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Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism

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Competing Accounts of Interpretation and Practical Reasoning in the Debate over Originalism

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ABSTRACT

This article explores two assumptions about constitutional law and the form of practical reasoning inherent in constitutional argument and decision that have shaped the debate over originalism. The first assumption—adopted by originalists—is that constitutional reasoning is a formalistic process. Originalism’s critics tacitly describe a very different and less formalistic model. The second assumption—shared by originalists and most of its critics alike—is that the central task of constitutional decision is to interpret the Constitution.

Both of these assumptions are wrong. Constitutional argument is not, and cannot be, reduced to the formal model of reasoning tacitly employed in originalism. The critics of originalism correctly point out that constitutional argument is more complex than originalism’s formal account allows. But those critics share with originalists the mistaken premise that our constitutional practice begins with interpretation. That agreement masks the substantial differences in their respective accounts of interpretation, however.

This Article demonstrates how these two assumptions have contributed to the fruitlessness of the debate. For example, if we reject the premise of the logical priority of interpretation the celebrated problem of generality dissolves. By articulating the jurisprudential foundations of the debate, this Article allows us to recognize the sterility of the debate over originalism and the likelihood that it cannot be successfully resolved by the protagonists on either side of the debate. While discarding the formalism of contemporary originalism does not compromise core originalist claims, the importance of that formalism to some of originalism’s stronger claims of privilege makes such an approach less attractive to originalism. Originalism’s critics, while right about constitutional reasoning, fail to discredit other important originalist claims. Thus, the protagonists in the debate may be likely to continue even after better understanding interpretation and the practice of constitutional argument. That would be a mistake. A better account of the place of interpretation and the nature of practical reasoning in constitutional reasoning also opens up the alternative of moving beyond the fruitless, stalemated debate about originalism.

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CONTENTS

I. ACCOUNTING FOR CONSTITUTIONAL INTERPRETATION AND REASONING	52
II. THE PRIORITY AND PRIMACY OF INTERPRETATION	61
A. <i>The Interpretative Claims of Classical Originalism</i>	61
B. <i>New Originalism and The Concept of Constitutional Construction</i>	73
C. <i>The Critics' Response</i>	82
III. COMPETING ACCOUNTS OF PRACTICAL REASONING IN OUR CONSTITUTIONAL DISCOURSE	92
A. <i>Originalism's Formal Account of Constitutional Reasoning</i>	93
B. <i>The Critics' Alternative to the Formal Account of Legal Reasoning</i>	103
C. <i>Conclusion</i>	107
IV. THE IMPLICATIONS OF A BETTER ACCOUNT OF INTERPRETATION AND OF REASONING	109

INTRODUCTION

I. ACCOUNTING FOR CONSTITUTIONAL INTERPRETATION AND REASONING

Originalism is not a theory of constitutional reasoning or a theory about the nature of constitutional interpretation.¹ The classical originalists did not come to their theory from a refined approach to language or hermeneutics.² It is a legal or jurisprudential theory of the Constitution and about constitutional

¹ Mitch Berman has previously made this point. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 5 (2009) [hereinafter Berman, *Originalism*] (“[O]riginalism maintains that courts ought to interpret constitutional provisions *solely* in accordance with some feature of those provisions' original character.”); see also William Baude, *Originalism as a Constraint on Judges*, U. CHI. L. REV. (forthcoming 2018) [hereinafter Baude, *Originalism as a Constraint*] (describing the movement in originalism from a theory of judicial constraint to a positive theory of constitutional law).

² See, e.g., Ronald Dworkin, *Comment*, in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 115 (Amy Gutmann ed., 1997) [hereinafter SCALIA, INTERPRETATION] [hereinafter Dworkin, *Interpretation*] (complimenting Justice Scalia, ironically, for having given his talk on interpretation without referencing the work of Gadamer or hermeneutics); D. A. Jeremy Telman, *Originalism: A Thing Worth Doing . . .*, 42 OHIO N.U. L. REV. 529, 537–40 (2016) (describing the roots of originalism in a reaction to the constitutional jurisprudence of the Warren Court).

decision.³ Its critics generally do not contest its claims on the basis of the nature of constitutional reasoning or the place of interpretation in constitutional theory and decision.⁴ The abstraction of the continuing debate increasingly obscures both the genealogy and import of originalism and the stakes of the debate itself.⁵

The debate over originalism is fruitless and pathological.⁶ Turning to the tacit competing accounts of practical reasoning and interpretation therefore

³ See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 363–72 (1977) [hereinafter BERGER, *GOVERNMENT BY JUDICIARY*] (arguing that the Warren Court's Equal Protection Clause jurisprudence had moved very far from the original, historical understanding of the Fourteenth Amendment); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 1–6 (1971) [hereinafter Bork, *Neutral Principles*] (contrasting principled judicial decision pursuant to the Constitution to discretionary, value-laden decisions); SCALIA, *INTERPRETATION*, *supra* note 2, at 9–14 (describing originalist interpretation as necessary to avoid usurpation of power by the courts).

⁴ See Richard A. Posner, *Bork and Beethoven*, 42 *STAN. L. REV.* 1365, 1368, 1378–79 (1990) [hereinafter Posner, *Bork*]; CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 71–73 (2005) [hereinafter SUNSTEIN, *RADICALS*] (arguing against originalism on prudential, consequentialist grounds); Dworkin, *Interpretation*, *supra* note 2, at 126–27 (arguing that the best way to interpret the Constitution requires incorporating moral theory into that interpretive process); Laurence Tribe, *Comment, in SCALIA, INTERPRETATION*, *supra* note 2, at 93–94 [hereinafter Tribe, *Interpretation*] (arguing that there are different kinds of provisions in the Constitution, some of which admit of simpler, semantic interpretation and others of which state principles that must be articulated and applied in a more complex and principled way). *But see* Cass R. Sunstein, *There is Nothing That Interpretation Just Is*, 30 *CONST. COMM.* 193, 202 (2015) [hereinafter Sunstein, *Nothing*] (arguing that claims about the nature of interpretation do not argue for originalism).

⁵ Some of this occurs expressly, as originalism is reformulated as a positive or natural law theory of law. See William Baude, *Is Originalism Our Law?*, 115 *COLUM. L. REV.* 2349, 2351–52 (2015) [hereinafter Baude, *Our Law*] (defending an account of originalism as a positivist theory of constitutional law); Jeffrey Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* 97, 117–21 (2016) [hereinafter Pojanowski & Walsh, *Enduring Originalism*] (natural law account of originalism). But there are also strands in the debate in which the protagonists simply seem to lose track of or tacitly abandon originalism's purpose as the debate continues to unfold. See Richard S. Kay, *Construction, Originalist Interpretation and the Complete Constitution*, 19 *U. PA. J. CONST. L. ONLINE* 1, 2, 7 (2017) [hereinafter Kay, *Constitutional Construction*] (rejecting the New Originalists' project of constitutional construction because it reopens the floodgates of judicial discretion).

⁶ This article is one of a series exploring and dissolving the debate over originalism. The complex, interrelated arguments made in the series are generally brought together in André LeDuc, *Striding Out of Babel: Originalism, Its Critics, and*

may appear either a dead end or an unimportant exercise in the intellectual history of the turn of the millennium. It appears of little interest and largely a waste of effort. In fact, understanding those foundational premises reinforces my arguments about the sterility of the debate over originalism and helps us to translate what is valuable about the discourse of the debate back into the constitutional vernacular of our decisional practice.

The premises about interpretation and practical reason play a central role in the formulation of originalism as well as in the debate. Originalism offers a highly formal account of constitutional reasoning, recognizing only specific kinds of constitutional authority.⁷ Indeed, originalism sometimes goes so far as to suggest that constitutional reasoning may be cast as a series of syllogisms.⁸ Originalism's critics generally offer a less formal account of constitutional reasoning.⁹ The elements that count as constitutional authority are more wide ranging and the reasoning with respect to such authorities is far less formal.¹⁰ As with other elements in the debate, however, inconsistent stances with respect to the nature of interpretation and constitutional reasoning inform the debate without being generally recognized or articulated.

At the outset, it is important to outline the relationship among the theories of meaning, interpretation, and practical reason inherent in the originalism debate. As I have explored before,¹¹ the theories of constitutional meaning—accounts of what the Constitution says, rather than, for the most part, what the Constitution does—are largely implicit in the debate over originalism. They describe the import of the Constitution that interpretation aims to identify and

the Promise of Our American Constitution, 26 WM & MARY BILL OF RTS. L.J. (forthcoming 2017) [hereinafter LeDuc, *Striding Out of Babel*] and André LeDuc, *Beyond Babel: Achieving the Promise of Our American Constitution*, 64 CLEV. ST. L. REV. 185 (2016) [hereinafter LeDuc, *Beyond Babel*].

⁷ See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 262 (1990) [hereinafter BORK, *TEMPTING*] (criticizing non-originalist constitutional reasoning for not proceeding with major and minor premises from the Constitution); SCALIA, *INTERPRETATION*, *supra* note 2, at 44–45.

⁸ See BORK, *TEMPTING*, *supra* note 7, at 262.

⁹ See, e.g., STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 75 (2010) [hereinafter BREYER, *DEMOCRACY*]; DENNIS PATTERSON, *LAW AND TRUTH* 169–79 (1996) [hereinafter PATTERSON, *TRUTH*] (expressly rejecting a formal account of legal argument); RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 269–72 (1990) [hereinafter POSNER, *PROBLEMS*]; LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 6–8 (2008) [hereinafter TRIBE, *INVISIBLE CONSTITUTION*]; LAURENCE H. TRIBE & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 59–60, 87–91 (1991) [hereinafter TRIBE & DORF, *READING*]; SUNSTEIN, *RADICALS*, *supra* note 4 at 5.

¹⁰ See generally BREYER, *DEMOCRACY*, *supra* note 9.

¹¹ André LeDuc, *Making the Premises about Constitutional Meaning Express: The New Originalism and Its Critics*, 31 BYU J. PUB. L. 111 (2017) [hereinafter LeDuc, *Constitutional Meaning*]

articulate. Once that meaning has been articulated by the process of interpretation, additional steps in the process of practical reasoning are employed to determine the decision of the constitutional controversy at bar. Thus, in the originalism debate, both sides generally take meaning to be the end of interpretation and the beginning of the chain of practical reasoning that decides a case. As with the tacit accounts of meaning in the debate, the accounts of interpretation and practical reasoning are largely tacit, too.

The debate over originalism accords interpretation a fundamental and foundational role in constitutional law in general and constitutional adjudication in particular that it does not play. My first task in this article is to explain why the assumption about the fundamental nature of interpretation is mistaken and how it informs the originalism debate. Originalism—the New Originalism—addresses this mistake by qualifying the role of interpretation and proclaiming a fundamentally important distinction between interpretation and construction.¹² Attention to the purported distinction between interpretation and construction is one of the two key moves in the New Originalism.¹³ My second task in this article is to argue why that distinction is not only problematic, but also a dead end in revivifying originalism and winning the debate for the originalists.

I first argue that originalism largely assumes that the task of constitutional adjudication begins with interpretation, an assumption that most of originalism's critics share.¹⁴ I have previously explored the concepts of

¹² See generally Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011) [hereinafter Barnett, *Interpretation and Construction*]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013) [hereinafter Solum, *Constitutional Construction*]; Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) [hereinafter Solum, *Distinction*].

¹³ See generally Mark Tushnet, *Heller and the New Originalism*, 69 OHIO ST. L.J. 609 (2008) [hereinafter Tushnet, *New Originalism*]; Keith Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004) [hereinafter Whittington, *New Originalism*]; Barnett, *Interpretation and Construction*, *supra* note 12; Solum, *Constitutional Construction*, *supra* note 12. But see John McGinnis & Michael Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 NW. U. L. REV. 751 (2009) (challenging the need for constitutional construction in originalism); Kay, *Constitutional Construction*, *supra* note 5 (arguing that the introduction of the methods is unnecessary and, moreover, compromises the originalist project of cabining judicial discretion). The other key difference between the new and the old is reliance on the original public semantic meanings rather than the original intentions of the relevant actors.

¹⁴ For a critical analysis of the triumph of interpretative theories see Michael Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 942–57 (1989) [hereinafter Moore, *Interpretative Turn*]; see also Michael Moore, *Interpreting interpretation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL

constitutional meaning in the debate, the target at which interpretation aims, as Richard Fallon has put it.¹⁵ I will explore in some detail the claims and commitments made as to the nature of the interpretative project. Interpretation, according to originalists, provides the necessary nexus between the text and the constitutional question presented for decision. The assumed need for an interpretation creates the potential for the originalists and their critics to debate the so-called problem of generality.¹⁶ The problem of generality dissolves without the tacit assumption of the need for an interpretation before a constitutional provision may be applied in constitutional adjudication.¹⁷

Although the commitment to interpretation is shared by many of originalism's critics,¹⁸ some critics of originalism, including pragmatists like Posner, have challenged the assumption that interpretation is prior to

PHILOSOPHY 1 (Andrei Marmor ed., 1995) [hereinafter LAW AND INTERPRETATION] [hereinafter Moore, *Interpretation*] (arguing against an interpretive account of the law). While some of originalism's critics have offered an alternative non-interpretive account of adjudication, that alternative has not been the mainstream line of criticism, and it takes the challenge to originalism in a direction different from that defended by the principal critics. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, FATE] (arguing that constitutional law is created by sometimes inconsistent modes of argument that are not simply deployed as interpretations of the Constitution to decide constitutional cases).

¹⁵ LeDuc, *Constitutional Meaning*, *supra* note 11, at 111; Richard Fallon, *The Meaning of Meaning*, 82 U. CHI. L. REV. 1235, 1237 (2015) [hereinafter Fallon, *Meaning*] ("Almost self-evidently, meaning is the object, or at least one of the objects, that statutory and constitutional interpretation seek to discover." (footnote omitted)).

¹⁶ *See generally* TRIBE & DORF, *READING*, *supra* note 9, at 73–80 (arguing that there is a fundamental interpretive problem in constitutional interpretation because the level of generality of the constitutional provisions is unspecified).

¹⁷ *Id.*; Robert B. Brandom, *A Hegelian Model of Legal Concept Determination: The Normative Fine Structure of the Judges' Chain Novel*, in PRAGMATISM, LAW, AND LANGUAGE 19, 21–22 (Graham Hubbs & Douglas Lind eds., 2014) [hereinafter Brandom, *Legal Concept Determination*; LeDuc, *Constitutional Meaning*, *supra* note 11, at 118 n.27, 218.

¹⁸ *See, e.g.*, RONALD M. DWORKIN, LAW'S EMPIRE 225–27 (1986) [hereinafter DWORKIN, EMPIRE] (describing an idiosyncratic concept of legal interpretation); Moore, *Interpretive Turn*, *supra* note 14 at 891–92. *But see* Dennis Patterson, *Interpretation in Law*, 42 SAN DIEGO L. REV. 685, 686–88 (2005) [hereinafter Patterson, *Interpretation*] (arguing against the priority of interpretation in understanding or applying law).

understanding and decision.¹⁹ They argue that the task of adjudication—of judging—cannot be reduced to one of interpretation, even when a constitutional case presents a question of the application of a constitutional text.²⁰ They argue that the task is not a semantic one because decision must focus on the consequences of potential decisions and rationales.²¹ I have explored the pragmatist account in a companion article.²² Here, I will explore the non-pragmatist objections to the interpretative model of constitutional decision. One such objection is made by natural law theorists, including natural law originalists.²³ These theorists assert that the overriding authority of natural law must inform the reading and application of positive law—regardless of what reading the best interpretation of that positive law might otherwise yield.²⁴ The interpretive model should be rejected, in the natural law theorists' view, because the mission of constitutional adjudication is not the interpretation of the meaning of constitutional provisions; rather, it is deciding the merits of the competing claims in a constitutional controversy—within the decisional metrics of our constitutional practice.

Interpretation is neither central to constitutional decision nor must interpretation logically precede such decision. Interpretation is an important element in the textual mode of constitutional argument and, to a lesser degree, in historical argument. It is not important in the other modes of constitutional argument.

By contrast with the generally shared emphasis on interpretation, the protagonists in the debate advance very different accounts of practical

¹⁹ See POSNER, PROBLEMS, *supra* note 9, at 269–72 (questioning whether the judicial project of applying statutory or constitutional provisions is best characterized as interpretation).

²⁰ See generally Posner, *Bork*, *supra* note 4, at 1380–81 (“The originalist faces backwards, but steals frequent sideways glances at consequences. The pragmatist places the consequences in the foreground.”).

²¹ *Id.*

²² See generally André LeDuc, *Paradoxes of Positivism and Pragmatism in the Debate about Originalism*, 42 OHIO N.U. L. REV. 613 (2016) [hereinafter LeDuc, *Paradoxes of Positivism*] (arguing that there is a fundamental failure on the part of the originalists and their pragmatist critics to engage because they disagree about the underlying question whether the Constitution should be interpreted from a deontological or consequentialist stance).

²³ RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 122–25 (2004) [hereinafter BARNETT, LOST]; Moore, *Interpretive Turn*, *supra* note 14, at 917–18.

²⁴ See ROBERT P. GEORGE, *Natural Law and Positive Law*, in IN DEFENSE OF NATURAL LAW 102, 107–09 (1999) [hereinafter GEORGE, *Natural Law*] (explaining the direct and indirect ways that positive law may be derived from natural law). See generally JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (2d ed. 2011) [hereinafter FINNIS, NATURAL LAW].

reasoning in constitutional theory and decision. Originalists, on the one hand, characterize key—if not all—steps of constitutional reasoning as formal syllogisms with constitutional text providing the major premises in such arguments.²⁵ That characterization of constitutional reasoning is an important constitutive element of originalism's highly formalistic theory of constitutional argument and reasoning.²⁶ The consequence of this model of constitutional reasoning is that originalism endorses an account of an almost mechanical judicial decision-making process.²⁷ Critics, on the other hand, do not share all of originalism's assumptions about constitutional reasoning. Instead, the critics describe constitutional reasoning and argument as ranging beyond formal syllogisms, with relevant premises in such arguments going beyond the premises derived directly from the constitutional text.²⁸ Their model of reasoning is much more open-ended.

But neither the originalists nor their critics articulate the implications of their competing descriptions of constitutional reasoning. For example, Dworkin denies the formal account of legal reasoning from legal rules that originalism offers.²⁹ He argues that constitutional reasoning is more complex and its sources broader.³⁰ But Dworkin effectively assimilates constitutional reasoning in decisions to philosophical reasoning.³¹ That characterization is

²⁵ See BORK, TEMPTING, *supra* note 7, at 262 (endorsing the model of the syllogism with major and minor premises in constitutional reasoning).

²⁶ See generally *infra* Part III.

²⁷ See SCALIA, INTERPRETATION, *supra* note 2, at 45 (characterizing the Constitution as generally “simple to apply”); Kay, *Constitutional Construction*, *supra* note 5, at 25 (“Constitutional construction, at its heart, puts its trust in human judgment not in historically fixed rules. This is—not to put too fine a point on it—the opposite of constitutionalism.”).

²⁸ See, e.g., BREYER, DEMOCRACY, *supra* note 9, at 78–82 (defending an account of the Living Constitution from the perspective of an anti-originalist justice of the Supreme Court).

²⁹ Thus, Dworkin denies that all legal authorities have the structure of legal rules. See, e.g., RONALD M. DWORKIN, *The Model of Rules: I*, in TAKING RIGHTS SERIOUSLY 14, 22–23 (1977) [hereinafter DWORKIN, TAKING] [hereinafter DWORKIN, *Rules I*] (arguing that law consists not only of legal rules that may be applied simply, but also of *legal principles* which are more complex and more reasoned, as well as less peremptory).

³⁰ DWORKIN, EMPIRE, *supra* note 18, at 365–89 (considering the proper authorities to be considered in deciding a case like *Brown*).

³¹ Dworkin's theory of law as integrity ascribes a substantial place to the coherence and consistency of the public and private law and argues that such law must ultimately be formulated in light of our moral and political theory; only philosophical argument can satisfy that requirement. See DWORKIN, EMPIRE, *supra* note 18, at 96–98 (emphasizing both the interaction of law and moral theory and that they remain distinct); see also André LeDuc, *The Ontological Foundations of the Debate over*

questionable, too. It is questionable both because philosophical argument does not look like constitutional argument and because philosophical argument, as a metaphysical matter, does not play that role in our constitutional practice.³²

More fundamentally, Toulmin has challenged the project of reducing practical reasoning to a formal, logical account.³³ The practice of constitutional argument is not described well by the formal account offered by originalism. That descriptive failure grounds an important argument as to why the originalist account cannot be an adequate account of constitutional reasoning. There is no stance outside our practice of constitutional argument from which to criticize those arguments that are made and the results that are obtained. The absence of such an Archimedean or neutral stance puts a premium on the accuracy and completeness of descriptive accounts of constitutional law. It is on the basis of those descriptions and, sometimes, redescriptions of our constitutional law from within our practice that constitutional arguments may be made.

Originalism's principal critics also generally fail to offer an account of practical reasoning in our constitutional practice that allows a place for the exercise of judgment.³⁴ For example, Ronald Dworkin defends a "Right Answer Thesis" that asserts that every legal question, including every constitutional question, has a unique right answer that can be identified by the application of his decisional method.³⁵ Instead of articulating the role of judgment in constitutional decision, the critics seek an algorithmic account that can fully explain the process of constitutional decision.³⁶ That search is

Originalism, 7 WASH. U. JURIS. REV. 263, 317 (2015) [hereinafter LeDuc, *Ontological Foundations*].

³² See André LeDuc, *The Relationship of Constitutional Law to Philosophy: Five Lessons from the Originalism Debate*, 12 GEO. J.L. & PUB. POL'Y 99, 155 (2014) [hereinafter LeDuc, *Philosophy and Constitutional Interpretation*].

³³ See STEPHEN TOULMIN, *THE USES OF ARGUMENT* vii (updated ed. 2003) (1958) [hereinafter TOULMIN, *ARGUMENT*] (criticizing "the assumption, made by most Anglo-American academic philosophers, that any significant argument can be put in formal terms . . . [as] a rigidly demonstrable deduction . . .").

³⁴ For a non-originalist statement of the importance of judgment, see Charles Fried, *On Judgment*, 15 LEWIS & CLARK L. REV. 1025, 1043–44 (2011) [hereinafter Fried, *Judgment*] (defending the claim that constitutional questions require the exercise of judgment and that the strongest opinions of Justice Scalia are not those that hew most closely to his originalist jurisprudential theory, but those that reflect a compelling constitutional judgment).

³⁵ See RONALD DWORKIN, *Is There Really No Right Answer in Hard Cases?*, in *A MATTER OF PRINCIPLE* 119 (1985) (arguing that there is one right answer even to hard legal questions); DWORKIN, *EMPIRE*, *supra* note 18, at 43–44.

³⁶ See, e.g., Sanford Levinson, *Hercules, Abraham Lincoln, the United States Constitution, and the Problem of Slavery*, in RONALD DWORKIN 136, 149–55 (Arthur

misguided. I'll describe an alternative account of constitutional reasoning. On that account, while argument is constrained by convention—or something like it—judgment must always play an important role.

Admittedly, some of originalism's critics also endorse this alternative account of constitutional reasoning.³⁷ But some of those same critics repudiate the originalists' formal account of constitutional reasoning only to assimilate constitutional reasoning to political decision-making.³⁸ That, too, is a mistake. It is a mistake because our practice of constitutional argument and decision operates within its own framework, distinct from if not entirely independent of the political decision-making sphere.³⁹ Naked political arguments are not made within that practice, and the arguments that are made do not translate or reduce nicely to political argument.⁴⁰

My third and final task in this article is to explain how the claims made here about the originalism debate fit together with my claim that the debate is grounded in mistaken or confused premises and that it is fruitless and pathological. Because the protagonists in the debate assume different premises about constitutional interpretation and constitutional reasoning, it is hardly surprising that they talk past each other in the debate. Most obviously, this article develops the account of reasoning and interpretation that I sketched in

Ripstein ed., 2007) [hereinafter Levinson, *Hercules*] (criticizing Dworkin's description of constitutional decision because it fails to determine how *Dred Scott* ought to have been decided). *But see* BOBBITT, FATE, *supra* note 14, at 6–7 (emphasizing the role of constitutional judgment and asserting that no constitutional theory can determine decisions).

³⁷ See TRIBE & DORF, READING, *supra* note 9, at 80–81; Levinson, *Hercules*, *supra* note 36, at 155.

³⁸ See Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 646–47 (1984). See generally MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); STANLEY FISH, *Wrong Again*, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 105 (1989); STANLEY FISH, *Working on the Chain Gang*, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 87 (1989) [hereinafter FISH, *Working on the Chain Gang*].

³⁹ See Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233, 1311–12 (1989) [hereinafter Bobbitt, *Is Law Politics?*]; BOBBITT, FATE, *supra* note 14, at 6.

⁴⁰ See CHARLES FRIED, SAYING WHAT THE LAW IS: THE CONSTITUTION IN THE SUPREME COURT 241–44 (2004) [hereinafter FRIED, SAYING] (arguing that the demands of doctrine result in Justices voting and arguing in ways that do not reduce easily to traditional political classifications); BOBBITT, FATE, *supra* note 14, at 6 (offering examples of kinds of arguments that are impermissible in constitutional adjudication); Bobbitt, *Is Law Politics?*, *supra* note 39, at 1302–12 (arguing that such a reduction of law to politics misunderstands the nature of constitutional argument and our constitutional practice).

my earlier articles.⁴¹ It also complements the claims I have made about how the premises about constitutional meaning factor into the debate. Moreover, from the critical strands in this analysis, we can also draw out the elements in the debate that may be incorporated into a more productive constitutional discourse. That discourse rejects foundational assumptions and acknowledges that there is no Archimedean stance from which we can assess constitutional argument and decision. Our argument and decision must be carried on *within* our practice as a matter of the social facts that comprise that practice.

II. THE PRIORITY AND PRIMACY OF INTERPRETATION

A. *The Interpretative Claims of Classical Originalism*

Underlying the originalism debate is the originalist claim that the mission of constitutional adjudication is principally constitutional interpretation.⁴² First, originalists are committed to the logical priority of interpretation: constitutional adjudication must begin with the interpretation of the meaning of the constitutional text (or, in some cases, the relevant constitutional precedent).⁴³ Second, originalists are committed to the primacy of interpretation: the reading of the constitutional text provided by interpretation provides a privileged ground on which to decide the case at hand.⁴⁴ Therefore, originalists argue, interpretation of the constitutional text trumps other grounds of decision.⁴⁵

⁴¹ See LeDuc, *Ontological Foundations*, *supra* note 31, at 274–88, 306–22 (briefly describing the accounts of interpretation and reasoning underlying the opposing positions in the debate over originalism); see also LeDuc, *Constitutional Meaning*, *supra* note 11 (exploring in some detail that theoretical assumptions about meaning in general and the nature of the meaning of the constitutional text in particular).

⁴² See SCALIA, INTERPRETATION, *supra* note 2, at 37, 46–47.

⁴³ The role of precedent and, in particular, non-originalist precedent has always been problematic for originalism. See, e.g., BORK, TEMPTING, *supra* note 7, at 157–59; SCALIA, INTERPRETATION, *supra* note 2, at 138–40 (asserting that originalism’s approach to precedent is not dissimilar to that of other theories).

⁴⁴ See SCALIA, INTERPRETATION, *supra* note 2, at 37–47.

⁴⁵ See *id.* at 37–39.

Those commitments are generally implicit.⁴⁶ They seem sometimes to be taken to be so obvious as to warrant no attention.⁴⁷ Interpretation is generally thought to be necessary both for understanding the constitutional text and for constitutional decision.⁴⁸ The originalist project is to interpret the Constitution by determining and then privileging⁴⁹ the original understanding of the meaning of the Constitution.⁵⁰ The originalist interpretations then provide the propositions to support the reasoning to originalist constitutional decision.⁵¹ The originalist interpretive model has an intuitive appeal—at least for early twenty-first century American lawyers—that non-interpretive theories do not have.⁵² Such non-interpretive theories do not have that appeal because of the

⁴⁶ *See id.*; BORK, TEMPTING, *supra* note 7, at 139-41 (grounding the need for the Court to interpret the Constitution on the basis of the original understanding in the requirements of the democratic republic and the so-called countermajoritarian problem). *But see* Patterson, *Interpretation*, *supra* note 18 (denying interpretation priority in judicial decision).

⁴⁷ *See, e.g.*, SCALIA, INTERPRETATION, *supra* note 2; BORK, TEMPTING, *supra* note 7; Frank H. Easterbrook, *Alternatives to Originalism?*, 19 HARV. J.L. & PUB. POL'Y 479, 485-86 (1993) [hereinafter Easterbrook, *Alternatives*].

⁴⁸ *See* SCALIA, INTERPRETATION, *supra* note 2, at 44-45 (asserting that the difficulties of deciding cases are negligible for originalism compared to those facing alternative theories).

⁴⁹ *See id.* at 37-39.

⁵⁰ *See id.*; Whittington, *New Originalism*, *supra* note 13, at 599.

⁵¹ SCALIA, INTERPRETATION, *supra* note 2, at 43-44 (offering an originalist account of the requirements of the confrontation clause).

⁵² Interpretative theories might not have the same appeal in the English common law tradition to the extent that common law methods are even more dominant. *See id.* at 3-9 (describing the exhilaration of the common law for law students, lawyers, and, above all, judges). Interpretative theories have an intuitive appeal to us because they assimilate our efforts to follow the constitutional directives to other common forms of communicative behavior. Sunstein captures that assimilation best. *See* SUNSTEIN, RADICALS, *supra* note 4, at 57 ("Fundamentalism also seems to have a justification in ordinary thinking about interpretation. If your friend asks you to do something, you're likely to try to understand the original meaning of his words."). Sunstein is likely mistaken here, in an understandable but philosophically naïve way. You don't try to understand the meaning of the words; you try to understand what your friend would like you to do. Well, Sunstein might reply, without the ability to read minds, how is that to be done without understanding what the words mean? While it is natural to assume that the process of understanding begins with, and is focused on, understanding the words employed, that claim is hardly well-defended—or clearly established. *See* THOMAS NAGEL, *Sexual Perversion*, in MORTAL QUESTIONS 39, 45-48 (1979) (exploring the complex non-linguistic communication patterns in normal human sexual desire).

prevalence of the interpretative model.⁵³ That dominance is not limited, of course, to the confines of the originalism debate.⁵⁴

Classical originalism takes the task of constitutional theory and the task of the judge in constitutional adjudication as that of interpreting the Constitution.⁵⁵ Classical originalism assumes that if it can show that the constitutional jurisprudence of the Warren Court was not rooted in interpretations of the meaning of the Constitution, then the legitimacy of that constitutional jurisprudence can be called into question.⁵⁶ Generally, classical originalists assert that the project of interpretation should be aimed at articulating the meaning of the relevant constitutional provision.⁵⁷

Understanding originalism's commitment to its account of constitutional decision as a matter of interpretation starts with originalism's definition of

⁵³ See Moore, *Interpretive Turn*, *supra* note 14, at 873 (acknowledging the prevalence of interpretive theory, but arguing that a variety of interpretive theories that purport to avoid the debate between realism and anti-realism, including that defended by Dworkin, are metaphysically and epistemologically mistaken).

⁵⁴ See generally Moore, *Interpretive Turn*, *supra* note 14, at 873; LAW AND INTERPRETATION, *supra* note 53, at 873; THE INTERPRETATIVE TURN: PHILOSOPHY, SCIENCE, CULTURE (David R. Hiley et al. eds., 1991) [hereinafter INTERPRETATIVE TURN].

⁵⁵ See KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 2 (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL INTERPRETATION]; BORK, TEMPTING, *supra* note 7, at 154 (characterizing originalism as a "method of interpretation"); SCALIA, INTERPRETATION, *supra* note 2, at 9–14 (rejecting broader common law decisional methods with respect to constitutional law). *But see* Baude, *Our Law*, *supra* note 5, at 2405–10 (arguing that originalism is not a theory of interpretation but a positivist theory of law).

⁵⁶ Bork, *Neutral Principles*, *supra* note 3, at 6–8. See generally BERGER, GOVERNMENT BY JUDICIARY, *supra* note 3.

⁵⁷ Fallon, *Meaning*, *supra* note 15, at 1237.

interpretation⁵⁸—to determine the meaning of a text.⁵⁹ Originalism begins with the intuition that the general or abstract language of a constitutional provision does not always immediately or obviously provide an answer to a constitutional question or dispute that presents itself.⁶⁰ Interpretation is the principal technique that instantiates the general meaning of the constitutional text in the particular context at hand.⁶¹ That meaning may be based upon the framers’ original understandings, intentions, or expectations. The relevant community with respect to such social facts may vary in different forms of originalism, but in each case, originalism assumes the existence of such

⁵⁸ Interpretation is a complex and controversial concept. *See generally* INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER (Sanford Levinson & Steven Mailloux eds., 1988) [hereinafter INTERPRETING LAW] (exploring fundamental questions with respect to the nature of interpretation in a broad range of contexts); INTERPRETIVE TURN, *supra* note 54 (describing, as the title suggests, the important role of interpretation in a wide range of contemporary cultural and academic fields); Patterson, *Interpretation*, *supra* note 18 (arguing for a limited role for interpretation in constitutional practice).

Classically, interpretation was distinguished from explanation, with explanation the project of the natural sciences and interpretation the projects of the humanities. Yet even with the weakening, if not collapse, of that distinction, the concept of constitutional interpretation as the process of articulating and expressing the meaning of the Constitution and of the provisions thereof is widely accepted. *See* James F. Bohman, et al., *Introduction: The Interpretative Turn*, in INTERPRETATIVE TURN, at 2–3 (noting that interpretation does not have an accepted definition).

⁵⁹ *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 430 (2012) [hereinafter SCALIA & GARNER, *READING LAW*] (defining interpretation as determining the meaning of a text).

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⁶⁰ *See* SCALIA, *INTERPRETATION*, *supra* note 2, at 45.

⁶¹ *See id.* (describing the judicial task as applying the constitutional text to “new and unforeseen phenomena”); WHITTINGTON, *INTERPRETATION*, *supra* note 55, at 1–2.

constructs.⁶² Assuming an unchanging constitutional text, originalism relies upon the concept of interpretation to specify the meaning of the general or abstract constitutional text in varying contexts.⁶³ The first mission of originalists is to identify and articulate the original meaning of the constitutional text. Once that is done, the originalists apply that meaning to resolve contemporary constitutional disputes.⁶⁴ While the foundations for that mission and the power of the arguments made in reliance on that original meaning may appear paradoxical,⁶⁵ the force and importance of such arguments is well established.⁶⁶

Bork, perhaps the most important of the early originalists, is representative when he describes the interpretive mission expressly as one of interpreting the original meaning of the Constitution.⁶⁷ But originalists generally have not focused clearly on the reason why a judge's task is to interpret the Constitution.⁶⁸ The reason is likely that they typically do not see an alternative.⁶⁹ Two leading originalists who do confront an alternative are Judge Bork and Justice Scalia. Justice Scalia believes that the judicial

⁶² There may be occasional, rare exceptions, but those exceptions are not viewed as challenging the originalist theory or posing a material impediment to the mission. See SCALIA, INTERPRETATION, *supra* note 2, at 45; BORK, TEMPTING, *supra* note 7, at 166 (arguing that in the rare case in which the meaning of a constitutional provision cannot be determined, such a provision should be given no effect, as if obscured by an "ink blot").

⁶³ For a non-originalist account of this process, see Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1171–73 (1993) [hereinafter Lessig, *Translation*] (arguing that the originalists' self-proclaimed goal of maintaining fidelity to the original meaning of the constitutional text requires the methods of translation).

⁶⁴ See BOBBITT, FATE, *supra* note 14, at 9–24; SCALIA, INTERPRETATION, *supra* note 2, at 37–38, 45.

⁶⁵ Cf. BOBBITT, FATE, *supra* note 14, at 9 (noting that the sciences and the arts do not admit of such historical arguments).

⁶⁶ Indeed, such arguments were clearly well established long before modern originalism offered a defense of such methods.

⁶⁷ See BORK, TEMPTING, *supra* note 7, at 139–51. Justice Scalia also states the mission of a judge in interpretative terms. SCALIA, INTERPRETATION, *supra* note 2, at 37–39. Other leading originalists take interpretation to be the charge of constitutional law, too. See, e.g., Frank Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1109, 1119–20 (1998) [hereinafter Easterbrook, *Dead Hand*] (arguing that new originalists are textualists committed to interpreting the constitutional words).

⁶⁸ See SUNSTEIN, RADICALS, *supra* note 4, at 57–58.

⁶⁹ For an account of the failure to recognize alternatives, see LeDuc, *Striding Out of Babel*, *supra* note 6 at 10–13. For an example of such thinking, see BORK, TEMPTING, *supra* note 7, at 251 (characterizing theories of constitutional interpretation that reject the original understanding as impossible).

alternative to interpreting the Constitution is rewriting it.⁷⁰ According to Justice Scalia, departing from the interpretation of the Constitution's original meaning rewrites the Constitution and results in a body of constitutional law that lacks legitimacy.⁷¹ It lacks legitimacy because it is grounded neither on historic democratic choices embodied in the text of the Constitution nor on an authoritative democratic enactment.⁷² The absence of the former is obvious to Justice Scalia. The absence of consensus follows from the nature of value choices and the diversity found in our modern Republic. Thus, interpretation, or lawyers' work, as Justice Scalia puts it,⁷³ becomes the judicial mission by default.⁷⁴ For Bork, the alternative to originalism is an indeterminate constitutional law and uncabined judicial discretion.⁷⁵ When non-originalist authorities are introduced, the judge is left with a broad discretion to read the Constitution and decide cases on this account.⁷⁶

Interpretation in this context gives a translation or reading of a constitutional provision that is focused upon the question at hand.⁷⁷ The originalists would not generally characterize their project of interpretation as

⁷⁰ SCALIA, INTERPRETATION, *supra* note 2, at 86, 140. Those would not appear the only options, however. As has been remarked, a variety of decisional rules would cabin judicial discretion. See Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 885–87 (2015) [hereinafter Sachs, *Legal Change*].

⁷¹ SCALIA, INTERPRETATION, *supra* note 2, at 9 (arguing that constitutional decision employing the full array of common law methods “would be an unqualified good, were it not for a trend in government that has developed in recent centuries, called democracy”).

⁷² *Id.* at 10.

⁷³ *Id.* at 46.

⁷⁴ *Id.* at 46–47; see BORK, TEMPTING, *supra* note 7, at 143–46. Although Bork does not expressly characterize his project as one of interpretation, that project to determine the meaning of the Constitution is manifestly interpretative.

⁷⁵ BORK, TEMPTING, *supra* note 7, at 251–59 (making the strong claim that non-originalist theories are impossible).

⁷⁶ *Id.*

⁷⁷ Originalists have not endorsed the concept of translation that Lessig has defended because it emphasizes the distance between the original text and its contemporary exposition and application. See generally Steven G. Calabresi, *The Tradition of the Written Constitution: A Comment on Professor Lessig's Theory of Translation*, 65 FORDHAM L. REV. 1435 (1997) [hereinafter Calabresi, *Lessig's Theory*] (criticizing Lessig's theory of translation as an inadequate description of our constitutional practice and yields a quietist theory of constitutional decision that leaves no ground from which to criticize decisions that we view as erroneous or misguided); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) [hereinafter Lessig, *Understanding Changed Readings*]; Lessig, *Translation*, *supra* note 63; Patterson, *Interpretation*, *supra* note 18, at 687 (denying Quine's claims about the central place of translation).

a matter of translation because translation is generally made from one language to another. The originalists deny that there are different linguistic communities across which translation is necessary.⁷⁸ Thus, constitutional interpretation is contextual. The contexts are the questions of import and force that arise over time with respect to the Constitution in our democratic constitutional republic. Interpretive theories are dominant today. There is a substantial literature that examines legal interpretation generally, and constitutional interpretation in particular, and compares it to the interpretation of other texts.⁷⁹ For example, Justice Scalia's Tanner lectures at Princeton were titled *A Matter of Interpretation*.⁸⁰ Similarly, Bork and Easterbrook describe the originalist mission as one of interpretation.⁸¹ Indeed, the commitment to interpretation would appear to range across the varieties of originalism.

While all varieties of originalism appear committed to an interpretive theory, the nature of that commitment varies. According to the principal varieties of originalism, the judge's task is to interpret the Constitution.⁸² Within this assumed interpretive mission, originalism's contribution is to help determine which interpretation of a constitutional provision should be given

⁷⁸ See generally Calabresi, *Lessig's Theory*, *supra* note 77; Lessig, *Understanding Changed Readings*, *supra* note 78; Lessig, *Translation*, *supra* note 63; Patterson, *Interpretation*, *supra* note 18.

⁷⁹ See, e.g., RICHARD POSNER, *LAW AND LITERATURE* (3d ed. 2009); DWORKIN, *EMPIRE*, *supra* note 19, at 228–29; INTERPRETING LAW, *supra* note 58.

But there are alternative accounts of constitutional adjudication that do not rely on, or do not rely exclusively on, a model of interpretation. So, for example, to the extent that we characterize the Constitution as a series of rules, there are important philosophical theories that suggest that we may follow such rules without need for, or recourse to, an interpretation. See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 198–202 (G.E.M. Anscombe trans., 3d ed. 1953) [hereinafter WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*]; Brandom, *Legal Concept Determination*, *supra* note 17, at 21–22. Most fundamentally, Wittgenstein appears to suggest that we cannot need an interpretation of a rule to follow the rule, because each such interpretation would itself need an interpretation. Moreover, the role of a rule is not merely to state a rule; it is to give us a rule. When we consider that function, we may come to wonder and ultimately question whether an interpretation of the meaning of a rule could be prior to the ability to apply the rule.

⁸⁰ See generally Antonin Scalia, *Foreword*, in ORIGINALISM: A QUARTER CENTURY OF DEBATE 37, 43 (Steven G. Calabresi ed., 2007) (referring to originalism as a “philosophy of constitutional interpretation”).

⁸¹ See, e.g., Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 349–51 (1992); BORK, *TEMPTING*, *supra* note 7, at 146–49.

⁸² See Easterbrook, *Alternatives*, *supra* note 47, at 485–86 (arguing that there are none); BORK, *TEMPTING*, *supra* note 7, at 143–46; SCALIA, *INTERPRETATION*, *supra* note 2, at 37–40.

and what ought to be taken into account in that interpretive project.⁸³ The originalist answer varies in its particulars.⁸⁴ Certain originalist theories share a strategy to restrict their scope by limiting the role of interpretation generally. Michael Perry, for example, believes that interpretation is only one part of the task of appellate adjudication.⁸⁵ Another part of that task is to specify the content of indeterminate constitutional provisions. Interpretation, in Perry's theory, can only operate with respect to specific constitutional provisions.⁸⁶ Indeterminate provisions need to be given meaning, but that project is neither one of interpretation nor best performed by the courts. Instead, Perry would look to the executive and legislative branches to specify the necessary content for such provisions.⁸⁷

Similarly, originalists like Keith Whittington give interpretation a logical pride of place, while limiting its role and acknowledging the place of constitutional construction.⁸⁸ I have noted above the problems caused by

⁸³ See generally André LeDuc, *Evolving Originalism: What Is Privileged?*, 5 (Jan. 12, 2013) (unpublished manuscript on file with the author) (exploring what original intentions, understandings, or expectations ought to be privileged in reading or interpreting the Constitution, and how, in the principal varieties of originalism).

⁸⁴ Thus, for example, an original expectations theory interprets the constitutional text on the basis of the expected effect that the text would have while an original public semantic understandings theory interprets the text on the basis of the original public understandings. See, e.g., Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) ("Perhaps most important of all, however, originalism has itself changed—from original *intention* to original *meaning*. No longer do originalists claim to be seeking the subjective intentions of the framers.").

⁸⁵ See MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 74–75, 95–101 (1994) (arguing that interpretation is the task of the courts only when facing determinate provisions of the Constitution.) [hereinafter PERRY, CONSTITUTION].

⁸⁶ *Id.* at 70–71.

⁸⁷ *Id.* at 202–04. Whittington and Barnett adopt a very similar strategy with the distinction between interpretation and construction. Both concede that for indeterminate and undetermined provisions the original intentions or understandings cannot alone determine the constitutional content. See WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55, at 7–13 (constitutional construction is essentially political); BARNETT, *LOST*, *supra* note 23, at 118–130.

⁸⁸ KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) [hereinafter WHITTINGTON, CONSTITUTIONAL CONSTRUCTION] (articulating a non-originalist account of constitutional construction to permit originalism as an exclusive account of constitutional interpretation); WHITTINGTON, *INTERPRETATION*, *supra* note 55. Whittington sorts constitutional provisions into determinate provisions that need only interpretation, and indeterminate provisions, for which rules must be constructed by the three branches of the Federal government. *Id.*; see also Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST.

incorporation of a broader concept of construction.⁸⁹ Nevertheless, privileging an original understanding of text, expectation, or intent, is what marks an interpretative theory as originalist. For originalists, the neutral, legitimate application of the Constitution begins first with interpretation.⁹⁰ As an interpretive theory, originalism is in the mainstream of contemporary theories of constitutional interpretation.⁹¹

I have previously explored some of the tacit premises about meaning that underlie the debate, including some of the reasons to question those tacit premises.⁹² But even conceding those premises, the protagonists in the debate defend or assume questionable claims about constitutional reasoning and the place of interpretation. Originalism's emphasis on interpretation and its disregard for the performative element of constitutional provisions contrast with the account originalism offers of the performative role of the Constitution as a whole.⁹³ An interpretative account of the constitutional text assumes that the meaning of the Constitution is a matter of the semantics of the constitutional text.⁹⁴ A performative account recognizes that the semantic meaning of the Constitution is only one contributor to the broader import that the constitutional text has in performing certain missions.⁹⁵

COMMENT. 257, 263–66 (2005) (outlining an exception to preserve non-originalist precedent where the Court's task was one of specifying an indeterminate or undetermined constitutional content). Those strategies may be seen as another attempt to deny the indeterminacy of the constitutional doctrine that Bobbitt highlights and savors. *See generally* PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 31–42 (1991) [hereinafter BOBBITT, *INTERPRETATION*] (arguing that classical accounts of the indeterminacy of legal doctrine falter because of their failure to recognize the role of the competing modes of argument).

⁸⁹ *See infra* text accompanying notes 104–153.

⁹⁰ *See, e.g.*, SCALIA, *INTERPRETATION*, *supra* note 2, at 37–40 (contrasting the proper task of constitutional interpretation with the more free-ranging process of common-law adjudication).

⁹¹ *See* ANDREI MARMOR, *INTERPRETATION AND LEGAL THEORY* (Rev. 2d ed. 2005) [hereinafter MARMOR, *INTERPRETATION*]; DWORKIN, *EMPIRE*, *supra* note 31. *But see* PATTERSON, *TRUTH*, *supra* note 9, at 169–72; Moore, *Interpretative Turn*, *supra* note 14; Patterson, *Interpretation*, *supra* note 18 (arguing against the priority of interpretation in understanding or applying law).

⁹² LeDuc, *Constitutional Meaning*, *supra* note 11.

⁹³ *See* SCALIA, *INTERPRETATION*, *supra* note 2, at 40–41 (describing the conservative role of the Constitution and, indeed, any constitution, as preventing the erosion or disregard of fundamental social and political values).

⁹⁴ *See, e.g., id.* at 144.

⁹⁵ *See generally* AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* (2012) [hereinafter AMAR, *UNWRITTEN CONSTITUTION*]; *see also* BORK, *TEMPTING*, *supra* note 7, at 139 (describing the Constitution as providing for two competing fundamental principles:

For example, when the text of Article I Section 3 provides that, “[t]he Vice President shall be the President of the Senate,” it might appear that the terms in the phrase “shall be the President of the Senate” must mean exactly what they mean in the corresponding declarative statement and that the meaning of the constitutional performative text incorporating those terms therefore shares that same meaning. Indeed, it may be difficult to imagine any ambiguity in such a phrase. Yet the issues that arise in the case of the trial of a proposed impeachment of the Vice President demonstrate that questions arise with respect to the performative text that do not arise with respect to the declarative text.⁹⁶ Despite the clause’s semantic meaning, it seems unlikely that the Vice President could be permitted to preside over his or her own impeachment trial. Yet, according to the interpretive account, no such exception would appear proper. The exception naturally understood with respect to the performative constitutional text is not a matter of semantics. Instead, the better explanation for the source of the exception is a matter of pragmatics, what the constitutional text is *doing* rather than simply what it is *saying*. What it is doing is articulating a rule for ensuring that a disinterested judge presides in an impeachment trial of the President. Understood from that performative perspective, the corollary in the case of an impeachment trial of the Vice President does not pose a difficult question for decision.

Interpretation of the meaning of the constitutional text assumes that an inquiry into the semantic content of the text is sufficient to identify the linguistic content of that text.⁹⁷ Interpretation of a constitutional text takes for granted that the meaning of the text is invariant and is formed from its semantic components under syntactical rules. When we consider the performative role of the constitutional text, however, we introduce an array of non-semantic elements and, indeed, potentially introduce non-linguistic elements into the analysis. The non-linguistic elements are the political and legal practices that the constitutional texts implicate.⁹⁸ To take an example highlighted by Bobbitt,⁹⁹ our understanding of why the stomach pumping by the police in

democratic self government and the protection of certain individual rights against the majority).

⁹⁶ See generally AMAR, UNWRITTEN CONSTITUTION, *supra* note 95.

⁹⁷ See SCALIA, INTERPRETATION, *supra* note 2, at 44–45.

⁹⁸ I want to distinguish this claim from the claim that there is an Unwritten or Invisible Constitution that is to be interpreted along with the conventional written Constitution. While these other non-linguistic social practices with regard to the exercise of power by the government and the exercise of freedom and choice by citizens inform our readings of the Constitution there is nothing added to our understanding by constructing concepts like the Invisible or Unwritten Constitutions.

⁹⁹ See BOBBITT, FATE, *supra* note 14, at 104–05 (advancing *Rochin* as an example of ethical argument in our constitutional decisional practice on the ground that police pumping the stomach of a suspect to secure evidence in a criminal investigation

*Rochin v. California*¹⁰⁰ was wrong is as much a matter of the respect we have for autonomy with respect to our bodies as the constitutional text. The performative nature of the Constitution, which creates the limited government that must respect our corporal autonomy, makes the embedding in and reconciliation with those non-linguistic social practices all the more intimate and complex.¹⁰¹ Those relationships are more involved and complex than a mere declarative text would have.

Originalism recognizes that the purpose of the Constitution is to do something, but it appears to lose sight of that as it addresses particular provisions and offers a general theory of constitutional interpretation.¹⁰² It conflates declarative and performative statements, assimilating the analysis of the latter to the analysis of the former.¹⁰³ Thus, for example, when Justice Scalia has repeatedly considered the Confrontation Clause of the Sixth

constituted an unacceptable State assault on citizens' autonomy rather than a violation of established constitutional law protecting against self-incrimination).

¹⁰⁰ 342 U.S. 165 (1952).

¹⁰¹ Philip Bobbitt captures the performative nature of the United States Constitution by contrasting its guarantees with the claims made to objective truth of Stalinist Russia (and implicitly the empty, infelicitous performatives of the Soviet Union Constitution purportedly guaranteeing individual rights never delivered). The Soviet Constitution's sweeping guarantee of rights were largely meaningless because they lacked a performative power. For the inspiring provisions of that text, saying did not make it so. See BOBBITT, FATE, *supra* note 14, at xvii (calling out the irrelevance of the Soviets' appeal to objective facts). The Constitution played a similar performative role in constituting the Republic because, while its adoption was inconsistent with the Articles of Confederation, it was accepted by the States and by the People. See generally MICHAEL G. KLARMAN, THE FRAMER'S COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016).

¹⁰² See Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers Series No. 07-24 [hereinafter Solum, *Semantic Originalism*]). Professor Solum has questioned whether his SSRN paper ought to be cited, but as it does not carry a disclaiming legend, it seems substantially consistent with his other, published papers, and he has himself cited it without qualification, I continue to do so as well. See, e.g., Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 482 n.6 (2013); Solum, *Interpretation-Construction Distinction*, *supra* note 16, at 95 n.2.

For the failure to acknowledge the performative role of a particular provision, see SCALIA, INTERPRETATION, *supra* note 2, at 146 (interpreting the Eighth Amendment prohibition on cruel and unusual punishment without considering what that provision was doing but instead only articulating certain elements of the semantic meaning of such provision).

¹⁰³ The conflation appears in a number of respects. For example, the interpretive methods that originalists employ make no distinction between the use of language in the Constitution as performative statements and the use of such language in declarative statements. Yet that linguistic use would appear different in important ways.

Amendment, he has analyzed it as if it were a declarative sentence.¹⁰⁴ Lost in that approach is the recognition that what a performative text does may not be simply a matter of the semantic or linguistic meanings of the words that comprise it. The performative role of the Confrontation Clause is to establish a framework for the introduction of testimonial evidence against individual criminal defendants.¹⁰⁵ That framework is focused upon the rights of the accused, guaranteeing her the right to be confronted by witnesses against her.¹⁰⁶ But implicitly it at least balances against that right the authority of the State to conduct criminal prosecutions. This abstract description does not shed much light on the particular questions about the scope and application of the Clause that have arisen.

If we consider some of those questions that have bedeviled the Court, like the treatment of vulnerable children testifying as to abuse claims, however, attention to the performative role sheds some light on understanding how to apply the Clause.¹⁰⁷ As I have noted before, the Clause's text is written in the passive voice; it speaks of being confronted with, rather than confronting, adverse witnesses.¹⁰⁸ The obvious question is whether that choice of voice is significant. If so, then the identification of the witness and the right to cross-examine such witnesses and impeach their testimony may satisfy the Clause. That reading might find support in the Clause's performative role in establishing the framework for what qualifies as a fair criminal trial that adequately limits the State's exercise of its sovereign power and protects the accused. The performative dimension of the constitutional text reminds us what is being done and calls for a reading that comports with that mission.

If confronted with such a performative analysis, it is likely that the originalists would be generally inclined to reject it. Classically, the rejection of a performative analysis was couched in terms of rejecting an interpretation

¹⁰⁴ See *Crawford v. Washington*, 541 U.S. 36, 42–54 (2004) (Scalia, J.); see also SCALIA, INTERPRETATION, *supra* note 2, at 43–44 (writing in the period between when *Maryland v. Craig*, 497 U.S. 836 (1990) (permitting child witnesses to testify by video in abuse cases) was decided and *Crawford v. Washington*, 541 U.S. 36 (2004) (reversing *Maryland v. Craig*, and requiring testimony to be given in person in the courtroom), Justice Scalia argued for a more robust reading of the right of confrontation).

¹⁰⁵ By focusing on *individual* criminal defendants I am simply putting to one side potentially more complex questions about the rights of non-individual defendants.

¹⁰⁶ U.S. CONST. amend VI.

¹⁰⁷ *Maryland v. Craig*, 497 U.S. 836, 852 (1990) (“We have of course recognized that a State’s interest in ‘the protection of minor victims of sex crimes from further trauma and embarrassment’ is a ‘compelling’ one.”).

¹⁰⁸ See U.S. CONST. amend. VI; LeDuc, *Ontological Foundations*, *supra* note 31, at 280 n.79.

based upon the purposes¹⁰⁹ or intentions¹¹⁰ of the authors. But the appeal to the performative element in the constitutional text ought not to be conflated with appeals to purpose and intent. The performative element arises as an independent matter of social fact, without regard to subjective purposes or intentions. As explored in the prior paragraph, a performative analysis can proceed smoothly without any analysis of authors' intentions and purposes.

Yet this performative analysis is not easily assimilated into originalist theory. Even Larry Solum, for example, who has recognized the performative element of the constitutional text,¹¹¹ nevertheless adopts a narrow linguistic focus in his analysis of constitutional law.¹¹² For Solum, the performative element of constitutional law is a very thin concept and functions only to capture the implicature of the constitutional texts.¹¹³ Solum either misunderstands or rejects a performative account of the constitutional text that focuses on what the constitutional text is to do. He does not endorse an account of the linguistic content of the Constitution that includes its political and social performative role.¹¹⁴ Instead, he ultimately returns to an account only of its linguistic content that focuses on the semantic import of the text.¹¹⁵

B. *New Originalism and The Concept of Constitutional Construction*

Critics have challenged the interpretative claims of classical originalism by asserting that some constitutional provisions are such that the prospect of

¹⁰⁹ See, e.g., SCALIA, *INTERPRETATION*, *supra* note 2, at 144 (asserting that the public understanding of the linguistic meaning of the constitutional text controls, not the expected or anticipated legal implications arising from the adoption of that text).

¹¹⁰ See, e.g., BERGER, *GOVERNMENT BY JUDICIARY*, *supra* note 3.

¹¹¹ See Solum, *Semantic Originalism*, *supra* note 102, at 31–37.

¹¹² See *id.*

¹¹³ *Id.* at 36.

¹¹⁴ For example, Solum's account of constitutional construction is one of translating semantic content to legal content. If we consider how Solum would approach the classic textual puzzle of who would preside over the impeachment trial of the Vice President, it is hard to see how his semantic originalism would sort through the various sources of legal content in the constitutional text. One obvious, ordinary implicature of the provision of Article I, Section 3, clause 6 that the Chief Justice presides over the impeachment trial of the president is that he presides over only that trial. The general provision of Article I Section 3 that the Vice President presides over the Senate would then appear to apply, yielding the implausible conclusion that the Vice President would preside over her own impeachment trial. It is unclear that Solum's semantic originalism provides us tools to lead to a more sensible result and more plausible application of the Constitution. Solum has missed the performative role of the Constitution. He cannot get the right reading because he won't acknowledge the fundamental performative role of the constitutional text.

¹¹⁵ Solum, *Semantic Originalism*, *supra* note 102, at 31–37.

finding a unique interpretation appears problematic.¹¹⁶ They challenge the originalist stance as simplistic.¹¹⁷ New Originalism has responded to this criticism, at least in part, by introducing the distinction between constitutional interpretation and constitutional construction.¹¹⁸ New Originalism tempers its commitment to the priority of interpretation by acknowledging the non-interpretative role of constitutional construction.¹¹⁹ Construction is proposed as the method to elucidate the meaning of constitutional provisions sufficiently indeterminate to admit of interpretation.¹²⁰

This distinction begins with the constitutional text and the distinction between constitutional provisions that ought to be interpreted from those that ought to be construed.¹²¹ The originalists who draw the distinction between interpretation and construction argue that it is grounded on a distinction between two kinds of meaning that constitutional texts have.¹²² Some constitutional texts have determinate meanings; the constitutional text has a specificity that employs general terms with known and agreed upon meanings.¹²³ For those provisions, the task in constitutional appellate

¹¹⁶ See Tribe, *Interpretation*, *supra* note 4, at 83–87 (arguing that there are different types of constitutional provisions as a matter of interpretation). See generally TRIBE & DORF, *READING*, *supra* note 9 at 8–13 (arguing against originalism that instead of treating the original understanding of the text of the Constitution as controlling we ought to treat the principle inherent in the text as determinative—as we now understand that principle).

¹¹⁷ Tribe, *Interpretation*, *supra* note 4, at 83–87.

¹¹⁸ Solum, *Distinction*, *supra* note 12; Kay, *Constitutional Construction*, *supra* note 5; Solum, *Constitutional Construction*, *supra* note 13; Randy Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL. 65 (2011) [hereinafter Barnett, *Interpretation*]; WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION*, *supra* note 88 (defending a theory of constitutional construction that characterizes construction as a political process); WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 55; Solum, *Semantic Originalism*, *supra* note 102; BARNETT, *LOST*, *supra* note 23.

¹¹⁹ Kay, *Constitutional Construction*, *supra* note 5; Solum, *Distinction*, *supra* note 12.

¹²⁰ WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 55, at 5–7 (deploying construction when we confront a constitutional provision with “an impenetrable sphere of meaning that cannot be simply discovered.”); Barnett, *Interpretation*, *supra* note 118; Solum, *Constitutional Construction*, *supra* note 13; Solum, *Distinction*, *supra* note 118, at 103 (“Conceptually, construction gives legal effect to the semantic content of a legal text.”).

¹²¹ WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 55, at 7 (characterizing the constitutional texts that require construction as “so broad and underdetermined as to be incapable of faithful reduction to legal rules.”).

¹²² BARNETT, *LOST*, *supra* note 118, at 118–30; WHITTINGTON, *CONSTITUTIONAL INTERPRETATION*, *supra* note 55, at 7.

¹²³ See, e.g., U.S. CONST. art. II, § 1 (president’s minimum age); see also POSNER, *PROBLEMS*, *supra* note 9, at 265–66) (offering far-fetched hypothetical alternative

adjudication is to interpret the provision in the context of the constitutional controversy at hand.¹²⁴ Examples include the provisions that require the president to be at least 35 years of age, prescribe the oath the president must swear or affirm, or require revenue bills to originate in the House.¹²⁵ On Whittington's account, the meaning of the constitutional text is fashioned into a rule and applied in adjudication.¹²⁶

Other constitutional provisions do not have such determinate meanings.¹²⁷ The source of the uncertainty derives from the more abstract general terms employed or because such terms employ essentially contested concepts.¹²⁸ For those provisions interpretation is inadequate to determine how such a provision is to apply.¹²⁹ The linguistic meaning of those provisions must be augmented to permit constitutional decision. Construction is thus characterized as a necessary step in constitutional decision.

Somewhat puzzlingly, Whittington gives the example of the non-constitutional text, "buy a dog," as an example of a non-interpretable text.¹³⁰ He asserts that while the broad parameters of this text are knowable, many questions of *meaning* remain because a reader would not know what kind of dog to buy, what color of dog to buy, or how old a dog to buy.¹³¹ Although Whittington does not carry his claim quite so far, it may be that unless the text made clear which dog to buy, when to buy it, who to buy it from, and how much to pay for it, the text would require construction. Whittington treats these unanswered questions as to the application of the text as questions of the meaning of the text, rather than questions about how a general rule or text is to be applied, but he does not explain why.¹³²

readings of the requirement of the constitutional text to support the conclusion that the rule stated by the constitutional text has a certain crystalline clarity).

¹²⁴ WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 118, at 6.

¹²⁵ U.S. CONST. art. I, § 7 (revenue bills); U.S. CONST. art. II, § 1 (form of presidential inaugural oath); U.S. CONST. art. II, § 1 (president's minimum age).

¹²⁶ WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55, at 6.

¹²⁷ BARNETT, LOST, *supra* note 88, at 123 (giving the example of constitutional provisions like the Due Process Clause that employ abstract terms); WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55, at 7.

¹²⁸ See generally W. B. Gallie, *Essentially Contested Concepts*, 56 PROC. OF THE ARISTOTELIAN SOC'Y 167 (1956) (arguing that certain concepts are not merely controversial as to their meaning in marginal or extreme cases but are inherently controversial as their meaning and application).

¹²⁹ WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55, at 7.

¹³⁰ *Id.* at 7. It is not entirely clear whether he means the text in its declarative sense, as in a narrative, or in its performative sense as an instruction or command.

¹³¹ *Id.*

¹³² *Id.*

Two arguments help make clear how questionable Whittington's claim is.¹³³ First, let us concede that the text is an instruction or command and that the task is one of understanding or acting on that instruction or command. Let us also concede that we have no context for the instruction or command. The hypothetical does not tell us anything more about the author, the person to whom the text was addressed, or the relationship of the two individuals. Consider the case if the individual to whom the text was addressed expeditiously purchases a St. Bernard puppy. Has the individual satisfied the instruction or command? Could the author properly claim, "that is not what I meant!!"? The buyer has bought a dog. She has done what the instruction or command requires. The subject is a dog, the act is a purchase, and she is the agent. I do not think any more semantic or linguistic analysis is easily available.¹³⁴ She has done what the instruction instructs, consistent with its meaning. The course taken was not the only course of action that would have satisfied the instruction or command of the text (the particular act was not a unique qualifying act), but it is sufficient to satisfy the instruction.

The speaker may well be right, of course, that he did not mean *that*, but only if at least one of two conditions are satisfied. First, he may not have said what he meant, so there could easily have been a disconnect between the language employed and the meaning intended on his side. Second, the context denied to us in the hypothetical might provide context and pragmatics that impose additional constraints on which acts satisfy the instruction, taking into account its full meaning and import. The speaker might be the agent's partner, and the two might live in poverty in a walk-up studio apartment in Brooklyn. In that context, a number of reasons militate against the selection of a St. Bernard puppy as the dog to buy. In that case, the speaker would be entitled to characterize the action taken as inconsistent with the meaning of the instruction given.

Second, on Whittington's account it does not appear that we can have texts with general terms that can be understood and applied without further choice.¹³⁵ Ironically, given Whittington's originalism, this appears to be a restatement of Tribe's claim that there is a problem of generality.¹³⁶ That appears to be the implication of his account of the uncertainty of meaning of his example. That seems implausible as a general claim. General statements, general performatives, and general rules are just that. They do not always have

¹³³ See LeDuc, *Constitutional Meaning*, *supra* note 11.

¹³⁴ The hypothetical eliminates the elements that might provide additional pragmatics of meaning.

¹³⁵ WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55, at 2 ("The need to interpret [the Constitution] is taken as the starting point for theory Interpretation is the touchstone of judicial authority.").

¹³⁶ See TRIBE & DORF, *READING*, *supra* note 16, at 80–87. See generally WITGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 79, §§ 198–202.

suppressed specifications.¹³⁷ When the traffic ordinance provides a speed limit of 55 miles per hour, we do not have to ask how fast we should go or when going as fast as the speed limit allows is imprudent or even unlawful to understand the meaning of the ordinance. The vast literature about meaning, ambiguity, and precision in the law and in philosophy simply does not support Whittington's claim.¹³⁸

I have previously explored the philosophical arguments against the claim that following a rule requires an interpretation.¹³⁹ Whittington does not make any new argument for this claim. It is as untenable in his hands as in Tribe's. The criticisms that I have previously sketched as to why there is not a problem of generality also apply to Whittington's claim that a constitutional rule requires an interpretation before it can be applied. Constitutional rules are like other rules; they can be applied without first interpreting them. Any contrary position invites the infinite regress that Wittgenstein identified and employed to construct a *reductio* against the argument that the application of a rule must begin with an interpretation of the rule.

Whittington might argue (although he fails to do so expressly) that constitutional rules are principles and, as such, are not simply characterized as rules in the sense that Wittgenstein explores. Perhaps to follow a principle requires an interpretation in ways that following simpler rules does not. On this argument, we can simply understand rules and understand how to apply them. Principles are more complicated, freighted with more inferential content, and in need of a determinative interpretation before they can be

¹³⁷ There is no persuasive reason to argue that there are such suppressed specifications than in other premises employed in our practical reasoning. See ROBERT BRANDOM, *ARTICULATING REASONS: AN INTRODUCTION TO INFERENCEALISM* 84–89 (2000) [hereinafter BRANDOM, *INFERENCEALISM*] (arguing against Davidson's account of practical reasoning that imputes suppressed premises to the argument used).

¹³⁸ See generally H. L. A. HART, *THE CONCEPT OF LAW* 125–26 (1961) [hereinafter HART, *CONCEPT*]; ANDREI MARMOR, *THE LANGUAGE OF LAW* 85–105 (2014) [hereinafter MARMOR, *LANGUAGE*]; Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204 (1980) [hereinafter Brest, *Misconceived Quest*] (exploring the classical example of the prohibition of vehicles in the park); SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special about Law*, in 1 *PHILOSOPHICAL ESSAYS: NATURAL LANGUAGE: WHAT IT IS AND HOW WE USE IT* 403 (2009) [hereinafter SOAMES, *Legal Texts*] (arguing that understanding legal texts is not fundamentally different from understanding other texts and that both require attention to sources of linguistic content that go beyond the semantic content that typically is the only source considered in the legal academy); Solum, *Distinction*, *supra* note 118.

¹³⁹ See LeDuc, *Ontological Foundations*, *supra* note 31, at 320–26 (criticizing Tribe's claim that there is a systemic problem of generality in constitutional interpretation); LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 32, at 113 n.92 (arguing that Wittgenstein's analysis of following a rule explains why there is no problem of generality).

applied.¹⁴⁰ It may therefore appear that we need an interpretation of a principle before it can be applied while we need no such interpretation for a rule. Wittgenstein's examples of rule following are generally directed toward rather *mechanical* rules.¹⁴¹

But on reflection those arguments are equally powerful against constitutional law, whether characterized as rules or as principles. To see that principles may be applied without first endorsing an interpretation, consider a constitutional principle like that of the Fourteenth Amendment that of the Equal Protection Clause of the Fourteenth Amendment.¹⁴² How could such an abstract and seemingly indeterminate provision be applied *without* an interpretation? To put it another way, how could we apply that provision with respect to a challenge to segregated public schools unless we had a view whether *Plessy* or *Brown* was the right way to read the clause? If so, aren't those readings *interpretations* of the clause? If we have such an interpretation or reading, aren't we then able to apply the principle in constitutional adjudication?

Certainly, if principles are the way that Dworkin describes them, they cannot be applied as rules.¹⁴³ The generality with which principles are stated appears to invite elaboration or specification, if not interpretation, before application. But if a principle requires an interpretation before it may be applied, then is the infinite regress argument that was developed against the claim that finding an interpretation of a rule is logically prior to the application of a rule also applicable here? These are complex questions, and I want to remain agnostic about their answers here. How a constitutional principle is employed in constitutional reasoning and decision is more complex than simply functioning as a rule. It may be that there is a process that leads from a principle to a rule and then to decision; it may be that such a process involves interpretation. Or it may be that the role of principles is quite different and involves neither intermediate rules nor interpretations. Principles may be a shorthand indicating the kinds of arguments that are relevant, for example. In any case, Whittington does not articulate the process of reasoning in his description of the difference between interpretation and construction.

Other New Originalists take a different approach to the distinction between interpretation and construction. Randy Barnett rejects Whittington's characterization of the project of construction as political, in part because he

¹⁴⁰ Such a claim may find support in Dworkin's distinction between rules and principles, the latter being more open ended and less determinate. See DWORKIN, *Rules I*, *supra* note 29, at 22.

¹⁴¹ See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 79, §§ 201–231 (offering several examples of rules that generate numerical sequences).

¹⁴² U.S. CONST. amend. XIV, § 1.

¹⁴³ DWORKIN, *Rules I*, *supra* note 29, at 22.

wants to create a role for natural rights theory in constitutional construction.¹⁴⁴ On his account, the underdetermined constitutional text is to be rendered more specific by making choices that are at once consistent with the linguistic meaning of the constitutional text and with constitutional principles inherent, but unarticulated, in the constitutional text.¹⁴⁵ The most obvious principles that Barnett calls out are federalism and the separation of powers.¹⁴⁶ Barnett would presumably not include Ely's principle of democracy enhancement as such a principle, but it is not entirely clear why.¹⁴⁷

Jack Balkin classifies construction as a discrete form of interpretation, to be contrasted with interpretation as ascertainment.¹⁴⁸ For Balkin, construction is necessary when the meaning of a provision cannot be simply ascertained.¹⁴⁹ This can happen when the constitutional text is simply too abstract, or when we must look to the principles inherent in the Constitution in much the same way that Barnett would do.¹⁵⁰ Thus, on Balkin's account, construction is required when the constitutional text states a principle rather than a rule.¹⁵¹ For those provisions expressing principles, Balkin asserts that the Constitution contemplates and demands an articulation and application of that principle.¹⁵² Balkin's constructive tools partially track Bobbitt's canonical modes of constitutional argument, and he references Bobbitt's account.¹⁵³ Balkin does

¹⁴⁴ BARNETT, LOST, *supra* note 23, at 122 (finding the task of construction in the gap between abstract constitutional texts and the requirements for legal rules).

¹⁴⁵ *Id.* at 128.

¹⁴⁶ *Id.*

¹⁴⁷ Including such a principle would give the Court and Congress broad power to intrude into the States' management and control of the electoral process in ways that appear inconsistent with Barnett's limited, libertarian state. But it would not generally give the federal government the regulatory powers that Barnett finds most troubling. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) [hereinafter ELY, DEMOCRACY AND DISTRUST] (offering a classic if limited defense of the controversial decisions of the Warren Court on the basis that the Constitution seeks to enhance democratic decision making and that it often falls to the Court to carry out this principle).

¹⁴⁸ JACK BALKIN, LIVING ORIGINALISM 4 (2011) [hereinafter BALKIN, LIVING ORIGINALISM] (asserting that construction is generally treated as a form of interpretation).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 5–6; BARNETT, LOST, *supra* note 23, at 122–25 (describing the process of articulating constitutional principles to inform the process of constitutional construction).

¹⁵¹ BALKIN, LIVING ORIGINALISM, *supra* note 148, at 6–7.

¹⁵² *Id.*

¹⁵³ *Id.* at 4. For Bobbitt's catalog of his canonical modes of constitutional argument see BOBBITT, FATE, *supra* note 14, at 7–8.

not treat construction as a political project.¹⁵⁴ Instead, construction is accomplished through techniques that articulate a constitutional principle expressed by the text, but in doing so interpret the constitutional principle in the contemporary world with our contemporary understandings—and contemporary values.¹⁵⁵

Balkin expressly contrasts his originalist approach with more traditional originalist approaches like that defended by Justice Scalia.¹⁵⁶ The critical difference between the two originalisms is that Balkin asserts that the open-ended provisions articulating principles were designed and intended to delegate the future participants in the Republic's constitutional decision-making the specification of these principles.¹⁵⁷ Construction is thus the means to narrow the gap between originalism and its critics who endorse a Living Constitution—hence, Living Originalism.

The New Originalists propose a variety of techniques to supply the additional legal content for such provisions to provide the requisite guidance for decision.¹⁵⁸ Whittington claims that such terms cannot be given meaning by the courts because determining the meaning of such uninterpretable provisions requires political choices to be made.¹⁵⁹ Political, in this context, means that normative choices must be made between competing claims with disparate impact on various members of political society.¹⁶⁰ In our democratic Republic, those choices are to be made through the democratic political process. Barnett's methods of construction look to the principles inherent in the Constitution.¹⁶¹ But those principles are strongly libertarian and sharply

¹⁵⁴ BALKIN, LIVING ORIGINALISM, *supra* note 148, at 5–8.

¹⁵⁵ *Id.* at 7.

¹⁵⁶ *Id.* Balkin, like Dworkin, asserts that Justice Scalia endorsed an original application originalism rather than an original understandings originalism. *Id.* This claim, whatever its merits, is a red herring.

¹⁵⁷ *Id.*

¹⁵⁸ Compare WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 118, at 1–15 (characterizing construction as a matter of making political choices) with BARNETT, LOST, *supra* note 23, at 122 (characterizing construction by its role in advancing the process of adjudication and emphasizing the natural rights dimension of much of that project) and BALKIN, LIVING ORIGINALISM, *supra* note 148, at 3–6 (following Barnett in emphasizing the necessary role of construction in constitutional decision but without the natural rights dimension).

¹⁵⁹ WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 118, at 7 (“[C]onstitutional construction is essentially political.”); WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 118, at 1–15.

¹⁶⁰ See generally WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 118, at 1 (expressly referring to the construction of constitutional law through the “political melding of the [Constitution] with external interests and principles”).

¹⁶¹ BARNETT, LOST, *supra* note 23.

critical of the modern administrative state, which is now a part of the Republic.¹⁶²

As explored above, Jack Balkin adopts a third method of construction, purportedly attending to principles inherent in the Constitution and the Republic that it constitutes.¹⁶³ The Constitution that Balkin constructs is very different from Barnett's, however, because his method takes a favorable stance toward the modern administrative state of the Republic.¹⁶⁴ Balkin articulates a somewhat different limitation on the role of interpretation.¹⁶⁵ When the constitutional text is express and its meaning can be made clear through interpretation, Balkin privileges that interpretation as a ground for constitutional decision.¹⁶⁶ He does so on the basis that only the original meaning of the constitutional text preserves the foundation for the structure of the Republic that the Constitution has created.¹⁶⁷

One question about the distinction between provisions that require interpretation and those that require construction is how clear the line between the two must be. Even proponents of the concept of construction acknowledge that the line separating it from interpretation may blur.¹⁶⁸ One possible response to my criticism is that I am simply asking for the distinction between construction and interpretation to be crystalline in a way that it is not and need not be. I do not mean to assert here that an imprecise line is no line. The argument I mean to make against the distinction between interpretation and construction is that no such distinction appears tenable. The distinction is untenable because the need for interpretation or construction is not determined by the nature of the language of the constitutional text.

The ontological distinction between the two classes of provisions has an epistemological corollary: we can distinguish the two classes with sufficient confidence to deploy the appropriate constitutional decision tools appropriate for the particular category into which any particular provision falls. The New Originalists sometimes seem to suggest this classification is obvious because they do not pause to articulate how the distinction is to be drawn.¹⁶⁹ On this account, the Due Process Clause and the Eighth Amendment prohibition of cruel and unusual punishment are manifestly abstract, requiring articulation

¹⁶² *Id.*

¹⁶³ BALKIN, LIVING ORIGINALISM, *supra* note 148, at 5.

¹⁶⁴ *Id.*

¹⁶⁵ *See id.* at 4–5.

¹⁶⁶ *Id.* at 14.

¹⁶⁷ *Id.* at 35–36.

¹⁶⁸ BARNETT, LOST, *supra* note 23, at 128.

¹⁶⁹ *See, e.g.*, WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 118, at 7; Barnett, *Interpretation and Construction*, *supra* note 12; Solum, *Distinction*, *supra* note 12, at 7; Barnett, *Interpretation and Construction*, *supra* note 12.

before they can be applied in particular cases; the requirement that the president be at least 35 years in age, by contrast, carries a precise meaning.

The New Originalists all argue or assume that the distinction between construction and interpretation is semantically sound and epistemologically accessible.¹⁷⁰ Armed with that distinction, the New Originalists argue that the criticism of classical originalism for implausibly assuming that all constitutional texts were interpretable and, therefore, “easy to discern and simple to apply,”¹⁷¹ has been disarmed. But that claim relies upon the distinction being adequately drawn and knowable by constitutional judges. I will explore the critics’ response to those claims below.

C. *The Critics’ Response*

Originalism’s critics sometimes share originalism’s commitment to the priority and primacy of interpretation in their account of constitutional decision.¹⁷² But when they do, they generally employ a different notion of interpretation.¹⁷³ Dworkin asserts the priority and primacy of interpretation in constitutional decision. In Dworkin’s account of interpretation, the law, including constitutional law, is interpreted in a manner that maintains its integrity while also taking into account the normative judgments of our best moral theory.¹⁷⁴ Thus, Dworkin’s project of interpretation is very different than that of the originalist. But it is not only Dworkin’s idiosyncratic concept of interpretation that is different from that of the originalists. Laurence Tribe also adopts very different methods of constitutional interpretation.¹⁷⁵

¹⁷⁰ If the distinction were not semantically sound and knowable, it could not do the task to which it is put: distinguishing constitutional provisions that may be given determinate meaning through interpretation and those that require the more open-ended techniques of construction. The originalists must assume those features in the absence of argument.

¹⁷¹ SCALIA, INTERPRETATION, *supra*, note 2, at 45.

¹⁷² See TRIBE & DORF, READING, *supra* note 9, at 73–80 (describing the problem of generality). *But see* BOBBITT, FATE, *supra* note 14, at 7–8 (describing a typology of constitutional argument with several forms going beyond interpretation); PATTERSON, TRUTH, *supra* note 9, at 135–38 (endorsing a modal account of constitutional argument); Sunstein, *Nothing*, *supra* note 4 (arguing that substantive normative choices must be made among competing kinds of constitutional interpretive methods before those methods can be employed to produce readings of the Constitution).

¹⁷³ As noted above, my focus is not on the pragmatist claims of the critics.

¹⁷⁴ See DWORKIN, EMPIRE, *supra* note 18, at 96–98.

¹⁷⁵ See generally TRIBE, INVISIBLE CONSTITUTION, *supra* note 9, at 9; TRIBE & DORF, READING, *supra* note 9, at 6–13.

Tribe's theory of constitutional interpretation is difficult to capture precisely, as he effectively acknowledges.¹⁷⁶ Unlike some substantively similar constitutional theorists, Tribe appears to believe that constitutional decision begins with interpretation of the Visible Constitution.¹⁷⁷ Most fundamentally, he argues that multiple interpretative methods must be deployed to work with the disparate types of constitutional provisions.¹⁷⁸ His slogan, "Integration without hyper-integration," captures his interpretative aspirations.¹⁷⁹ Tribe's methods of interpretation are, in substantial part, a response to his claim that interpretation faces a threshold question of determining the generality at which to interpret a constitutional provision.¹⁸⁰ The less general, more specific constitutional provisions are easier to interpret. For these specific provisions, understanding their semantic meaning is often enough.¹⁸¹ For the more general, aspirational provisions, by contrast, the Court's task is somewhat harder. For those provisions, Tribe urges that interpretation requires a normative judgment or choice.¹⁸² That normative judgment is based upon extra-constitutional sources. Tribe argues that our contemporary understandings inform the interpretation and application of these open-ended constitutional provisions.¹⁸³ He gives the example of *Brown v. Board of Education*'s consideration of the question whether segregated public schools violated the Equal Protection Clause.¹⁸⁴ Conceding that the Clause was not understood at the time of adoption to prohibit such schools, he concludes easily that by 1954 the application of the Clause to prohibit such segregation was a correct interpretation and application.¹⁸⁵

Originalism's critics have been generally unimpressed by the New Originalists' introduction of the interpretation/construction distinction.¹⁸⁶ They have argued that the distinction has little changed the evidence adduced

¹⁷⁶ Tribe, *Interpretation*, *supra* note 4, at 72–73 (acknowledging that his theory of constitutional interpretation cannot be reduced to a "sound bite").

¹⁷⁷ TRIBE & DORF, *READING*, *supra* note 9, at 71–73, 72 ("[I]t is primarily in the interpretation of prior cases that the battle for constitutional meaning is joined.").

¹⁷⁸ *Id.* at 30 (citing Walt Whitman to emphasize the fundamental tensions, if not inconsistencies, inherent in the Constitution).

¹⁷⁹ TRIBE & DORF, *READING*, *supra* note 9, at 58–60. *But see* TRIBE, *INVISIBLE CONSTITUTION*, *supra* note 9.

¹⁸⁰ *Id.* at 73–80.

¹⁸¹ Tribe, *Interpretation*, *supra* note 4, at 77 ("[S]ome parts of the Constitution cannot plausibly be open to significantly different interpretations.").

¹⁸² *Id.* at 87–94.

¹⁸³ *Id.*

¹⁸⁴ TRIBE & DORF, *READING*, *supra* note 9, at 12–13.

¹⁸⁵ *Id.*

¹⁸⁶ *See, e.g.*, Tushnet, *New Originalism*, *supra* note 13.

for originalist interpretations.¹⁸⁷ There is substantial reason to question the epistemic claim that we can distinguish those provisions that may be interpreted and those that require construction.¹⁸⁸ The first reason is that the sources of uncertainty for the constitutional texts are contingent and historical; they evolve over time. Thus, for example, the meaning of the Second Amendment likely appeared to be well-settled prior to *District of Columbia v. Heller*¹⁸⁹ and, certainly, prior to the academic revisionist analysis beginning in the late 1980's.¹⁹⁰ The first clause of the Amendment was read as limiting the right; the scope of the constitutional right to bear arms was therefore quite narrow.¹⁹¹ The constitutional text needed only interpretation, not construction. Today, in light of *Heller* and *McDonald v. Chicago*,¹⁹² which read the first clause only as prefatory and without limiting effect, construction seems required to articulate the limits of constitutional firearm regulation.¹⁹³ The Court has recognized that the right to bear arms is not absolute, either as to the kind of arms permitted or the locations to which they may be carried but articulating the relevant limits—which appears to require a normative choice for which the constitutional text provides little guidance—appears to be a matter of construction.

Second, moreover, the sources of uncertainty and ambiguity are varied, and are not identifiable simply by inspecting the kinds of terms used in the relevant provision. The judgment as to the classification of a particular text, and the methods properly available to a judge facing a case as to which the text appears relevant must look beyond the linguistic meaning of the text to the performative role the text plays to determine how to approach it. This approach will turn on the constitutional doctrine that has arisen, the precedents

¹⁸⁷ Tushnet, *New Originalism*, *supra* note 13, at 612 (“[P]roponents of the new originalism acknowledge, or at least should acknowledge, that nearly everything examined by old originalists is relevant to the new originalist inquiry.”).

¹⁸⁸ Laurence Tribe made this point forcefully at Princeton in criticism of both Dworkin and Justice Scalia. Tribe, *Interpretation*, *supra* note 4, at 72 (“Both [Scalia and Dworkin] err, I think, in the confidence of their conclusions . . .”).

¹⁸⁹ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (striking down the District of Columbia firearms regulatory statute while affirming that certain kinds of regulation would be permissible).

¹⁹⁰ See, e.g., Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989) [hereinafter Levinson, *Second Amendment*] (calling out the legal academy’s virtual disregard of the Second Amendment and suggesting that the Amendment might have more substance than had been generally acknowledged).

¹⁹¹ Justice Scalia acknowledged this established reading of the Second Amendment in his Tanner Lectures at Princeton. See SCALIA, INTERPRETATION, *supra* note 2, at 43 (suggesting that the Second Amendment would be found to guarantee only the right of the states to maintain a national guard).

¹⁹² *McDonald v. Chicago*, 561 U.S. 742 (2010).

¹⁹³ *Id.*; *Heller*, 554 U.S. at 573–78.

that may be relevant, and prudential concerns that may be applicable to the case at bar. In some cases, a reading that is supported by a seemingly powerful interpretation will be unpersuasive because of extratextual concerns, be they structural, doctrinal, or prudential, for example. There can be no algorithm to tell a judge when interpretation is enough and when construction is necessary.¹⁹⁴

The introduction of the concept of constitutional construction and the powerful role it has been accorded by its proponents has been criticized even by originalists.¹⁹⁵ Richard Kay argues that the claim that construction is necessary to articulate constitutional authority outside the Constitution is mistaken.¹⁹⁶ According to Kay, the Constitution incorporates the source of all constitutional law.¹⁹⁷ Kay asserts that constitutional construction need not draw upon extra constitutional sources both because recourse to such authority is unnecessary and because it is impermissible as a matter of constitutional theory.¹⁹⁸ He holds that it is unnecessary because it is apparently made necessary only by the excessively restrictive conditions that the New Originalism places on interpretation.¹⁹⁹ If we adopt interpretative methods that go beyond the narrow set permitted by New Originalism and consider not merely what was understood to be meant by the constitutional language but what was understood to be done by the text, then it will be possible to answer a broader range of questions.²⁰⁰ Here, I think Kay is right; in my terms, he is proposing interpreting the Constitution as a performative text. It is impermissible because the purportedly originalist proponents of construction acknowledge that it creates binding constitutional law beyond that understood at the time the Constitution was adopted and the relevant amendment was passed.²⁰¹ That accretion is inconsistent with originalism.

¹⁹⁴ This is a corollary of the anti-foundational pluralist account of constitutional law I have defended elsewhere. See generally André LeDuc, *The Anti-Foundational Challenge to the Philosophical Premises of the Debate over Originalism*, 119 PENN. ST. L. REV. 131 (2014) [hereinafter LeDuc, *Anti-Foundational Challenge*].

¹⁹⁵ Kay, *Constitutional Construction*, *supra* note 5.

¹⁹⁶ *Id.* at 14–25.

¹⁹⁷ *Id.* at 2 (“For the purposes of constitutional adjudication, the Constitution is complete.”).

¹⁹⁸ *Id.* at 23–25; see also SCALIA, INTERPRETATION, *supra* note 2, at 44–45 (arguing against looking beyond the original understanding of the constitutional text to moral theory because of the indeterminacy that would result in constitutional law).

¹⁹⁹ Kay, *Constitutional Construction*, *supra* note 5, at 12–13.

²⁰⁰ *Id.* at 13–15.

²⁰¹ *Id.* at 11–12.

Moreover, most of originalism's critics do not disagree with the central and foundational role accorded interpretation by originalism.²⁰² Most dramatically, Ronald Dworkin argues that law is interpretation.²⁰³ By this he means that constitutional decision is a matter of forging the best interpretation of the authoritative sources of law, taking into account not only traditional legal authorities but also moral theory.²⁰⁴ Dworkin doesn't disagree with the originalists about the priority of interpretation; he disagrees with them about the interpretation that they defend.²⁰⁵ Similarly, Tribe endorses the priority of interpretation in constitutional analysis, as a matter of understanding and decision.²⁰⁶ Again, he doesn't disagree as to the place and role of interpretation; he disagrees about the interpretation defended by originalism,²⁰⁷ as well as the interpretative method defended by originalism.²⁰⁸ Importantly, for example, Tribe asserts that the originalists are committed to the proposition that the Constitution may be interpreted within its four corners, and that this claim is false.²⁰⁹ Instead, Tribe holds that interpreters must bring to the task of interpretation extraneous material.²¹⁰ But Tribe does not challenge the claim that the project of constitutional understanding and decision begins with interpretation.²¹¹

Not all critics of originalism share the premise that interpretation is logically prior to constitutional decision, however.²¹² The pragmatists assign priority to prudential considerations in decision, so that the consequences of decision are paramount instead of the interpretations that may be articulated with respect to a constitutional text.²¹³ Philip Bobbitt and Dennis Patterson have challenged the priority accorded interpretation by the originalists and their critics on the grounds that the practices that comprise law are the

²⁰² E.g. DWORKIN, *EMPIRE*, *supra* note 18; Tribe, *Interpretation*, *supra* note 4, at 65–66.

²⁰³ See generally DWORKIN, *EMPIRE*, *supra* note 18.

²⁰⁴ *Id.* at 240–50.

²⁰⁵ See generally Dworkin, *Interpretation*, *supra* note 2, at 115–27.

²⁰⁶ Tribe, *Interpretation*, *supra* note 4, at 65–66.

²⁰⁷ *Id.* at 65–72.

²⁰⁸ *Id.* at 66.

²⁰⁹ See TRIBE & DORF, *READING*, *supra* note 9, at 81–87.

²¹⁰ *Id.* at 82–87.

²¹¹ *Id.* at 14–15 (emphasizing the need for principles of interpretation with which to anchor the meaning of the Constitution).

²¹² Michael Moore has challenged the priority accorded interpretation on the grounds that interpretative claims carry embedded ontological and other philosophical claims. See generally Moore, *Interpretive Turn*, *supra* note 14.

²¹³ See, e.g., SUNSTEIN, *RADICALS*, *supra* note 4.

discourse of arguments made within the constraints of accepted modes.²¹⁴ On that account, argument, not interpretation, is the path to decision.²¹⁵ Moreover, not all arguments are made on the basis of anything that can easily be cast as an interpretation.²¹⁶

Nevertheless, originalism and most of its critics share the premise that constitutional decision requires, as a condition precedent, an interpretation of the constitutional text, and much of the debate over originalism has unfolded on that ground.²¹⁷ Both sides accord a logical priority to interpretation.²¹⁸ The claim that interpretation is prior to constitutional decision is not uncontroversial and is likely mistaken. The interpretive premise of originalism and most of its critics is subject to three criticisms. First, originalism's commitment to the logical priority of interpretation may be challenged. Second, the claim that appellate constitutional adjudication, after the facts have been found, is exclusively a matter of interpretation may be challenged. Third, the claim that constitutional law is a fundamentally or exclusively a text that is to be interpreted in adjudication may also be rejected. I will look at each of these increasingly radical challenges in turn.

Because of the prevalence of the interpretive model in our contemporary accounts of constitutional adjudication, the alternatives to that model may not be immediately apparent. How would constitutional adjudication work if it did not begin with an interpretation of the relevant constitutional provisions? Application need not be derivative of interpretation. We may simply apply a rule without need for interpreting it.²¹⁹ Making an argument derived from Wittgenstein's analysis of rule-following, originalism's critics rely both upon our intuitions of what it is like to follow a rule and the more theoretical arguments that an infinite regress results if we posit that an interpretation of a rule is required as a precondition for the application of a rule.²²⁰ Applied to

²¹⁴ See, e.g., BOBBITT, INTERPRETATION, *supra* note 88, at 11–22; BOBBITT, FATE, *supra* note 14, at 3–8; PATTERSON, TRUTH, *supra* note 9, at 151–79; Patterson, *Interpretation*, *supra* note 18.

²¹⁵ See, e.g., BOBBITT, FATE, *supra* note 14, at 3–8; BOBBITT, INTERPRETATION, *supra* note 88, at 11–22.

²¹⁶ Prudential arguments, for example, are not made on the basis of what the relevant text says as much as on the basis of what ought to be done. See BOBBITT, FATE, *supra* note 14, at 59–73.

²¹⁷ E.g., DWORKIN, EMPIRE, *supra* note 18; SCALIA, INTERPRETATION, *supra*, note 2. See generally Moore, *Interpretive Turn*, *supra* note 14.

²¹⁸ E.g., DWORKIN, EMPIRE, *supra* note 18; SCALIA, INTERPRETATION, *supra*, note 2, at 144–45.

²¹⁹ See generally WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 79, §§ 83–240.

²²⁰ See, e.g., *id.* (sketching a series of arguments that rule following is an inherently social phenomenon); G. P. BAKER & P. M. S. HACKER, SCEPTICISM, RULES AND LANGUAGE (1983) (challenging the attribution of Kripke's argument to Wittgenstein);

constitutional adjudication, this analysis would suggest that judges may simply apply the constitutional rule, and then use the associated opinion to explain their application. Or, perhaps, judges may merely offer an *ex post* interpretation of the rule and its application. What, then, is involved in or necessary for such an application of the constitutional rule?

Perhaps the judge must simply grasp the constitutional rule. Justice Black's self-conscious constitutionalism, purportedly focusing on the "plain meaning" of the Constitution,²²¹ and his account of reading the Constitution and then applying it, may appear to capture the notion that the constitutional rules may be applied without an intermediated interpretation. The obvious difficulty with such an account is that the notion of grasping certain kinds of rules does not appear easily applicable to constitutional rules. My intuition that such rules are different than the rules that we grasp "in a flash" is not easy to articulate. While some of those rules appear simple (like the rule for addition), the model of understanding by an intuitive grasp has a broader scope in mathematics, for example, and would appear to extend to very complex mathematical truths (at least for sophisticated and able mathematicians) with a broader scope.²²² There appear, at least initially, to be very substantial differences between the nature of the rules of addition, such as those chosen by Wittgenstein for his examples, and rules of constitutional law.²²³ Indeed, the way mathematicians often describe grasping even very complex and

SAUL KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982) (controversial skeptical reconstruction of Wittgenstein's discussion of rules, with an express qualification as to whether it ought to be attributed to Wittgenstein himself).

²²¹ For some appropriate and thoughtful qualifications about endorsing such an account of Justice Black's constitutional theory, see ELY, DEMOCRACY AND DISTRUST, *supra* note 147, at 3 (pointing out that Justice Black's constitutional theory was much more nuanced and sophisticated than Black presented it to be or than it has been traditionally recognized to be); Lessig, *Translation*, *supra* note 63, at 1165, n.25 (citing several of Justice Black's important constitutional decisions expressing his plain meaning theory of constitutional interpretation).

²²² The role of sophistication in this account is itself not unproblematic, as George Hardy's account of the introduction of the Indian mathematician into England's mathematical elite makes clear. See GEORGE H. HARDY, A MATHEMATICIAN'S APOLOGY (1940); see also MICHAEL HARRIS, MATHEMATICS WITHOUT APOLOGIES (2015) (contemporary account of work on the frontiers of modern mathematics' research agenda); REBECCA GOLDSTEIN, THE MIND-BODY PROBLEM (1981) (fictional account of mathematical intuition). *But see* NICOLAS BOURBAKI, GENERAL TOPOLOGY: CHAPTER 1-4 (1998) (indicative example of codifying axiomatic approach to pure mathematics).

²²³ See generally WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 79, §§ 198-242 (providing examples of simple rules that are like the rule of addition, such as the rules of chess and the rule generating the series of odd integers).

difficult mathematical propositions appears more like grasping addition than grasping the scope of the Eighth Amendment's prohibition on cruel and unusual punishment. How would a modern judge "grasp" the constitutional rule against bills of attainder, for example?²²⁴

Justice Black may appear to be a proponent of the position that the import of the plain meaning can provide the answers to constitutional questions, without need for interpretation or for argument.²²⁵ But as others have pointed out, Justice Black's claim that constitutional decision can proceed in reliance upon only the text of the Constitution and its plain meaning, doesn't hold up even as an account of Justice Black's own jurisprudence.²²⁶ Even Justice Black needed a fuller account of the First Amendment, and the scope of the power of the state to restrict particular classes of speech, despite the apparently absolute language of the text.²²⁷

One way to capture the discomfort here would be to invoke Dworkin's distinction between rules and principles.²²⁸ On Dworkin's account, principles are softer, less mechanical, and more powerful than rules.²²⁹ Moreover, principles are more highly articulated and more reasoned than rules in their application on that account.²³⁰ The constitutional provisions cited above appear more like principles than like rules. While we may acknowledge that rules can be grasped without need for an intermediating interpretation, can we grasp principles in the same way? The same arguments that Wittgenstein makes against the view that we need an interpretation of a rule to apply it would appear applicable to legal principles, too. If we need an interpretation to apply a principle, then we would appear to need an interpretation of that interpretation, too. One possible reply would be the argument that principles work differently from rules, and that we cannot grasp a principle in the same way we speak of grasping a rule. Principles, on this characterization, cannot

²²⁴ Not by reading a law journal note like John Hart Ely's (even if that permits her to understand that constitutional rule). See John Hart Ely, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 *YALE L.J.* 330 (1962). I do not know whether the task would have been less difficult when the Constitution was adopted.

²²⁵ See, e.g., ELY, DEMOCRACY AND DISTRUST, *supra* note 147 (acknowledging that Justice Black was often viewed as holding such absolute views, but expressing caution about that attribution).

²²⁶ See *id.* at 3.

²²⁷ As has been often pointed out, even Justice Black understood that the absolute prohibition on laws abridging free speech had exceptions for speech by those serving in the military and speech in the context of riot or insurrection.

²²⁸ See DWORKIN, *Rules I*, *supra* note 29, at 22–23.

²²⁹ *Id.* at 22.

²³⁰ The abstract status of principles and their provenance in the realm of morality would appear to explain these differences. See *generally id.* at 24–28.

be “grasped” in such a direct manner because of their complexity, softness, and articulation. Principles, on this account, must be understood through articulation and in application. It is not enough to apply a principle; it must be articulable inferentially, explaining the arguments that support it, and explaining the consequences that follow from it. The role of interpretation on this account is to tease out this inferential context of the principle; that’s arguably a different role than the interpretations that have been posited as prior to and necessary for the interpretation of a rule, and then criticized by Wittgenstein and others.²³¹ Working out the implications of, and proper inferences from, a constitutional text does not appear to be merely a matter of interpretation.²³²

It is also possible that constitutional provisions are neither rules nor principles. If we bear in mind the performative nature of the Constitution, we should not be surprised that there are a variety of performative techniques available. The Constitution may sometimes be understood as providing a framework within which constitutional rights are to be protected. The First Amendment prohibition on the enactment of any law abridging the freedom of the press on this perspective is neither wholly a rule nor wholly a principle.²³³ Instead, it is a directive that the rights of a free press are of fundamental importance. That doesn’t mean it is permissible to cry “Fire!” in a crowded theater,²³⁴ or that the rights of a free press are to be balanced against other unidentified values. The artificial dichotomy between rules and principles doesn’t do justice either to the text of the First Amendment or to the constitutional doctrine that has evolved thereunder.

Originalists cannot move easily beyond the artificial dichotomy between rules and principles however, because it would add a complexity to the account of language at odds with the formalism of their account. Such a distinction would require an account that describes how interpretation may move from the constitutional text to the principle inherent in that text.²³⁵ But such a move is available to critics. If constitutional provisions are not statements of rules or principles, an alternative characterization may be that they are statements of

²³¹ See, e.g., WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 79, §§ 83–240.

²³² On Solum’s account, for example, the task described is a matter of determining legal content, not interpreting communicative content. Solum, *Communicative Content*, *supra* note 102, at 480–83.

²³³ U.S. CONST. amend. I.

²³⁴ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

²³⁵ Of course, this challenge is already present for the originalists with respect to texts like that of the First Amendment. But originalists have taken pains to adopt opaque accounts of the interpretative process for such texts. See SCALIA, INTERPRETATION, *supra* note 2, at 38 (characterizing the First Amendment as “a sort of synecdoche”).

aspirations.²³⁶ Another possibility is that the relationship judges have with constitutional texts is that of making arguments or defending outcomes with those texts. On this account, which I defend in a companion article in this series, judges don't offer interpretations of texts, they offer arguments for outcomes in constitutional adjudication based upon the text, or perhaps, based upon other modes of argument.²³⁷ Interpretation is not the end of constitutional adjudication; it is only one of its means. This is the familiar radical critique of the anti-representationalists like Bobbitt and Patterson.²³⁸

A final approach toward interpretation has been recently sketched by Cass Sunstein.²³⁹ Sunstein approaches interpretation from his commitment to judicial minimalism, intent to disarm interpretation as a method that might legitimate a more principled approach to constitutional decision.²⁴⁰ Sunstein asserts that there are competing models of constitutional interpretation and that the choice among them—which has implications for the substantive constitutional doctrine that is derived through interpretation—is itself a substantive normative choice.²⁴¹ Put somewhat simply, there is not a canonical interpretive method that can derive a neutral constitutional interpretation.

The originalists take as a foundational premise that constitutional appellate adjudication is principally a matter of interpretation. That premise may be criticized from a number of vantages, which remain largely unaddressed by the originalists. I have previously explored the pragmatist challenge, but here my focus has been upon alternative characterizations of the nature of the adjudicative activity and of the constitutional text itself. An exclusive interpretative account of constitutional adjudication is inadequate. First, the argument for interpretation from the purported logical priority of interpretation cannot be sustained. Consequences, both in the space of causes and in the space of reasons, would appear properly part of the Supreme Court's deliberative and decisional mission. Second, it is unpersuasive to think that such considerations in the constitutional sphere have been cabined by the Constitution to only the amendatory processes of Article V. It is more plausible that such considerations should be entertained by the Congress in

²³⁶ See generally Tribe, *Interpretation*, *supra* note 4, at 80 (so characterizing the First Amendment). But see SCALIA, *INTERPRETATION*, *supra* note 2, at 134. In Dworkin's theory, while aspirations may shape legal principles, a mere aspiration does not constitute a legal principle.

²³⁷ See generally LeDuc, *Striding Out of Babel*, *supra* note 6; LeDuc, *Anti-Foundational Challenge*, *supra* note 194.

²³⁸ See, e.g., BOBBITT, *INTERPRETATION*, *supra* note 88, at 24; PATTERSON, *TRUTH*, *supra* note 9, at 136–38.

²³⁹ Sunstein, *Nothing*, *supra* note 4.

²⁴⁰ See generally CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 13–34 (1996) [hereinafter SUNSTEIN, *LEGAL REASONING*].

²⁴¹ Sunstein, *Nothing*, *supra* note 4, at 193–94.

legislation and by the Court in adjudication. Third and finally, a more careful attention to the text of the Constitution and its role in both saying and in doing also makes a reduction of constitutional adjudication to interpretation implausible. These arguments are largely unaddressed by originalism, in part because originalists take the nature of the text and the judicial mission as given and so accord neither much scrutiny.²⁴²

Interpretation is not logically prior to the application of the Constitution's provisions. The Constitution may be applied without interpretation. But that is not to say that we may dispense with interpretation. Interpretation, both by the courts and by the commentators, plays a role in our constitutional law. Interpretations may support arguments and so are an important part of the ways in which decisions are justified and explained. I explore both of those constitutional functions in more detail in *Striding Out of Babel*.²⁴³ Interpretation is an element in our constitutional practice of argument and justification. It is not, however, logically prior to decision.

Finally, any alternative account of constitutional adjudication that rejects the priority and primacy of interpretation ought to explain why interpretation exercises such a powerful appeal as an account of constitutional decision. Interpretive accounts have a pervasive role in our intellectual culture and the public space of reason.²⁴⁴ Interpretation is an established and powerful model for understanding an array of social practice.²⁴⁵ But the appeal of interpretation goes beyond those common grounds; the theory of constitutional decision as beginning with interpretation of the constitutional text has a particular jurisprudential appeal for many. That appeal is itself grounded in the ontological premises about the Constitution that the participants in the debate generally share.²⁴⁶

III. COMPETING ACCOUNTS OF PRACTICAL REASONING IN OUR CONSTITUTIONAL DISCOURSE

The preceding discussion has explored an account of interpretation that figures in the originalism debate. This section explores those accounts at a higher level of abstraction as accounts of constitutional reasoning. We will see that even when the protagonists share a concept of constitutional decision as a matter of interpretation, their tacit accounts of constitutional reasoning are very different.

²⁴² See, e.g., SCALIA, INTERPRETATION, *supra* note 2, at 37–38 (diving directly into the task of interpretation without pausing to place that project of interpretation in any context of adjudication).

²⁴³ LeDuc, *Striding Out of Babel*, *supra* note 6.

²⁴⁴ See generally Moore, *Interpretive Turn*, *supra* note 14, at 872–73.

²⁴⁵ See generally *id.*

²⁴⁶ See LeDuc, *Ontological Foundations*, *supra* note 31.

A. *Originalism's Formal Account of Constitutional Reasoning*

Originalism offers a formalistic account of constitutional reasoning.²⁴⁷ By formalistic, I mean that the originalist account values stating legal propositions as rules rather than as principles or standards,²⁴⁸ and values clear rules, at least in certain cases, more highly than just outcomes.²⁴⁹ Clear rules permit reasonable reliance and planning in socio-legal relations and restrict judicial discretion. Originalism's formalism, to the extent it reduces law to rules, faces obvious challenges when applied to the language of the text of the Constitution.²⁵⁰ The linguistic styles of the various provisions of the Constitution and its Amendments appear to vary significantly.²⁵¹ Originalists have not generally been fair in acknowledging or responding to this challenge.²⁵² Originalism's formalism has two principal components, one largely tacit, and the other express. First, the tacit premise of originalism is

²⁴⁷ See BORK, TEMPTING, *supra* note 7, at 261–65. Some have contraposed originalism and formalism. See generally DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* (2002) [hereinafter FARBER & SHERRY, *DESPERATELY SEEKING*] (characterizing Bork as an originalist and Justice Scalia as a formalist). That strategy appears problematic, because both Robert Bork and Justice Scalia, as well as many other originalists, adopt a formal account of constitutional reasoning and, on the account defended here, that formalism is an important argument for the stronger claims of originalism.

²⁴⁸ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *Rules*] (arguing that our concept of the rule of law incorporates a principle of equal justice pursuant to which justice is rendered not on a particularized, ad hoc basis but on a uniform basis through the application of general principles or rules).

²⁴⁹ This is not intended as a novel definition of formalism. For a classic exploration of formality and formalism in the private law context, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); see also Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 155 (1981) (“The formalist theory of adjudication asserts that legal disputes can be, and should be, and are resolved by recourse to legal rules and principles, and the facts of each particular dispute.” (footnote omitted)); POSNER, *PROBLEMS*, *supra* note 9, at 14–16 (describing legal formalists as committed to the existence of legal principles underlying the decisional law which, when identified, can furnish premises for deductive derivations of the correct answer to new cases).

²⁵⁰ See, e.g., Tribe, *Interpretation*, *supra* note 4, at 86–89.

²⁵¹ Compare U.S. CONST. art. II, § 1, clauses 5 & 8 (specifying the minimum age of the President and prescribing the oath that he must swear), with U.S. CONST. amend. VIII (prohibiting “cruel and unusual punishments”). But see SCALIA, *INTERPRETATION*, *supra* note 2, at 135 (rejecting Tribe’s claim that some constitutional provisions are “aspirational”).

²⁵² See SCALIA, *INTERPRETATION*, *supra*, note 2, at 134–36.

that the meaning of constitutional words, and, thus, of constitutional provisions, is generally straightforward.²⁵³ Originalism offers a formal account of the linguistic meaning of the Constitution,²⁵⁴ and assumes that words picture the world.²⁵⁵ Originalism's task is simply to uncover the semantic understandings at the time of the relevant adoption or amendment of the constitutional provision. Second, originalism's account of constitutional reasoning asserts, expressly, that constitutional reasoning largely follows the syllogistic reasoning of formal Aristotelian logic.²⁵⁶ This formal account of constitutional interpretation is defended by originalists in part because of its promise to deliver a science of interpretation, with the same kinds of confidence relied upon as the natural sciences.²⁵⁷

Originalism offers an Aristotelian model of reasoning to characterize the proper method of judicial reasoning in constitutional interpretation.²⁵⁸ The syllogistic model of judicial reasoning begins with the derivation of a major premise from (the original meaning of) the text of the Constitution. That major premise typically has the form of a legal principle like: "All X are p."²⁵⁹ The minor premise is furnished from the facts of the case at hand. That minor premise would typically be of the form "A is an X." Basic logic yields the conclusion that decides the case, or states the premise for a further inference. It follows then that "A is p", and judgment is rendered. Thus, the Aristotelian syllogism, constructed in this manner from the constitutional text, is the paradigm of constitutional adjudication for the originalist.

²⁵³ See *id.* at 45 ("Often—indeed I dare say usually—[the original understanding of the text] is easy to discern and simple to apply."). Some of the certainty as to the meanings of words and texts arises from overlooking the natural and almost instinctive use of context and implicature to help provide those meanings.

²⁵⁴ See generally LeDuc, *Ontological Foundations*, *supra* note 31.

²⁵⁵ See SCALIA, INTERPRETATION, *supra* note 2, at 3.

²⁵⁶ See BORK, TEMPTING, *supra* note 7, at 262. Bork's originalism might be defended on the basis that allowances ought to be made for occasional stylistic excesses. Bork's characterization of constitutional reasoning as described by formal logic would be tempered in the same way that his occasional claim that originalism is necessarily true is best read. But because the formality of Bork's characterization is central to his claim for the certainty provided by originalism, it does not appear possible to excise or reconstruct that claim.

²⁵⁷ See SCALIA, INTERPRETATION, *supra* note 2, at 3 ("The following essay attempts to explain the current neglected state of the science of construing legal texts, and offers a few suggestions for improvement."); see also Richard M. Rorty, *The Banality of Pragmatism and the Poetry of Justice*, in PRAGMATISM IN LAW AND SOCIETY 89, 91 (Michael Brint & William Weaver eds., 1991) ("Nobody wants to talk about a 'science of law' anymore.").

²⁵⁸ See BORK, TEMPTING, *supra* note 7, at 162–63.

²⁵⁹ The model of the syllogism is expressly endorsed and adopted by leading originalists. See *id.* at 252–57.

Originalism does not defend its account directly. When Justice Scalia distinguished the nature of constitutional argument and reasoning from the common law methods, he does so on the basis that the common law methods are inconsistent with democratic sovereignty.²⁶⁰ The argument from democratic sovereignty is a structural argument, based upon the separation of powers in the Constitution and the allocation of legislative power to Congress, with a modest role accorded to the President. On Justice Scalia's account, the common law judge makes law in a manner inconsistent with that allocation of the legislative function to Congress.²⁶¹ From that charge, Justice Scalia concluded that only a formal interpretative method is proper.²⁶²

Justice Scalia's argument was too facile. First, common law was not thought to be inconsistent with, or an affront to, the sovereign.²⁶³ Instead, common law tradition was thought consistent with the authority of the sovereign because of the principle of separation of powers that no person—including the sovereign—should be a judge in her own case.²⁶⁴ Moreover, the survival of the common law tradition and practice within the constitutional law of the new democratic republic appears well established.²⁶⁵ The separation of powers and the democratic republican structure of the United States was not understood to circumscribe the role or the reasoning of the courts in the new nation.²⁶⁶

Justice Scalia's conclusion as to the scope of the methods of reasoning permitted appears unfounded. It is unclear that the interpretative methods to which Justice Scalia would limit constitutional judges are the only methods that a sovereign might choose for judges acting on its behalf. The choice between what a provision was understood to mean and what it was intended to

²⁶⁰ SCALIA, INTERPRETATION, *supra* note 2, at 9.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ That was in part because common judges were understood to be agents of the sovereign. *See generally* GARY L. MCDOWELL, THE LANGUAGE OF THE LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (2010) [hereinafter MCDOWELL, LANGUAGE OF LAW].

²⁶⁴ *See generally id.* at 248–52; *see also* THE FEDERALIST No. 78 (1788) (Alexander Hamilton).

²⁶⁵ *See generally* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (describing the common law provenance of the express protections of the Fourth, Fifth and Sixth Amendments).

²⁶⁶ *See id.*; MCDOWELL, LANGUAGE OF LAW, *supra* note 263, at 343–78 (describing Justice Story's central contribution to harmonizing the common law tradition flowing from Blackstone with the political and legal theory of constitutionalism).

do, for example, is not an obvious choice for a sovereign.²⁶⁷ More importantly, the question of whether to follow the original understanding of a provision or to follow what is understood at the time the future decision is made presents a choice for a sovereign. Similarly, whether to require formal logical reasoning or to permit a wider array of argument and reasoning also present choices that do not have obvious answers for a sovereign. Thus, the conclusion that Justice Scalia wants to draw from his premise appears equally as unsupported as the premise itself.

The formal account of constitutional reasoning raises a number of questions as to what counts as proper types of arguments. Are inductive and empirical arguments and the other kinds of legal arguments made in the common law proper? Common law reasoning is not formalistic.²⁶⁸ Reasoning from analogy, deriving reasoned principles from disparate decisional law, and generalizing principles to serve as premises for arguments—not necessarily syllogistic in form—for conclusions as to how a case should be decided are important in common law.²⁶⁹ Common law reasoning is inductive and inferential,²⁷⁰ and is inconsistent with the formal model of originalism. Justice Scalia makes one of the clearest statements of the limits of permissible constitutional argument based upon an argument from a theory of democratic republican sovereignty.²⁷¹ He emphasizes the creative role of common law arguments: recognizing principles, articulating the direction inherent in a line of cases, and building a foundation for a decision to make new law.²⁷² According to Justice Scalia's argument, common law methods permit judges to make law.²⁷³ The creative role of judicial decision-making arrogates a law-making function to the judiciary that is inconsistent with our democratic republic, according to Justice Scalia.²⁷⁴ Thus, anything but the formal mode of syllogistic argument from the major premises stated by the constitutional text is improper.²⁷⁵

²⁶⁷ Original understandings would better capture what a sovereign meant by a statutory or constitutional provision, but prudential or structural arguments might produce results more in keeping with what the sovereign would prefer.

²⁶⁸ BORK, TEMPTING, *supra* note 7, at 3–9.

²⁶⁹ See generally FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009).

²⁷⁰ See *id.*; BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 19–21 (1921) (“The sentence of today will make the right and wrong of tomorrow.”); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (Mark DeWolfe Howe ed., 1963) (1881) (“The life of the law has not been logic: it has been experience.”).

²⁷¹ See SCALIA, INTERPRETATION, *supra* note 2, at 9.

²⁷² *Id.* at 6–9.

²⁷³ *Id.*

²⁷⁴ *Id.* at 9.

²⁷⁵ *Id.* at 37–41.

The originalists' formal account of constitutional reasoning thus grounds its criticism of common law reasoning in constitutional interpretation and decision.²⁷⁶ Originalists criticize common law methods as violating the fundamental political and legal premises of our democratic republic by giving judges too much power.²⁷⁷ Originalism's model looks to the provisions of the Constitution to provide the major premises for formal logical deductions, while the minor premise comes from the case at bar.²⁷⁸ By describing constitutional reasoning as formal in this logical sense, originalism purports to limit the kinds of arguments that may properly be made in constitutional argument, the kinds of propositions that may be taken as the starting point for inferences, and limited the role of judicial judgment in constitutional decision.²⁷⁹ Thus, the formal account of constitutional reasoning provides a key element for the originalist project of cabining judicial discretion.

The formality of originalism and the model of syllogistic reasoning does not appear an accurate description of the legal reasoning in constitutional decisions. For example, in *Brown*, the question before the Court was whether segregated public schools violated the equal protection clause of the Fourteenth Amendment.²⁸⁰ Certainly, the Court did not approach the question as if the major premise of the syllogism was clear and only the minor premise was to be determined.²⁸¹ Rather, the Court's argument was more informal and it was cognizant that a finding for the plaintiff would likely run counter to the expectations of those who drafted and ratified the Fourteenth Amendment.²⁸²

Moreover, originalism's account of constitutional reasoning is not easily reconciled with the methodology that the originalists actually deploy. Even in strongly originalist opinions like the Court's in *Heller*²⁸³ and *Citizens United*,²⁸⁴ the dissent in *Boumediene*,²⁸⁵ and the concurrence in *Adarand*

²⁷⁶ See *id.* at 13–14.

²⁷⁷ *Id.* at 9–14.

²⁷⁸ See SCALIA, INTERPRETATION, *supra* note 2, at 46; BORK, TEMPTING, *supra* note 7, at 261–64.

²⁷⁹ See Fried, *Judgment*, *supra* note 34 (emphasizing the role of judgment in constitutional adjudication and the necessity to account for that important role in our constitutional theory).

²⁸⁰ *Brown v. Bd. of Educ.*, 347 U.S. 483, 488 (1954).

²⁸¹ *Id.* at 492–96.

²⁸² *Id.* at 492–93 (Warren, C.J., writing for a unanimous Court) (asserting that the case must be decided on the basis of the realities of free public education at the time of decision).

²⁸³ *District of Columbia v. Heller*, 554 U.S. 570 (2008) (Scalia, J., writing for the majority).

²⁸⁴ *Citizens United v. FEC*, 558 U.S. 310 (2010) (Kennedy, J., writing for the majority).

²⁸⁵ *Boumediene v. Bush*, 553 U.S. 723 (2008).

Constructors,²⁸⁶ the reasoning cannot be easily reduced to, or translated into, a series of syllogisms.²⁸⁷ Instead, the reasoning is far more fluid and informal, and far more casually inferential in its argument.²⁸⁸

In *Heller*, the Court tested a stringent District of Columbia firearm regulatory regime under the Second Amendment.²⁸⁹ It is not easy to assimilate the reasoning of that case to a syllogism.²⁹⁰ The Court first articulated what the Second Amendment meant.²⁹¹ After examining the subsequent interpretation of the Second Amendment, including the Court's own precedents, the Court applied the Second Amendment to the District of Columbia ordinance in question.²⁹² The argument of the opinion advanced a long series of propositions, which are not easily restated in syllogistic form.²⁹³

²⁸⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and in the judgment).

²⁸⁷ The difficulty in reducing the argument to such a series of syllogisms arises from the more complex structure of the argument itself, as articulated by Stephen Toulmin and Dennis Patterson, and also from the tacit premises that are accepted both by the Court and by its intended audience. The structure of the argument is neither as explicit nor as simple as a series of syllogisms might suggest.

²⁸⁸ Moreover, much such practical reasoning also employs modal and probabilistic elements. See generally DONALD DAVIDSON, *How Is Weakness of the Will Possible?*, in DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 36–40 (1980) (defending an account of the logical structure of practical reasoning to account for *akratic* action); CARL G. HEMPEL, *ASPECTS OF SCIENTIFIC EXPLANATION* (1965).

²⁸⁹ *Heller*, 554 U.S. at 573.

²⁹⁰ *Id.* at 577. The Court announced a series of key premises without argument or defense, proceeding to rely on, and reason from, those premises. Thus the Court stated that “[t]he Second Amendment is naturally divided into two parts” and that “[l]ogic demands that there be a link between the stated purpose and the command.” *Id.* Note that the text of the Second Amendment hardly states that the first clause states the purpose of the Amendment and that whatever may explain the relationship of the two clauses, it is not logic, as ordinarily understood.

²⁹¹ *Id.* at 576–603.

²⁹² *Id.* at 628–35.

²⁹³ Propositions asserted by the Court in *Heller* that apparently factored into the holding (and thus are not mere dicta) include:

HP1: The Second Amendment is divided into two parts.

HP2: One part is its “prefatory clause.”

HP3: One part is its “operative clause.”

HP4: The Second Amendment could be restated: “Because X, Y.”

HP5: The prefatory clause structure is unique in the Constitution.

HP6: The prefatory clause structure was common in “other legal documents.”

HP7: The prefatory clause structure was particularly common in individual-rights provisions of contemporaneous state constitutions.

For example, when the Court asserts that the Second Amendment has a “prefatory clause” and an “operative clause,” it is not apparent where those claims came from.²⁹⁴ Nor is the meaning of those claims apparent, because

HP8: Logic demands the existence of a “link” between the stated purpose and the command.

HP9: The prefatory clause states the purpose.

HP10: The operative clause states the command.

HP11: The “first salient feature” of the operative clause is that it codifies.

HP12: The operative clause codifies a right.

HP13: The right codified by the operative clause is a right of “the people.”

HP14: The unamended Constitution and the Bill of Rights use the locution “right of the people” in two other contexts.

HP15: One context is the First Amendment.

HP16: One context is the Fourth Amendment. (It is thus unstated that the unamended Constitution does not use this locution at all.)

HP17: Justice Stevens criticizes the majority for discussing “the prologue” last.

HP18: If a prologue can be used only to resolve ambiguity in an operative provision, then it is necessary to determine whether the operative provision is ambiguous first.

HP19: There exists an argument that: “The prologue should be considered as ‘one of the factors’ in determining whether the operative provision is ambiguous.”

HP20: If we considered the prologue as provided by HP19, then we would reach the same result.

HP21: We would reach the same result because our interpretation of “the right of the people to keep and bear arms” furthers the purpose of an effective militia.

HP22: Our interpretation furthers such purpose no less than the dissent’s interpretation furthers such purpose.

HP23: Our interpretation furthers such purpose more than the dissent’s interpretation furthers such purpose.

HP24: The Ninth Amendment uses terminology very similar to “right of the people.”

HP25: All three formulations refer to individual rights.

All of these propositions appear in the first five pages of the sixty-four page slip opinion. This very incomplete listing of the propositions that would need be taken into account in the *Heller* opinion confirms that the opinion does not fall into syllogistic form. Moreover, as the simplified propositions themselves reveal, they are far from self-evident or unproblematic. The model of the logical syllogism simply fails to capture the richness required in hard legal analysis. Even in the hands of Justice Scalia, it’s not easily possible to reduce legal reasoning to such formality. Holmes’s pragmatic slogan that the life of the law has been experience, not logic, is captured in the rich texts of opinions in novel and hard Constitutional questions—even for Justice Scalia.

²⁹⁴ *Heller*, 554 U.S. 570, 577 (2008).

the import of designating a clause as prefatory or operative in a constitutional text is novel. Thus, it is not clear how to fit those claims, as *conclusions*, into a syllogistic model.

It is also not apparent how such claims fit into a syllogistic model as *premises*. Justice Scalia intends his characterization of the initial clause as prefatory to strip that clause of legal effect.²⁹⁵ But there is no step in his argument that explains why status as a prefatory clause should have such effect. Thus, the structure of his argument is both more informal and more complex. The formalistic reduction of judicial reasoning to a series of syllogisms, at least with respect to the Court's opinion in *Heller*, is not an accurate description of the originalist reasoning articulated by the Court.

Justice Scalia's opinion for the Court instead introduces claims based upon tacit assumptions about what readers will accept or endorse. Thus, for example, when he asserts that one part of the Second Amendment is a "prefatory clause" in HP2, he offers no argument for that claim.²⁹⁶ Despite the fundamental importance of that claim to set up his argument that the reference to the militia is without legal import, Justice Scalia simply makes the claim based upon the ambiguous syntactical structure of the text.²⁹⁷ But the syntax makes the claim plausible, whether or not true.

The same exercise of outlining the structure of the operative sentences comprising the judicial decisional texts can be performed with other opinions of equally impeccable originalist pedigree.²⁹⁸ Non-originalist decisions are equally resistant to reduction to formal logic. For example, Justice Breyer's crisply reasoned dissent in *Heller* is not an argument expressed in syllogistic form, and cannot be easily translated into such form.²⁹⁹ It is important,

²⁹⁵ See *id.* at 578 ("[A] prefatory clause does not limit or expand the scope of the operative clause.").

²⁹⁶ *Id.* at 577–78.

²⁹⁷ *Id.*

²⁹⁸ I analyze the reasoning of three recent, important constitutional cases in *Beyond Babel*. See LeDuc, *Beyond Babel*, *supra* note 6, at 197–220.

²⁹⁹ A similar analysis of the salient propositions of Justice Breyer's dissent in *Heller* is no less easily cast in a syllogistic form:

DP1: The Majority's opinion is wrong for two independent reasons.

DP2: One reason is set forth by Justice Stevens.

DP3: The rights protected by the Second Amendment relate to militias.

DP4: The second, independent reason is that the rights protected are not absolute.

DP5: The Amendment permits the government to regulate the interests that the Amendment serves.

DP6: The Majority can be correct only if it can show that the regulation is unreasonable or inappropriate.

DP7: The majority cannot satisfy the requirement of DP6.

moreover, to remark the difference between how an opinion works for the Court and how a dissenting opinion is written. Because an authoritative opinion of the Court states the law, it must make that statement more precisely than a dissenting opinion that serves more as an argument for a contrary result or approach. A dissenting opinion can be more free-wheeling.³⁰⁰ Because dissents are not authoritative law, they do not need to be written as precisely and transparently as the legal rule that they would endorse if written as an opinion.

Neither originalist nor non-originalist decisions generally reduce easily to a syllogism or a series of syllogisms. If it were only non-originalist constitutional reasoning that did not conform to the formal originalist account, it might easily be argued that such nonconformity is further evidence that non-originalist constitutional reasoning is improper or mistaken. But the originalists' formal account of constitutional reasoning fails to fit their own practice of reasoning, too. It appears inadequate as a description of our practice of constitutional decisional reasoning. That inadequacy has important implications.

DP8: Assume with the majority that the Amendment protects firearm ownership for self-defense.

DP9: The Majority does not assume that the Amendment provides protection for a specific right to possess handguns with which to shoot burglars.

DP10: That claim is indefensible.

DP11: Colonial history presents examples of gun regulation.

DP12: That regulation applied in urban areas.

DP13: That regulation restricted the right to defend one's home.

DP14: The three largest cities at that time restricted the discharge of firearms at least to some degree.

DP15: Restrictions on the storage of gunpowder would have precluded a citizen having a firearm that could be immediately discharged without loading.

DP16: The Majority criticizes my citation of these laws.

DP17: The Majority cannot deny their existence.

DP18: The laws may have had an implied exception for self-defense.

DP19: An argument to that effect can only be made on the basis of the statutes' prefaces.

DP20: The majority derides recourse to prefaces as a matter of interpretation.

Heller, 554 U.S. at 681–87. Despite the crispness with which Justice Breyer articulates his argument, it is far from syllogistic, even if we begin with DP8, after the introduction of Justice Breyer's opinion.

³⁰⁰ It is no coincidence that Justice Scalia's admirers have been most admiring of his dissenting opinions. See, e.g., *SCALIA DISSENTS: WRITINGS OF THE SUPREME COURT'S WITTIEST, MOST OUTSPOKEN JUSTICE* (Kevin A. Ring ed., 2004).

Some originalists have attempted to broaden the scope of constitutional argument by distinguishing constitutional interpretation from constitutional construction.³⁰¹ The former is the proper approach when the constitutional text speaks to the constitutional question at hand.³⁰² The latter is proper when the constitution does not provide a governing provision.³⁰³ The methods permissible in constitutional construction (which apply to questions for which there is no determining constitutional text to be interpreted) are broader than the formal methods applicable in interpretation.³⁰⁴ Constitutional texts are not easily sorted into the two classes and, moreover, the distinction (to the extent that it is sensible) is often more a matter of degree than kind. Moreover, many questions arise when constitutional provisions appear in tension, as with respect to the provision that the Vice President serves as the President of the Senate, and the express exception to that rule (only) for trials of the impeachment of the President.³⁰⁵ Thus, the New Originalists' distinction between construction and interpretation raises important questions for the originalist project that the new originalists do not fully acknowledge.³⁰⁶

The formality of the originalist model plays an important part in that theory. Formality supports the certainty and focus that originalism seeks.³⁰⁷ The model of adjudication confirms originalism's narrow focus on sources and methods. Originalism, having circumscribed the sources of law by its exclusive focus on the original meaning of the provisions, seeks also to preclude a consideration of the pragmatics of the application of the understanding for the case at hand, or a consideration of whether and how that

³⁰¹ WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 118, at 5–9.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 3–9 (emphasizing the political choices that must be made in construction); WHITTINGTON, CONSTITUTIONAL INTERPRETATION, *supra* note 55, at 7–13.

³⁰⁵ U.S. CONST. art. I, § 3.

³⁰⁶ The new originalists acknowledge these questions tacitly when they articulate a somewhat different mission for their theory. *See, e.g.,* Sachs, *Legal Change*, *supra* note 70.

³⁰⁷ Thus, for example, Justice Scalia wrote an essay emphasizing the importance of the certainty and impartiality of rules of law rather than discretionary and ad hoc justice. *See* Scalia, *Rules*, *supra* note 248. Justice Scalia's focus upon, and preference for, legal rules, is a complementary element of his formalistic originalist jurisprudence. Both aspire to and purport to characterize constitutional argument as a highly structured practice that does not require the diverse sources of constitutional authority and more open-ended kinds of argument that originalism's critics endorse. Martha Nussbaum has emphasized the formalism in contemporary conservative constitutional jurisprudence. *See* Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" against Lofty Formalism*, 121 HARV. L. REV. 4 (2007) (arguing that recent constitutional formalism in the Court has produced doctrinal developments that have undermined important substantive constitutional rights and resulted in injustice).

original understanding is reconciled or harmonized with precedent. Thus, the model of syllogistic reasoning provides the second part of originalism's comprehensive theory of constitutional interpretation. Originalists who distinguish constitutional construction from interpretation must (and do) offer an account for when construction is permitted.³⁰⁸ When they offer this account, however, they compromise the originalist agenda of restricting judicial discretion and the role of judgment.

B. The Critics' Alternative to the Formal Account of Legal Reasoning

There are three principal objections to the originalists' theoretical account of legal reasoning: that syllogism fails to capture the complexity of constitutional arguments; that constitutional interpretation is primarily a matter of harmonizing conflicting or inconsistent interpretations; and that constitutional reasoning is not theoretical reasoning, but practical reasoning. Critics have largely emphasized only two of the objections.

Critics of originalism adopt a different, less formal account of constitutional reasoning, but they often do so tacitly rather than expressly. For example, critics argue that the methods of constitutional interpretation cannot be reduced to a syllogistic form in which only the express provisions of the constitutional text are taken as major premises. They argue that legal reasoning is much more fluid, much more balancing, and more judgmental than the process described by originalism's structured, syllogistic account.³⁰⁹ The model of the syllogism fails to capture the richness and complexity of constitutional argument, either in theory or in practice.³¹⁰

Critics point to originalist argument as disproving such an account. Constitutional disputes about the scope of the *habeas corpus* writ with respect to detainees in Guantánamo, or the scope of the takings clause of the Fifth Amendment, appear to implicate precedential issues, ethical issues, prudential issues and even, perhaps, issues relating to institutional competences within the federal government. These disputes would not appear to be easily reduced to questions about the validity of constitutional syllogisms.³¹¹

³⁰⁸ See generally WHITTINGTON, CONSTITUTIONAL CONSTRUCTION, *supra* note 118.

³⁰⁹ See SUNSTEIN, LEGAL REASONING, *supra* note 240, at 13–34.

³¹⁰ See TRIBE, INVISIBLE CONSTITUTION, *supra* note 9, at 9 (arguing that constitutional interpretation and decision proceeds in the context of, and in reliance upon “a vast and deep—and crucially, invisible—ocean of ideas, propositions, recovered memories, and imagined experiences”); see also PATTERSON, TRUTH, *supra* note 9, at 169–72; SUNSTEIN, LEGAL REASONING, *supra* note 240.

³¹¹ In assessing this debate, we should acknowledge the limited descriptive claim made by originalism. Originalism acknowledges that current constitutional practice is full of error. See, e.g., BORK, TEMPTING, *supra* note 7, at 95–100 (criticizing

The brief reconstruction of the argument in *Heller* above supports this claim. The *Heller* argument is at once richer and less formal than a syllogistic account might suggest. That departure cannot be explained on the basis that the opinion is designed to persuade the reader of its validity and therefore its rhetorical techniques reflect that advocacy. The argument simply cannot be fit within the procrustean syllogistic model. For example, many of the apparent premises of the argument are stated without argument or other derivation.³¹²

The second argument against the syllogistic reduction proffered in originalism is that much of the task of constitutional interpretation is one of harmonizing conflicting or inconsistent interpretations or arguments.³¹³ The task is not so much one of finding an interpretation of the Constitution but of settling on only one. The competing interpretations or potential decisions are not generally distinguishable on the basis of the validity of their embedded logical inferences, and the nature of their practical reasoning is often closer to an inductive model than to deduction. Syllogisms are not very good at providing a solution to those kinds of problems of practical reasoning.³¹⁴ By hypothesis, each of the competing interpretations or proposed decisions is supported by reason and argument. The problem is not constructing a syllogism, but of weighing the arguments, evidence, and inferences implicated by the competing interpretations and decisions. Those implications and inferences are not confined to the syllogisms that may be derived from an interpretation.

The third argument begins by remarking that constitutional reasoning is a form of practical reasoning, not theoretical reasoning.³¹⁵ Important accounts of practical reasoning recognize that such reasoning cannot be reduced to, or

Griswold); 111–16 (criticizing *Roe v. Wade*); 116–23 (criticizing the dissent in *Bowers v. Hardwick*); SCALIA, INTERPRETATION, *supra* note 2, at 41–42; 140 (criticizing *Planned Parenthood v. Casey* on the basis that the right to an abortion is not protected by the Constitution, but acknowledging the authoritative force of precedent). To the extent originalism offers prescription, departure from the description of existing practice is not necessarily troubling. Still, there is a sense in which constitutional disputes do not appear to be easily assimilated to disputes about major or minor premises in a syllogism.

³¹² The propositions stated in notes 287 and 288 are generally stated without argument.

³¹³ Bobbitt's account is an example of a theory that emphasizes the indeterminacy of constitutional argument. See BOBBITT, INTERPRETATION, *supra* note 88, at xi.

³¹⁴ See, e.g., POSNER, PROBLEMS, *supra* note 9, at 53–54 (describing the limitations of logic in substantive legal reasoning).

³¹⁵ See generally J. DAVID VELLEMAN, THE POSSIBILITY OF PRACTICAL REASON (1989); GILBERT HARMAN, CHANGE IN VIEW: PRINCIPLES OF REASONING 1 (1986) [hereinafter HARMAN, CHANGE IN VIEW]; TOULMIN, ARGUMENT, *supra* note 33.

assimilated to, deductive argument.³¹⁶ Practical reasoning looks more like the kind of reasoning that Stephen Toulmin has described.³¹⁷ Toulmin argues that our reasoning is richer and more complex than classical logical descriptions suggest.³¹⁸ He acknowledges that the classical paradigm of logical reasoning is the syllogism.³¹⁹ But he doesn't think that the syllogism adequately captures much of our practical reasoning.³²⁰ In Toulmin's reconstruction of our reasoning, instead of a major premise, minor premise, and conclusion, we have claims, data, warrants, backing, exceptions, and qualifiers.³²¹ The relationship of these elements of argument is more complex and intricate than mere syllogisms easily capture. Indeed, Toulmin highlights the ambiguity of common syllogisms.³²² According to Toulmin, syllogisms of first order logic, stripped of a modal vocabulary, cannot do the work that we need them to do.³²³

The formal model for legal reasoning adopted by originalism is a corollary to the claims of reliance on the unique, knowable original understanding of the Constitution.³²⁴ By claiming that the legal reasoning necessary for constitutional decision-making is syllogistic, wide swathes of informal, practical styles of reasoning are excluded from the account.³²⁵ Such a formal model reinforces the claims of originalism that constitutional disputes are semantic disputes. If legal reasoning (along with many other forms of practical reasoning) is the more complex, open-ended practice that Toulmin describes, the originalist project of rendering a formal account of the Constitution and constitutional reasoning appears less plausible, if not wholly inadequate.³²⁶

³¹⁶ See, e.g., HARMAN, CHANGE IN VIEW, *supra* note 315, at 1 (describing how, as a matter of practical reasoning, we come to change our views, giving the seemingly simple example of changing one's mind about what to have for breakfast).

³¹⁷ TOULMIN, ARGUMENT, *supra* note 33, at vii (making a philosophical claim that argument in practical reasoning is irreducible to "a rigidly demonstrative deduction of the kind to be found in Euclidean geometry.").

³¹⁸ *Id.* at 89 (explaining the nature of legal arguments).

³¹⁹ *Id.* (discussing the Aristotelian account of reasoning).

³²⁰ *Id.* at 89–100; see also PATTERSON, TRUTH, *supra* note 9, at 169–72 (applying Toulmin's description to legal argument).

³²¹ TOULMIN, ARGUMENT, *supra* note 33, at 89–100.

³²² *Id.* at 100–05. Toulmin offers the example of the proposition "All A's are B's." That proposition may be true for a variety of reasons—by definition, by statute, by empirical investigation, or as a moral value statement. The short form statement obscures the significance and meaning of the claim.

³²³ *Id.* at 89. Toulmin takes the complexity of legal argument and proof as his model by which to amplify the customary syllogistic rendition of practical argument.

³²⁴ See, e.g., SCALIA, INTERPRETATION, *supra* note 2, at 45.

³²⁵ The analogical reasoning emphasized by Sunstein would appear to be excluded, for example. See SUNSTEIN, LEGAL REASONING, *supra* note 240, at 62–83.

³²⁶ The implications of Toulmin's account of reasoning are reinforced by Bobbitt's claim that there is no metric or method that can be applied to resolve the relative claims

In relevant part, the text of the First Amendment simply prohibits Congress from making any law abridging the freedom of the press.³²⁷ The originalists have split in their analysis of this provision. Some have followed traditional constitutional doctrine³²⁸ in interpreting and applying the First Amendment to preclude similar legislation with respect to broadcast media.³²⁹ How do they explain the disregard for the semantic meaning of the text and its original understanding and the expectations with respect thereto? Justice Scalia says that the language is a synecdoche.³³⁰ But he never explains why that language is a synecdoche, or even why the concept of reading a term in a constitutional provision as a synecdoche is permissible. Such a reading reveals the tacit invocation of informal techniques that employ the principles of implicature in constitutional decision and interpretation. But that is subtler and more complex than the formal account articulated suggests is possible. Others hew more closely to the language of the Amendment, interpreting the concept of speech more narrowly.³³¹ They confine the protection of the amendment to political speech.³³² Even Robert Bork extends the protection of the First Amendment to novel forms of communication,³³³ employing interpretative techniques that expressly go beyond history and text.³³⁴

Justice Scalia's account of the First Amendment's reference to "speech" as a synecdoche never explains how that conclusion is to be supported by formal argument.³³⁵ Speech, after all, often meant speech, even in the eighteenth century.³³⁶ Indeed, reading speech as a synecdoche is to adopt a non-canonical interpretation of that term. The arguments that may be offered

of the six modes of constitutional argument. Each can produce its own sets of syllogism, but no further formal argument can enable us to systematically determine which mode of argument ought to be controlling in a particular case. *See generally* BOBBITT, INTERPRETATION, *supra* note 88, at xi.

³²⁷ U.S. CONST. amend. I.

³²⁸ *See generally* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 656–67 (1969) (assuming that the First Amendment principles apply to broadcast media despite not being expressly mentioned and exploring the differences in the way in which the protections of the First Amendment ought to apply); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948).

³²⁹ SCALIA, INTERPRETATION, *supra* note 2, at 37–38.

³³⁰ *Id.* at 38 (“[S]peech and press, the two most common forms of communication, stand as a sort of synecdoche for the whole.”). It is unclear what Justice Scalia means by his equivocation that it is a “sort of” synecdoche.

³³¹ Bork, *Neutral Principles*, *supra* note 3, at 21 (“Any such reading [of speech to mean any form of expression] is, of course, impossible.”).

³³² *Id.* at 21–23.

³³³ *Id.*

³³⁴ *Id.* at 22.

³³⁵ SCALIA, INTERPRETATION, *supra* note 2, at 38.

³³⁶ A DICTIONARY OF THE ENGLISH LANGUAGE (Samuel Johnson ed., 3d ed. 1762).

for such a reading are not easily cast as syllogisms with major and minor premises.

C. Conclusion

Originalism's emphases on semantic content and the formal description of legal reasoning are complementary. The syllogistic account works with arguments from and about meanings. If originalism incorporated prudential arguments, such practical reasoning would not naturally be cast into syllogistic form. Instead, informal inductive arguments, modal arguments, and other more complex inferential strategies, would likely be needed.³³⁷ So the exclusive focus on meanings makes the formal account of legal argument and reasoning more plausible. Similarly, the formal account for legal reasoning helps to explain how judges may move from abstract statements about the text to decisions in particular cases. Moreover, by reducing legal arguments to such formal logical models, originalism reinforces the claim to be neutral and non-discretionary.³³⁸

The formality of Judge Bork and Justice Scalia's account of legal reasoning is the second element of their theory of law.³³⁹ On their account, law generally, and constitutional law in particular, is best understood as a series of rules that can serve as the major premise in syllogisms of legal reasoning.³⁴⁰ The functional importance of those rules, like originalism itself,

³³⁷ For example, in a prudential argument in favor of restricting some of the historic constitutional rights of criminal suspects in the modern world of global, stateless terrorists with access to weapons of mass destruction, a significant part of the argument must address the premise of threat. Such an advocate needs a Brandeis brief on terrorism. This line of argument is empirical, not formal. See, e.g., RICHARD POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006) (defending the constitutional permissibility of certain novel forms of surveillance while asserting the continuing need for constitutional limits on more intrusive forms of governmental intervention in our personal and social lives).

³³⁸ The claim to neutrality and the project of cabining discretion has been central to originalism from the get go. See Sachs, *Legal Change*, *supra* note 70; BORK, TEMPTING, *supra* note 7, at 140–41 (defending originalism as providing a metric by which to assess constitutional decisions and thereby to restrain judicial discretion).

³³⁹ See generally, e.g., BORK, TEMPTING, *supra* note 7, at 253–54, 262 (characterizing proper constitutional argument as a matter of constructing syllogisms with the mayor premises drawn from the original meaning of the constitutional text); Bork, *Neutral Principles*, *supra* note 3; SCALIA, INTERPRETATION, *supra* note 2, at 45 (characterizing the task of constitutional adjudication as simply that of applying the original meaning of the constitutional text to the case at bar).

³⁴⁰ Scalia, *Rules*, *supra* note 248.

is to cabin the subjective preferences of judges.³⁴¹ When an appellate judge adopts a legal rule, she not only binds lower courts, she binds herself.³⁴² Thus, for Justice Scalia, legal rules coupled with *stare decisis* binds the judicial Odysseus to the mast, preventing escape to the siren calls confronting her. Is this a plausible account, empirically, doctrinally, psychologically, or philosophically?

I doubt it very much.³⁴³ First, legal history includes few accounts of judicial odysseys in which foresighted judges have been pinned by prior legal rules to the mast of consistent principle.³⁴⁴ Justice Scalia does not cite any examples in his Chicago essay.³⁴⁵ His account of the force of precedent seems implausible because judges generally recognize the primacy of judgment in their obligation to decide cases.³⁴⁶ It is unclear how the obligation to provide the best judgment would permit a prior judgment, now viewed as incorrect, to trump.³⁴⁷

Second, as a matter of the nature of rules and rule-following, the kind of constraint Justice Scalia is invoking doesn't exist.³⁴⁸ Justice Scalia has confused the space of reasons with the space of causes.³⁴⁹ Legal rules, howsoever abstract and broad of application, will not bind the appellate judge

³⁴¹ *Id.* at 1176 (describing the criticism of vague laws as undemocratic because they shift decision making from the democratically-elected representatives of the people to judges or executive branch administrators); *see also* BORK, TEMPTING, *supra* note 7, at 141 (“[A]ny theory [of constitutional decision] worthy of consideration must both state an acceptable range of judicial results and, in doing that, confine the judge’s power over us.”).

³⁴² Scalia, *Rules*, *supra* note 248, at 1176–77.

³⁴³ *See* FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM (2013); Baude, *Originalism as a Constraint*, *supra* note 1.

³⁴⁴ Posner makes a very similar point in his discussion of the force of legal precedent in the courts. *See* POSNER, PROBLEMS, *supra* note 9, at 87–100; *see also* CROSS, *supra* note 343; Baude, *Originalism as a Constraint*, *supra* note 1.

³⁴⁵ *See generally* Scalia, *Rules*, *supra* note 248.

³⁴⁶ *See* BOBBITT, INTERPRETATION, *supra* note 88, at 166–67 (describing an exchange between Judge Learned Hand and Judge Henry Friendly).

³⁴⁷ For an account of changing judgments in practical reasoning, *see* HARMAN, CHANGE IN VIEW, *supra* note 315. For a more general approach to practical reasoning, *see* J. DAVID VELLEMAN, THE POSSIBILITY OF PRACTICAL REASON (1989).

³⁴⁸ *See* WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 79, § 172. It may feel that way, as Achilles suggested to the hare, but that is another matter. *See* Lewis Carroll, *What the Tortoise Said to Achilles*, 4 MIND 278, 279 (1895).

³⁴⁹ *Cf.* BORK, TEMPTING, *supra* note 7, at 251 (arguing that a non-originalist theory of the Constitution is impossible much like a perpetual motion machine is impossible under the laws of physics).

who formulated the rule in the manner Justice Scalia wants and asserts. With respect to the lower court judges, the effect may be somewhat different.³⁵⁰

Third, as a doctrinal matter, it does not appear that in the evolution of constitutional doctrine that rules have grasped the Court by the throat in a subsequent case and made it decide the case differently than it otherwise would have done.³⁵¹ Proving that negative persuasively is not an easy task, of course. But in the absence of examples adduced by the proponents of the position that constitutional doctrine has such force, skepticism would appear justified. The practice of the Court to revisit precedent as necessary casts substantial doubt upon the claim of constraint. The modal, pluralist description of constitutional argument defended here offers an alternative account of decision that explains why decision is underdetermined rather than indeterminate but rejects the claim that the linguistic meaning of constitutional texts has constrained the Court's decision of constitutional controversies.

IV. THE IMPLICATIONS OF A BETTER ACCOUNT OF INTERPRETATION AND OF REASONING

There are three principal implications of a richer account of interpretation and constitutional reasoning with respect to the debate over originalism. The first implication arises from the originalist commitment, shared with many of its critics, that the central task of constitutional decision is interpretation.³⁵²

³⁵⁰ Lower courts are bound by the decisions of their superior appellate courts. Does this mean that their commitment to following precedent stands as a counterexample to Lewis Carroll's fable? Well, no. The social practice of federal court adjudication and *stare decisis* insure that most lower courts will try very hard most of the time to follow their controlling precedent. Moreover, their opinions will construct a narrative of harmony and compliance. They will do so even when the governing precedents are muddy or confused. Lower courts will do so for a variety of reasons. At the margins, they are constrained, in theory, by the threat of impeachment, but that is a loose and unimportant constraint on doctrinal error. More realistically, in the realm in which decisions are made, they do so because the professional and legal community of which they are respected members values such compliance and disfavors judges whose decisions must be reversed. None of this account is novel or surprising, of course. But there is no sense in which such constraints on lower courts find themselves gripped by logic or precedent in a manner that compels an outcome in a manner inconsistent with the tortoise's experience with Achilles. See Carroll, *supra* note 348, at 279 (best read for the implicit lesson that not all inferences may be justified by express principles, as Brandom emphasizes).

³⁵¹ See generally *id.*; CROSS, *supra* note 343. But see Baude, *Originalism as a Constraint*, *supra* note 1.

³⁵² See generally TRIBE & DORF, READING, *supra* note 9, at 6–30. It is not clear that Tribe's assertion of the primacy of interpretation is consistent with his later views. See generally TRIBE, INVISIBLE CONSTITUTION, *supra* note 9, at 5–8.

The premise that the task of decision is a matter of interpretation has led, for example, to the controversy over the problem of the level of generality.³⁵³ Tribe and Dorf argue that constitutional provisions are of indeterminate generality, and that the interpretive problems posed by that indeterminacy preclude an exclusive originalism.³⁵⁴ Thus, according to them, the existence of the problem of generality precludes the reliance on original meanings that originalism demands. The critics are wrong here.

Tribe's examples make a strong case that constitutional provisions do have different levels of generality. That demonstration sets up the need to determine the level of generality at which a provision is to be interpreted and applied. Tribe argues that the text alone cannot, as a linguistic matter, specify the level of generality without creating an infinite regress.³⁵⁵

Having purportedly established the problem of generality, Tribe explains how a judge may determine the level of generality of a constitutional provision.³⁵⁶ The judge's task incorporates both textual interpretation,³⁵⁷ and political and moral value choices.³⁵⁸ Tribe is at pains to note that not all constitutional provisions state or implicate broad moral principles.³⁵⁹ Within that broad framework for interpretation and adjudication, Tribe believes it is impossible to define a more precise description of, or decision theory for, judging.³⁶⁰ Instead, Tribe's approach, as reflected in his work, *American Constitutional Law*, is much more concrete and historical.³⁶¹ His first strategy is to describe a variety of constitutional provisions and to invite the reader to acknowledge that the provisions do not have a transparent statement of their level of generality.³⁶²

³⁵³ See TRIBE & DORF, READING, *supra* note 9, at 73.

³⁵⁴ *Id.* at 73–74, 80.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 73.

³⁵⁷ Tribe, *Interpretation*, *supra* note 4, at 77.

³⁵⁸ TRIBE & DORF, READING, *supra* note 9, at 78–80 (citing Paul Brest and concluding that even after semantic and linguistic analysis is done, that “[t]he value-laden choice of a level of generality remains.”).

³⁵⁹ Tribe, *Interpretation*, *supra* note 4, at 68, 72, 80.

³⁶⁰ *Id.* at 68–69 (emphasizing the complex and not wholly consistent sources and strands of the constitutional text and rejecting interpretations that offer a single, unifying interpretation of that text).

³⁶¹ See *generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988).

³⁶² See *generally id.* (describing seven theoretical models of the Constitution that tacitly informed the Court's constitutional jurisprudence over time, not as competing modes of constitutional argument as in Bobbitt's modal account); TRIBE & DORF, READING, *supra* note 9, at 73–80.

Originalists deny the existence of a problem of generality.³⁶³ They argue that the text and the context of the Constitution usually make clear the level of generality at which a constitutional provision speaks.³⁶⁴ In the face of uncertainty, the alternatives are to disregard the unclear provision or to construe it at the most specific, least general level.³⁶⁵ It is not easy to restate the debate on this issue in a manner that permits a more productive dialogue. It may be helpful, however, to consider the respective positions in the context of specific examples.

The First Amendment provides in relevant part that “Congress shall make no law . . . abridging the freedom of speech or of the press”³⁶⁶ At what level of generality does that prohibition operate? That question was implicitly before the Court in *Citizens United*.³⁶⁷ The issue of generality presented itself in at least three dimensions in *Citizens United*: the scope of the definition of speech, the limits of a protected right, and the scope of speakers protected.³⁶⁸ Justice Scalia concurred in the opinion of the court holding that the First Amendment protects the right of corporations to fund political film distribution costs.³⁶⁹ In so holding, Justice Scalia and Justice Stevens debated these questions by reference to the original understanding of the First Amendment.³⁷⁰ Justice Scalia argued that the original understanding was that all persons are protected.³⁷¹ Therefore, he read the level of generality as absolute, even in the face of the dissent’s objection that corporations cannot speak,³⁷² an argument Justice Scalia dismissed as “sophistry” without defense

³⁶³ See SCALIA, INTERPRETATION, *supra*, note 2, at 135 (arguing that the context of a provision determines its meaning and, accordingly, its scope or generality); BORK, TEMPTING, *supra* note 7, at 149–50.

³⁶⁴ See SCALIA, INTERPRETATION, *supra*, note 2, at 135; BORK, TEMPTING, *supra* note 7, at 149–50.

³⁶⁵ BORK, TEMPTING, *supra* note 7, at 166; Michael H. v. Gerald D., 491 U.S. 110, 127–28, n.6 (1989) (Scalia, J.) (“One would think that Justice Brennan would appreciate the value of consulting the most specific tradition available . . .”). Justice Scalia never explains or defends his claim that in constitutional decision a judge should look for the most particular constitutional interpretation or construction, or his *ad hominem* claim that Justice Brennan should endorse such an approach. On its face, such an approach may appear narrow and mechanical, absent any indication that the Constitution ought to be read that way. Moreover, the critics are right that a text cannot be self-interpreting.

³⁶⁶ U.S. CONST. amend. I.

³⁶⁷ *Citizens United v. FEC*, 558 U.S. 310 (2010).

³⁶⁸ *Id.*

³⁶⁹ See *id.* at 385–93 (Scalia, J., concurring).

³⁷⁰ See *id.* at 391–92 (Scalia, J., concurring), 425–29 (Stevens, J., concurring in part and dissenting in part).

³⁷¹ *Id.* at 385, 385–86 (Scalia, J., concurring).

³⁷² *Id.* at 428 n.55 (Stevens, J., concurring in part and dissenting in part).

or amplification.³⁷³ Justice Scalia apparently thought the argument sophistical because the law attributes personality to corporations in a variety of contexts in order to hold them legally responsible for the acts of their agents and to regulate their activity, through their agents, more generally.³⁷⁴ But an argument for personality in the contexts of liability and regulation hardly is dispositive for a corresponding concept in the case of First Amendment rights. Nor do fundamental considerations of fairness, arguing that burdens and obligations ought to be paired with rights, provide a plausible argument, because questions of fairness for juridical entities are very different (if meaningful at all) compared to the corresponding questions for natural persons. We are perhaps betrayed by our language into thinking the correspondence is closer than it actually is.³⁷⁵

The argument with respect to the generality of the prohibition on abridgement was subtler. The Court moved quickly past the question of what qualifies as speech, vaguely referring to a “speech process” and relying on the established doctrine reading protected speech broadly.³⁷⁶ Justice Scalia reads the term “speech” as a synecdoche for the implicit expansive communicative concept, which he found to include financing film distribution costs.³⁷⁷ It is difficult to reconcile the holding in this case, or the dissent, with the proposition that the generality of this constitutional provision can be extracted from the semantic meaning of its terms. If the generality of the provision and its associated linguistic and constitutional legal content is not simply a matter of the semantic meaning of its terms, what are the sources of such content?

³⁷³ *Id.* at 392 n.7 (Scalia, J., concurring). Justice Scalia’s claim that the argument that corporations cannot speak is sophistry likely is based upon two tacit premises. First, corporations can do nothing on their own; they must always act through agents, generally human, but potentially other agents, too (one imagines a corporation offering drug interdiction services that employs specially trained beagles). Second, we nevertheless generally employ the legal fiction of regulating corporations, both civilly and criminally. Selectively ignoring our array of fictions speaking to corporations only in the context of constitutional rights without explanation or argument does indeed appear specious. That conclusion does not resolve the question whether the First Amendment’s protections extend to corporations.

³⁷⁴ *Id.* at 392–93 (emphasizing that there is no disagreement that the production of the film was a form of speech).

³⁷⁵ See WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 79, § 350 (asking what it would mean for it to be 5 o’clock somewhere on the surface of the sun).

³⁷⁶ See *Citizens United*, 558 U.S. at 336–37.

³⁷⁷ *Id.* at 392–93 (Scalia, J., concurring) (emphasizing that speech has always been read broadly, not literally in interpreting the protection of the First Amendment); see SCALIA, INTERPRETATION, *supra*, note 2, at 37–38 (arguing that “speech” and “press” are used like synecdoche in the First Amendment).

How do the originalists and their critics reconcile such sources with their accounts of constitutional reasoning?

One solution to this puzzle is to recognize that this dispute over the purported problem of generality is, at best, confused. If we discard the premise that the application of a rule first requires an interpretation of the rule, then it seems unlikely that there is a problem of generality. The rule grasped and applied simply has a level of generality. That is what the rule is, and how it is applied.³⁷⁸ We do not need to have a question of interpretation independent of the question of how the rule is to be applied.³⁷⁹ One might try to rehabilitate Tribe's claims about the problem of generality as a badly stated claim about the uncertainty as to how a rule is to be applied.³⁸⁰ That is, Tribe's claim that the text of a rule cannot tell us how to interpret the rule or, more importantly, to apply the rule, is more plausible.

But Tribe's claim misses the point that we can understand and follow an array of rules without ever needing something else with which to interpret such rules. Tribe's claim could be recast as an assertion that the choice of how to apply a rule requires a value choice or judgment. The objection to such a claim is that it appears reductive. It appears to derive the constitutional ought or rule from a moral or other sphere of value.³⁸¹ The choices that inform constitutional decision are constitutional choices and are made within the context of our constitutional practice. Those constitutional choices cannot be reduced to political or to moral choices, but that is not to assert that those choices are wholly independent of those political and moral choices and values. Justice Scalia contrasts the extremes of textual literalism and nihilism,³⁸² and other originalists also appear to assume that the alternative to

³⁷⁸ See generally WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 79, §§ 83–240, and text at *supra* notes 220–238. Robert Brandom has also rejected of the problem of infinite regress. Brandom, *Legal Concept Determination*, *supra* note 17, at 21–22 (expressly invoking Lewis Carroll's logic fable of Achilles and the Tortoise to deny that a legal rule needs an interpretation before it can be applied). See generally LeDuc, *Ontological Foundations*, *supra* note 31, at 320–22.

³⁷⁹ See generally WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 79, §§ 83–240, and text at *supra* notes 220–238.

³⁸⁰ This rehabilitation appears difficult as a textual matter because one of Tribe's central, repeated objections to originalism's claim to neutrality is that value judgments must be made in constitutional decision. See LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* (1985); see also TRIBE, *INVISIBLE CONSTITUTION*, *supra* note 9, at 5–8 (arguing that we cannot read and apply the Constitution without also understanding an Unwritten Constitution that incorporates the unspoken and unwritten foundations underlying and tacitly incorporated in the Constitution).

³⁸¹ I am unclear whether Tribe intends such a reduction, but I am inclined to believe so. Exploring that question would take us too far afield here.

³⁸² See SCALIA, *INTERPRETATION*, *supra*, note 2, at 24.

principled originalist decision is unfettered judicial discretion.³⁸³ Both dichotomies are forced and misleading. Constitutional decision can be constrained and subject to limitations of practice without being determinate or reducible to an algorithm.

If we reject the premise that constitutional decision must begin with an interpretation of the Constitution, the problem of generality does not arise. The problem of generality is a problem of interpretations, not a problem of applying rules themselves. The knowledge of the rule consists in the knowledge of how to apply it. There is no problem of generality in the rule of addition. There is no reason to accept the epistemological premise that one cannot know how to follow or apply a rule unless and until one has a controlling interpretation of the rule.³⁸⁴ Tribe's criticism of originalism on this ground is unpersuasive.³⁸⁵ Here the originalists have the better stance, but not for the reasons they advance. It is not that the text is self-interpreting, but that constitutional decision may proceed without a logically prior interpretation of the constitutional text. But the benefits from rejecting the claim that interpretation is logically prior to application of constitutional rules goes beyond dissolving the paradox of the level of generality.

The second implication of a better account of adjudication that does not make interpretation the prior and primary element in constitutional decision is more fundamental. If interpretation is not prior to decision, then an account of constitutional adjudication must explain constitutional decision without necessarily beginning with interpretation. This article has explained why describing judicial decision as beginning with interpretation is an unpersuasive account of constitutional rules and rule following. In addition to the generality puzzle described above, beginning with interpretation mistakenly overemphasizes the constitutional text and the semantic and linguistic dimensions of that text and our constitutional law. The practice of constitutional law is not entirely a linguistic practice. That is in substantial part because the performative dimension of legal texts—the Constitution and

³⁸³ See, e.g., BORK, TEMPTING, *supra* note 7, at 254–57 (arguing that the absence of a moral consensus precludes a legitimate appeal to moral principles in law).

³⁸⁴ See LeDuc, *Ontological Foundations*, *supra* note 31, at 280 n.79. An analogy may be found in the rules of grammar; many are able to speak grammatically without being able to state or interpret the applicable grammatical rule that makes a particular utterance grammatical. It is not a perfect analogy because the practice of constitutional law requires the authoritative participants not just to decide cases but also to make and respond to arguments. But while some of those arguments are grounded on interpretations and interpretative claims, not all are—or need to be. See MOLIÈRE, *LE BOURGEOIS GENTILHOMME* Act II, scene iv (F. M. Warren ed., 1899) (1670).

³⁸⁵ See TRIBE & DORF, *READING*, *supra* note 9, at 73–80; LeDuc, *Ontological Foundations*, *supra* note 31, at 320–22; Brandom, *Legal Concept Determination*, *supra* note 17, at 19–20.

judicial decisions—is embedded in the constitutional practice of deciding constitutional controversies. Those practices are not plausibly reduced to entirely linguistic practices. The best alternative to the interpretative model of the debate is the modal, pluralist account articulated by Bobbitt and Patterson and, more recently, by Brandom³⁸⁶ and me.³⁸⁷ That account dispenses with a reductive formalistic, linguistic description of practical reasoning in constitutional decisions. This article has explained in more depth why the description of constitutional interpretation assumed or defended by both originalists and their critics and the role accorded interpretation in constitutional decision is inadequate. Briefly, there is a better alternative description. The limitations of the interpretative model and the existence of a richer, more accurate alternative thus offers another powerful argument for a non-interpretative theory of constitutional decision.

The third important implication of a richer description of our practice arises with respect to our account of constitutional reasoning. If interpretation is not a condition precedent to constitutional decision, then we are positioned to describe constitutional decision in non-interpretive terms. Our account of constitutional argument and decision can incorporate the modes of constitutional argument that are manifestly non-interpretive like prudential, structural, and doctrinal, the last of which, to the extent it is interpretive, is not interpretive with respect to the constitutional text alone. We can capture the social practice of constitutional argument and decision in the various forms that it takes. For example, at least since the introduction of the Brandeis brief, prudential arguments are made in constitutional cases.³⁸⁸ The consequences of decisions can be debated and the description of those consequences that prevails—often, of course in the face of uncertainty—can be taken into account in the decision of the case.

Originalism and its critics rely upon very different accounts of constitutional reasoning. The formal originalist account of constitutional reasoning is manifestly unsatisfactory as a description of our practice of constitutional reasoning as captured by the Court's opinions. The non-originalist account appears on the right track when it asserts that constitutional

³⁸⁶ Brandom, *Legal Concept Determination*, *supra* note 17, at 19–20 (offering a Hegelian description of judicial decision that emphasizes the reciprocal roles of authority and responsibility for judges).

³⁸⁷ LeDuc, *Striding Out of Babel*, *supra* note 6; LeDuc, *Anti-Foundational Challenge*, *supra* note 194.

³⁸⁸ See generally MELVIN I. UROFSKY, LOUIS D. BRANDEIS: A LIFE 161 (2009) (discussing Justice Brandeis' development of a revolutionary form of legal brief that relied on scientific data and social science research rather than on traditional constitutional arguments and legal citations alone).

reasoning is more informal and flexible than the originalist account.³⁸⁹ When we study the way that the Court (and dissenting Justices) articulate their arguments, we see that it is not cast in syllogistic form.³⁹⁰ The arguments made cannot be reduced to that form and important elements of the opinions often are not cast as arguments at all.

Those models of constitutional reasoning are largely tacitly assumed rather than defended.³⁹¹ Originalism generally assumes a highly formal, syllogistic model.³⁹² The model is one of major and minor premises, linked by the principles of deductive inference.³⁹³ It is not clear that inductive reasoning is a significant part of this account.³⁹⁴ For example, inductive arguments with respect to the consequences of potential interpretations or decisions would generally not be proper.³⁹⁵ That prohibition on inductive argument, which requires an ordered set of particular consequences which could be enumerated as the basis for an argument as to the proper interpretation or application of a constitutional provision. Those particulars in the present day, of course, likely could not have been understood, anticipated, or intended

³⁸⁹ See, e.g., Tribe, *Interpretation*, *supra* note 4, at 83–87; TRIBE & DORF, *READING*, *supra* note 9, at 114–17.

³⁹⁰ While it might be argued that the argument incorporates implicit, suppressed premises, and with the introduction of these premises the argument could be recast as a series of syllogisms, it is not clear that such a redescription is compelling. Some of the sentences in the opinions do not appear to figure into an argument at all, yet they do not appear to be extraneous asides. See generally BRANDOM, *INFERENCE*, *supra* note 137, at 82–92 (rejecting a description of practical reasoning as syllogistic through such an imputation of suppressed premises).

³⁹¹ See, e.g., SCALIA, *INTERPRETATION*, *supra* note 2, at 145 (characterizing the Constitution as articulating abstract principles in its provisions, the original understanding of which must first be understood and then applied to the case at hand); Easterbrook, *Alternatives*, *supra* note 47; POSNER, *PROBLEMS*, *supra* note 9, at 53–86 (rejecting the model of the logical syllogism for legal reasoning and arguing that logic can play only a critical, constraining role in legal reasoning, helping to avoid error but not to reach correct substantive results); BORK, *TEMPTING*, *supra* note 7, at 261–65 (suggesting that constitutional reasoning may be cast in the formal logic of syllogism).

³⁹² See BORK, *TEMPTING*, *supra* note 7, at 262 (describing constitutional decision as requiring interpretation to determine the applicable constitutional rule and syllogistic reasoning to apply that rule to the case at bar).

³⁹³ *Id.*

³⁹⁴ Inductive reasoning may be employed in originalism to define terms used in a constitutional provision, for example. Examples of instances qualifying under a definition might thus help determine whether the relevant term encompassed the object or activity presented in the case at bar. But even in that instance, once the definition had been derived, the constitutional argument would appear susceptible of being cast in a deductive mode.

³⁹⁵ Such arguments would appear impermissible both as inductive arguments and because they focus upon the consequences of alternative interpretations or decisions.

(or unintended) by the relevant original actors.³⁹⁶ Even in the case of particulars that may have been known to the relevant original actors, however, originalism would account for those facts only in a mediated manner as evidence for the meaning or understanding of the meaning of the relevant provision.³⁹⁷ Thus, the formality of the syllogistic reasoning would be preserved. Those originalists who do not go as far as Bork in asserting that constitutional reasoning is syllogistic nevertheless generally endorse formal accounts, too.³⁹⁸

Critics have challenged that account, both as a description of how courts reason, and as a prescriptive account of the task of adjudication. With respect to the account of legal reasoning about the Constitution, Aristotelian syllogisms play far less of a role than originalists tacitly assert. Legal reasoning cannot be easily so reduced to that logical form. Sophisticated accounts of the complexity of reasoning, from Stephen Toulmin to modern modal logicians, offer a theoretical account of our reasoning that supports the empirical evidence we find for more complex patterns in constitutional opinions and arguments.³⁹⁹ When we turn to that theory both for its descriptive force and as a theoretical, normative account of how our constitutional reasoning should proceed, the formalist foundations of originalism do not survive. Without those foundations, some of the manifest appeal of originalism's crystalline clarity dissolves; when we return to Wittgenstein's "rough ground",⁴⁰⁰ we may find that we need a richer theory of constitutional adjudication and interpretation than originalism, or generally its critics, offer.

³⁹⁶ To the extent such particular consequences could have arisen in the relevant past, such instances could support an inductive argument for the original understandings or intentions.

³⁹⁷ Thus, for example, when the Court considers arguments about the scope of the President's authority under the Recess Appointments Clause, it does not consider arguments from pure political philosophy. Instead, it refracts those arguments thru the lens of our practice of structural arguments about the particular democratic republican state that the Congress has created. *See* *NLRB v. Canning*, 134 S. Ct. 2550, 2568 (2014) (arguing in favor of the conclusion that the Clause ought to apply to pre-existing vacancies so that the work of the government might proceed). *See generally* LeDuc, *Beyond Babel*, *supra* note 6, at 214–18.

³⁹⁸ *See, e.g.*, Scalia, *Rules*, *supra* note 248.

³⁹⁹ *See, e.g.*, BRANDOM, *INFERENTIALISM*, *supra* note 137, at 82–92 (describing practical reasoning); DAVID K. LEWIS, *COUNTERFACTUALS* (1973) (describing the nature of counterfactual conditionals); TOULMIN, *ARGUMENT*, *supra* note 33.

⁴⁰⁰ *See* WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS*, *supra* note 79, § 107 (suggesting that our philosophical analysis of language ought not to elide the apparent anomalies and complexities of ordinary language and use).

Such an account of constitutional reasoning exists. But it must begin, as Hart did, with a description of our legal practices.⁴⁰¹ Theory must begin with description. There is no authoritative, normative stance that stands both within our practice of constitutional argument and decision, as well as outside and above that practice. That claim is neither obvious nor generally accepted, of course. I have previously offered my own rendition of the arguments for the claim and I will not reiterate them here.⁴⁰²

The failure to articulate the foundations that originalism assumes in characterizing constitutional argument has also resulted in the protagonists in the debate often talking past each other. Originalism is committed to a formal account of constitutional argument, while its critics would include other forms of argument, too. Without common ground on the methodological question as to the nature of permissible constitutional argument, it is hardly surprising that there is no agreement on the conclusions that may be drawn from such arguments. Robert Bork was perhaps the originalist who has been clearest on this point, denying legitimacy to the more free-form opinions and decisions of the Warren Court on the grounds that their reasoning was improper.⁴⁰³ But because many of originalism's critics do not share originalism's model of interpretation and practical reason, there is little room for agreement. It is not clear that agreement on the methodological question would lead to an agreement on the substantive disagreements, but the resulting debate would be more transparent. Each side would need to begin by recognizing that they must defend their respective accounts of constitutional reasoning and argument on descriptive and prescriptive grounds. We need an adequate descriptive account because the practice of constitutional argument and decision is groundless; there is no Archimedean stance from which to radically reform that practice. Therefore, any adequate account of the practice must begin with an adequate description.

The potential to rehabilitate the debate over originalism is not promising. The debate is derivative of more fundamental disagreements about the nature of law and practical reasoning. Resolution of the debate over originalism, on the terms on which it has been conducted, would appear hostage to those more fundamental controversies. The originalists adopt a simplistic model of practical reasoning that they assert or assume is applicable in the reasoning of

⁴⁰¹ HART, *CONCEPT*, *supra* note 138, at 88–91 (insisting on the existence of an internal point of view toward legal obligations as an element of a description of our social behavior).

⁴⁰² See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 194; LeDuc, *Striding Out of Babel*, *supra* note 6; see also BOBBITT, *FATE*, *supra* note 14, at 3–8 (describing a groundbreaking pluralist modal account of constitutional argument and decision); PATTERSON, *TRUTH*, *supra* note 9, at 151–79 (describing and defending what he terms “post modern jurisprudence”).

⁴⁰³ See, e.g., BORK, *TEMPTING*, *supra* note 7, at 95–100 (criticizing *Griswold*).

constitutional judicial decision. Their critics reject that model. The originalists' model buttresses their claims that originalism's methods are the only legitimate methods, but originalism's modes or arguments could be salvaged and deployed in the context of particular controversies without the claims it makes about constitutional reasoning.⁴⁰⁴ Those claims about constitutional reasoning are employed in defense of originalism's claim to privilege the methods of interpretation based upon the original understandings, expectations, and intentions. But those modes of argument—albeit not as privileged modes—are legitimate simply because they are an accepted part of our practice of constitutional argument.⁴⁰⁵ They do not need any further foundation. Accordingly, the rejection by originalism's critics of the originalist account of constitutional reasoning also does not discredit the modes of originalist argument, or privilege the kinds of argument that originalism's critics make—and generally seek to privilege in turn.

Resolving the debate over practical reasoning does not, however, open a path for the critics to prevail in their arguments against originalism. A richer account of constitutional reasoning does not discredit the originalists' textual and historical arguments or privilege the competing modes of argument that their critics emphasize. But without a resolution of the dispute over the nature of practical reasoning in constitutional decision, the potential to move beyond the debate appears remote. Originalism employs its account to buttress its central claim that the textual and historical methods of originalism are privileged, generally controlling in the interpretation of the Constitution that originalists endorse. Without that privilege, originalism is no longer originalism in any of the canonical forms that we have known it, even if the originalist methods of argument survive intact. On my account, the claims with respect to practical reasoning and the interpretative method are central to the claim to privilege historical and textual modes of argument. Rebutting those arguments may simply send the originalists in search of alternative grounds for such a privilege. If their critics acknowledge that their richer, alternative account of constitutional reasoning does not discredit textual or historical arguments—or privilege competing modes of argument—then they are likely to go in search of such alternative arguments. In that event, only the field on which the debate over originalism unfolds would change.⁴⁰⁶ But both responses would be mistakes.

⁴⁰⁴ See LeDuc, *Striding Out of Babel*, *supra* note 6.

⁴⁰⁵ See generally LeDuc, *Anti-Foundational Challenge*, *supra* note 194; LeDuc, *Striding Out of Babel*, *supra* note 6.

⁴⁰⁶ It may appear that the project of this article and the substantive conclusions expressed here are inconsistent with my deflationary account of the debate. See LeDuc, *Philosophy and Constitutional Interpretation*, *supra* note 32. The arguments here are simply therapeutic strategies to elucidate the confusions inherent in the originalism debate.

Why then do the accounts of interpretation and practical reasoning matter, if the two stances in the debate and debate itself are confused and its pursuit fruitless? The accounts of interpretation and practical reasoning matter because if the theoretical commitments to particular accounts underlying the originalism debate are discarded, then we can recognize the legitimacy of a more complex practice of constitutional argument and decision. If that more inclusive, pluralist practice is legitimate, then we may return to that practice without the aspirations of the protagonists in the debate to fundamentally reform our practice of constitutional argument and decision. We may return to the project of considering the merits of competing decisions and alternative arguments for the hard constitutional questions that we face.⁴⁰⁷ Getting it right with respect to the role of interpretation and the nature of constitutional reasoning does not open a path to revivify the originalism debate but to transcend it.

⁴⁰⁷ See generally LeDuc, *Beyond Babel*, *supra* note 6, at 197–220 (sketching a post-debate reconstruction of three recent constitutional cases).