Constitutional Adjudication as a Craft-Bound Excellence

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Imagine someone pointing to a place in the iris of a Rembrandt eye and saying: “The walls in my room should be painted this colour.”

Wittgenstein

I. INTRODUCTION

A multifaceted debate over constitutional interpretation dominates contemporary constitutional scholarship in the United States. Jurists dispute whether constitutional meaning should be drawn exclusively from the text of the Constitution, restricted to its original meaning or to the ascertain-

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able intent of the Framers, subsumed under political theories showing the structure or aims of constitutionalism, expanded to include Rawlsian, natural law, utilitarian, or other normative principles of justice, or reformed to reflect the evolutionary ascension of moral consciousness in America.

Despite the spectrum of theoretical viewpoints found in this contemporary debate over constitutional meaning, one important group of persons sometimes engaged in constitutional interpretation has largely ignored the debate. Judges, those public officials charged with administering the laws, for whom interpreting laws—including constitutions—is often a necessity, have given the interpretive debate little attention. Some say this judicial


11. This is not to say judges have given it no attention. Some prominent judges have entered the debate, most notably, Supreme Court Justices William Brennan and Antonin Scalia. See William J. Brennan, Jr., “The Constitution of the United States: Contemporary Ratification,” in Sanford Mailloux, eds., Interpreting Law and Literature: A Hermeneutic Reader (Evanston:
silence comes from a predisposition toward judicial activism.12 Contending that many judges legislate from the bench by basing their decisions on personal visions of a just and fair society,13 these critics charge that activist judges ignore the juristic debate because following the true method and restricting deliberation to the true criteria for constitutional interpretation would hinder the achievement of their political agendas.14 Others attribute the silence to "unimaginative legalism,"15 i.e., an unwillingness to bend the slow machinery of common law development to expedite "humane evolutions of legal principle."16 Perceiving the common law method of incremental growth in decisional law as an outworn tradition filled with legal rules diecast under antiquated forms to sustain obsolete concepts of economic and social morality, proponents of this view castigate the courts for undue "restraint,"17 for passive indifference to the moral


13. See McDowell, Equity and the Constitution, xi, 3, 9-11 ("And the Court has been steadily moving into the realm of legislation. Broad decrees 'fashioned and effectuated' for the whole country on the basis of 'equitable principles' are, in essence, judicially created social policies."); Wolfe, The Rise of Modern Judicial Review, 3 ("[T]here has been a gradual but dramatic shift in the character of judicial review. What was once a distinctively judicial power, essentially different from legislative power, has become merely another variant of legislative power."). See also Gary L. McDowell, "Postscript: A Debate on Judicial Activism," in Macedo, The New Right v. The Constitution, 109 (condemning Lochner v. New York, 198 U.S. 45 (1905), and Griswold v. Connecticut, 381 U.S. 479 (1965), as decisions resting only on "personal predilection and political preference," and amounting to "judicial contrivances at war with the Constitution").


underpinnings of the law, as well as to the pressing needs of modern society.  

Another explanation for the judicial silence may be given. Before attributing it to “activism,” “legalism,” “restraint,” or some like term negatively charged with emotive content, we should inquire whether any of the juristic theories fit the practice of judging cases at law. I do not mean here to form an inquiry based on the “old saw” Kant sought to dispel that while something may be right in theory it won’t work in practice. We should not categorically suppose a tension between theory and practice. We should, however, be wary of disharmony in the application of a theory to a practice if the theory rests on considerations external to those that guide the practice.

I want to suggest that there is a difference between constitutional theory and constitutional interpretation. Indeed, there is a difference between constitutional interpretation and constitutional adjudication. Those who theorize about constitutional interpretation aim to discover some fundamental axioms of political morality, or a set of unassailable rules of interpretation that can (or ought to) be used to determine constitutional meaning. This juristic enterprise differs fundamentally from the judicial task of applying the Constitution while deciding concrete cases within the practice of adjudication.

Nearly all who engage in the contemporary juristic debate ignore this difference in practices. They assume that the axioms and rules they identify as fundamental to their inquiries into constitutional meaning are directly transferable and relevant to the practice of constitutional adjudication. This point of view, which I shall call “externality,” explains the judicial silence. Judges, I will argue, pay little attention to contemporary juristic theory because it ill-fits the practice of deciding cases at law. Legal theorists evaluate the results of judicial decisionmaking, and purport to inform courts how to reach “correct” outcomes, by deriving constitutional


meaning from standards or criteria lying outside and determined antecedent to the practice of adjudication; judges, by contrast, only approach questions of constitutional meaning from within the context of, and while participating in, that practice.

Against this externalist trend in contemporary constitutional scholarship, I recommend "internality," where adjudication stands independently of externalist theory, as a craft-bound excellence with objective conditions of mastery reflective of the internal demands of its practice. Influenced by the later philosophy of Wittgenstein, I will argue that legal judgment is so tightly interwoven with judicial practice that we cannot disentangle the results of adjudication from its practice. From the internal point of view, there is no authoritative access to constitutional meaning except as the product of adjudication, and no means to evaluate that product except by internal investigation of judicial practice. It follows that the judicial silence is not part of a complex, multidirectional judicial conspiracy to achieve certain subjective (and inconsistent) political goals, but a reasonable response by practitioners within the craft-bound practice of adjudication for whom the interpretive claims and normative considerations of externalist theory are simply irrelevant and unnecessary.

II. INTERNALITY AND EXTERNALITY

Just as the master house painter knows that the color concepts used by Rembrandt would ill serve the practice of his craft, judges may shun contemporary constitutional theory because they perceive the theories as irrelevant or possibly even harmful to the craft they practice. Adjudication, I want to suggest, is a craft-bound excellence, like ship designing, playing concert piano, novel writing (specific to genre), portrait and landscape painting (adjusted to historical period), historical writing (specific to period and movement), and participating in the game of baseball (actually a multitude of craft excellences: hitting, base-running, pitching, managing, umpiring, etc.). Each craft-bound excellence has objective conditions of mastery reflective of the internal demands of the practice. Some of these conditions are apparent even to the casual observer (failing to make a ship seaworthy, striking the wrong chord, striking out), while the careful student or critic eyes the practice with much keener appreciation of a masterful performance (the allegory of Dionysian impotence in Waiting for Godot, spiritual transcendence in a panoramic landscape representative of the Hudson River School, Horowitz performing Beethoven's "Pathetique," a batter "working" a walk or executing a suicide squeeze).

Yet even the seasoned critic stands as an "outsider" to the craft he evaluates. Working within a craft as a practitioner involves a fundamental-

21. I owe the term "craft-bound excellence" to Professor James F. Ross.
ly different cognitive approach to the craft from the evaluative or descriptive enterprise undertaken by the critic. The practitioner must develop a working knowledge of the conditions of excellence for her craft in order to try to accommodate them in practice. By becoming an artist, novelist, architect, or pianist, she subjects herself to the relevant craft-standards of excellence. The critic, however, sees those conditions of excellence not as conditions to satisfy, nor as the standards by which his work shall be evaluated, but as material for his criticism. While working with that material he, in turn, works within a separate craft containing its own conditions of excellence. The literary critic and the art critic, for example, must answer to the conditions of excellence for the crafts of literary criticism and art criticism, not to the standards that obtain in the specific literary or artistic fields about which they write.

The fundamentally different points of view from which the practitioner and the critic approach a craft lead to two different perspectives on craft excellence. The practice-oriented approach of the practitioner amounts to an internalist point of view. The practitioner develops an understanding of the conditions of excellence for her craft while pressed to meet the internal demands of working within it. Thus the artist acquires a sense of mastery in painting while learning to conform her creative ideals to fit the natural limitations of her medium; the architect comes to understand architectural excellence as she develops competence combining principles of material and mathematics with those of architectural design. Practice and mastery thus relate to one another symbiotically, as the practitioner’s understanding of craft excellence and her sense of working within the internal demands of practice develop concurrently, each reacting to and working upon the other. From the internalist point of view, therefore, the practice of a craft objectively determines its conditions of excellence. The internalist looks no further than to the internal demands and objectives of practice to justify those conditions.

The critic’s understanding of a craft and its conditions of excellence arises in the very different context of working with the material of the craft under the constraints and limitations set by the conditions of excellence regulating his area of criticism. As an outsider to the craft, the critic does not have an experiential understanding of its internal demands. Since the practitioner’s understanding of the conditions of excellence reflects those internal demands, epistemological distance separates the critic from the set of conditions of excellence accepted as objectively valid by practitioners. Nevertheless, the critic can take an “internalist” approach by seeking to apprehend those conditions through careful study of the objective

22. The “material” I have in mind here is the set of conditions of excellence for any craft under critical evaluation. Of course, the critic also uses as “material” for criticism the craft-products of practitioners within the subject craft.
manifestations of the craft practice, and then tailoring his critical appraisal to coincide with or extend the practitioner’s sense of craft mastery.

Critics who substitute external criteria of justification for the conditions of excellence drawn from practice effectively spurn internalism for externalism. The paradigm externalist critique evaluates a craft on the basis of criteria external to its practice. Usually these criteria originate in the critic’s craft, as theoretic viewpoints more or less accepted under the conditions of excellence for that craft. Sometimes the critic straightforwardly denounces practice-orientation, as when John Ruskin set out to rescue the “distinctively political art” of architecture by “extricat[ing it] from the confused mass of partial traditions and dogmata with which it ha[d] become encumbered during imperfect or restricted practice.” More often, the critic assumes his theory reveals the true nature of the craft, including the sense of its practice. Hence, in literary theory, rival explanations of narrative form—structural,24 semiotic,25 and deconstructionist26—seek not to repudiate practice but to unfold its logical structure.

Whether a critic views craft mastery internally or externally matters a great deal. His choice signals acceptance of a particular sense of excellence. Moreover, it marks an orientation in interpretive inquiry that weighs heavily on questions of meaning and linguistic usage. The externalist, whether taking a reformative or a descriptive approach, employs interpretive methodology and criteria drawn from outside the subject craft. He further adopts the linguistic conventions of his craft, engraving them on the craft under evaluation. Marxists, for example, interpret literature and art according to the doctrines of historical materialism, class struggle, and alienation internal to their political philosophy.27

While the externalist emboses interpretive and linguistic theories on the craft he critiques, the critic who takes the internalist point of view studies the practice of a craft to discern the interpretive methods and linguistic conventions used by its practitioners. The internal point of view regards interpretive methodology as a condition of practice. Practitioners of a craft,

on this model, adopt methods of interpretation that respond to the internal demands of their practice. We see this approach repeatedly throughout the history of historiography. The historians of ancient Greece found they could satisfy the demands Homer and Herodotus had set for their practice—to portray reality veritably and artistically—only by supplementing the facts liberally and imaginatively, and by connecting events causally through elaborate inferences.\(^{28}\) Roman historians developed the first rational system of chronology so their histories could, with some assurance of accuracy, document more than contemporary events set against a static, atemporal past.\(^{29}\) Christian historians of the Middle Ages peppered their histories with mythology and miracle in order to explain a world where an anthropomorphemic divinity directly intervened in and piloted human affairs.\(^{30}\) Nineteenth- and early-twentieth-century historians in the United States and Western Europe interpreted history in terms of power, progress, and nationhood, to provide moral justification for the emergence of powerful, modern industrial nation-states.\(^{31}\) More recently, historiography has splintered, as many contemporary historians choose to forego the traditional focus on statecraft and war under the conviction that they can more accurately and richly depict human experience through intellectual,\(^{32}\) social,\(^{33}\) cultural,\(^{34}\) or local history.\(^{35}\) Critics who evaluate histories


\(^{31}\) See John Emerich Edward Dalberg-Acton (Lord Acton), "The Study of History," in *Essays in the Study and Writing of History*, ed. J. Rufus Fears (Indianapolis: Liberty Classics, 1985), 504-05 ("For the science of politics is the one science that is deposited by the stream of history . . . and the knowledge of the past, the record of truths revealed by experience, is eminently practical, as an instrument of action and a power that goes to the making of the future."). Lord Acton argued that histories must be written to show that the modern world, characterized by "the universal spirit of investigation and discovery," distinctly differs from the medieval world, from which the modern age cannot even be said to have come "by normal succession, with outward tokens of legitimate descent." Ibid., 507-08. See also George Bancroft, *The History of the United States of America from the Discovery of the Continent*, ed. R.B. Nye (Chicago: University of Chicago Press, 1966), 39 (contending that history should reflect that the United States was created "for the advancement of the principles of everlasting peace and universal brotherhood"); Leopold von Ranke, *Fürsten und Volker*, ed. W. Andreas (Wiesbaden: E. Vollmer, 1957), 4-10 (characterizing the emergence of modern European nation-states as several manifestations of the Divine will, and leading ultimately to a single European community under God). See generally, Breisach, *Historiography*, 228-67; David W. Noble, *Historians Against History: The Frontier Thesis and the National Covenant in American Historical Writing Since 1830* (Minneapolis: University of Minnesota Press, 1965).


written within each of these methods of historical interpretation must be sensitive to the dependence of the history on the internal demands and conditions of excellence obtaining in the craft of historical writing at the time and place involved.\textsuperscript{36}

Internality further perceives meaning as perforce bound up in practice. Whether the “meaning” is linguistic, historical, artistic, or otherwise, the internalist point of view regards it as a product of craft-bound interpretive acts. Here we find a strong parallel between internalism and the later philosophy of Wittgenstein.

\section*{III. WITTGENSTEIN ON MEANING IN PRACTICE}

In a series of works running from the early 1930s until the end of his lifetime, Wittgenstein emphasized the integration of judgment with practice.\textsuperscript{37} For a whole range of central human activities, he found that

\begin{itemize}
\item Breisach, \textit{Historiography}, 361-78.
\item 36. This point comes across quite strongly in the work of some historians and philosophers of history. For example, Charles William Fornara claims that since the “imaginative recreation and inferential elaboration from the facts” common among historians in ancient Greece was a “necessary consequence of the demands” of the practice of historical narrative as it then and there existed, “the categories of ‘fact’ and ‘fiction,’ ‘truth and falsity,’ ‘honesty and dishonesty,’ so often applied to the discredit of the ancients” are simply irrelevant. Fornara, \textit{Nature of History}, 134-35. Similarly, Benedetto Croce, while highly critical of Medieval Christian historiography, denied that it is susceptible to any form of general externalist objection: “To censure ecclesiastical history because it overrules and oppresses profane history will perhaps be justified, as we shall see, from certain points of view and in a certain sense; but it is not justifiable as a general criticism of the idea of that history, and, indeed, when we formulate the censure in these terms we are unconsciously pronouncing a warm eulogy of it.” Croce, \textit{History: Its Theory and Practice}, 205. See also Breisach, \textit{Historiography}, 126.
\item Medieval historians did not grant primary importance to secular changes. The true history was the story of human redemption through Christ in time. And if we study these accounts of the integration of people into the Latin world, accounts of new kingdoms and dynasties, the rise and fall of kings and emperors, and great battles, we must not ‘read over’ the many passages that testify to the chronicler’s basic view of the world, even though such passages may have no ‘factual’ value for one who gathers data. When we ignore that view, the medieval version of the Christian faith, then medieval historiography is left without true continuity, spark of life, drama, and, worst of all, almost all meaning.
\end{itemize}
judgment so tightly interweaves with practice that we cannot disentangle
the results of its doing, its understanding, its gestures, and its discourse
from the practice or activity of the doing, understanding, gesturing,
discouraging. That is, Wittgenstein saw a fundamental mistake of under-
standing in what I call the externalist method of standing outside any
central human activity—whether it be science, music, art, religion,
mathematics, law, or simply thinking, reading, or knowing—to evaluate,
criticize, or justify the results of judgment, the concepts used, or the
linguistic meanings employed.

Wittgenstein attributed the confusion of externalism to a misunder-
standing regarding the nature of language. As he saw it, the externalist method
treats language as strictly discursive, as "a calculus proceeding according
to exact rules." Within this calculus, the externalist—the "spectator,"
the "observer"—treats words and concepts as symbols operating in
accordance with fixed rules of usage, each possessing an absolute, all-
inclusive, essentialist "real definition." The externalist, on this account,
inquires into the "meaning" of a word or concept by trying to apprehend
its "real definition" through abstracting from the apparently "inessential
features" of use either its "essence" or the "law" which determines the way it is used.

To Wittgenstein this approach makes the search for linguistic meaning an irresolvable philosophical puzzle. Once the externalist posits a "real definition" for a word or concept, Wittgenstein assumed he would try to apply it consistently. Suggesting that this effort often leads to paradoxical results, as where a new application of an expression falls outside the boundary of the real definition, Wittgenstein conjectured that we can expect the externalist to offer a reformed definition, believing that this time he has correctly identified the essence of the expression. Take the concept "time":

First the question is asked 'What is time?' This question makes it appear that what we want is a definition. We mistakenly think that a definition is what will remove the trouble (as in certain states of indigestion we feel a kind of hunger which cannot be removed by eating). The question is then answered by a wrong definition; say: 'Time is the motion of the celestial bodies.' The next step is to see that this definition is unsatisfactory. But this only means that we don't use the word 'time' synonymously with 'motion of the celestial bodies.' However in saying that the first definition is wrong, we are now tempted to think that we must replace it by a different one, the correct one.

The externalist would thus find himself caught in a dialectical process with no logical outlet. This definitional puzzle exhibits the logic of dialectic as each "real definition" necessarily contains the logical possibility of its own refutation. Since the definition is separate from the concrete usage of the word or concept, the possibility always remains that the next application will contradict or fall outside the boundary fixed by the definition. To Wittgenstein, no abstract definition going to the supposed "essence" of a term can avoid this logical possibility of refutation through paradoxical application.

While exhibiting the logic of dialectic, the externalist puzzle is not in any respect suggestive of a dialectical progression. Wittgenstein saw it as a

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44. See Wittgenstein, Philosophical Investigations, 1:97 ("We are under the illusion that what is peculiar, profound, essential, in our investigation, resides in its trying to grasp the incomparable essence of language."); Wittgenstein, The Brown Book, 1:17 ("We are inclined to say that the description has left out the essential feature of such a process and given us accessory features only"); ibid., 1:73 ("It seemed to us that the essence of the process of deriving was here presented in a particular dress and that by stripping it of this we should get at the essence.").
46. Ibid.
47. Ibid. This assumption follows from the externalist notion of language as an "exact calculus."
48. Ibid.
49. See Wittgenstein, Philosophical Investigations, 1:80 ("[W]e are not equipped with rules for every possible application of [a word].").
static dialectical movement—a circle—a circle—wherein the process of definitional reform continues ad infinitum. He believed externalism can offer no escape from this circle because few, if any, words conform to the standard of exactness required for a workable "real definition." For most words, there is "no one exact usage," "no one relation of name to object," no "strict" or "fixed" meaning, "no sharp boundary" marking off appropriate use. More importantly, the logical possibility of paradoxical application remains for even those words seemingly covered by complete definitions. So long as externalists search for meaning "by contemplating the expression itself," or by appealing to "higher order" principles, Wittgenstein contended they will remain enmeshed in the puzzle of definition, because "a word hasn't got a meaning given to it, as it were, by a power independent of us, so that there could be a kind of scientific investigation into what the word really means."

To Wittgenstein, "meaning" goes no further than use. "[T]he meaning of a word is its use in the language" and nothing more: "[I]t is the particular use of a word only which gives the word its meaning." Fruitful inquiry into the meaning of an expression consists solely in an examination of the "meaning someone has given to it" in "actual
Wittgenstein cautioned against treating this inquiry as an invitation to extrapolate from use supposedly common elements for definitional purposes. Treating "use" as a synonym for "application," he perceived a "yawning gulf" between "illustration" through essentialist definitions—the necessary first step in the dialectical puzzle of definition—and "application" in particular cases. And he stressed we must overcome "the illusory image of a greater depth" by recognizing that nothing lies hidden beneath the concrete case:

The idea that in order to get clear about the meaning of a general term one had to find the common element in all its applications has shackled philosophical investigation; for it has not only led to no result, but also made the philosopher dismiss as irrelevant the concrete cases, which alone could have helped him to understand the usage of the general term.

Wittgenstein thus regarded meaning as determined by the use, the application, of a word or concept in particular cases. Understanding the meaning of a proposition requires inquiry into "how it is used in this case, and how it’s used in others." Yet this inquiry must not take place in a vacuum. Wittgenstein advised that we only "understand a proposition as a member of a system of propositions." Only within a system of propositions, employing what he calls a "language-game," does a word or concept take on meaning; only within such a system, that is, does a contraption become a gearbox, one stick become a yardstick, another rod a lever. And

64. Wittgenstein, *Philosophical Investigations*, I:124 (emphasis added). See also Wittgenstein, *The Blue Book*, 27 ("There is no one exact usage of the word 'knowledge'; but we can make up several such usages, which will more or less agree with the ways the word is actually used.") (emphasis added).


66. Wittgenstein, *Remarks on the Foundations of Mathematics*, V:37. See also Wittgenstein, *Philosophical Remarks*, § 164 ("This is the unbridgeable gulf between rule and application, or law and special case.").


69. Ibid., 23.

70. Wittgenstein, *Philosophical Remarks*, § 15. See also ibid., § 82 ("It isn’t a proposition which I put against reality as a yardstick; it’s a system of propositions.") (emphasis in original); Wittgenstein, *On Certainty*, § 141 ("When we first begin to believe anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually over the whole.") (emphasis in original); ibid., § 225 ("What I hold fast to is not one proposition but a nest of propositions.") (emphasis in original); Wittgenstein, *The Blue Book*, 5 ("The sign (the sentence) gets its significance from the system of signs, from the language to which it belongs."). Cf. Wittgenstein, *Remarks on the Philosophy of Psychology*, 2 vols., ed. G.H. von Wright and Heikki Nyman, trans. C.G. Luckhardt and M.A.E. Aue (Chicago: University of Chicago Press, 1980), II:190 ("It seems therefore, that our concepts, the use of our words, are constrained by a factual framework.").


to regard a proposition as imbued with meaning in this sense—from its use within a system of language—is to say it has *life*: "As a part of the system of language, one may say, the sentence has life."\(^75\)

Wittgenstein used the term "language-game" to make the point that the use which makes a proposition a "live proposition" is something more than simply being a symbol or sign within a system of language, moved about and acted upon by the system's rules of usage.\(^76\) He explained that "the term 'language-game' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life."\(^77\) Language, on this account, cannot be disentangled from *action*. Understanding the meaning any "live" proposition acquires from its use within a system of language necessarily requires inquiry into the activity or "whole *practice*" which constitutes the *form of life* within which the system—the language-game—serves as the language of discourse.\(^78\)

From this Wittgenstein hypothesized that one can approach a language-game from either of two very different directions: "Language is a labyrinth of paths. You approach from one side and know your way about; you approach the same place from another side and no longer know your way about."\(^79\) The first side is that of *practice*, while the second involves interpretation and rule-following unaccompanied by action: "To understand a sentence," Wittgenstein wrote, "means to understand a language. To understand a language means to be *master of a technique*."\(^80\) In the language-game motif, understanding a language-game thus depends on being a *master player*. One does not become a master player, however, by simply becoming acquainted with the *rules* of the game. The master player learns the rules through *participation*. Through "the day-to-day *practice* of playing,"\(^81\) the master player exhibits her understanding of the rules by her actions—by "‘obeying the rule’ and ‘going against it’ in actual cases."\(^82\) Wittgenstein stressed that this form of *action in practice* differs importantly from *interpretation*, "the substitution of one expression of the rule for another."\(^83\) It also constitutes the only true form of *rule-following*, for only by participating in a practice—playing the game—does one actually obey the rules:

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74. Ibid., § 14.
76. Ibid., 4-5.
80. Ibid., I:199.
81. Ibid., I:197.
82. Ibid., I:201.
83. Ibid.
And hence also ‘obeying a rule’ is a practice. And to think one is obeying a rule is not to obey a rule. Hence it is not possible to obey a rule 'privately': otherwise thinking one was obeying a rule would be the same thing as obeying it.84

Practice thus served for Wittgenstein as the form of life, the “proto-phenomenon” wherein language-games are “played.”85 To communicate in a language-game involves more than understanding its rules of usage. Communication requires participation—“the day-to-day practice of playing” the game—such that one becomes a “master” in the technique of judging in that language-game. Considered in the abstract, outside the context of practice, the rules of a language-game can justify anything.86 Hence, for Wittgenstein, to understand the meaning of a proposition depends not just on familiarity with the rules of a language-game, but on acquaintance with the practice within which those rules, and the proposition, are used.87 And any inquiry into meaning must begin with the question: “In what practice is this proposition anchored?”88— for “[o]nly in the practice of a language can a word have meaning.”89

To Wittgenstein, practice thus places epistemological distance90 between the externalist and the practitioner:

For someone who has no knowledge of such things a diagram representing the inside of a radio receiver will be a jumble of meaningless lines. But if he is acquainted with the apparatus and its function, that drawing will be a significant picture for him.91

The engineer or radio technician understands the diagram to the extent he or she is acquainted with the practice of radio design and circuitry. While acknowledging the ever present “danger of wanting to find an expression's

84. Ibid., I:202.
85. Ibid., I:654.
88. Wittgenstein, Remarks on the Foundations of Mathematics, II:35 (emphasis added). See also Wittgenstein, On Certainty, § 103 (“And now if I were to say 'It is my unshakeable conviction that etc.,' this means in the present case too that I have not consciously arrived at the conviction by following a particular line of thought, but that it is anchored in all my questions and answers, so anchored that I cannot touch it.”).
90. See Wittgenstein, On Certainty, § 108: “But is there then no objective truth? Isn’t it true, or false, that someone has been on the moon?” If we are thinking within our system, then it is certain that no one has ever been on the moon. Not merely is nothing of the sort ever seriously reported to us by reasonable people, but our whole system of physics forbids us to believe it . . . . But suppose . . . . we met the reply: ‘We don’t know how one gets to the moon, but those who get there know at once that they are there; and even you can’t explain everything.’ We should feel ourselves intellectually very distant from someone who said this.
91. Wittgenstein, Zettel, § 201.
meaning by contemplating the expression itself, and the frame of mind in which one uses it."92 Wittgenstein advised that no realm of central human activity can be described or understood except by "always thinking of the practice."93 Only through "the practice of language"94 can we describe logical inference; it is only through the practice of mathematics that mathematical signs come to have meaning;95 only through the practice of calculating do we develop understanding of the nature of calculating.96

Understanding how to use words and concepts thus depends for Wittgenstein on more than learning the rules of a language-game. Training in a language-game rests in part on explanation,97 but to become a master player capable of making "expert judgments" one must learn the language through "experience" as a participant in the practice to which the language-game is the language of discourse.98 The engineer understands how to use a language-game—the diagram of radio circuitry—because he or she is learned in the field of radio technology. This is not just acquaintance with the language-game, the "diagram," but with the apparatus and its function, the whole practice within which the language-game operates.

To "understand" the use of an expression within a language-game thus required, for Wittgenstein, experiential understanding. It is this fact which makes the gulf between the craft master and the externalist unbridgeable. "By being educated in a technique," he wrote, "we are also educated to have a way of looking at the matter which is just as firmly rooted as that technique."99 Wittgenstein thus saw internalism and externalism as fundamentally different viewpoints: people who play the game of chess

93. Ibid.
94. Ibid., § 501 (emphasis added).
97. See Wittgenstein, Zettel, § 186 ("Understanding is effected by explanation; but also by training."). But see Wittgenstein, Remarks on Colour, III:291 (description is not teaching).
98. Wittgenstein, Philosophical Investigations, II:xi, 227h. See also ibid, I:197-203; Wittgenstein, Remarks on Colour, I:77-78, III:120-23 ("But can I describe the practice of people who have a concept, e.g. 'reddish-green,' that we don't possess?—In any case I certainly can't teach this practice to anyone."); ibid., III:291 (one learns a game (tennis) by playing, "knowledge by acquaintance"); Wittgenstein, Remarks on the Foundations of Mathematics, VI:33; Wittgenstein, Last Writings, §§ 915, 917-18. Wittgenstein explains:

An important fact here is that we learn certain things only through long experience and not from a course in school. How, for instance, does one develop the eye of a connoisseur? Someone says, for example: 'This picture was not painted by such-and-such a master'—the statement he makes is thus not an aesthetic judgment, but one that can be proved by documentation. . . . A great deal of experience was necessary. That is, the learner probably had to look at and compare a large number of pictures by various masters again and again. In doing this he could have been given hints. Well, that was the process of learning. But then he looked at a picture and made a judgment about it. In most cases he was able to list reasons for his judgment, but generally it wasn't they that were convincing.

Ibid., § 925.
understand it differently than those who do not play;\textsuperscript{100} using a mathematical technique to avoid contradiction differs importantly from philosophizing against contradiction in mathematics;\textsuperscript{101} in music, to "understand[] a musical phrase may also be called understanding a language,"\textsuperscript{102} an understanding inaccessible to those untrained in the craft of music:

I think of a quite short phrase, consisting of only two bars. You say 'What a lot that's got in it!' But it is only, so to speak, an optical illusion if you think that what is there goes on as we hear it. ('It all depends who says it.') (Only in the stream of thought and life do words have meaning.)\textsuperscript{103}

IV. EXTERNAITY AND INTERNALITY IN CONSTITUTIONAL ADJUDICATION

The internalist standpoint I recommend for constitutional adjudication shares this Wittgensteinian view that meaning and judgment are inextricably interwoven with practice. Approaching constitutional adjudication from this point of view suggests that the current debate strikes a silent chord with judges not because of a judicial propensity for activism or a legalistic fear of rectificatory innovation, but because judges and legal theorists practice different crafts. Like every other craft-bound excellence, adjudication depends for its justification upon objective conditions of mastery which cannot be disentangled from the internal demands of its practice. Internal investigation of adjudicative practice reveals a set of objective conditions of neutrality which constrain freedom in judicial decision while establishing a domain for inventive genius. Strictly oriented toward fairness and justice in the resolution of legal disputes, these internal conditions require that judicial decisions be arrived at impartially,\textsuperscript{104} rest on reasoned explanation,\textsuperscript{105} and satisfy objectives of coherence\textsuperscript{106} and

\textsuperscript{100} See Wittgenstein, Remarks on Colour, I:75, III:119.

\textsuperscript{101} Wittgenstein, Remarks on the Foundations of Mathematics, IV:55.

\textsuperscript{102} Wittgenstein, Zettel, § 172. See also Wittgenstein, Philosophy of Psychology, II:503.

\textsuperscript{103} Wittgenstein, Zettel, § 173. See also Wittgenstein, Philosophy of Psychology, II:504.

\textsuperscript{104} See Vasquez v. Hillery, 474 U.S. 254, 263 (1986); In re Murchison, 349 U.S. 133, 136 (1955); Tumey v. Ohio, 273 U.S. 510, 535 (1927). See also John Chipman Gray, The Nature and Sources of the Law (New York: Columbia University Press, 1909), 109-10 ("The essence of a judge's office is that he shall be impartial, that he is to sit apart, is not to interfere voluntarily in affairs. . . ."); Patricia Smith, Feminist Jurisprudence (New York: Oxford University Press, 1993), 211 ("Impartiality is the highest ideal toward which judges can aspire.").

\textsuperscript{105} See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) (O'Connor, Kennedy, and Souter, JJ.) ("The inescapable fact is that adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."); Foucha v. Louisiana, 112 S. Ct. 1780, 1797 (1992) (Thomas, J., dissenting) ("Invalidating this quite reasonable [state statutory] scheme is bad enough; even worse is the Court's failure to explain precisely what is wrong with it.").

In dissenting from the Supreme Court's plurality opinion in Webster v. Reproductive Health Services, 492 U.S. 490, 552 (1989), Justice Blackmun stated:

Finally, the plurality asserts that the trimester framework cannot stand because the State's interest in potential life is compelling throughout pregnancy, not merely after viability. The opinion contains
workability,107 while setting articulative boundaries for future applications.108 Excellence in adjudicative practice consists in satisfying these conditions of neutrality.109

External legal theorists ignore these conditions of excellence, just as they do the craft-bound nature of adjudication, as they extract postulates for constitutional interpretation from disciplines not only external to judicial practice, but outside law. Drawing upon principles and methods internal to other craft-bound enterprises such as philosophy,110 literary criti-

not one word of rationale for its view of the State's interest. This "it-is-so-because-we-say-so" jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place.


107. Casey, 112 S. Ct. at 2812 (refusing to overrule Roe v. Wade because, in part, while the rule announced in that case "has engendered disapproval, it has not been unworkable"); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985) (overruling earlier case which established a rule that had proven to be "unsound in principle and unworkable in practice"); Rochin v. California, 342 U.S. 165, 179 (1952) (Douglas, J., concurring) (approving of the rule adopted by the Court because it set "an unequivocal, definite and workable rule of evidence for state and federal courts," yet criticizing the rule for continuing "the process of erosion of civil rights of the citizen in recent years."); The License Cases, 46 U.S. (5 How.) 504 (1847) (Taney, C.J.) (expressing approval of the commerce clause "original package" doctrine because it was "perhaps the best [rule] that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them"). See also Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965).

108. See Lee v. Weisman, 112 S. Ct. 2649, 2661 (1992) ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one, . . . of necessity one of line-drawing, . . ."); Saffle v. Parks, 494 U.S. 484, 505 (1990) (Brennan, J., dissenting) (criticizing the Court for speaking in "generalities . . . [and] offer[ing] no guidance despite its concession that the 'precise contours of this exception may be difficult to discern'"); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 340 n.17 (1987) (Stevens, J., dissenting) (criticizing the Court's regulatory takings jurisprudence for being "open-ended and standardless"); Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (suggesting that the boundaries the Supreme Court must draw in its due process analysis are "not a series of isolated points . . . [but lines along] a rational continuum . . .").

109. It is beyond the scope of this paper to fully develop the set of conditions of adjudicative practice here mentioned. For a more complete discussion of these conditions, see Douglas Lind, Wrongness and Overruling, forthcoming.


By "conditions of neutrality" I mean conditions of craft excellence specific to the craft (practice) of adjudication. These conditions do not directly go to the substance of any rules or principles of decision, but rather address only the performance of the practitioners (judges) who work within the craft.

110. See Ronald Dworkin, Taking Rights Seriously (Cambridge: Harvard University Press, 1977), 149 ("Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."); Jeffrie Murphy, "Cruel and Unusual Punishments," in Retribution, Justice, and Therapy: Essays in the Philosophy of Law (Boston:
cism, and political science, externalist jurists tend to follow a three-step critical path. First, they assume a posture of fidelity to the Constitution, often, but variously, prescribing a "genuinely constitutional attitude" or a "sharp jurisprudential vision" said to be required, as a necessary condition for legitimacy, of all who set out to interpret the Constitution. This attitude or vision takes many forms and is usually characterized as a general, but vague, normative goal, such as "integrity," "cultural awareness," "toleration," "conscientiousness," "constitutional faith," "constitutional aspiration," "moral aspiration," "charity," "principled" interpretation, or grasping the "reasoning spirit" of the Constitution.

D. Reidel, 1979), 223 ("If one can mount a good argument that to treat a person in a certain way is gravely unjust or would violate some basic human right of his, this is also and necessarily a good argument that it is unconstitutional to treat him in this way."); W.A. Parent, "Privacy, Morality, and the Law," Philosophy and Public Affairs 12 (1983): 269-88 ("My purpose is to show how contemporary privacy jurisprudence could have benefited from the use of disciplined philosophical analysis."); Graham Walker, Moral Foundations of Constitutional Thought: Current Problems, Augustinian Prospects (Princeton: Princeton University Press, 1990) (suggesting an Augustinian perspective for constitutional interpretation); Richard Weisberg, "On the Use and Abuse of Nietzsche for Modern Constitutional Theory," in Interpreting Law and Literature, 181-92 (Nietzschean perspective).


113. Barber, On What the Constitution Means, 10.

114. Lively and Podgor, "Reckoning with the Bluster of Apolitical Jurisprudence," 735. Lively and Podgor characterize the vision they have in mind as one of "cultural awareness." Ibid., 742-44.


116. Lively and Podgor, "Reckoning with the Bluster of Apolitical Jurisprudence," 742-43.


118. See Macedo, The New Right v. The Constitution, 23, 46, 50, 54, 85, 95, 170-71 (calling the requisite point of view that of a "conscientious" or "critical" "interpreter" of the Constitution).


121. Barber, On What the Constitution Means, 11.


From these visionary perspectives, theorists then posit axioms of political morality and rules of interpretation which together constitute the formal method of each externalist theory. The axioms of political morality usually consist of comprehensive theories of rights,\(^\text{125}\) justice,\(^\text{126}\) or constitutional democracy\(^\text{127}\) drawn from one or more of several sources, including the text, structure, and history of the Constitution, as well as sources wholly independent of the Constitution itself. For some external theorists, these principles of political morality stand independently of interpretive theory as self-defining \textit{a priori} concepts; others combine the principles with various, sometimes quite elaborate, theories of interpretation.\(^\text{128}\) In either case, the external theorists contend that their normative principles allow them to discern what the Constitution "actually" means, i.e., not simply what the courts \textit{say} it means.\(^\text{129}\)

Finally, external theorists use their avowed insight into the Constitution's "actual meaning" to reveal judicial error (the "derelicts of constitutional law"\(^\text{130}\)). They claim to identify instances (specific cases as well as whole bodies of constitutional doctrine) where a court, usually the Supreme Court, has "undermined" the "true" meaning of the Constitution.\(^\text{131}\) Often they go further, connecting alleged judicial mistakes with political agendas, contending in effect that judicial error is a product of judicial decision-making which is unduly political. Those who work from this political hypothesis strive to expose the Court acting in an improperly political fashion—whether as an activist body "overleaping its bounds,"\(^\text{132}\) or as a politically reactionary institution bent on abstaining, through an attitude of undue restraint, from complete fulfillment of its intended function.\(^\text{133}\)

\begin{itemize}
  \item \textbf{125.} See ibid. (natural rights); Dworkin, \textit{Life's Dominion}; Dworkin, \textit{Law's Empire}.
  \item \textbf{126.} See Richards, \textit{Foundations of American Constitutionalism}; Richards, \textit{Toleration and the Constitution}; Richards, \textit{The Moral Criticism of Law}.
  \item \textbf{129.} See Barber, \textit{On What the Constitution Means}, 6-11 (claiming to adopt a "genuinely constitutional attitude" for the purpose of constructing "a general theory of what the Constitution actually means").
  \item \textbf{131.} Arkes, \textit{Beyond the Constitution}, 75.
  \item \textbf{133.} See Arkes, \textit{Beyond the Constitution}, 10; Lively and Podgor, "Reckoning with the Bluster of Apolitical Jurisprudence," 715-44.
\end{itemize}
We can perhaps best apprehend this critical standpoint of jurisprudential externality by briefly considering some of its exemplars. Take Ronald Dworkin. In a long series of books and articles written over several years, Professor Dworkin has constructed a normative theory of adjudication he calls "law as integrity" or "principled integrity." An idealistic vision of judicial decision-making which calls upon judges to aspire to the standard of an imaginary superjudge—Hercules—law as integrity holds that right outcomes in adjudication are the product of inquiries which follow two interpretive dimensions, "fit and justification." The dimension of fit requires historical consistency in legal decision; it imposes on judges an affirmative obligation to follow precedent, other things being equal. The other things requiring consideration come under the dimension of justification. Here Dworkin calls for the "fusion of constitutional law and moral theory," as he directs judges to inquire "which interpretation shows the legal record to be the best it can be from the standpoint of substantive political morality." Law as integrity, that is, affirms a constitutional decision (declares it to be "right") if it historically coheres with the whole of constitutional law as it stands at the time the decision is rendered, unless that requirement of historical fit is overridden by considerations of political morality. For Dworkin, the critical moral consideration is the priority of rights. He claims that individual rights "trump" all countervailing considerations of governmental policy. While he grounds this rights thesis primarily in his own political philosophy, Dworkin claims it also can be found in "the abstract moral command[s] of the Constitution." He contends that the Constitution, especially the Bill of Rights and Fourteenth Amendment, raises "profound questions of political morality" which necessarily require "value judgments." As a result, constitutional adjudication becomes for


135. See Dworkin, Law's Empire, 176-275.

136. Dworkin, "The Center Holds!" 31. See also ibid., 32 ("integrity of principle").

137. Dworkin, Law's Empire, 255-57.

138. Ibid. See also Dworkin, "The Center Holds!" 31-32.

139. Dworkin, Taking Rights Seriously, 149.

140. Dworkin, Law's Empire, 248 (emphasis added).

141. Dworkin maintains steadfastly that for every legal issue there is a single "right answer". See "Is There Really No Right Answer in Hard Cases?" in Dworkin, A Matter of Principle, 119-45. The purpose of his interpretive theory is to provide a formal method for determining "right answers."


143. Dworkin, "The Center Holds!" 32.

144. Ibid.
Dworkin "in the last analysis . . . responsive to [the judge's] political judgment."145

Similar to Dworkin's method of "principled integrity" is Stephen Macedo's "principled activism."146 Macedo envisions a Constitution administered and continually rewritten and revised by all persons who qualify as "conscientious interpreters,"147 i.e., all who adopt his perspective of principled activism. Like Dworkin, Macedo contends that only by "fusing constitutional interpretation and moral theory"148 can the Constitution be read as "the best it can be."149 He recommends that this fusion occur under the formal methodology of principled activism. That method calls upon judges (and all other "conscientious interpreters") to take several factors into account in interpreting the Constitution. These factors include "the text itself and . . . the structure of the document as a whole, the nature of the institutions it sets up, the powers and rights it enumerates, and the principles and purposes implicit in these words, structures, institutions, powers, and rights."150 Furthermore, while Macedo objects to the special authoritative weight traditionally given judicial interpretations of the Constitution,151 he acknowledges that sometimes caselaw "become[s] part of the public's understanding of our fundamental law."152 Hence, he states that "[r]eceived authoritative interpretations and practices [i.e., cases which stand as precedent] deserve to be taken seriously."153

Yet under Macedo's principled activism all these factors count only as "helpful guides" to interpreting the Constitution.154 Macedo contends that certain considerations of political morality are of greater importance for constitutional meaning than text, structure, purpose, or precedent. He claims that constitutional interpretation is most fundamentally a "moral enterprise,"155 and that "conscientious interpreters" must "engag[e] in moral reflection . . . to complete the meaning" of the Constitution.156

145. Dworkin, Law's Empire, 257. See also Arthur, The Unfinished Constitution, 2-3, 24 (following Dworkin in claiming that constitutional interpretation "reflects deep moral and political tensions" and involves two interpretive "aspects" (read Dworkin's "dimensions"), "fit" and "charity" (paralleling Dworkin's "fit" and "justification").


148. Macedo, The New Right v. The Constitution, 5. See also ibid., 55 ("Only by fusing constitutional and moral theory can interpreters at once vindicate and justify the Constitution's authority as supreme law.").

149. Macedo, Liberal Virtues, 170, 189. Further paralleling Dworkin, Macedo claims that it is principally in the adjudication of "hard cases" that "moral criticism is urgent." Ibid., 96.


153. Ibid.

154. Ibid.

155. Macedo, Liberal Virtues, 172. Cf. ibid., 147 ("[C]onstitutional interpretation is an eminently political enterprise.").

Macedo finds that meaning lodged in the principles of political morality that he identifies with the Constitution’s Framers. He asserts that the Constitution rests on a moral foundation of justice and individual rights as expressed in classical liberalism and associated with the natural rights tradition.\textsuperscript{157} This political point of view stresses individual rights, especially economic liberty and property rights.\textsuperscript{158} Macedo contends that all who interpret the Constitution \textit{conscientiously} must give it “the morally best meaning”\textsuperscript{159} consistent with these individual rights and, overall, with liberalism’s aspirations to justice and liberty.\textsuperscript{160} In this way, he concludes that there is a single “correct answer” for even the most intractable of constitutional questions.\textsuperscript{161} This answer may be consistent with precedent, and may conform with the Constitution’s text, structure, and purpose. But it need not. The determining factor for principled activism is “moral judgment”; that is, Macedo asserts that the essential question in constitutional interpretation is “which interpretation . . . constitutes a better vision of what America stands for?”\textsuperscript{162}

Robert Bork agrees with Dworkin and Macedo that constitutional interpretation must be “principled,” yet he strongly rejects the type of explicit appeal to moral philosophy that Dworkin and Macedo recommend. Bork calls upon judges to render decisions which comport with his notion of “neutral principles.”\textsuperscript{163} Courts must, on his account, base their decisions on principles which are neutrally derived in that they “transcend any immediate result that is involved,”\textsuperscript{164} while remaining “exterior to the will of the Justices.”\textsuperscript{165} Bork regards this notion of neutrality as essential to principled constitutional adjudication: if a court maintains a neutral perspective in the derivation, definition, and application of constitutional rights, its decision is principled and justified; but if it fails to remain neutral at each stage in the interpretive process, the decision is unprincipled—an instance of illegitimate judicial lawmaking.\textsuperscript{166}


\textsuperscript{159} Macedo, \textit{The New Right v. The Constitution}, 15.

\textsuperscript{160} Ibid., 20, 23, 94-95.

\textsuperscript{161} Ibid., 69.

\textsuperscript{162} Ibid.

\textsuperscript{163} See Bork, “Neutral Principles,” 2, 7.

\textsuperscript{164} Ibid., 2 (quoting Wechsler, “Toward Neutral Principles of Constitutional Law,” 27).

\textsuperscript{165} Ibid., 6.

\textsuperscript{166} Ibid., 6-8, 23.
On this account, courts may never legitimately turn to values deduced from abstract philosophical reasoning,\(^\text{167}\) for, according to Bork, there are no demonstrable truths of moral philosophy\(^\text{168}\) and no principled way to cast any in constitutional armor.\(^\text{169}\) He claims that judicial practice should be confined to a mechanical inquiry into the political morality of the Founding Fathers. The object of adjudication, he says, is to "relate[] the Framers’ values to today’s world"\(^\text{170}\) by turning the morality of the Constitution’s Framers into rules applicable to present circumstances. Drawing purportedly from the Constitution’s text, structure, and history,\(^\text{171}\) Bork contends that the political morality of the Framers is embedded in the structure of government they created under the Constitution. Labelling that structure “Madisonian majoritarianism,”\(^\text{172}\) he claims the American constitutional system contains two basic principles: representative democracy\(^\text{173}\) and a “counter-majoritarian premise” establishing a narrow realm of social life where individual rights stand paramount over the will of the majority.\(^\text{174}\) Under this definition of the structure of government established by the Constitution, Bork maintains that courts must defer to the will of the majority as expressed through legislative value choices,\(^\text{175}\) except in the narrow realm of individual rights.\(^\text{176}\) To the extent courts upset this preference for democratic decisionmaking by assigning constitutional stature to individual rights derived from normative considerations unconnected with the political structure of Madisonian majoritarianism, Bork concludes their decisions are unprincipled and unjustified, and should be overturned.\(^\text{177}\)

Despite his protests against philosophy and abstract political theory, Bork’s method of constitutional adjudication ironically rests upon his own theoretical conception of the governmental structure established by the Constitution. Madisonian majoritarianism is as much a normative theory of political morality as is Dworkin’s rights thesis or Macedo’s version of classical liberalism. For all three, “principled” interpretation—whether principled in terms of integrity, activism, or neutrality—amounts to a formal method of constitutional inquiry where answers are deemed “right”

\(\text{169}\) Bork, “Neutral Principles,” 8, 10.
\(\text{171}\) See ibid., 8; Bork, “The Impossibility of Finding Welfare Rights,” 695, 696; Bork, “Neutral Principles,” 1, 8, 22-23.
\(\text{175}\) Ibid., 10-11.
\(\text{176}\) Bork, *Tradition and Morality*, 11.
\(\text{177}\) Bork, “Neutral Principles,” 11.
insofar as they conform to predetermined principles of political morality and sound governmental structure.

Many other writers embrace this general externalist methodological approach, disagreeing only over the applicable principles of political morality. John Hart Ely, for example, agrees with Bork that the Constitution endorses two fundamental values, on his account "the protection of popular government . . . and the protection of minorities from denials of equal concern and respect."178 Claiming that both of these values "arise[s] from a common duty of representation," Ely contends that constitutional cases are decided rightly if they follow from a "participation-oriented, representation-reinforcing approach to judicial review."179 Gary Jacobsohn agrees with a different aspect of Bork’s approach, as he argues that judges should interpret the Constitution to "retrieve . . . the constitutional aspirations of the Framers."180 Unlike Bork, however, Jacobsohn claims that this exercise in retrieval involves an appeal to "fuzzy concepts of natural justice,"181 not merely the mechanical application of a political theory like Madisonian majoritarianism. Nevertheless, Jacobsohn contends that the fuzzy concepts have identifiable and determinate content which can be drawn from the Declaration of Independence,182 the intentions of the Constitution’s Framers,183 and the writings and speeches of Abraham Lincoln.184 Bernard Siegan likewise identifies what he takes to be the essential political principles of American constitutionalism and then argues, in a manner similar to that of Professor Macedo, for increased judicial protection of economic liberties.185 David A.J. Richards maintains, like Macedo and Dworkin, that the Constitution is essentially a testament to

179. Ibid., 87.
181. Ibid., 139.
abstract moral values and should be "interpreted in a normative way, so as to provide the best theory of the values of the [American constitutional] tradition."\textsuperscript{186} He thus directs judges to read the Constitution according to the "best moral and political theory,"\textsuperscript{187} which he sees as a combination of John Locke and John Rawls.\textsuperscript{188}

The list could go on, as the variety of externalist theories is rich and diffuse. Yet even this brief survey suffices to show that while the many externalist characterizations of constitutional vision and method vary markedly, they share certain foundational assumptions. These assumptions mark from the outset the sharp contrast between the practices of externalist jurisprudence and adjudication.

First, as I have stressed throughout this essay, the most fundamental difference between externalism and judicial practice is one of orientation: externality or internality. Legal scholars who evaluate judicial decisions on the basis of criteria external to the practice of adjudication engage in a cognitive enterprise fundamentally different than that of deliberating over and rendering decisions in the restrictive context of concrete disputes arising within judicial practice. Second, externalist theory is essentially result-oriented, whereas adjudication is practice-oriented. Externality emphasizes, theoretically and critically, the outcomes reached in adjudication; while viewed critically from the standpoint of internality, those very same judicial decisions are justified not on the basis of their results, but insofar as they satisfy the conditions of adjudicative excellence—impartiality, reasoned explanation, articulative boundaries, coherence, and workability. Third, externalist writers rely heavily on abstract generalities. They posit, for use in adjudication, normative standards of justice, rights, or political morality which take the form of abstract general rules or principles known \textit{a priori}. Courts, to the contrary, often expressly reject such abstract essentialist definitions in favor of meanings worked out in practice. Fourth, externalist jurists work from within a rationalist paradigm where particular constitutional provisions are said to have determinate meaning accessible by deductive reasoning from the predetermined abstract general rules and principles.\textsuperscript{189} This rationalist model stands at odds with judicial practice, where legal meaning is

\begin{itemize}
\item \textsuperscript{186} Richards, \textit{Toleration and the Constitution}, 30.
\item \textsuperscript{187} Ibid.
\end{itemize}
primarily a product of empirical investigation, and of reasoning by analogy and induction. Finally, externality depends on an interpretive assumption, the assumption that all constitutional adjudication involves interpretation. Internally, this assumption is rejected in judicial practice, as judges regard nearly all constitutional adjudication as involving application of the Constitution, not its interpretation.

Yet externalism stands not only in contrast to, but in opposition to judicial practice. The opposition comes across most clearly in those instances in which external legal theorists call into question the more basic precepts of judicial practice. For one, many externalist jurists challenge the interpretive authority of the courts by rejecting the notion of judicial finality. Within the practice of adjudication it is well established that the highest court of a jurisdiction is the final arbiter of constitutional meaning. This is particularly true of the United States Supreme Court. Externalist jurists challenge this doctrine of finality, claiming that the interpretations of all non-judges who exhibit the “proper” constitutional attitude are entitled to the same authoritative weight as judicial applications of the Constitution.

Another point of opposition between externalist jurisprudence and judicial practice is the significance each attaches to a constitution’s preamble. Historically, courts have looked circumspectly at the prefatory language found in many legal documents, whether preliminary recitals in contracts, statutory statements of findings and purpose, or, especially, preambles to constitutions. Preambles tend to be intentionally vague and rhetorical statements of the general purposes, goals, and objectives behind the formation of a government. The preambles found in the federal and state constitutions typically declare, among other things, that government

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192. See Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution."); Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945) (Supreme Court “is under the commerce clause the final arbiter of the competing demands of state and national interests."); Williams v. North Carolina, 317 U.S. 287, 302 (1942) (Supreme Court is “the final arbiter when the question is raised as to what is a permissible limitation on the full faith and credit clause."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is, emphatically, the province and duty of the judicial department, to say what the law is.").

is established to secure the blessings of liberty\textsuperscript{194} or freedom,\textsuperscript{195} to establish justice,\textsuperscript{196} to insure domestic tranquility,\textsuperscript{197} and to promote the general or common welfare.\textsuperscript{198} When pressed to "enforce" a preamble, courts at the very most apply an irrebuttable presumption that the challenged governmental action conforms to the preamble's general declarations.\textsuperscript{199} Within the context of judicial practice courts can do nothing more, for by their nature preambles defy judicial application. Their broad-sweeping terms and phrases contain no substantive content and offer courts no interpretive direction.\textsuperscript{200} Courts accordingly can make little practical use of the language in a preamble as they struggle to craft workable, coherent, and bounded rules of constitutional law. As ambitious recitations of hope, preambles simply do not lend themselves to enforcement in a manner consistent with those conditions of adjudicative excellence.

External legal theorists look very differently at preambles. They see them as the central repositories of a constitution's most fundamental values and aspirations. For many externalist writers, especially those trained in political science, constitutional interpretation begins with the preamble, and proceeds properly only when all substantive provisions are read in light of the preamble's broad normative parameters.\textsuperscript{201} Yet these writers do not acknowledge that this attitude toward the interpretive significance of

\textsuperscript{198} See Idaho Const., pmbl; Ohio Const., pmbl.; S.D. Const., pmbl.; U.S. Const., pmbl.
\textsuperscript{199} See Palmer v. Tingle, 45 N.E. 313, 314 (1896) (Where the preamble to the Ohio Constitution declares: "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution," the Ohio Supreme Court ruled, "[I]t must be presumed that the laws to be passed by the general assembly under the powers conferred by [the constitution] are to be such as shall secure the blessings of freedom, and promote our common welfare.").
\textsuperscript{200} See Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905):
We pass without extended discussion the suggestion that the particular section of the statute of Massachusetts now in question . . . is in derogation of rights secured by the Preamble of the Constitution of the United States. Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom.
preambles is a product of their own training and interpretive methodology. Nor do they consider whether the interpretive weight they assign preambles may run counter to the conditions of excellence which regulate judicial practice. Instead, they forge ahead using preambles to derive constitutional meaning as the methodology of their craft dictates, while criticizing the courts for not agreeing with their interpretations.202

External legal theorists also treat the intentions of the Constitution's Framers very differently than do judges. While courts often rely on indicia of Framer intent to craft rules of constitutional law, they do not consider such intent to be conclusive of constitutional meaning. Within judicial practice, every reference to Framer intent functions either (1) as an analytical devise for extricating constitutional meaning from a particularly ambiguous clause,203 (2) as confirmatory or persuasive evidence that a proposed reading of the text is a reasonable application of the Constitution,204 or (3) as a largely rhetorical attempt to bolster a reading of the Constitution which is principally supported by other reasons.205 Within externalist jurisprudence, in contrast, Framer intent carries far more weight; some even regard it as unconditionally binding on courts and conclusively determinative of constitutional meaning.206

Perhaps most importantly, externalist jurisprudence opposes judicial practice in regard to the relative significance of moral theory for constitutional interpretation. Symbolized by recurrent use of normative terms and concepts—aspirations, autonomy, ideals, icons, integrity, faith, dignity, human good, virtue, civil religion, charity, moral beliefs, moral vision, moral evolution, natural law, higher law—the visions pronounced by externalist theory suggest that constitutional interpretation is part of a grand normative enterprise. These visions involve noble quests, often undertaken by heroes of American or ancient mythology. Professor Dworkin harks back to Hercules and ancient Greece, metaphorically casting adjudication in terms of demigods consulting oracles of truth. Macedo, Bork, and many others journey to the era of the Constitution's founding, proclaiming

202. See Macedo, Liberal Virtues, 95.
idolatrous faith in the document’s Framers, or at least others of their time, believing that they had special insight into the true nature of justice, rights, and the relationship between government and governed, sovereign and subject.207 Sometimes the quests involve journeys back less far in time in the hope of reclaiming the exalted moral visions of certain significant figures in America’s political past, Andrew Jackson, for example,208 or Abraham Lincoln.209 At other times, externalist vision treks into the future.210 Whether backward- or forward-looking, externalist visionaries strive to improve our understanding of the aspirations, principles, and moral implications of the United States Constitution, viewed as a document either ideal in its original form or, like the ever-developing deity of Teilhard de Chardin, constituted necessarily and irreversibly toward increasing perfection.

Unfortunately, this noble enterprise, in an earlier form aptly characterized by Roscoe Pound as the search for “the notion of a logically derivable superconstitution,”211 is from the standpoint of internality wholly unnecessary and beside the point. Within the practice of adjudication, abstract moral theory, no matter how compelling, is considered an irrelevant and unreliable indicator of constitutional meaning.212 Judges are bound to apply the Constitution as it is (which is to say, as they, in their impartial, considered judgment, see it to be), not as it “ought” to be, nor as individual judges would like it to be.213 They must take the

207. See Berns, Taking the Constitution Seriously, 236 (“The Framers had a better grasp of these matters [of constitutional principle].”).
209. See Arkes, Beyond the Constitution, 11, 15-20, 36-52, 80, 107, 154; Levinson, Constitutional Faith; Jacobsohn, The Supreme Court and the Decline of Constitutional Aspiration, 8, 95-114.
213. Here lies the core of the difference between external jurisprudence and judicial practice. To externalist jurists, adjudication ought to be a matter of deciding what the law ought to be. See Arthur Selwyn Miller, “On the Need for ‘Impact Analysis’ of Supreme Court Decisions,” in Theodore L. Becker, ed., The Impact of Supreme Court Decisions (New York: Oxford University Press, 1969), 7 (identifying as “the problem in constitutional adjudication: the need for deciding what the law ‘ought to be.’”). But from within their craft-bound practice judges recognize that constitutional adjudication is not a matter of simply engraving on the law their views on politics and morality. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2806 (1992) (“Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.”); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (quoting United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d))
Constitution as a whole—its language, ascertainable intent, and overall structure, set within the context of American history (good and bad), and the traditions (good and bad) of American constitutionalism. Unlike externalist jurists, who, like appellate lawyers, work within a practice which encourages and rewards creative and selective use of this material so as to present arguments on behalf of particular points of view, judges may not assume the posture of advocate. Whether advocacy goes from attorney to client or from jurist to idea, ideal, aspiration, or vision of a higher, moral law, advocacy demands partiality and bias. Judicial practice, to the contrary, rests foremost on the assumption that the judge or judges presiding over a case have no interest in the outcome.214 “Interest,” in this context, is far broader than a personal or monetary stake. It includes any theoretical reason or ground—religious, moral, political, aesthetic, economic, whatever—which may make a judge predisposed to deciding a case one way or another. When externalist jurists advocate visions of justice and moral right, however, they purposefully try to influence judges to adopt certain moral predispositions. This places externalist jurisprudence, in terms of its basic purpose and objective, directly at odds with the conditions of excellence which regulate judicial practice. Judges accordingly respond in silence to externalist advocacy because judicial acceptance of the moral visions the externalists posit would undermine the fundamental internal requirements of judicial practice that judges act impartially and without bias.215

It is for this reason that decisional law is replete with evidence of judges fighting against the temptation to play the part of Dworkin’s Hercules or Macedo’s conscientious interpreter. The federal Supreme Court on occasion reminds itself of this fact, cautioning that “not even the temptations of a hard case” can overcome “the duty of all courts” to work within the practical limits of their craft.216 Yet sometimes the Court cannot mask its dismay at realizing that the remedy for an obvious injustice lay

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215. I am not suggesting that all, or even very many, judges actually attain the degree of impartiality and nonbias demanded by their practice. Within every technical, craft-bound activity, there are but few true craft masters. What I am suggesting is that we should not reject or revise the internally determined standards of excellence for any craft-bound practice just because those standards are difficult (or even nearly impossible) to achieve. To reject the conditions of excellence for adjudicative practice because few judges can fully and consistently satisfy them would be as senseless as it would be to lower the standards of excellence for epic poetry, classical music composition, or baseball because there are so few with the talents of Milton, Mozart, or Mays.

beyond its reach. In *Leffingwell v. Warren*, for example, the Court stated with frustration:

The equities in behalf of the plaintiff below, are strong. We have all felt their force. Without any fault on his part, he has been divested of the title to his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust the remedial power lies with the Legislature of the State, and not with this Court.  

And sometimes the Justices will admit political distaste for a decision they find mandated by the law. In *Texas v. Johnson*, Justice Kennedy, concurring in the Court's opinion that flag-burning is a form of free expression protected by the First Amendment, wrote:

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision.  

Arguably, judges do on occasion bend to the temptation. The historical development of modern choice-of-law rules giving courts broad, result-oriented discretion over which jurisdiction's law to apply in a particular controversy is perhaps the clearest example of the type of legal/moral fusion Dworkin and Macedo, among others, recommend. Courts at the cutting edge of choice-of-law jurisprudence a few decades ago often spoke Dworkin-like, rendering decisions aimed at making the law “the best it can be.”

Yet not even a body of morally impregnated law like choice-of-law jurisprudence can establish the claim made by externalists like Dworkin and Macedo that constitutional adjudication requires broad moral speculation. The Constitution does not explicitly outline the extent to which moral inquiry is appropriate for determining constitutional meaning. Nor does it suggest the methods judges should use to reach decisions based upon moral principles. Moreover, as others have argued, there are good reasons to doubt the externalist claim that the Constitution has inscribed in it either a fixed moral formula for interpretation or a general interpretive demand for its own moral reformation or purification.

Justifying any claim about the appropriate (or required) use of moral principle within constitutional adjudication requires, therefore, either appeal to externalist theory or an internal investigation into the practice of judging. I have outlined above the externalist approach. From the point of view of internality, we can only ascertain the relevance of moral principle for constitutional adjudication by following Wittgenstein's directive: "[D]on't think, but look!"\textsuperscript{221} It is illusory to think that from outside judicial practice we can somehow grasp how normative considerations are used within. Hence, rather than "thinking" abstractly about which assertedly immutable principles of right will make the Constitution best as a matter of political morality, we must "look" into judicial practice to detect, if possible, patterns or methods of moral inquiry.

Such a Wittgensteinian "look" reveals that moral considerations do figure importantly in constitutional adjudication, but only in ways strictly determined by the internal requirements of the practice. Certain constitutional provisions, such as the Equal Protection Clause and the Due Process Clause, are exceedingly "open-textured." While denying that the vagueness brought about by open-texture permits judges to draw upon their personal conceptions of political morality,\textsuperscript{222} the Supreme Court acknowledges that the meanings it discerns for open-textured clauses often depend in part on normative considerations.\textsuperscript{223} This does not mean that the Court appeals to abstract conceptions of political morality. Rather, it directs its inquiry into the practice of adjudication. For within that practice we find the fusion of law and morality which has so eluded the externalists. They have missed it because they look in the wrong place. Far from a fusion of substantive constitutional law with abstract moral theory, the fusion which takes place within constitutional adjudication links concrete, relativistic moral facts with the practice of adjudication itself. As a result, whatever ethical content an open-textured clause may have, the point of view of internality regards it as strictly "derived from considerations that are \textit{fused} in the whole nature of . . . judicial process."\textsuperscript{224}

Sometimes courts find their practice fused with morality when normative considerations provide precisely the critical insight necessary for deciding a case reasonably and coherently. Usually this form of judicial inquiry into morality proceeds by way of appeal to values or standards apparent in or logically compelled by the practice of social life within the community or, more broadly, within the practice of civilized living \textit{per se}. Thus, the

\textsuperscript{224} \textit{Rochin}, 342 U.S. at 170 (emphasis added).
Supreme Court has decided constitutional cases on the basis of “contem-
porary standards of decency,”225 “principles of justice so rooted in the
traditions and conscience of our people as to be ranked as fundamen-
tal,”226 “the evolving standards of decency that mark the progress of a
maturing society,”227 and “the community’s sense of fair play and decen-
cy.”228 Yet in making these various moral appeals, the Court engages in
a method of moral reasoning very different from externalist inquiry into
abstract, formal principles of “higher law.” The Court does not debate
philosophically the merits of alternative moral theories; nor does it assume
any absolute, objective moral truths.229 Rather, it looks for empirical
evidence of values or standards as they exist within the relevant community
of human thought and social life.230 And it uses that evidence not as the
decisive major premise in a deductive argument, but only as necessary to
craft an opinion which will satisfy its craft-bound objectives of coherence
and reasoned explanation.231

Normative considerations also enter into (become fused with) judicial
practice in a second way, through a process of reasoning reminiscent of
Wittgenstein’s notion of “family resemblances.” When required to decide
an issue under an open-textured clause whose content is at least partially
moral, the Court often looks to the product of its craft-bound practice, the
“families” of prior caselaw. With a concrete case in hand, it searches that
product for “similarities [and] relationships.”232 What it finds, if there is
a “family of cases” on point,233 is a “vast net of family likenesses,”234

228. Rochin, 342 U.S. at 172 (1952) (Frankfurter, J.).
Equal Protection Clause is not shackled to the political theory of a particular era.”); Snyder, 291 U.S.
at 105 (Reasoning that a state may “regulate the procedure of its courts in accordance with its own
conception of policy and fairness unless in so doing it offends some principle of justice so rooted in
the traditions and conscience of our people as to be ranked as fundamental,” while cautioning that a
state “procedure does not run afoul of the Fourteenth Amendment because another method may seem
to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar.”
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230. For a philosophical account of this type of moral reasoning, see J.L. Mackie, “Can There Be
a Right-Based Moral Theory?” in Jeremy Waldron, ed., Theories of Rights (New York: Oxford
University Press, 1984), 168-81. Cf. Alasdair Maclntyre, After Virtue, 187 (moral virtues are to be
understood by considering the “particular type of practice” which provides the arena wherein those
virtues are exhibited).
mutability of a constitutional principle, based upon shifting political and social judgments, undermines
the chances for consistent application of the Constitution from one generation to the next, a critical
feature of its coherent interpretation.”).
234. Ibid., I:66.
“a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail.”

This is the method of *Griswold v. Connecticut*, where the Court found a network of overlapping, criss-crossing similarities in several earlier cases arising under various provisions of the Bill of Rights. Justice Douglas discerned from this network of family likenesses “that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.”

It is also the method of *Plessy v. Ferguson*. When *Plessy* came before the Court it was a novel case. Judicial reactionism in the post-Civil War period had “virtually strangled [the Equal Protection Clause] in infancy.” Accordingly, nearly all equal protection cases prior to *Plessy* concerned businesses or individuals contesting state or local regulatory measures which allegedly impaired their economic freedom. While a few cases involved challenges to state criminal procedure and one an attack on state civil procedure, these cases, like their economic counterparts, conceived of the Equal Protection Clause as meaning nothing more than “that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.” When *Plessy* forced the Court to consider the constitutionality of a state statute mandating the social segregation of the races, there was no immediate network of similar cases. The “family” of cases with which the Court could compare the challenged legislation consisted only of distant cousins. Since in the areas of economic regulation and state judicial procedure the Court had developed a net of criss-crossing cases which found equal protection satisfied so long as persons were treated equally “in the same place and under like circumstances,” the groundwork was in place for “separate but equal.”

As the lone dissenter in *Plessy*, Justice Harlan essentially implored the majority to recognize that the existing body of equal protection caselaw was so dissimilar to the case at bar that they should address more directly the moral implications of their decision. Harlan foresaw correctly that the

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236. 381 U.S. 479 (1965).

237. Ibid., 484-85.

238. 163 U.S. 537 (1896).


240. See Barbier v. Connolly, 113 U.S. 27 (1885).


243. Ibid., 31.
decision in *Plessy* would "in time, prove to be quite as pernicious as the decision . . . in the *Dred Scott Case*."244 Yet he did not try to sway his colleagues by reasoning deductively from an abstract higher law conception of equality. Indeed, Harlan himself suggested that it is perfectly appropriate (constitutionally, at least) to refuse equal treatment to members of at least one particular race.245 His moral opposition to the majority's decision was strictly craft-bound to the practice of adjudication. He castigated the Court for rendering a decision which was unworkable ("permit[s] the seeds of race hate to be planted under the sanction of law"),246 incoherent ("The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution.")247 and insupportable by reasoned explanation ("It cannot be justified upon any legal grounds.").248

Even a cursory look at these two ways whereby moral inquiry fuses with the practice of constitutional adjudication shows that morality does figure importantly in the practice. The Supreme Court will consider evidence of moral values and standards, and will draw inferences from moral principles embedded in prior caselaw, insofar as doing so will help it render its next decision in a manner which satisfies the conditions of adjudicative excellence. Yet these methods differ markedly from appeals to abstract moral principles which, according to the Court, simply "do not carry [it] far."249 The practice of judging involves far more than performing logical deductions from *a priori* moral principles. Judges must deliberate dispassionately, maintaining, on the one hand, the "requisite detachment" from personal views toward morality,250 while affirming, on the other, their "commitment to the process."251 Only in that framework of craft excellence do moral principles find a place in the Constitution.

None of this should be taken to suggest that the purpose and function of judicial practice is any less noble, any less grand, any less normative, even,

245. See ibid., 561 ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race."). Harlan went on to criticize the Louisiana statute at issue not because it violated some fundamental moral notion of equality, but because it ironically treated Chinese better than Blacks:

[B]y the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, . . . are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.

Ibid.

246. Ibid., 560.
247. Ibid., 562.
248. Ibid.
than externalist theory. It is only to say that the nobility, grandeur, and normative force of adjudication is to be found in a different place. The justification of judicial practice lies not in the outcomes it achieves, but in the method of achievement. At its functional core, adjudication is a method of dispute resolution, an instrument of social order. "Excellence" in judicial practice reflects practical workability relative to that functional objective. It is an evaluative notion going to how efficiently and effectively the practice works to resolve conflict while maintaining the bonds, including the basic values and beliefs, of a society.252

Now it is true that the effectiveness of adjudication as a method of conflict resolution is reflected marginally in the degree to which the parties and the public are satisfied with the outcomes in individual cases. Controversial cases addressing highly charged issues, such as the Supreme Court's rulings in Ableman v. Booth253 (slavery), Brown v. Board of Education254 (racial segregation), and Roe v. Wade255 (abortion), make it appear that public acceptance plays a substantial role in the judiciary's effectiveness. Yet even when the authority of the courts comes under attack by those displeased with the result in one case or another, that authority as well as the overall effectiveness of the judiciary as an arbiter of disputes is overwhelmingly a product of how well the courts are perceived as satisfying the conditions of adjudicative excellence. Those conditions, which symbolically and in fact represent the judiciary's submission to the rule of law, are as central to the basic values and beliefs of American constitutionalism as any substantive values found in the Constitution. To allow even the most compelling moral theory to override the conditions of adjudicative excellence would thus subvert this nation's commitment to the rule of law and severely impair the courts' effectiveness and legitimacy.

From the internalist point of view, therefore, judicial decisions are subject to meaningful critique only according to how well they conform to the conditions of adjudicative excellence, not as to their results per se. Brown, for example, was not decided rightly because it made the Equal Protection clause "the best it can be,"256 or because it contributed to "moral growth" in the United States,257 or even because it conformed to

256. Dworkin, Law's Empire, 379.
257. See Perry, The Constitution, the Courts, and Human Rights, 121.
“our own best sense of what ‘equal protection of the laws’ requires.”

Nor was it decided wrongly because it stood in opposition to certain models of American constitutionalism or certain political viewpoints arguably held by the Framers of the Fourteenth Amendment. From the standpoint of internality, such talk is incoherent. Judgments of right and wrong necessarily presuppose a standard of rightness. Every externalist judgment of constitutional right or wrong thus rests on some criterion of constitutional meaning. As we have observed, the interpretive criteria favored by external legal theorists allow for determinations of constitutional meaning prior to and wholly independent of the practice of adjudication. Yet in constitutional interpretation, the practice of adjudication provides the only authoritative standard of constitutional meaning. Hence, since they claim to have access to constitutional meaning according to standards which lie outside and stand independently of the practice of adjudication, external legal theorists issue judgments of constitutional right and wrong which are fundamentally, and unavoidably, irrelevant.

It thus has no bearing on constitutional meaning to say that Brown or any other controversial judicial decision was decided rightly or wrongly if what one means is that it conforms to some external standard of constitutional interpretation. Those standards do not speak to constitutional meaning, only constitutional desire, the ever-present search for a logically derivable superconstitution.

Yet while it makes no sense to evaluate constitutional caselaw in terms of right and wrong outcomes, judicial decisions affecting constitutional meaning can quite appropriately be said to be excellent or less-than-excellent. This judgment depends on how well the decision satisfies the practice-specific conditions of adjudicative excellence. Here we can talk quite sensibly in a critical, evaluative manner of the decision in Brown. From this standpoint of internality, Brown stands as a paradigm example of excellence in adjudicative practice. In its unanimous decision, the Supreme Court held that the “separate but equal” standard of Plessy v. Ferguson was no longer (if it ever had been) a workable, coherent criterion for assessing laws mandating racial segregation. Notably, the Brown Court did not say Plessy had been decided wrongly. To say it had would have been as meaningless in 1954 as it is today, except perhaps for purposes of political rhetoric. The Court did say that whatever merit the Plessy standard of separate but equal may have had in 1896, it clearly

258. Macedo, The New Right, 71. See also Macedo, Liberal Virtues, 95 (claiming the decision in Brown is “superior” to the case it overruled, Plessy v. Ferguson, 163 U.S. 537 (1896), because it better satisfies “the preamble’s declaration that the Constitution aims to secure justice, liberty, welfare, and other important moral goals . . . ”).


amounted to a worthless, pernicious standard in 1954. To the Brown Court, “separate but equal” was a wholly unworkable and incoherent standard of constitutional equality for which no rational justification could be found.

A more recent decision matching the technical excellence of Brown is the joint opinion of Justices O’Connor, Kennedy, and Souter in Planned Parenthood v. Casey. Using the highly unusual, but particularly forceful form of a joint majority opinion, the three justices reaffirmed Roe v. Wade for reasons wholly unrelated to external considerations, and fully dependent on the conditions of adjudicative excellence. The Court faced substantial pressure to overrule Roe’s essential holding, “that viability marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.” Yet the three Justices found the viability standard still workable and coherent both in terms of subsequent caselaw development and the factual assumptions made by the Roe Court. They further determined that viability continues to set an articulative boundary for the constitutionality of abortion legislation. And they reasoned that only by upholding Roe, not through overruling it, could they issue a decision which was rationally justified and consistent with the principles of impartiality and nonbias which lie at the heart of the rule of law.

261. Ibid., 494 (“To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).
262. Ibid., 494-95. The fact that the Brown Court grounded its decision in part on empirical data drawn from the social sciences does not diminish the excellence of the opinion, or make it in any respect externalist. Courts seek “whatever aid is available” to determine legal meaning. Regents of U. of Cal. v. Bakke, 438 U.S. 265, 284 (1978). Social science data, like moral principle, is relevant insofar as it aids in the disposition of a case in a manner responsive to the conditions of adjudicative excellence.
264. The Casey decision notably occupies a wholly different plane than externalist evaluations of Roe and the snarly question of the morality of legalized abortion. Placed alongside the Casey majority opinion, Ronald Dworkin’s recent work on abortion and the Constitution is particularly inapposite. See Dworkin, Life’s Dominion; Dworkin, “The Center Holds!” 29-33.
265. Casey, 112 S. Ct. at 2811.
266. Ibid., 2812 (“Although Roe has engendered opposition, it has in no sense proven ‘unworkable.’”). Cf. Webster v. Reproductive Health Services, 492 U.S. 490, 549-50 (1989) (Blackmun, J., dissenting) (contending that Roe’s trimester framework, not just the viability standard, has proven to be workable).
267. Ibid., 2810 (”No development of constitutional law since the case was decided has implicitly or explicitly left Roe behind as a mere survivor of obsolete constitutional thinking.”)
268. Ibid., 2811 (“We have seen how time has overtaken some of Roe’s factual assumptions. . . . But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of Roe’s central holding. . . .”).
269. Ibid., 2804.
270. Ibid. 2814-16. The Court wrote:
But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure, and an unjustified repudiation of the
In this sense of adjudicative excellence, and in this sense only, we can thus say from the perspective of internality that *Casey* was decided *rightly*. In so judging the Justices, we should not purport to claim, pretentiously and hautishly, that the case was "right" in a substantive sense relating to outcome. To make that judgment would be to arrogate for ourselves a degree of super-appellate power and authority. And it would be to assume that we have access to constitutional meaning independently of judicial practice. Yet there is no such access, no authoritative external standard of constitutional meaning. Hence, when we say that *Casey* was decided rightly we can only mean "right" in the sense of excellence, as we can imagine Maxwell Perkins might once have said to Thomas Wolfe after reading the manuscript *Look Homeward, Angel*—"You did it right."

V. CONCLUSION

A "yawning gulf" no less unbridgeable than the abyss Wittgenstein perceived between essentialist illustration and concrete application thus separates external legal theorists from the practice of adjudication. Courts interpret law only in the "day-to-day practice"\(^{271}\) of its application in concrete cases. The practice of judicial application of law is a paradigm example of what Wittgenstein meant by practice as a *form of life* wherein words and concepts find meaning, the sense of practice he saw "exhibited in what we call 'obeying the rule' and 'going against it' in actual cases."\(^{272}\)

Constitutional meaning, on this internalist account, is a product of judicial *application* of law in such concrete cases and in accordance with the craft-bound conditions of adjudicative excellence. Every act of judicial "application" depends for its justification on its performance within judicial practice, for only then is it subject to the *practice*-specific, *internally* determined conditions of adjudicative excellence. Here we must stress again application, not *interpretation*. Adjudication is in a very real sense not an interpretive enterprise at all, but a forum for the practical application of legal rules and principles—"a way of grasping a [legal] rule which is *not* an *interpretation*."\(^{273}\) Hence, just as Wittgenstein emphasized the difference between concrete "application" and essentialist "illustration," we

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\(^{272}\) Ibid., I:201 (emphasis added).

\(^{273}\) Ibid.

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principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question, . . . A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

Ibid., 2815-16.
must remain ever alert to the fundamental difference between judicial “application” of law and externalist “interpretation.”

The claim of juristic externality that the Constitution has meaning outside the practice of adjudication denies that practices are craft-bound, overlooks the conditions of adjudicative excellence, characterizes adjudication as essentially interpretive, and assumes that legal meaning is absolute, existing in some abstract realm accessible to anyone with the proper interpretive attitude. In these respects, contemporary juristic theory not only ill-fits but stands opposed to the practice of adjudication. While assuming there to be “real” essentialist definitions for constitutional provisions, externalists aim to objectify the task of judicial interpretation by specifying necessary conditions or determinative criteria for deriving that constitutional meaning. This undercuts judicial practice by shifting attention away from the internal conditions of adjudicative excellence. It is only those conditions of excellence that govern the internal operation of judicial practice.

Externalism furthermore perpetuates illusion. The externalist method of abstracting the supposedly true spirit or moral vision of the Constitution from the text or other sources, and then positing formal rules of interpretation so as to cull from that spirit or vision the “real” definitions of constitutional terms rests on what Wittgenstein characterized as the “strange illusion” that from outside practice one can discern “essesces” or “laws” not grasped in practice. Yet this “illusory image of a greater depth” takes us nowhere, for it rests on the mistaken appearance of common understanding between the externalist and the practitioner. This appearance is mistaken because the externalist (the constitutional scholar) and the internalist (the judge) employ different language-games. Even though they reference the same constitutional terms and concepts—e.g., equal protection, privacy, finality, preamble, Frimer intent, and constitutional values and aspirations—they use them differently according to the purpose, method, and conditions of excellence of their respective practices. As Wittgenstein noted, we learn the use of words “under particular circumstances,” that is, as active participants in practices. For this reason, we cannot disentangle language and action. A proposition “lives”—has meaning—only within the context of a system of language, a language-

274. Wittgenstein, The Brown Book, II:17, 22 (“The same strange illusion... possesses us even more strongly if repeating a tune to ourselves and letting it make its full impression on us,... the idea suggests itself that there must be a paradigm somewhere in our mind, and that we have adjusted the tempo to conform to that paradigm.”). See also Wittgenstein, Remarks on the Foundations of Mathematics, VI:7-8.

275. Wittgenstein, Remarks on the Foundations of Mathematics, VI:31 (“For the ground keeps on giving us the illusory image of a greater depth, and when we seek to reach this, we keep on finding ourselves on the old level.”).

276. Wittgenstein, Last Writings, § 41; See also Wittgenstein, Zettel, §§ 114, 116; Wittgenstein, Philosophy of Psychology, II:200, 203.
Understanding the meaning of any live proposition requires inquiry into the activity, the "whole practice" within which the language-game serves as the language of discourse. Given the great differences between externalist jurisprudence and judicial practice—differences in purpose, method, and standards of excellence—it is only reasonable to suppose that their use of common terms and concepts masks markedly different language-games and that a profound epistemological distance separates the jurist from the judge. Hence, when we read juristic critiques of judicial decisionmaking we must be ever-mindful of Wittgenstein's insights that "[w]hen language-games change, then there is a change in concepts, and with the concepts the meanings of words change," and that "it is worthless and of no use whatsoever for the understanding" of a practice to subject it to externalist evaluation.

In grappling with the Constitution, in wrestling with the meanings its provisions come to acquire through adjudicative practice, we must therefore resist the allure of externality. Constitutional adjudication—no less than historiography, ship-building, music, art, architecture, novel writing, baseball, or any other central human activity—is a craft-bound excellence which can only be grasped wholly and credibly from within. We must

281. I imagine there may be some who would still object at this point that my thesis rests too heavily and problematically on the analogy I draw between adjudication and all other central human practices. One counterargument here could be that adjudication is disanalogous to ship-designing, playing concert piano, playing baseball, etc., because practitioners in those activities, unlike judges, produce commodities and act from self-interest. This objection simply misses the point. The central human activities I cite differ from one another dramatically both in terms of their products and the reasons that individuals may have for participating in them. Neither product nor motivation, however, is the basis of the analogy. All central human activities are analogous insofar as excellence in their performance is determined by the internal demands of the practice of the activity. Even if we believe (which I do not) that most concert pianists or baseball players play the piano or the field for the purpose of creating a marketable commodity, and even if we assume (which I would not) that pianists or ball players act more from self-interest (desire, inclination) than do judges when each decides to become or stay what they are (the requirement, for judges, of holding no interest in the outcome of cases before them does not translate into holding no interest (no desire, no ambition) in being a judge or retaining one's seat on the bench), the point remains that we can no more judge excellence at the piano or at bat by thinking outside the practice of those activities than we can understand excellence in adjudication by appealing to considerations external to judicial practice.

Another possible counterargument could go to what we often take to be the special "gifts" or "talents" necessary for the achievement of excellence in crafts like baseball, music, or art. Adjudication and legal criticism, so this argument would go, are crafts unlike those others because one can do them well without being especially gifted or talented. And since no special talents are required, the line between the practitioner and the critic of adjudication becomes blurred and easily crossed.

I disagree that talent is any less essential for achieving excellence in adjudication or criticism than it is in baseball, music, or art. There are thousands of judges, too many lawyers, scads of amateur baseball players, millions who sing in the shower, and an ever-growing stream of critics who vent in cyberspace. But true craft masters in judging, lawyering, playing baseball, singing, or criticism are few. Excellence in adjudication or criticism—that is, doing either craft and doing it well—requires talent, talent appropriate to the craft. The line between adjudication and criticism is just as hard to bridge (but not impossible: Holmes, Posner) as that between classical music and jazz (but Wynton Marsalis, Yo
shake the tempting illusion that externalist theory can solve the dilemmas judges face in their application of the Constitution. Externality can never supplant internality. This, once again, we learn from Wittgenstein who saw quite clearly that while "a physical theory such as Newton’s cannot solve the problems that motivated Goethe,"282 neither can Goethe’s theory about the constitution of colors assist the artist or the decorator in performing their crafts.283 And even those two must hold fast to the internalist point-of-view, for the decorator would be ill-advised to employ the color concepts used by Rembrandt, who, after all, did not use gold paint to paint a golden helmet.284