes have a legal meaning that exists before the process of statutory interpretation.” Id. at 457; see also Eskridge, supra note 168, at 638 (referring to Justice Scalia as one of the “apparently foundationalist
textualism is based on the false hermeneutical assumption of a clear, immutable text that has a single, neutral, objective meaning. In practice, however, the disagreement among leading textualists themselves about the meaning of legal texts undermines their claim that textualism eliminates judicial discretion. As an example, Professor Nicolas Zeppos cites Newman-Green, Inc. v. Alfonzo-Larrain, in which Justices Scalia and Kennedy, two leading textualists on the Supreme Court, disagreed with Judge Easterbrook on the interpretation of a United States Code provision dealing with a basic matter of appellate procedure. Critics contend that since the text alone cannot resolve all the questions that a court must confront, the court should seek interpretive aids, including legislative history.

While textualists such as Justice Scalia and Judge Easterbrook emphasize textual exegesis as the primary means of statutory interpretation, they do not hold the view that there is an objective meaning buried in the statute waiting to be recovered by the interpreter through a process of scientific discovery. For example, Judge Easterbrook has written, "[j]udges interpret words. And words do not bind the interpreters; rather the interpreters give meaning to the words. . . . [W]ords are mere instruments for conveying thoughts to others. The critical people are the users, not the writers, of words." Justice Scalia has noted that "[s]tatutory interpretation . . . is a holistic endeavor."

248. See Zeppos, supra note 190, at 1323, 1329, 1360-61, 1373.
249. See id. at 1325-26.
252. The issue before the Seventh Circuit was whether a court had authority to dismiss a party whose presence destroyed diversity jurisdiction. Judge Easterbrook found such authority in 28 U.S.C. § 1653 (1988), which provides that "[d]efective allegations of jurisdiction may be amended . . . in the trial or appellate courts." Newman-Green, Inc. v. Alfonzo-Larrain R., 832 F.2d 417 (7th Cir. 1987) (opinion by Easterbrook, J.). On rehearing en banc, the panel reversed, 854 F.2d 916 (7th Cir. 1988), but the panel was subsequently reversed by the Supreme Court. See 109 S. Ct. 2218 (1989). The Supreme Court majority rejected Judge Easterbrook's reading of § 1653 but found authority for the power to dismiss in Rule 21 of the Federal Rules of Civil Procedure. While disagreeing with the Court's invocation of Rule 21, Justices Kennedy and Scalia did agree with the majority's interpretation of § 1653. See id. at 2226-27 (Kennedy, J., dissenting, joined by Scalia, J.).
253. Zeppos, supra note 190, at 1330; see also Eskridge, supra note 190, at 682.
If the text does not bind the interpreter, then are legal texts indeterminate and are judges free to interpret legal texts arbitrarily and opportunistically? The textualists must give an account of significant constraints on judicial interpretation of legal texts even if they abandon the positivist notion that meaning inheres in the foundation of the text itself. At the same time, the textualists cannot attempt to restore determinacy by invoking new foundations to replace the old. Otherwise, the solution they propose would be no better than the problem they attempt to remedy. As a result, they seek to restore determinacy without the use of foundations at all.

The textualists seek to impose determinacy by requiring that legal interpretations be consistent with a relatively narrow range of permissible interpretations within a tightly circumscribed context of existing legal materials. According to Justice Scalia, the method for determining meaning of a statute is:

[F]irst, find the ordinary meaning of the language in its textual context; and second, using established cannons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply the ordinary meaning.256

In determining the ordinary meaning of the text, a court is “to read the words of the text as any ordinary Member of Congress would have read them . . . and apply the meaning so determined.”257 Thus, in interpreting a text, the court should apply accepted principles of grammar, diction, syntax, usage and logic used at the time of the text’s enactment. Once the court arrives at an ordinary meaning under this method, it then uses canons of statutory construction in order to see whether the ordinary meaning should be altered. These canons of statutory construction permit the court to adjust the ordinary meaning of the statute against other provisions within the same statute or against the structure of the statute as a whole.258 In addition, these canons allow the court to integrate the meaning of the statute at hand with other statutes subsequently enacted, thus acknowledging the possibility of dynamic statutory interpretation.259 As Eskridge has noted, “Justice Scalia’s holistic approach opens the door for statutes to evolve over time.”260

257. Id.
258. See 484 U.S. at 371.
260. Eskridge, supra note 190, at 668.
Since textualism holds that the meaning of a statute is determined by its coherence with a certain set of interpretive materials, it should be clear that the textualists do not believe that they are excavating a single objective meaning embedded in the text as their critics sometimes charge. Rather, the textualists fully understand that they are constructing meaning in the very act of interpretation. Justice Scalia simply disagrees about what is the relevant interpretive context and he attempts to define the context as narrowly as possible to constrain judicial discretion to the greatest extent possible.

Since statutory interpretation involves finding a coherence of meaning with the other elements of the interpretive context, it should also be clear the textualism cannot completely eliminate judicial discretion. Textualism contemplates its limited use. Finding coherence between a specific statutory text, the rest of the statute, and other related statutes involves prudentialist judgment of the sort discussed by Professor Kronman. To be sure, the textualists emphasize judicial constraint, but this does not mean that textualist judges, acting in good faith, cannot disagree among themselves in certain cases or that such disagreement undermines the claim by textualism that it eliminates judicial discretion. The textualists never made such a naive claim to that impossible objectivity. Rather, they seek to constrain, not eliminate, judicial discretion.

ii. Nonneutrality

Critics of textualism have also charged that it champions a normative agenda even though it makes the claim, typical of foundationalist theories, that it reaches neutral outcomes. These critics also sometimes charge that textualists' assumption of neutrality is based on the naive foundationalist assumption that there is a cleavage between law and politics. The textualists, however, have never attempted to claim that their position does not prescribe a normative vision for our legal system. Rather, they acknowledge openly that their position is normative, but they argue that they derive these norms ultimately from

262. See supra text accompanying notes 152–58.
263. See supra text accompanying notes 250–52.
264. See supra text accompanying notes 256–59.
265. See Zeppos, supra note 190, at 1331 ("[T]he textualist is being less than candid when he claims that he is guided by neutral rules which are not designed to reach any particular substantive outcomes."). Zeppos insists that the new textualism reflects a normative vision of how government should operate and be structured. See Justice Scalia's Textualism, supra note 194, at 1636.
Textualism acknowledges that normative questions and policy issues are an inevitable part of legal reasoning. Indeed, the textualists' description of legal reasoning as arriving at the ordinary meaning of language involves the use of judgment in a way that does not appear different from the type of judgment used in other fields or even in everyday life. The textualists have no inherent objection to policy or normative principles. What they object to is a judge's use of norms or policies that are personal to the judge.

e. Justice Scalia and Prudentialism

Since Justice Scalia views statutory meaning as coherence with a web of interpretive materials, one might wonder whether there are any fundamental differences between his approach and the dynamic statutory interpretation approach advocated by his critics. Justice Scalia would give the interpreter the least possible play or discretion by limiting the interpreter to a range of permissible interpretations that must cohere with materials within a narrowly circumscribed context: the particular text of the statute, other provisions of the same statute, evolutive factors that can be tied directly to later enacted statutes and relevant rules of language, grammar, and logic. Advocates of dynamic statutory interpretation, such as Eskridge, would consider relevant all that Justice Scalia would consider, but permit more play in interpretation by allowing the interpreter to consider an additional array of factors including legislative history, intervening factual developments, and evolving social norms and public values. Eskridge argues that Justice Scalia seeks only "horizontal coherence," coherence of the text with other parts of the statute or other terms in similar statutes and not "vertical coherence," coherence with legislative history, current social norms and public values. Eskridge's dynamic approach seeks both horizontal and vertical coherence.

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266. See infra text accompanying notes 219–35.
267. See Dynamic Statutory Interpretation, supra note 184, at 1548 (in construing Internal Revenue Code provision conferring tax benefits on charitable institutions “current attitudes about giving tax breaks to racially discriminatory institutions are decisively influenced by the public deliberation . . . since Brown”); see also id. at 1483–84, 1520; Eskridge, supra note 168, at 653–55 (taking into account evolving medical, social, and religious attitudes toward homosexuality in construing immigration statute provision requiring the exclusion of aliens afflicted with "psychopathic personality").
268. Eskridge, supra note 190, at 655.
269. See Dynamic Statutory Interpretation, supra note 184, at 1484 (under a model of dynamic statutory interpretation “when a clear text and supportive legislative history suggest the same answer, they typically will control”); see also id. ("[T]he evolutive perspective is most important when the statutory text is not clear. . . . In such cases, the pull of text and history will be slight, and the interpreter will find current policies and societal conditions most important.").
While Eskridge proposes a cautious model of statutory interpretation, Justice Scalia's model is still more cautious. To the extent that Justice Scalia refuses to consider evolutive developments in social values and adheres steadfastly to existing legislation and linguistic rules, his position is more formalistic than dynamic statutory interpretation. There is, however, no fundamental difference between the epistemology of Justice Scalia and that of these prudentialist scholars. Justice Scalia and Eskridge agree that legal interpretation consists of a coherence with an existing context of interpretive materials, but they disagree about the scope of that context. Eskridge's critique is an effort to expand Justice Scalia's permissible interpretive context; it is an intramural skirmish between proponents who share the same fundamental views about legal knowledge and interpretation.

I have not attempted a general defense of textualism, but only to deflect the charge of foundationalism. Justice Scalia fully understands pragmatism's insights and the new coherentist epistemology. His views are better characterized as those of a prudentialist judge in the mold of Burke and Bickel. Justice Scalia's views may have flaws, and we shall see them presently, but one of them is not the naive sin of epistemological foundationalism.

V. PRAGMATISM AND NORMATIVE LEGAL THEORY

The preceding part has set forth a pragmatic model of legal reasoning that attempts to restore determinacy to legal reasoning without epistemological foundations. An account of legal reasoning, however, is only one part of a model of law. If legal pragmatism is to provide a viable alternative to the traditional model, legal pragmatists must also reconstruct a normative account of law. The normative account serves to explain the basis of our political and moral obligation to obey law at the same time that it distinguishes the legitimate coercion of law from arbitrary power. Under the traditional model, this normative account was provided by ontological foundations for the extralegal or suprapolitical norms of natural law and legal positivism underlying the legal system. In a world without ontological foundations, what is the basis of normative legal theory?

In this part, this Article turns to the question of pragmatic normative theory. I argue that the legal pragmatists have shifted from ontological foundations to deontological arguments in support of underlying norms. As we shall see, the deontological arguments used by the pragmatists rely upon a method drawn from their pragmatic epistemology. Although they now share a similar epistemology, what
ultimately causes deep divisions between the critical and prudential pragmatists are the conflicting background norms that each group advocates for our legal system.

Finally, I suggest a normative approach that incorporates major elements of both critical and prudential pragmatism and attempts to unify the two approaches. Under my approach, liberal traditions play a significant part in the pragmatic model, but these traditions are limited by a recognition that pluralism is a permanent, expanding feature of our society.

A. From Ontology to Deontology in Normative Theory

Under a foundationalist approach, the justification of legal norms consisted in demonstrating that they were sustained by or embedded in some external, ontological ground. Legal pragmatists use what I shall refer to as a deontological approach. Pragmatism uses coherence not only as a theory of truth about general, theoretical knowledge, but also a criterion of "truth" in normative theory.

In normative theory, the pragmatist does not start from an empirical vacuum or from a purely theoretical, ahistorical point of view and then seek to derive abstract, comprehensive principles of political justice, such as norms governing a legal system, for some ideal society. Indeed, this type of rationalist approach would be the antithesis of a pragmatic normative approach. Rather, as Kronman and Gadamer suggest, the pragmatist starts with our own situatedness in a context of historical and social circumstances, with our inheritance of a certain shared public social culture as well as a legal culture, rooted in principles of liberal democracy, that is over 200 years old.

The task for the pragmatist is to arrive at a set of norms for this political and legal culture. The pragmatist should seek to describe a set of norms that interprets or best captures our deep moral sense and that best coheres with the history of our moral and legal experience. Once the pragmatist identifies the deep features of our moral experience, the pragmatist should attempt to capture these features in a set

270. The term "deontological" is commonly used in contrast to "teleological," the view that a norm is justified because it promotes or advances some favored objective. An example of a teleological norm would be classical utilitarianism. In this Article, I contrast deontological arguments with ontological arguments, which seek to compel or demand our acceptance of norms based upon the ineluctable authority of ontology. Deontological arguments do not compel or command our assent, but seek our commitment and allegiance by calling upon us to reflect upon a set of norms. This is the sense of the usage of deontological in the text and it follows the approach used by John Rawls in A THEORY OF JUSTICE (1971) and Ernest Weinreb in NATURAL LAW AND JUSTICE 97–126 (1987).
of normative principles that stakes its claim to our allegiance. The pragmatist draws upon a store of certain fundamental intuitive ideas and norms implicit or latent in the shared public social, political and legal culture of a democratic society. The pull or moral persuasion exerted by the proposed normative theory is not based upon the ineluctable force of logic or the incontestable authority of ontology, but upon the theory's ability to win our commitment based upon its account of the main features of our normative experience. The foundationalist, at least at times, seems to demand or compel our acceptance of normative principles. The pragmatist, to the contrary, seeks, but can never demand, our respect, allegiance, and ultimately our commitment based on a proposed theory that illuminates those features that we recognize as essential to our moral sense and experience. Perhaps the grandest and most ambitious modern example of this type of deontological approach was applied by John Rawls in *A Theory of Justice* to the problem of distributive justice.

To some extent, the approach suggested here is similar to that suggested by Gadamer and much admired by prudentialists such as Eskridge. Gadamer's concept of the "hermeneutic circle" is the notion that the interpreter approaches a text by according the text a certain normative authority, a presumption that it forms an internally consistent whole. Given this presumption, the interpreter projects his meaning onto the text and then adjusts that projection to take into account the integrity of the text. In the context of normative theory, we accord the "text" of our political and legal culture a certain normative authority and we derive an interpretation of this "text" which consists of normative principles. If we apply these norms and find that

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271. This is similar to the process of Kantian constructivism described by John Rawls, who uses this process to arrive at his conception of justice as fairness in *A Theory of Justice*, supra note 270.

272. Rawls argues that in a liberal democracy such as ours, any normative theory must have the support of an overlapping consensus, the support of groups which may have conflicting or even incommensurable views about the value and meaning of life. See John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. Rev. 233, 234–45 (1989) [hereinafter *The Domain of the Political*]; John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 4 (1987) [hereinafter *The Idea of An Overlapping Consensus*].

273. As the text suggests, Rawls' theory of justice is not foundationalist at all. Rawls argues that any theory of justice must capture those features of our moral experience that match our considered judgments. See *Rawls*, supra note 270, at 46–53. In his more recent works, Rawls has suggested that the aim of justice as fairness, the basic conception of justice presented in *A Theory of Justice* is practical; it does not purport to rest on timeless metaphysical and ontological premises about the self, but starts from within a political tradition of a constitutional democracy. See John Rawls, *Justice as Fairness: Political Not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 236 (1985); *The Idea of an Overlapping Consensus*, supra note 272, at 7.

274. See supra text accompanying notes 173–76.
they fail to account for some important feature or provisional fixed points of our legal system, we then make an adjustment in the interpretive norm itself or reject the norm entirely. For example, any proposed set of norms that rejects Brown v. Board of Education and extols Plessy v. Ferguson will be plainly unacceptable to us and we will reject the norms rather than tamper with Brown and its legacy or resurrect Plessy. This account views practical normative reasoning as a dialectical process in which we derive norms and then test them against the background of our moral and legal experience and make adjustments where necessary.

Once we commit our allegiance to a set of norms, these norms serve as a guide to our future conduct. In the context of the legal system, these norms function as the background or interpretive norms for a context of legal materials. Since coherence is the criterion of truth, we seek the result in legal reasoning that best coheres with the background norms we have chosen. Legal reasoning in general, not just statutory interpretation, should seek the result that best coheres with the given norm. For example, Justice Scalia uses tradition as a norm of constitutional interpretation and would uphold practices that are consistent with tradition and not prohibited by a clear textual command of the Constitution.

In identifying interpretive norms, some pragmatists will inevitably emphasize certain features of our legal history and culture over others. This choice of emphasis inevitably involves value judgments. The pragmatists’ ability to gain wide allegiance for favored norms depends on whether those norms achieve a coherence with important, deeply held features of the web of legal culture. This approach to normative theory recognizes that at some point we must inevitably commit our-

275. See Rawls, supra note 279, at 48-51 (describing the concept of reflective equilibrium).

276. Justice Scalia recognizes that no legal theory that rejects Brown is acceptable. One problem with Justice Scalia’s argument that tradition should be the touchstone of constitutional interpretation is that it seems Brown cannot be justified by this approach because Brown seems a bold departure from tradition. Justice Scalia’s response is that we should respect only traditions not prohibited by the clear text of the Constitution and that Brown is explicitly compelled by the clear text of the Constitution through the Equal Protection Clause of the Fourteenth Amendment read in conjunction with the Thirteenth Amendment’s abolition of slavery. See Rutan v. Republican Party of Ill., 110 S. Ct. 2729, 2748 n.1 (1990). He also argues that even if the text of the Constitution is not clear, there was no unchallenged tradition of slavery during the nineteenth century. For a highly skeptical appraisal of such arguments, see Robert A. Burt, Precedent and Authority in Antonin Scalia’s Jurisprudence, 12 CARDOZO L. REV. 1685, 1696 (1991).

277. See Cass R. Sunstein, After the Rights Revolution 158 (1990) (task of identifying background interpretive norms for use in statutory interpretation will be highly value laden).
selves to value judgments. The pragmatist approaches a legal culture that consists of, among other things, cases, statutes, and constitutions. No doubt some of the proposed norms may be derived directly or primarily from written materials. Examples of norms that are traceable directly or indirectly to textual materials are principles of federalism, political accountability, and the protection of disadvantaged groups. Nevertheless, at the meta-level of choosing interpretive norms with which to approach this legal culture, the pragmatist must abandon all hope of finding a textual basis for interpretive norms. Rather, these norms must derive from the store of shared intuitive ideas in the political, social and legal culture. No one, not even Justice Scalia, can escape the need to make value choices at the meta-level of choosing interpretive norms with which to approach law. Despite his assertions to the contrary, Justice Scalia does not derive all of his interpretive norms for the legal system directly or even indirectly from the Constitution. For example, tradition becomes an interpretive norm that Justice Scalia uses as a criterion to decide cases. Justice Scalia may use tradition to inform ambiguous constitutional text, but the Constitution itself is silent on the role of tradition in adjudication and silent on the role of tradition and respect for the past in general. Justice Scalia’s use of tradition is not derived from the text or even the structure of the Constitution, but is formed at the prior, meta-level of the choice of interpretive norms.

This approach is enormously complex and perhaps no one can ever hope to arrive at norms that comprehensively capture all of the salient features of our moral and legal experience. This is perhaps one of pragmatism’s central lessons: we can never hope to achieve the illusory perfection in normative theory promised by foundationalism. At the same time, pragmatism urges us not to abandon ourselves to a radical relativism or anarchism once the illusion of foundationalism is exposed. Some value choices are better than others if the chosen ones exert a stronger claim to our allegiance. This is true although no logi-


279. Some of Justice Scalia’s non-textually based normative views on the Constitution can be gleaned from Antonin Scalia, *Originalism: The Lesser of Evil*, 57 U. Chi. L. Rev. 849 (1989), and in Employment Div., Dept of Human Resources v. Smith, 494 U.S. 872 (1990). In *Smith*, the petitioner, a Native American, argued that a state law outlawing the use of narcotics did not apply to the use of small amounts of peyote in religious rites. Without considering history or tradition at all, Justice Scalia upheld the local law. One commentator has accused of Justice Scalia of interpreting traditions opportunistically in order to implement a substantive agenda that is profoundly anti-egalitarian. See David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 Cardozo L. Rev. 1699, 1715 (1991).
cally compelling or dispositive argument exists for the choice of one norm as opposed to others. As the history and course of our experience changes, so too should these norms. Pragmatic normative theory is evolutive. This account also rejects any rigid demarcations between law and other aspects of our historical and social circumstances.

This account of pragmatic normative theory is not simply a descriptive one but is intended to be prescriptive as well. In a post-foundationalist world where the criterion of truth is coherence, normative theory should seek those norms that best cohere with the "text" of our experience, and we should commit ourselves to those norms. Nevertheless, I recognize that this approach will not appeal to all pragmatists. To some extent, this account requires that normative theory operate within the existing traditions of liberal democracy because they form an integral part of the social and legal culture that we inherit. Some critical pragmatists, particularly some critical legal scholars, reject these traditions. I argue below, however, that a confluence of both critical and prudential pragmatists adopt this pragmatic, deontological approach to normative legal theory.

B. A Taxonomy of Pragmatic Normative Theory

Although legal pragmatism signals a shift in the nature of arguments given to support a given result, rule, or principle, this does not necessarily mean that the substance of the rules or principles themselves change. Although ontological foundationalism has gradually eroded, there continue to be advocates of natural law and legal positivism in a predominantly post-foundationalist legal world. Ronald Dworkin, for example, is often described as an advocate of natural law. And, as we shall see, some critical pragmatists also seem to invoke natural law. In addition we shall see that Justice Scalia strongly believes in legal positivism, although he does not subscribe to ontological foundationalism.

Influential historical and current positions on legal norms can be represented as follows:

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<tr>
<th>Account of Law</th>
<th>Source of Legal Norms</th>
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<tr>
<td></td>
<td>Natural Law</td>
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<tr>
<td>Foundationalist</td>
<td>Locke, Jefferson</td>
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<td>Langdell</td>
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<td>Pragmatist</td>
<td>Delgado, Minow</td>
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<td>Matsuda</td>
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Table 1
As we shall see below, what ultimately divides the critical pragmatists and prudentialists are the conflicting norms favored by each group.

1. *Natural Law Without Nature*

Modern legal pragmatists still adhere to a version of natural law, but unlike the classical natural law theorists, pragmatists do not invoke transcendental foundations. While Locke believed in a divine, ontological basis for natural rights, critical pragmatists, such as Delgado and Matsuda, have argued that certain conditions of oppression permit its victims to speak with privileged insight and special normative authority. The basis for the special moral prerogative of certain voices in society is not grounded in a norm supplied by divine providence but instead is based upon a favored normative principle that exposes the unfairness and injustice of a legal system that systematically masks the exclusion and oppression of certain minority groups. Critical pragmatists seem to advocate a strong normative principle of individual autonomy that disfavors collective coercion of any kind that lacks the full participation or input of all persons subject to the law’s coercive power.

The distinctive feature of natural law is its claim that there are valid extralegal norms to which positive law ought to conform. Just as Locke and the drafters of the Constitution considered positive law that did not embody natural law to be unjust, critical pragmatists reject positive law that does not reflect the excluded voices or viewpoints of minorities and women. Critical pragmatists, then, advocate a new form of natural law, not based on ontological foundations, but based upon deontological principles. Critical pragmatism advocates a form of natural law without nature.

I do not mean to suggest that all critical pragmatists reject all positive law and urge us to return to a state of nature, although some seem to have taken this position in the past. Rather, most critical

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280. See supra note 59 and accompanying text.
281. The justification for this norm is not based on foundations, but on commitment and passion. See Singer, supra note 6, at 52–53.
282. For a further discussion of this point, see Chow, supra note 6, at 296–97.
283. See Weinreb, supra note 12, at 109.
pragmatists, such as the critical race and feminists scholars, probably adhere to a jurisprudence that combines elements of both natural law and legal positivism. I have stressed here the natural law element of the jurisprudence of the critical pragmatists to distinguish their position from the strong legal positivism of prudentialists such as Justice Scalia.

2. Legal Positivism Without Foundations

As a view that traces the legitimacy of social norms to their pedigree in the traditions of the social community, prudentialism espouses a form of legal positivism. Unlike Hobbes, however, the prudentialists do not believe that legal norms or rules issue from a sovereign authorized by a divine source or law of nature. The prudentialists promote a new form of legal positivism without foundations.

The prudentialists' respect for tradition is based on their view that in a world without foundations, no other source can legitimate social norms already given to us by wide public consent and intersubjective agreement. For example,

Gadamer's thesis [is] . . . since we are historically finite, since we have no concept of rationality that is independent of the tradition to which we belong and hence no universal norms and principles to which we can appeal, we ought not even to attempt to overthrow the authority of that tradition.

Other prudentialist philosophers have argued that we cannot “step outside our skins” or traditions to judge those traditions because our traditions define our very notions of what is rational and norma-

285. See supra text accompanying notes 219–35.
286. In THE CONCEPT OF LAW (1961), H.L.A. Hart reformulated legal positivism into its most powerful form. Classical forms of legal positivism suffered from several philosophical flaws. Hobbes' version, for example, invoked a divine ordinance that authorized a sovereign to issue binding commands. See supra text accompanying note 20. Austin's version of legal positivism, in addition to also invoking ontological foundations, suffered from the additional defect that Austin equated law with the power to sanction disobedience with sovereign commands. Under Austin's version, law seemed indistinguishable from naked power or “a gunman writ large.” See H.L.A. HART, THE CONCEPT OF LAW, supra this note, at 79–88. Hart reformulated the Hobbesian and Austinian versions into the view that the basis of the coercive power of law lies in a form of political justification. Laws are rules issuing from some sovereign political source within a civil society. The substantive rules of law, such as criminal laws, are primary rules. These primary rules are deemed legitimate unless they violate some secondary or higher level rules, such as a constitution. See id. at 67.
287. WARNKE, supra note 164, at 136.
288. CONSEQUENCES OF PRAGMATISM, supra note 45, at xix.
tive. They propose that we can have no concept of reason and normative authority outside of those we inherit.289

Justice Scalia adopts a similar position as applied to law. Like Gadamer and Kronman, Justice Scalia believes that whatever norms are embodied in traditions must be the authoritative social norms of our society because they are the cumulative result of incremental and experimental social practices that, over time, have gained widespread social support.290 Given that the historical tradition of our legal system is one of a constitutional liberal democracy, Justice Scalia adheres firmly to a strong version of classical liberalism that emphasizes majoritarian preferences over libertarian interests.291 He believes that the individual is the best judge of his or her own best interest and the best judge of the norms that should govern or guide social life. Indeed, Justice Scalia is almost boastful that we should accept tradition on this basis without any need for further justification or analysis. According to Justice Scalia, the norms embodied in existing social and legal institutions have the authority of longstanding social endorsement and should be considered authoritative. A judge should vindicate tradition whenever possible and no judge should be allowed to upset practices that embody these traditions unless authorized to do so by an authoritative constitutional or legislative enactment.

C. Charting a Middle Course

In the previous sections, I have suggested that although critical and prudential pragmatists share a similar approach to normative theory, they adopt different normative principles because they highlight different features of our moral and legal experience. Once these norms are adopted, they become background or interpretive norms for legal reasoning, which seeks the results that best cohere with a given norm or set of norms. Since they emphasize different norms, the critical and prudential pragmatists will tend to reach different results even though many adopt the same coherentist approach to legal reasoning and interpretation.

Although the prudentialists favor a strong view of classical liberalism and a concomitant endorsement of the majoritarian traditions that have the stamp of social consent and approval, critical pragmatists view these traditions as oppressive to minorities and

289. See id. at xix–xxvii; WARNKE, supra note 164, at 156.

290. See Michael W. McConnell, The Role of Democratic Politics in Transforming Moral Convictions into Law, 98 YALE L.J. 1501, 1504 (1989); see also West, supra note 50, at 653 (explaining positions of conservative constitutional thinkers).

291. For a discussion of classical liberalism, see supra note 16 and accompanying text.
would advocate forms of corrective justice to limit tradition.\textsuperscript{292} To some extent, at least, the conflict between critical and prudential pragmatism is a form of one of the basic, seemingly most unresolvable dilemmas of liberal democracy: to what extent can the libertarian interests of minorities be protected from majoritarian traditions that are oppressive? At this point, it might appear that we have reached an uneasy and perhaps intractable stalemate. One might wonder whether there is any principled way to resolve this dispute between the critical pragmatists and the prudentialists. If the choice is among background norms, how can we ever hope to justify one set of norms rather than another?

Although pragmatism recognizes that knowledge, including legal norms, are socially constructed, this does not mean that we have no way of preferring some norms over others.\textsuperscript{293} In the section that follows, I suggest an approach to normative theory that will develop some criteria by which we can compare background norms.

1. Some Criteria for Evaluating Proposed Norms

As I have suggested, critical and prudential pragmatists actually favor different normative principles, but both support their principles through deontological arguments. Taking this approach, both the critical pragmatists and the prudentialists argue that their favored normative principles emerge from an examination of relevant legal materials. Deontological arguments are persuasive to the extent that they demonstrate that a favored normative principle best coheres with the existing web of legal materials. Given that this is the approach taken by both the critical and prudential pragmatists, I believe that the jurisprudence that has the strongest claim to our allegiance and respect is the one that consists of normative principles that coheres with as much of the existing web of beliefs as possible, including the conflicts and flaws within the legal system itself. A jurisprudential theory that coheres with more of the legal system than a rival theory is a better theory and desires more of our allegiance and respect. On the other hand, a norm that fails to capture some deeply felt features of our moral and legal experience deserves less of our respect and allegiance.

\textsuperscript{292} See supra text accompanying notes 55–76.

\textsuperscript{293} Professor Hilary Putnam makes a similar point in discussing metaphysical realism, the view that there is some substratum of reality independent of human cognition. Even if we accept the view that there is no realism in the strong sense of some bedrock external reality that, through the test of correspondence, will confirm or infirm specific beliefs, this does not mean that all beliefs are equally valid and that some beliefs are not better than others. See HILARY PUTNAM, REALISM WITH A HUMAN FACE 3–29 (1990); see also PUTNAM, supra note 42.
The approach suggested here is similar, but not identical to, the “law as integrity” approach developed by Ronald Dworkin. According to Dworkin’s approach, “propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community’s legal practice.”294 We are to view laws “on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.”295 The law is an “unfolding political narrative,” like a chain novel where the authors of the novel—judges and lawyers—aim jointly to “make this the best novel it can be construed as the work of a single author.”296

The approach suggested here differs from Dworkin’s grand, majestic approach that views the legal system as the product of a single author. Instead, I take seriously the insight of the critical pragmatists that the legal system often reflects a single authorship that purports to speak for its entire constituency, but which actually masks the systematic exclusion of other points of view. Dworkin brusquely dismisses critical scholarship as an embarrassing, even spectacular, failure.297 I argue that an approach that combines tradition with the insights of the critical pragmatists offers a more complete account of the legal system than a single, romantic vision of the legal system.

In the discussion that follows, I suggest some problems with prudentialism and why it is an incomplete approach, one that must be limited or tempered by the insights of the critical pragmatists. In this context, I suggest that the prudentialists’ emphasis on tradition as a constraint on legal reasoning fails to capture or cohere with some essential, deeply felt features of the existing web of beliefs and the social and political institutions that form our society.

2. Tradition and its Limits in a Pluralistic Society

Although any set of legal norms must accord weight to tradition, I suggest that tradition itself must be limited by other, countervailing features of our legal culture. Although we inherit and are conditioned by tradition, this does not logically entail that we must uncritically

294. RONALD DWORKIN, LAW’S EMPIRE 225 (1986) [hereinafter LAW’S EMPIRE].
Dworkin’s account of law has been developed in a series of works and was already apparent in TAKING RIGHTS SERIOUSLY. See DWORKIN, supra note 4, at 66 (“[A] principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question.”).

295. LAW’S EMPIRE, supra note 294, at 225.

296. Id. at 225-29.

297. See id. at 271-75.
accept whatever tradition dictates. The approach of some prudentialists, which accords near dispositive weight to traditions that do not violate some authoritative textual command, is inconsistent with other important features of our legal culture.

a. Tradition in a Pluralistic Culture

Adherence to a strong principle of traditionalism is inconsistent, or at least in deep tension, with the fact of pluralism, a given, permanent feature of democratic societies that will not soon disappear.298 Pluralism assumes that persons will have conflicting, even incommensurable, conceptions of the meaning, value, and purpose of human life.299 A strong principle of traditionalism favors a conception of culture that may be more appropriate for a monolithic society with a homogeneous culture, but seems problematic for a nation marked by an increasing diversity of incommensurable doctrines of both western and non-western religious, philosophical, and moral beliefs. Respect for tradition for its own sake, even where it is not dogmatic or uncritical, may impede the progressive development of a culturally diverse society by clinging to a cultural past that did not value diversity.

b. Perpetuating a Repressive Past

Professor Kronman argues that we should respect, within limits, the past for its own sake. We must respect the past “because the world of culture that we inherit from it makes us who we are.”300 In a pluralistic society, the traditions of culture do not necessarily define the identities of everyone, especially those who have been ignored or oppressed in the past or those who have only recently been admitted to a culture with a long history and tradition. Although Kronman views a failure to embrace an inherited culture as an act of impiety,301 certain historically disenfranchised groups do not commit an act of impiety if they do not welcome the inheritance of a dominant culture that was historically unsympathetic to the diversity and pluralism represented by their ancestors. Traditions may reflect the values of the politically powerful who have engineered a private hierarchy that secures advan-

298. See The Domain of the Political, supra note 272, at 234–45; The Idea of an Overlapping Consensus, supra note 272, at 4.


300. Precedent and Tradition, supra note 136, at 1066. Kronman does argue that respect for the past does not need to become an apology for the status quo. Alexander Bickel's Philosophy of Prudence, supra note 136, at 1608–12.

301. See Precedent and Tradition, supra note 136, at 1066.
tages at the expense of the politically disempowered.\textsuperscript{302} Groups who did not contribute in any meaningful way to the creation of the dominant culture can hardly feel reassured by a view that perpetuates and finds intrinsic value in a past that contains oppressive and even brutal, morally repugnant traditions such as racial discrimination and other forms of intolerable behavior toward certain groups.

c. The Problem of Stability

In a pluralistic society, favoring tradition or a comprehensive, dominant conception of political, social, and legal culture will eventually involve the oppressive use of state power to maintain a single, comprehensive doctrine and overcome pluralism.\textsuperscript{303} The prudentialists seem to give little weight to or totally ignore the arguments of the critical pragmatists. Prudentialist judges will continue faithfully to uphold tradition in case after case even though the traditions of American culture often ignored the interests of minority groups and others interests favored by the critical pragmatists. Each judicial decision favoring tradition becomes a result that entitles its advocate to enforce its dictates by invoking the coercive mechanism of the state. A judicial decision favoring some dominant, comprehensive conception becomes an endorsement of the use of oppressive state power to overcome pluralism and diversity. At some point, the continued use of state power to favor a single, dominant conception in light of an expanding pluralism consisting of intense, deeply felt conflicting conceptions, may risk the stability of the legal system.\textsuperscript{304}

d. The Problem of Social Change

The appeal to tradition also is itself inconsistent with a deeply rooted liberal belief in self-determination and self-transformation. Traditions are essentially backward-looking and do not accommodate change easily or comfortably. Despite the prudentialists' arguments, it seems difficult to understand how we can change the status quo when we are encouraged to view existing institutions with a sense of reverence and even "wonder."\textsuperscript{305} A strong appeal to tradition is especially

\textsuperscript{302} See supra text accompanying notes 62–76.

\textsuperscript{303} See The Idea of An Overlapping Consensus, supra note 272, at 10.

\textsuperscript{304} Rawls believes that any political theory of justice needs to achieve an "overlapping consensus" in order to maintain stability. An overlapping consensus for a political conception exists when it gains the support of opposing religious, philosophical and moral doctrines likely to thrive over generations in a constitutional democracy. See The Domain of the Political, supra note 272, at 241; The Idea of an Overlapping Consensus, supra note 272, at 5.

\textsuperscript{305} See Alexander Bickel's Philosophy of Prudence, supra note 136, at 1569; see also supra text accompanying notes 139–42.
troublesome in light of dramatically changed circumstances and social conditions. Indeed, limiting tradition may, under some circumstances, lead to results that engender more coherence in the legal system. The traditional interpretation of a statute enacted under different social and political conditions may lead to results that are incoherent or irrational in light of modern conditions. Valuing the past for its own sake may be a virtue under some conditions, but it can also become a vice when it locks us into the past when we seek new directions for the future.

The availability of the legislative process is not a complete response to the problem of tradition. Some may argue that no judge can fail to respect a practice or doctrine that has been socially endorsed by tradition and has not been altered by legislation. Yet some traditions simply seem to elude legislative amendment. For example, Professors Crenshaw and Matsuda argue that the traditions of American culture condition members of society to perceive Blacks and other minority ethnic groups in pejorative, demeaning ways. Similarly, Professor Minow argues that society is conditioned to view women only in comparison to a male norm. It seems difficult to envision how such traditions can be altered through legislative means. Moreover, the exclusion of groups from access to power is part of the process that led to dominant conceptions in the first place. In a pluralistic society, there will be intense, deeply felt beliefs by certain groups who do not have ready access to power. Yet this does not make the imposition of a dominant, comprehensive conception and the stifling of pluralism any less problematic.

In true pragmatist fashion, I recognize that none of the observations above can be considered as conclusive, dispositive arguments against the prudentialists’ strong adherence to tradition. On the other hand, if the prudentialists’ seek wide allegiance for their approach to legal theory, they must recognize the need to temper an approach that is in such deep tension, if not direct conflict, with other important features of an increasingly pluralistic society.

306. See Sunstein, supra note 278, at 494.
307. See Crenshaw, supra note 55, at 1370-73 (“Throughout American history . . . various political, scientific, and religious theories, each of which relies on racial characterizations and stereotypes about Blacks . . . have coalesced into an extensive legitimating ideology” and have depicted Blacks as lazy, unintelligent, shiftless, and lascivious); Voices of America, supra note 55, at 1375 (A “nationalist/monocultural” view that holds “people in a nation as radically diverse in accents as ours to one standard of pronunciation is a declaration that this is a nation of one voice. . . . [T]he fiction of a generic American accent implies that this is a white, upper-class nation, and all non-white, ethnic, regional, and lower-class accents are subnormal.”).
308. See supra text accompanying notes 69-76.
All of the modern legal pragmatists discussed in this Article reject both ontological and epistemological foundationalism, essential features of the traditional model of law. I have suggested that legal pragmatism offers an alternative model of law that avoids the untenable philosophical assumptions of the traditional model. The pragmatic model of law contains two distinctive features: a pragmatic account of legal reasoning and a pragmatic approach to normative theory. Most, but not all, legal pragmatists today adopt some version of both features.

Among the critical pragmatists, however, some critical legal scholars reject not only the traditional model of law, but also seem to reject both the normative and epistemological features of the pragmatic model explained in this Article.309 Other critical legal scholars seem to accept the pragmatic approach to normative theory, but reject the pragmatic approach to legal reasoning advocated by the prudentialists in Part IV above. Since both a normative account and an epistemological account are necessary to sustain the legitimacy of law and since some critical legal scholars reject the traditional model and also reject one or both features of the alternative pragmatic model, it becomes difficult to see how law is possible at all for some critical legal scholars.

On the other hand, at least some critical pragmatists, the critical race scholars and critical feminists, seem to accept both the normative and epistemological features of the pragmatic model. For example, at the same time that Professor Delgado argues for the special prerogative of the voice of color, he also maintains a staunch fidelity to the results that are achieved by the application of certain favored positive laws that inhibit discrimination against minorities.310 At the same time, prudentialists, such as Justice Scalia and Professor Kronman, seem to accept both features of the pragmatic model.

If this account of pragmatism is accurate, then modern legal thought has reached a significant new stage in which opponents have finally reached common ground concerning fundamental assumptions or premises. There is a confluence between some critical pragmatists and the prudentialists who now seem to share common fundamental assumptions about the nature of normative theory and the nature of legal knowledge and legal reasoning. The essential debate is no longer at the intractable philosophical or metaphysical level concerning the

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309. See, e.g., Singer, supra note 6. For a further discussion of this point, see Chow, supra note 6, at 255–58.
310. See supra text accompanying notes 125–30.
nature of normative theory and legal knowledge. The debate is not between legal pragmatists and some straw foundationalist, who seems to represent no one with current views on jurisprudence. To a certain extent, many or even most modern legal pragmatists seem to have ascended to common ground concerning these fundamental questions. Those who have not, some critical legal scholars, may soon be eclipsed by those critical pragmatists who have.

Critical pragmatists, then, need no longer take aim at a foundationalism which maintains that law is grounded in external, transcendental foundations and that legal interpretation is the excavation of an objective meaning from a determinate text. Yet, critical pragmatists continue to challenge mainstream legal thought as based upon a false belief in foundationalism and do not seem to appreciate fully that they face a new, more formidable opponent in the prudential pragmatists who have articulated a profoundly conservative theory of law, but without foundations. The prudentialists have already grasped the basic insight of critical pragmatism that there are no external, transcendental foundations that sustain law and have sought to take the next step to justify norms and restore determinacy in legal reasoning, but without the appeal to foundations. The prudentialist is a philosophically more sophisticated opponent than the naive foundationalist and shares common philosophical assumptions held by critical pragmatists while using those assumptions to generate norms that support a profoundly conservative approach to law.

Modern legal pragmatists share similar, if not common, assumptions about the nature of legal reasoning and normative theory. What ultimately divides modern legal pragmatists, then, is no longer an intractable, abstract debate about fundamental assumptions or starting points, but the differing background or interpretive norms that each group favors. I do not suggest that the debate over norms can be quickly or easily resolved. I do believe, however, that modern legal pragmatists have at last reached common philosophical ground and can finally move on to the next step concerning the substance of the norms themselves. In this Article, I have attempted to suggest an approach that might begin this debate by combining elements of the normative vision of both of these groups. This approach charts a mid-

311. See, e.g., Crenshaw, supra note 55, at 1351–52 (arguing that society has reified the contingent assumptions and norms of the white majority and views them as natural, immutable and clothed with an air of necessity); Johnson, supra note 55, at 2015 (arguing that mainstream legal academics maintain that the standard of evaluation of scholarship is based on a “neutral, objective, evaluative standard” and rejecting this as premised on a false foundationalist belief in “certainty and objective truths”).
A Pragmatic Model of Law

dle course that reflects the need to accommodate the tension between respect for tradition and a recognition of a permanent, expanding pluralism.