

Against Constitutionalism

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I. *Constitutionalism*

As a metaphysic of human persons, constitutionalism in its most general form is the view that human persons are constituted by their bodies, but are not strictly identical to them. The relation between human persons and their bodies is that of *constitution*, a type of unity-relation whose relata are strictly non-identical; “constitution is not identity”, as the phrase goes.

Proponents of constitutionalism maintain that the constitution relation is a very general relation that is ubiquitous in the natural world. Bronze statues are constituted by pieces of bronze; dollar bills and diplomas are constituted by pieces of paper; rivers are constituted by an aggregate of water molecules. Constitutionally related objects, such as the human person, one’s body (which many construe as identical to a living human animal), and the aggregate of particles that (immediately) constitutes one’s body, are non-identical material objects that all share the same matter—indeed are atom-for-atom qualitative duplicates—and are thereby spatially coincident at the times at which they are so related. Each of these objects all belong to distinct primary kinds and, as a result, each differ with respect to their modal profiles, i.e. their modal properties and persistence conditions. As the literature on constitutionalism is plentiful—the proponents and critics of the view are many—I will interact principally (though not exclusively) with the brand of constitutionalism defended by Lynne Rudder Baker (Baker 2000; 2007; 2013) in what follows.

For Baker, human persons are constitutionally related to their bodies (which are strictly identical to living, human animals) without being strictly identical to them. As a genuine relation of unity, constitution facilitates a kind of mutual property-sharing between the *constituting* human animal and the *constituted* human person, each of which belong to distinct primary kinds (which answers the question “What most fundamentally is x ?”). I borrow the property of *being 5’11”* from the human animal that constitutes me, and the human animal borrows the property of *thinking about philosophy* from me, the person. In Baker’s terminology, the human animal has the property of *being 5’11”* non-derivatively at t in the sense that it does not have it in virtue of being constitutionally related to me at t . More generally, if x

constitutes y at t , and x is F at t independently of its standing in constitution relations to y at t , then x has F *non-derivatively* at t . I, on the other hand, have the property of *being 5'11" derivatively* at t in that I have the property in virtue of my being constitutionally related to an object at t that has the property non-derivatively at t , i.e. independent of constitution relations.

So what exactly marks the fundamental difference in kind between human persons and human animals for Baker? For Baker, it is the possession of a first-person perspective *essentially* and *non-derivatively* that sets human persons apart from human animals. Persons alone have as part of their nature “the ability to conceive of oneself as oneself, from the inside, as it were” (Baker 2007: 69). When a human animal or organism develops a first-person perspective in this sense, a new entity comes in to existence, a human person.¹ Human persons are *human* in virtue of being constituted by human animals (*Homo sapiens*), and are *persons* in virtue of exemplifying a first-person perspective non-derivatively. Unlike the biological persistence conditions of human animals, human persons have unique first-person persistence conditions such that they exist as long as their first-person perspective is exemplified.

In my estimation, the chief virtue of Baker’s constitutionalism is that it aims to uphold a view of human persons as fundamental in an important sense; persons carve out genuinely unique and irreducible joints in reality. This emphasis on the fundamentality or metaphysical priority of human persons is to be commended in my view, particularly in light of the ever-increasing penchant for ascribing metaphysical priority to the very small (particles as on microphysicalism) or the very large (the cosmos as a whole as on priority monism).²

II. *Against Constitutionalism*

I will assume going forward that constitution-without-identity is a coherent metaphysical concept, and thus leave aside discussion regarding the adequacy of the machinery standardly used in formulating constitutionalism.³ Instead, in this section I want to explore what I consider to be a few of the most trenchant criticisms of constitutionalism, with a particular emphasis on the brand of constitutionalism defended by Lynne Rudder Baker as well as her re-

¹See (2007:49) for Baker’s distinction between a *rudimentary* and a *robust* first-person perspective, the possession of either (to be exact: a rudimentary first-person perspective that is *developmentally preliminary* to a robust first-person perspective) is both necessary and sufficient for a human animal to constitute a human person. I take up this distinction in detail in §II.4

²As recently defended by Schaffer (2010), “priority monism” is the view that the maximal whole—the fusion of all concrete reality, the cosmos—is metaphysically fundamental and prior to each of its proper parts. All ordinary concrete objects such as persons, tables, and trees are derivative and thus posterior to the cosmos. In classical terms, the cosmos is the sole substance.

³For criticisms of Baker’s formal notion of constitution see the contributions by Rea and Zimmerman in Baker et. al. (2002), as well as Jedwab (2013).

joinders to such criticisms.⁴

II.1 *The Grounding Problem*

Perhaps the most common objection leveled against constitutionalism is what is known as the *grounding (or indiscernibility) problem* (Olson 2001; Zimmerman 1995). Recall that on constitutionalism you (“Person”), the human animal (“Animal”) that constitutes you, and the aggregate of particles that constitutes the human animal (“Aggregate”) are atom-for-atom qualitative duplicates, they share precisely the same physical profile (same size, shape, structure, weight, texture, and made of the same bits of matter); as such, each object is empirically indistinguishable and share the precisely the same non-modal profile. Yet, on constitutionalism, Person, Animal, and Aggregate each have radically different modal profiles, including different persistence and identity conditions. But if these objects share precisely the same physical and non-modal profiles, then what accounts for such radical modal differences between them, say, in Animal’s ability to continue to exist despite a brain inquiry that brings about the cessation of Person? Or what, for example, explains the modal differences in the way these objects exhibit a first-person perspective, Person having a first-person perspective essentially and non-derivatively where Animal and Aggregate do not, given that they are empirically indiscernible neural-for-neural duplicates? Herein lies the grounding problem for constitutionalism.

Baker’s primary response to the grounding problem is to reject the latent assumption in the objection that a difference in modal profile entails a difference in non-relational (non-modal) properties.⁵ More specifically, Baker contends that the modal profile of material objects can be fixed by relational as well as non-relational properties. She remarks that the objection “is a worry only on the assumption that the nature and identity of a thing are determined by its actual intrinsic physical properties. But we have independent reason to think that ordinary things—like statues, flags, carburetors, and passports—have relational properties essentially” (Baker 2001: 170). If constitutionally related objects have at least some relational properties essentially, then they need not differ in their modal properties and persistence conditions in

⁴For other important objections to Baker’s brand of constitutionalism in particular see Moreland (2009: 130-137) and Zimmerman (2002).

⁵There is a straightforward, albeit controversial, response to the grounding problem available to the constitutionalist, yet one that Baker outright rejects given her “quasi-naturalist” (Baker 2007: 87) desideratum that persons are *wholly* material. The controversial response is this: while persons and animals share all of their material parts in common, they might nevertheless differ with respect to some *immaterial* part (see Koslicki 2008). If persons, say, have immaterial, rational souls as proper parts, then while they might share all of their material parts in common with animals, they nevertheless differ from animals with respect to their *total* compositional base. Yet given her quasi-naturalist desideratum, i.e. persons are *wholly* part of the natural world, Baker will have no truck with immaterial souls, or even immaterial parts of persons; any adequate account of human persons ought to construe them as material through and through (2007: 68).

virtue of any non-relational property, as the objector assumes.

What are we to make of this appeal to essential relational properties to avoid the grounding problem? While the appeal to essential relational properties might carry some weight for *intentional* objects like artifacts or artworks (objects the existence and identity of which are intention-dependent), the move lacks force when it comes to grounding the relevant difference in modal profile for *non-intentional* objects like Person and Animal in particular. What relational property of Animal, for instance, accounts for the radical differences in modal properties and persistence conditions between it and Person? As far as I can tell, Baker does little to fill out the details as to how exactly her appeal to relational properties might help ground the difference in modal profile for non-artifact kinds such as *human person* and *human animal* in particular.

But consider the following reason to think that Baker's appeal to essential relational properties falls short even in the case of intentional objects like artifacts and artworks. One can construct a case where constitutionally related objects share all non-relational *and* relational (non-modal) properties. If so, then it remains difficult to see what grounds remain for thinking that constitutionally related objects differ in their modal profiles by way of differing with respect to some relational property.

Taking a cue from Alan Gibbard's (1975) famous thought experiment, suppose an artist fashions from two distinct lumps of clay a statue of the bottom half of the giant Goliath at t , and a statue of the top half of the giant at t_1 , where each piece of clay constitutes each respective statue at each time. Now suppose, as seems plausible, that in bringing the two statues together at t_3 , the artist brings into existence a new statue, *Goliath*, as well as a new lump of clay, *Lumpl*. The artist then puts the new statue on display in his local art gallery where it is admired for its exquisite proportion and symmetry, and in time is considered by the majority of art critics as one of the most beautiful clay statues ever produced. Now suppose the statue is completely incinerated at t_4 by the artist's closest friend in a fit of envy, simultaneously destroying *Goliath* and *Lumpl*.

Here we have a case of constitutionally related objects, *Goliath* and *Lumpl*, that not only share precisely the same temporal boundaries (t_3 - t_4) and are exact atom-for-atom qualitative duplicates during their careers, but they also share all *historical* properties and stand in precisely the same *relations* to the artworld. Both *Goliath* and *Lumpl* are brought into existence by the same artist, at the same time, for the same aesthetic purposes, and both stand in the same relations to the wider artworld for the same temporal duration. Nevertheless, according to Baker, *Goliath* and *Lumpl* are constitutionally related objects that differ radically in their modal profile, in virtue of having different relational properties throughout their spatiotemporal careers. But if *Goliath* and *Lumpl* are qualitatively identical both with respect to their physical construction as well as their relational and historical properties at each time they exist, what grounds remain for claiming that some relational property determines the modal profile of one and not the other; consequently, the radical difference in modal properties and

persistence conditions lacks a difference-maker.⁶ At the very least, the above case suggests that Baker's rejoinder in terms of essential relational properties fails even to generalize to all cases of constitution regarding intentional objects like artifacts and artworks.

But the move to essential relational properties is just as untenable when it comes to grounding the modal-differences for non-intentional objects such as Person and Animal. What relational properties of Animal, for example, might account for its differing so radically from Person in its modal profile, its modal properties and persistence conditions?

Perhaps the most promising route for Baker here would be to argue that Animal, as a member of the biological species *Homo sapiens*, is what it is in virtue of specific relational and historical facts. In fact, Baker (Baker 2007:63) explicitly rejects the notion that kind-membership for biological organisms amounts to exemplifying "underlying intrinsic properties" (Baker 2007: 63). By her account, kind-membership for organisms is fixed purely by relational properties, in particular genealogical lineage. The view that biological species are purely relational and historical in that they are constituted exclusively by evolutionary lineage on the phylogenetic tree is known as "cladism" in contemporary philosophy of biology.⁷ Thus Baker might call on a cladistic concept of biological species to help ground the difference in modal profile between Animal and Person.

While cladism rightly emphasizes the importance of ancestral lineage for the classification of biological organisms, it is susceptible to several notable objections, only one of which I am able to rehearse here.⁸ Even if we were to uncritically grant that relational or historical properties concerning ancestral lineage are *necessary* for biological species membership, such properties are arguably not sufficient; the nature and identity of biological organisms cannot be fully captured by where they come from.

To see this, we can once again construct a scenario resembling Gibbard's above thought experiment, although this time adapted to the generation and extinction of genealogical lineages and their respective biological members (see Oderberg 2007: sec. 9.2). Take the event of an existing genealogical lineage l splitting into two lineages l_1 and l_2 , where the splitting constitutes a genuine speciation event, e_1 ; on cladism, the splitting of l into two distinct lineages l_1 and l_2 in e_1 suffices to generate two distinct biological species. Now suppose that some time after the occurrence of e_1 , the members of l_1 and l_2 simultaneously cease to exist as a result of a single extinction event, e_2 (due a meteorite perhaps). In this case, we have two distinct lineages l_1 and l_2 consisting of distinct members, but nevertheless share the very same ancestral lineage (l) and are bounded by the very same speciation and extinction events e_1 and e_2 .

⁶A standard four-dimensionalist move here, see Sider (2001: 114), is to argue that *Statue* and *Lumpl* stand in distinct modal counterpart relations. However, Baker is no four-dimensionalist, and she emphatically rejects modal counterpart theory (2007: 210-213).

⁷Two contemporary proponents of cladism include Okasha (2002: 200) and Sober (1993: 148).

⁸For more objections to cladism and purely relational accounts of biological species see Goodwin and Webster (1996: 44-47) and Devitt (2008).

But if biological species are purely relational and historical as on cladism, it is difficult to see what grounds the difference in biological species between members of l_1 and l_2 given that they share precisely the same genealogical nexus on the evolutionary tree. As with the case above with *Goliath* and *Lumpl*, the case suggests that what fixes biological species-membership amounts to something more than mere historical or relational properties. A purely relational or historical conception of biological species, then, is not sufficient to account for Animal's modal profile. And on the operational assumption that Person and Animal are qualitatively indistinguishable with respect to their non-relational (non-modal) properties, no properties remain to act as the relevant difference-maker regarding their difference in modal profile.

But one can argue that not only are historical or relation properties not sufficient for biological species-membership, they are not necessary either. For suppose, borrowing from Donald Davidson's (Davidson 1987: 443-444) famous Swampman thought-experiment, that a bolt of lightning destroys Animal while, at the same time, another bolt strikes the surface of a swamp and spontaneously produces an atom-for-atom duplicate of Animal. The newly generated Animal shares all of the same qualitative features, including sub-systems, functions, and behaviors as the original Animal, yet lacks a causal history and an ancestral lineage. If ancestral lineage is necessary for biological species-membership, the newly generated Animal would not only fail to be a human animal and a member of the species *Homo sapiens*, it would fail to be a member of any biological species at all. But given that the original Animal and the newly generated Animal are atom-for-atom duplicates, this seems deeply problematic.

Consequently, Baker's appeal to essential relational properties as a solution to the grounding problem seems untenable for both intentional and nonintentional objects alike.

II.2 *Constitutionalism and the Zombie Problem*

Eric Olson (2016) has recently argued that certain forms of constitutionalism have the untoward consequence that zombies are both actual and ubiquitous. Currently roaming the earth are several billion (7.4 billion to be precise) exact physical duplicates of human persons that are nevertheless devoid of a mental life. Where zombies were once thought to be exclusively denizens of possibility-space (if at all) and acclaimed residents of philosopher's thought experiments, Olson argues that it is a consequence of most forms of constitutionalism that there is at least one living, breathing zombie within the spatiotemporal boundaries where each human person is located.

Why think so? Olsen points out that if the human animal that constitutes the human person is in fact conscious, then it would be puzzling to learn, given that both are atom-for-atom (and neural-for-neural) physical duplicates, that the person and the animal diverge significantly when it comes to their mental lives (say, one's possessing simple, low-grade sentience and the other higher-order rational thought). It is for this reason, argues Olson, that most defenders of constitutionalism are not inclined to attribute mentality to human animals or

organisms at all.⁹ If no physical difference-maker is forthcoming to account for sharp differences in mentality between human persons and human animals, then it is best to withhold mentality from human animals altogether.

The implications of this brand of constitutionalism are strange indeed. If human animals are atom-for-atom physical duplicates of human persons and yet are completely devoid of conscious experience, it follows that for each human person there exists a zombie that constitutes that person.

Olson recognizes that his argument fails to implicate Baker's brand of constitutionalism, precisely because Baker (Baker 2000: 103) maintains that human animals exhibit at least some conscious, mental properties in both a derivative and non-derivative sense. In particular, she allows for human animals to be non-derivatively sentient, and derivatively possess a first-person perspective. But in so far as Baker's view entails that the human animals that constitute human persons really do exhibit conscious experience, her view raises a difficulty to which we now turn.

II.3 *The Duplication Problem and the Problem of Too Many Thinkers*

Informally, the *Duplication Argument* against constitutionalism runs as follows. According to constitutionalism, there is a human animal that is located precisely where you (the person) are that is physically indistinguishable from you in every respect, your atom-for-atom duplicate. As a result, every physical activity you undertake, the animal undertakes the very same activity. If you stub your toe and experience pain, the animal that constitutes you likewise stubs its toe and experiences the very same instance of pain; if, in holding your newly born child in your arms, you experience a deep sense of joy and wonder, the animal likewise experiences the very same sense of joy and wonder, and holds the very same child in its arms. But many find these overcrowding implications of constitutionalism deeply problematic, even absurd, and consider them a serious mark against the view.

One particularly thorny version of the *Duplication Problem* is known as the *Too Many Thinkers* argument and can be formulated against constitutionalism as follows:

1. If an animal constitutes me, and the animal is a thinker and I am a thinker, then there are two thinkers occupying the region where I am located.
2. It is false that there are two thinkers occupying the region where I am located.
3. I am a thinker, and the animal that constitutes me is a thinker.
4. Therefore, an animal does not constitute me.

⁹Olson cites Johnston (2007: 55), Lowe (1996: 1, 2010), Shoemaker (2008) as proponents of constitutionalism that explicitly deny mentality to the bodies that constitute human persons (but see Hawthorne and McGonigal (2008) for the view that bodies are psychologically indistinguishable from persons).

The argument trades on the implausibility of there being more than one conscious thinker in any region of spacetime where a human person is located. As we noted above (II.2), many prominent defenders of constitutionalism reject (3) and deny that human animals have mental lives at all.¹⁰ For this brand of constitutionalism, we might once again press the following grounding worry as above: if persons and animals are exact atom-for-atom (as well a neural-for-neural) physical duplicates, then what grounds the fact that each exhibit such radically different mental profiles?¹¹

As Baker affirms (3), her own response to the *Too Many Thinkers* argument is to argue that (1) begs the question against her brand of constitutionalism. How so? Part and parcel of Baker's constitutionalism is a form of numerical sameness without strict identity. This point is often underappreciated in extant criticisms of Baker's response to the problem of *Too Many Thinkers* (Olson 2001; 2016: 4; Zimmerman 2004). More specifically, Baker rejects the following standard analysis of number-concepts and counting in terms of strict, absolute identity:

(Counting_{Identity}) There is exactly one F =_{def} $\exists x (Fx \wedge (\forall y) (Fy \leftrightarrow y = x))$.

In words: there is exactly one F just in case there exists something, x , where x is F and any y is F if and only if y is strictly identical with x . On the standard view, we count the number of Fs by strict, absolute identity; according to Counting_{Identity}, if x is F and y is F and x is strictly non-identical to y , then there are at least two Fs.

Baker's brand of constitutionalism rejects Counting_{Identity} and opts instead for an analysis of number-concepts and counting in terms of strict identity-or-constitution. That is:

(Counting_{Identity-or-Constitution}): There is exactly one F =_{def} $\exists x (Fx \wedge (\forall y) (Fy \leftrightarrow y = x \text{ or } y \text{ is constitutionally related to } x))$

In words: there is exactly one F just in case there exists something, x , where x is F and any y is F if and only if y is either strictly identical to x or is constitutionally related to x . Baker argues that if we gloss number-concepts and counting in terms of Counting_{Identity-or-Constitution}, then the problem of *Too Many Thinkers* is a non-starter as there is exactly one thinker occupying the region where I am located. While the animal and I are strictly non-identical, we are to be counted as *one and the same* thinker in virtue of the fact that we are constitutionally related. If Counting_{Identity-or-Constitution} is adopted, then there is no duplication of thinkers and the problem dissipates.

Baker seems wholly unmoved by the counterintuitiveness of the notion of two strictly non-identical objects being counted as numerically one and the same object. Where some who rely

¹⁰See note 8.

¹¹The objection here seems particularly problematic for materialist brands of constitutionalism: if persons are *wholly* physical, and persons and animals are atom-for-atom and neural-for-neural duplicates, then what grounds the radically different mental profiles between the two?

on numerical sameness without strict identity in their metaphysical theorizing are quick to recognize that it cuts against widespread and well-entrenched intuitions about sameness and counting, Baker is undeterred by the incredulous stares (See Brower and Rea 2005; Brower 2014).

Why, then, does Baker hold fast in spite of the incredulous stares? As far as I can tell, Baker's motivation for wedding her version of constitutionalism to the above revisionary analysis of number and counting is primarily twofold, neither tenet of which is tenable in my estimation.

First, Baker advertises the relation of constitution as one of deep unity that falls short of strict identity. In her own words, "Although you are a person and your body is a person, there are not two persons where you are. This is so because constitution is a unity relation. If x constitutes y at t , and x is an F at t derivatively and y is an F at t nonderivatively—or vice versa—then there are not thereby two F s" (Baker 2007:38). But note that deep unity without strict identity does not *in and of itself* require the revision of well-entrenched intuitions about number and counting by strict identity. The relation of constitution stands among a family of what E.J. Lowe (2006: ch.3) calls "formal ontological relations" such as *grounding*, *dependence*, *instantiation*, *composition*, *identity*, *determination*, and *realization*. Composition, for example, is an asymmetric and irreflexive, one-many "building relation" (to use Bennett's (2011) terminology) that generates genuine unity out of plurality, which many take to fall short of strict identity. Contemporary metaphysicians who reject composition-as-identity maintain that the composition relation generates a single, unified whole out of the many parts, without in any way being strictly identical to those parts. While Baker is quick to distance herself from a mereological conception of the constitution relation (in particular many of the formal axioms of classical mereology), the point stands that the desire to secure deep unity without strict identity is not a sufficient motivation *in its own right* for overthrowing standard counting practices in terms of strict identity.

Second, Baker takes her particular brand of constitutionalism, with Counting_{Identity-or-Constitution} at its core, to have certain theoretical virtues with respect to (a) solving longstanding puzzles in material objects, and (b) rival accounts of the human person such as animalism and substance dualism. I have already noted that I think Baker is to be commended for her overall non-reductive approach to ordinary objects and persons. But of course it is well beyond the scope of this chapter to offer a full-scale cost-benefit analysis of Baker's constitutionalism with respect to (a) and (b). Any full-scale critique of Baker's view must weigh such theoretical virtues against the costs and benefits of alternative solutions to such puzzles, in addition to rival views regarding the metaphysics of human persons.

In my estimation, the virtues of constitutionalism (of which there are many) are outweighed by the high price of departing with what many consider to be other more deeply

entrenched philosophical views about the world.¹² These include: (i) an analysis of number concepts and counting solely in terms of strict identity (Counting_{Identity}), (ii) that ordinary, strictly non-identical material objects cannot be in the same place at the same time, (iii) that nothing that is not strictly identical to me thinks my thoughts (see below), and (iv) that I do not borrow any aspect of my mental life from any thinker that is not strictly identical to me (See II.4, *Priority Principle*). A good many philosophers have taken the intuitive plausibility of (i)-(iv) as evidence against any philosophical model of the human person that entails their denial. Of course many very capable philosophers have not done so, Baker being a prime example. Perhaps it is true that, as one philosopher aptly put it, serious metaphysics ultimately proceeds not from the head, but from the gut (Heil 2012:9).

But for those who identify as orthodox Christians (as Baker herself does), there are arguably additional, *prima facie* theological costs, namely, the departure from a longstanding, historically entrenched view of human persons in explicitly *non-materialist* terms, along with certain Christian doctrines that are corollaries to such a view (Crisp 2009: 153; van Inwagen 1995: 487). These include the existence of a disembodied intermediate state between death and the final resurrection of the saints (grounded in Pauline and non-Pauline Scriptural passages, e.g. 2 Cor.5:1-10; Mt.22:23-33), as well as a creedally orthodox Christology which consists of Christ's having a "rational soul" in accord with a straightforward reading of The Council of Chalcedon (AD 451).¹³ Christians who remain committed to these two historic positions will find additional theological motivation to reject Baker's brand of constitutionalism.

Even still, the underlying intuition driving the original *Too Many Thinkers* argument has not been completely put to rest by Baker's use of Counting_{Identity-or-Constitution}. The fact remains that on Baker's view there exists an object that is strictly not identical to me that thinks my thoughts and shares my mental life. So instead of (1) of the *Too Many Thinkers* argument we might offer the following revised (non-question begging) premise:

1* If an animal constitutes me, and the animal is a thinker and I am a thinker, then in the region that I occupy there is a thinker that is strictly not identical to me that thinks my thoughts.

¹²A quick note on (a). If Baker's principal way of solving puzzles in material objects (e.g. the problem of material constitution) is to put to use Counting_{Identity-or-Constitution}, then what she considers to be a theoretical benefit of her view will be deemed by many to be a steep theoretical cost.

¹³While constitutionalists like Baker (2004:336) and Corcoran (2006:140) argue that Scriptural passages that teach the reality of an intermediate state are *logically consistent* with a *bodily* intermediate state (Baker uses the phrase "for all we know" suggesting that such a reading is epistemically possible), it is no accident that such texts have historically been straightforwardly interpreted as, in fact, teaching a *disembodied* intermediate state (see *Westminster Confession of Faith*, Ch. 32 and *The Heidelberg Catechism*, Answer 57). While deference to Christian tradition on theological matters is defeasible in my opinion, I see no overriding reason to depart from the longstanding, traditional interpretation of these passages.

We can then go on to amend the argument by revising (2) to:

2* It is false that in the region that I occupy there is a thinker that is strictly not identical to me that thinks my thoughts.

The argument can then be run the same as before to the conclusion that an animal does not constitute me. Unlike (1), (1*) makes no claim about the *number* of thinkers in the region I occupy, and thus begs no questions against Baker's view. And many will find (2*) just as compelling as (2) of the original *Too Many Thinkers* argument. If so, then despite Baker's protestation to the contrary, her brand of constitutionalism remains saddled with a version of the *Too Many Thinkers* argument.

II.4 *Constitutionalism and the Priority Principle*

Lastly, constitutionalism runs afoul of an independently plausible principle regarding the relationship between persons and their mental lives, what Andrew Bailey (2015) has recently called the *Priority Principle*:

Priority Principle: We human persons possess all our mental properties in the primary and non-derivative sense. We think each of our thoughts in the primary and non-derivative sense.¹⁴

By my lights, the principal motivating factor behind the *Priority Principle* is that human persons are the ultimate source or originator of their mental lives. While Baker argues that some mental properties are had by persons in the primary and non-derivative sense, viz. a first-person perspective, she maintains that persons possess certain mental properties (e.g. *being in pain*) in a derivative or secondary sense, that is, in virtue of being constitutionally related to animals that possess such states in a non-derivative sense (Baker 2000: 100-101). So, when I stub my toe and find myself in a state of pain, I possess the mental property of *being in pain* in virtue of being constitutionally related to a (non-identical) human animal that is itself in pain in a non-derivative sense. On Baker's view, while I really do possess the property of *being in pain*, I am in pain *in virtue of* the animal's being in pain, and not conversely (ignore whether this entails that pain is extrinsic). As a result, Baker's view cuts against the *Priority Principle*.

But why think the *Priority Principle* true? For starters, the principle is independently plausible and is arguably a "down-home observation" (Baker 2002: 31) regarding the mental lives

¹⁴This is a slightly altered version of Bailey's principle. As originally stated, his principle is consistent with Baker's constitutionalism in so far as she maintains that some of our mental properties are had in the primary and non-derivative sense. As such, the original principle lacks an exclusivity clause specifying that *all* of our thoughts are had in the primary and non-derivative sense.

of persons. Intuitively, it is facts about me alone that ground facts about the specific contour and qualitative character of my mental life. It would be odd if a person provided an explanatory account of their mental life—*why* the person is in pain, say—by appealing to the mental life of some object that is not strictly them. The notion of borrowing or possessing a mental property in a secondary or derivative sense cuts against the intuitive idea that we are the ultimate source or originator of our mentality.

In addition to its independent plausibility, Bailey offers the following quick argument in favor of the *Priority Principle*. If I think some of my thoughts in a derivative sense, and doing so is a genuine way for me to think my thoughts, then there are two things thinking my thoughts in so far as the animal that constitutes me thinks some of my thoughts in a non-derivative sense, e.g. *being in pain*; but the notion that there are two things currently thinking my thoughts is absurd; hence, I think all of my thoughts in the primary or non-derivative sense (*Priority Principle*). Yet in light of our previous discussion (II.3), to wield this particular argument for the *Priority Principle* against Baker would be to beg the question against her view in that that it assumes a standard gloss on number and counting (solely) in terms of strict identity. Thus Bailey's argument in this context neglects Baker's use of a revisionary number-concept and counting principle that allows her to outright reject the claim that there are *two* things thinking my thoughts; the person and the animal are numerically the same thinker in so far as they are constitutionally related.

Be that as it may, the *Priority Principle* itself strikes many as a well-grounded datum regarding the relationship between persons and their mental lives. Baker will no doubt rejoin that the *Priority Principle* itself begs the question in that it is part and parcel of her view that not all of a person's mental properties are had in the primary or non-derivative sense. Yet for those who remain perplexed by the notion of borrowing a portion of one's mental life from something that is not strictly identical to *oneself* (even if we are to count them as one and the same object), the fact that Baker's constitutionalism runs roughshod over the *Priority Principle* is a steep cost for the view.

II.4 Constitutionalism and the First-Person Perspective

As noted above in §1, at the heart of Baker's brand of constitutionalism is the notion of the first-person perspective that sets human persons apart from animals and organisms. In her more recent work on the first-person perspective, Baker (Baker 2013) glosses the first-person perspective as a complex, irreducibly dispositional property that consists of two distinct stages, the *rudimentary* and the *robust* stage, where each stage is accompanied by the exemplification of a distinct dispositional property.

For Baker, the rudimentary stage of the first-person perspective is nothing more than the exemplification of the disposition or "capacity to interact consciously and intentionally with one's environment" (Baker 2013: 173). Both higher-order nonhuman animals as well as hu-

man infants exemplify this particular dispositional property in so far as they have the power to interact with their environment in such a way. By contrast, the robust stage of the first-person perspective consists in the exemplification of the dispositional property of being *self-conscious* or the “capacity to conceive of oneself as oneself* in the first person” (Baker 2013: 174).¹⁵ As persons alone possess self-concepts in general, persons uniquely exemplify the robust stage of the first person perspective. For Baker, a human person is any being that essentially exemplifies either disposition corresponding to each stage of the first-person perspective, whether rudimentary or robust (Baker 2013: 40).

There are, however, several notable objections to Baker’s dispositional ontology of the first-person perspective.¹⁶ First, while Baker contends that the exemplification of a first-person perspective (essentially) is the sole distinguishing mark of human personhood, she also adamantly maintains the deep ontological divide between the personhood of human infants and the non-personhood of higher-order nonhuman animals, despite the fact that both exemplify a rudimentary first-person perspective (essentially).¹⁷ In fact, the ontological uniqueness of human persons is one of the two key desiderata that Baker employs for an explanatorily adequate account of human persons (Baker 2007: 87). Baker herself states the worry here as follows,

If having a first-person perspective is what distinguishes a person from everything else, and if a human infant and a chimpanzee both have rudimentary first-person perspectives, how can a human infant be a person if a chimpanzee fails to be a person? (Baker 2007: 79)

Baker goes on to answer her own query,

What distinguishes the human infant from the chimpanzee is that the human infant’s rudimentary first-person perspective is developmentally *preliminary* to having a robust first-person perspective, but a chimpanzee’s rudimentary first-person perspective is not preliminary to anything further. (Ibid.)

On Baker’s view, then, the following are necessary and sufficient conditions for the constitution of a human person:

(HP) x constitutes a human person at t iff (i) x is a human animal (nonderivatively) and (ii) x has either a robust first-person perspective at t , or a rudimentary first-person perspective at t that is *developmentally preliminary* to a robust first-person perspective.¹⁸

¹⁵Following Matthews (1992), Baker employs terms accompanied by an asterisk such as “I*” or “oneself*” to signal that the user of such terms has a robust first person perspective.

¹⁶For further objections to Baker’s notion of the first-person perspective see Moreland (2009).

¹⁷Baker underscores the fact that “human infants are persons and higher nonhuman mammals are not persons (or probably not)” (Baker 2007: 79).

¹⁸This is adapted from Baker (2007: 79).

By a human infant's having a rudimentary first-person perspective that is "developmentally preliminary" to a robust first-person perspective, Baker intends to underscore the unique dispositional properties exemplified by the human infant that "developmentally ground or underpin" the development of the robust first-person perspective, properties not possessed by nonhuman animals. In Baker's own words, "a being with a rudimentary first-person perspective is a person *only if it is of a kind that normally develops robust first-person perspectives*" (Ibid., emphasis in original). On her view, severely mentally impaired individuals are persons nevertheless because they are the sorts of beings—members of the kind *human animal*—that are naturally disposed to develop a robust first-person perspective, in contrast to higher-order nonhuman animals. According to Baker, then, the deep ontological divide between the personhood of human infants and the non-personhood of higher order nonhuman animals amounts to a fundamental ontological difference in kind-membership.

Baker's appeal to kind-membership as marking the fundamental ontological divide between persons and non-persons is important in light of her response to what she calls a "regress" or "slippery slope" argument to HP (Baker 2007: 80). As Baker herself points out, the following worry arises for those who aim to secure the ontological uniqueness of human persons by way of HP: "Once we consider a being with a preliminary to a robust first-person perspective to be a person, why not consider a being with a preliminary to that preliminary also to be a person?" (Ibid.). At bottom, the worry here is that once the appeal to kinds or sortals has been made as the principal way of carving the deepest metaphysical divide between human persons and higher-order nonhuman animals, there remains no principled reason to exclude from the class of human persons beings that belong to the same kind as human infants, *human animal*, yet fail to (occurently) exemplify a first-person perspective.

The worry threatens to undermine HP as a way of securing the ontological uniqueness of human persons. To illustrate, consider the example of a human embryo after implantation (about fourteen days after fertilization).¹⁹ By Baker's lights, the human embryo in this stage of development is not a person in any sense in so far as it lacks a first-person perspective. Nevertheless, as a member of the kind *human animal*, the human embryo is a genetically distinct human organism at this particular developmental stage. As an organism belonging to the kind *human animal*, the human embryo is the kind of organism that exemplifies the requisite dispositions that are developmentally preliminary to both rudimentary and robust first-person perspectives; given a suitable environment, nutrition, and unless hindered by some extrinsic condition (preventers, masks, etc.), the human embryo is precisely the sort of organism (in contrast to other living organisms) that is naturally *disposed* to develop the capacity for a first-person perspective, whether rudimentary or robust. Consequently, both the human embryo and the human infant alike are the *sorts or kinds of beings* that have the

¹⁹Baker (2007: 75) is clear that she rejects the view that the embryo is a human organism prior to implantation. While I disagree that the embryo prior to implantation is not a human organism, I grant Baker's view for the sake of argument in what follows. .

requisite dispositions that developmentally underpin a robust first person perspective. If so, then according to HP there are no principled grounds for including human infants in the class of human persons while excluding human embryos from that same class.

As noted, Baker foresees this objection to HP and formulates the objector's proposed revision to HP as:

(HP*) x constitutes a human person at t if and only if x is a human animal (non-derivatively) and either (i) x has a robust first-person perspective or (ii) x has capacities that, in the normal course of development, produce a being with a robust first-person perspective.²⁰

Baker's chief argument against HP* relies on the distinction between an "in-hand" and a "remote" capacity, which tracks the notion of a first-order and a higher-order capacity (i.e. a capacity to develop a capacity), respectively. A hammer, she notes, "has an in-hand capacity at t for driving nails whether or not it is actually driving nails; you have an in-hand capacity at t for digesting food whether or not you are actually digesting food. Unassembled hammer parts (a wooden handle and a metal head) have only a remote capacity at t for driving nails; an embryo has only a remote capacity at t for digesting food" (Baker 2007: 80).

With the distinction between first-order and higher-order capacities in place, Baker claims that the first-person perspective (whether rudimentary or robust) is a first-order capacity; a subject's exemplifying a first-person perspective "awaits nothing for its exercise other than a subject's thinking a certain kind of thought" (Ibid.). Along the lines of HP, then, personhood depends exclusively on the exemplification of first-order capacities, since "remote capacities do not suffice for making *anything* the kind of thing that it is" (Ibid. emphasis in original). As Baker takes the human embryo just after implantation to be a being with absolutely no first-order capacities (Ibid.) but only with capacities to develop capacities, it follows that no human embryo at that stage of development qualifies as a human person.

What are we to make of Baker's rejoinder to HP*, and by extension her defense of the ontological uniqueness of human persons in terms of HP? For one, note that HP itself assumes that the determinants of personhood are not exclusively first-order capacities. In contrast to nonhuman animals, human infants are ontologically unique precisely *because* the kind to which they belong is characterized by the higher-order capacity to develop a robust first person perspective. The possession of a higher-order capacity in this case is what cuts the deepest ontological divide between the human persons and non-persons, and explains why a human infant and not a chimpanzee counts as a human person on Baker's view; nonhuman animals like chimpanzees are not the kinds of beings that, by nature, possess the higher-order capacity to develop the first-order capacity for a robust-first person perspective. While human infants do not have a robust first-person perspective in hand as a first-order capacity, they neverthe-

²⁰This is slightly adapted from Baker (2007: 80).

less are still persons in so far as they have the higher-order capacity to develop and exercise a first-order capacity for self-conscious awareness.

In summary, the following dilemma applies to Baker's preferred way of securing the ontological uniqueness of persons in terms of HP. Either the above regress or slippery slope argument against HP is sound or it is unsound. If (a) the argument is sound, then HP is false and either (i) HP* is true and human embryos after implantation are human persons (which Baker denies), or (ii) Baker rejects HP* and is left without a principled way to secure the ontological uniqueness of persons, and thereby unable to satisfy one of her key desideratum for an explanatorily adequate account of human persons. If (b) the regress argument is unsound, precisely because first-order or in-hand capacities are exclusively determinative of personhood as Baker argues, then HP is undermined in so far as it relies on the fact that the having of least one higher-order capacity, in this case having (in virtue of belonging to the kind *human animal*) the higher-order capacity to develop and exercise the first-order capacity of a robust first-person perspective, is at least partially determinative of personhood. On either (a) or (b), then, HP is undermined and Baker is without a principled way to secure the ontological uniqueness of persons in contrast to the rest of the natural world.

Consider a second objection to Baker's conception of the first-person perspective, one that stems from the use of first-person indexicals. Recall that Baker maintains that human animals possess a first-person perspective *derivatively* in virtue of constituting human persons who possess a first-person perspective *nonderderivatively*. Recall further that for Baker the notion of having a property in a derivative sense is a *genuine* form of property-exemplification, and thus amounts to more than the having of a property "by courtesy". By extension, to have a first-person perspective derivatively is to *genuinely* or *really* have a first-person perspective.²¹

Now consider the following version of an argument originally put forward by Snowden (1990: 83-107) that I take to cut against Baker's claim that derivative property-exemplification is genuine form of property-exemplification. For *reductio*, assume constitutionalism—that human person are not strictly identical to human animals—and call the animal that constitutes you "A".

1. If constitutionalism is true, then on occasion O when you, a human person, utter the indexical, "I am strictly identical to an animal," that remark is false.
2. Animals—and hence A—have acquired the capacity to use first-person indexicals and thus genuinely possess a first-person perspective.
3. If (2), then indexical remarks made through the mouth of A are remarks in which A is the subject.

²¹ Along these lines, Baker (2007: 175) remarks: "I take (G)—If x has a property F at t , then x has F nonderivatively or x has F derivatively—to be a substantive axiom. So, it is simply not the case that to have a property derivatively is not to have it at all. If you take the constitution-relation seriously as a unity relation, then to have a property derivatively is not just to have it by courtesy."

4. Therefore, indexical remarks made through the mouth of A are remarks in which A is the subject.
5. If (4), then the indexical remark on occasion O made through the mouth of A (i.e. “I am strictly identical to an animal”) is true.
6. Therefore, you are strictly identical to an animal; constitutionalism is false.
[1&5]

In response, Baker argues that (4) and the consequent of (3) are ambiguous and are false if read along the lines of:

- (a) Indexical remarks made through the mouth of A are remarks in which A is the subject *nonderderivatively*.

If (2) is true and one adopts reading (a), then the consequent of (3) is false and (4) does not follow and the *reductio* fails. This is precisely because on Baker’s view the animal (A) is the subject of indexicals only in a derivative sense, i.e. in virtue of constituting a human person who is the subject of indexicals in a nonderivative sense. On the other hand, if (2) is false, then the *reductio* is straightforwardly unsound; either way, says Baker, the *reductio* fails on reading (a).

Alternatively, Baker argues that if (4) and the consequent of (3) are read along the following lines of

- (b) Indexical remarks made through the mouth of A are remarks in which A is the subject *derivatively*.

then (5) is false and the *reductio* once again fails. While (4) and the consequent of (3) may be true if read along the lines of (b), the utterance “I am strictly identical to an animal” in the mouth of the animal is false, precisely because the indexical “I” always refers nonderivatively to the human person. In her own words:

When ‘I am identical to an animal’ issues from the mouth of the animal that constitutes me, I refer to myself (the person) nonderivatively, and say of myself that I am identical to an animal...There are not two referents of ‘I’—any more than there are two persons or two animals—where I am. So, when ‘I am identical to an animal’ issues from an animal’s mouth, there are not two statements—a true one by the animal and a false one by the person. There is only one statement (a false one) made nonderivatively by the person. (Baker 2001: 172).

Baker’s response to the foregoing argument brings to light a peculiar feature of her brand of constitutionalism, one that calls into question whether derivative property-exemplification is *real* property-exemplification and not merely exemplification *by courtesy*. If the animal (A)

is the genuine subject of indexicals and the bearer of a first-person perspective albeit in a derivative sense (as per (4) and the consequent of (3) along the lines of (b)), then why is the indexical remark “I am strictly identical to an animal” false in the mouth of the animal? If none of the animal’s first-person remarks or thoughts suffice to generate remarks or thoughts with the animal as the subject or referent, i.e. remarks with the content “I (the animal) am strictly identical to a human animal”, then it is difficult to see how the animal really does possess a first-person perspective in the first place.

On Baker’s view, even indexicals that issue from the mouth of the animal have the human person as the subject or referent. While the animal is said to genuinely possess a first-person perspective, the animal is never strictly the subject or referent of first-person indexicals, even when uttered by the animal. The fact that Baker takes (5) to be false on reading (b) strongly suggests that the animal is not *really* a subject of indexicals and a *genuine* bearer of a first-person perspective, even though it is true on Baker’s view that the animal has these derivatively in virtue of constituting a human person.

Consequently, if Baker reads (4) and the consequent of (3) along the lines of (b), then her rejection of (5) as a way to block the *reductio* threatens to undermine derivative property-exemplification as *genuine* or *real* property-exemplification. If the animal really is the subject of indexicals and the *genuine* bearer of a first-person perspective, then (5) seems unassailable and the *reductio* against constitutionalism sound.

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