ARGUING ABOUT THE CONSTITUTION: THE TOPICS IN CONSTITUTIONAL INTERPRETATION

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I. INTRODUCTION

Constitutional construction is the part of constitutional interpretation in which interpreters implement and give effect to the Constitution—for example, by creating doctrines, practices, and institutions. The idea of constitutional construction is central to the New Originalism, which divides constitutional interpretation into two tasks. Interpretation (in the narrower sense) ascertains the text's original meaning; construction implements the text, giving it effect in practice.[1] What most people call constitutional interpretation includes both interpretation, in the narrower sense of ascertaining the meaning of the text, and constitutional construction, which creates and applies doctrines and practices that implement the Constitution.[2]

The distinction between interpretation and construction highlights an important problem in constitutional theory. What authorizes constructions of the Constitution that may be consistent with the text but are not required by the text? For example, the Supreme Court's decision in *New York Times Co. v. Sullivan*[3] created a constitutional privilege that requires public officials suing for defamation to prove "actual malice."[4] *Sullivan*

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1. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 455–58 (2013).

2. JACK M. BALKIN, LIVING ORIGINALISM 4–5 (2011); Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 645–46 (2013).

3. 376 U.S. 254 (1964).

4. *Id.* at 279–80.

purports to follow from the text of the First Amendment.[5] But this construction of the First Amendment is by no means the only possible rule that is consistent with the text.[6] So what makes the rule of *New York Times Co. v. Sullivan* a good—much less the best—construction of the Constitution?

Two features of legal practice help ensure that construction is guided by and furthers the Constitution. The first is an interpretive attitude of fidelity to the Constitution and to the constitutional project. The second is a set of rhetorical techniques for analyzing problems and devising legal arguments, techniques that originated in the common law.

Lawyers and politicians adapted common law techniques for interpreting legal texts to the U.S. Constitution once it became a legal document. American lawyers still employ descendants of these techniques today. These techniques are what classical rhetoric calls *topoi* or "topics" that are characteristic of American constitutional law. These topics are tools for analyzing legal problems and generating legal arguments. They involve commonplace but incompletely theorized justifications for constitutional interpretation. They help interpreters perform the work of constitutional construction.

The point of understanding constitutional construction in terms of topics is not to put an end to disputes about contested questions of constitutional law. Legal disputes will continue as long as our Constitution continues to function. The point, rather, is that constitutional interpretation rests on shared rhetorical techniques and commonplaces about interpretation. Constitutional topics structure constitutional argument in our legal culture. They connect the text of the Constitution to its implementation. And they allow people with very different views to argue that their proposed interpretations are faithful interpretations of the Constitution and further the Constitution.

A. CONSTRUCTION IS INEVITABLE

All theories of constitutional interpretation must account for constitutional construction in one form or another, whether they

5. *Id.* (arguing that "[t]he constitutional guarantees require" the actual malice rule).

6. Some critics might argue that the result is not even consistent with the text, because it applies to judge-made law, *id.* at 265, and not to a law made by Congress. *See infra* note 253. *But see* New York Times Co. v. Sullivan, 376 U.S. at 276–77 (rejecting the argument).

are originalist or non-originalist, and whether or not they recognize the idea of constitutional construction. The distinction between interpretation and construction merely makes this problem especially salient.

In some versions of originalism—for example, in the New Originalism—the importance of construction is obvious. My own theory of "living originalism" or "framework originalism," for example, argues that the object of constitutional interpretation (in the narrower sense) is the Constitution's basic framework. The basic framework consists of the Constitution's original public meaning plus the text's choice of rules, standards, and principles.[7] The original public meaning consists of the original semantic meaning of the text, plus any generally recognized legal terms of art, and any inferences from background context necessary to understand the text. Constitutional construction builds on and implements the basic framework.[8] Most disputed questions of constitutional law involve construction.

This is a relatively thin version of original public meaning. The thicker the account of original meaning, the narrower is the zone of constitutional construction. The thinner the account, the more questions must be decided in the construction zone.[9] The most important distinction in originalist theory, therefore, is not whether one should follow original intention, original understanding, or original meaning. It is how thin or thick is one's account of original public meaning, and therefore how often one must turn to construction to answer contested constitutional questions.

Some forms of originalism deny any role for construction.[10] Everything is a question of interpretation that, in theory, can be derived from a close inspection of original public meaning. But these forms of originalism still must account for the role of precedent, for applications to new facts and circumstances, for long-standing custom, for the development of conventions of practice (including whether and when to accept them), and for

7. Balkin, *supra* note 2, at 646.

8. *Id.*

9. *Id.* at 646–47.

10. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 13–15 (2012); *id.* at 15 ("[T]he supposed distinction between interpretation and construction has never reflected the courts' actual usage.") (emphases omitted); JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 15, 139–40 (2013) (rejecting the distinction).

doctrinal elaboration and evolution of the Constitution.[11] Grappling with these issues is an inevitable result of attempting to implement a Constitution over time.

This is not simply a question of what to do with non-originalist precedents decided by non-originalist judges—the central focus of most originalist writing on the question.[12] The point, rather, is that even if *all* courts *always* attempt in good faith to apply the original meaning in changing circumstances, there will likely be reasonable disagreements about the best account of the Constitution's meaning and how to implement that meaning in practice. Later courts must then decide whether to defer to earlier views.[13]

Suppose, for example, that a court decides that a new technology involves or does not involve a "search or seizure" affecting "persons, houses, papers and effects" covered by the Fourth Amendment. Or suppose that a court decides that a new technology involves or does not involve "speech" or "press" protected by the First Amendment. Should later courts decide the issue of original meaning afresh each time they consider a new case involving the First and Fourth Amendments? Or should they defer to and reason from the previous determination of the Constitution's meaning, unless there are very good reasons to abandon it? The latter approach is more consistent with American practice. One could generate similar examples for many different parts of the Constitution. Therefore, much as originalists may try to avoid the term "construction," they must engage in something like it to implement the Constitution in practice.

Non-originalists also try to dispense with the distinction between interpretation and construction, but for the opposite reason. They do not recognize original meaning as having a

11. MCGINNIS & RAPPAPORT, *supra* note 10, at 154–96 (offering a detailed theory for treating precedents consistent and inconsistent with original public meaning); *id.* at 84–85 (approving application of Constitution to new technologies while rejecting judicial updating); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017) (explaining Justice Scalia's theory of precedent).

12. *See, e.g.*, MCGINNIS & RAPPAPORT, *supra* note 10, at 175–96 (explaining when to reject non-originalist precedents); Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (arguing that all non-originalist precedents must be rejected).

13. *Cf.* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 527–39 (2003) (discussing Founding-era ideas of "liquidation" of unclear texts.)

special legal status in interpretation. Hence for non-originalists, all constitutional interpretation is a kind of construction, with original meaning forming one consideration among many others.

B. CONSTRUCTION IS AN ENGINE OF CONSTITUTIONAL CHANGE

People often imagine the distinction between interpretation and construction as a division between two separate tasks. But the idea of construction is important for a second reason: it also reflects a division of labor among different institutions. This division of labor generates constitutional change over time.

Both judges and the political branches (including state and local government officials) engage in constitutional construction. Constitutional construction by different branches of government generates different kinds of constitutional development. When judges engage in construction, the result is a sequence of decisions and doctrine. When the political branches engage in construction, the result is a series of laws, administrative regulations, political conventions, and institutions.

The political branches assert that their constructions are faithful to the Constitution. Often these assertions are controversial. Throughout American history, people have challenged the constitutionality of political branch constructions before the judiciary. When this happens, the judiciary decides whether these constructions are consistent, partially consistent, or inconsistent with the Constitution. Judges apply the Constitution's text and judicial constructions to decide these questions, producing new constitutional constructions in the process. Some political branch constructions, however, are never challenged before the judiciary, or the judiciary refuses to consider the challenges, because of judicial constructions about the role of the judiciary and the separation of powers.

Thus, the American system of constitutional development involves competing constructions that interact through struggles between the various branches (and levels) of government, and especially through the process of judicial review. This ongoing process of interaction between the political branches and the judiciary is the *dialectic of construction*.[14] It is a dialectic because

14. Jack M. Balkin, *Constitutional Interpretation and Change in the United States: The Official and the Unofficial*, 14 JUS POLITICUM 1, 9–10 (2015) (Fr.),

both the judiciary and the political branches assert that their constructions are faithful to the Constitution, and the interaction between them affects the development of constructions by both sides.

The continuous process of construction by the political branches and the judiciary, and their interactions over time, generates constitutional development. Any theory that recognizes constitutional construction or its equivalent must also recognize that significant elements of the Constitution-in-practice change over time. That is why I have argued that originalism and living constitutionalism are two sides of the same coin.[15] Whatever aspect of the Constitution-in-practice arises from construction is living constitutionalism.

The question, therefore, is not whether we will have living constitutionalism in the United States, but what kind of living constitutionalism we will have, because all constitutional theories must account for constitutional implementation, application to changing facts and circumstances, and the accumulation of precedents and conventions, whether or not they call this process construction.

Thus, the account of construction offered in this Article will be useful regardless of whether one is an originalist or a non-originalist, and whether one regards original public meaning as binding or merely as one consideration among many others. Similarly, this Article's account of construction is useful whether one distinguishes between interpretation and construction or simply labels everything as interpretation.

C. CONSTRUCTION REQUIRES GOOD FAITH AND EMPLOYS RHETORICAL TOPICS

Constitutional construction has two central features. The first is interpretive attitude. The second is interpretive technique. Interpretive attitude concerns how interpreters understand what they are doing: they must place themselves on the side of the Constitution and attempt to further it in good faith. But what kinds of interpretive techniques further the Constitution? The majority of the Article takes up this second question.

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http://juspoliticum.com/uploads/5709f15cf28c4-jp14_balkin.pdf (describing the dialectic of legitimation that occurs as a result of construction).

15. BALKIN, *supra* note 2, at 20–21.

American constitutional culture employs a series of standard rhetorical moves—what classical rhetoric calls *topoi* or topics—to interpret and implement the Constitution in practice.[16] These rhetorical topics rest on widely accepted justifications for interpretation. Within each topic are a vast range of subtopics for arguing about the Constitution.

Because American constitutional interpretation is based on rhetorical topics, it involves what rhetorical theory calls *invention*.[17] Rhetorical invention means the use of shared topics and tools of understanding to analyze problems and offer solutions. People turn to rhetorical invention to analyze and answer certain kinds of questions—these are the sorts of questions that cannot be demonstrated with mathematical certainty but instead concern what is most plausible and reasonable in a given community.

The most well-known account of the rhetoric of constitutional argument is Philip Bobbitt's theory of modalities.[18] His theory has two parts. The first part is a list of standard forms of argument, which he calls modalities. The second is a sophisticated and elaborate theory of constitutional legitimacy that argues that legitimacy arises from adherence to practice. Bobbitt maintains that all constitutional theories (other than Bobbitt's own theory) that try to legitimate our practices, or that attempt to prescribe the correct way to interpret the Constitution, are either futile or impossible.[19]

This Article revisits and rethinks the idea of modalities of constitutional argument. It accepts Bobbitt's descriptive claim—with some modifications—but rejects his underlying theoretical apparatus and his general dismissal of constitutional theory.

16. *See infra* Part III.

17. *See infra* Part III.A.

18. *See* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991) [hereinafter BOBBITT, CONSTITUTIONAL INTERPRETATION]; PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982) [hereinafter BOBBITT, CONSTITUTIONAL FATE]; Philip Bobbitt, *Reflections Inspired by My Critics*, 72 TEX. L. REV. 1869 (1994) [hereinafter Bobbitt, *Reflections*]; Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989) [hereinafter Bobbitt, *Is Law Politics?*].

19. As Dennis Patterson puts it, "there is nothing more nor less to constitutional law than the practice itself." Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 270 (1993) (reviewing BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18).

As a descriptive matter, Bobbitt's list of modalities is incomplete. It is also not well designed for explaining how lawyers use history in constitutional argument. For example, Bobbitt calls arguments about original intention "historical" arguments.[20] This is unhelpful in two respects. First, most originalist arguments these days concern original public meaning rather than original intention. Second, most uses of history in constitutional argument do not concern either original intention or adoption history.[21]

I agree with Bobbitt that lawyers and judges employ standard forms of argument as a shared practice; I also agree that this shared social practice contributes to a limited form of sociological and procedural legitimacy, one that operates largely within the legal profession itself.

However, most of Bobbitt's theoretical views do not follow from this fact. These include his claims that (1) his list of six modalities is complete and comprehends all legitimate constitutional argument; (2) the modalities are incommensurable; (3) conflicts between different modalities can only be resolved by recourse to individual conscience; and (4) all constitutional theory that attempts to legitimate our practices is either ineffectual or mistaken.[22]

My view of constitutional argument is different: the modalities are a group of widely used rhetorical topics that help constitute American legal culture. They rest on (largely undertheorized) commonplaces about what makes a constitutional argument plausible or persuasive. People use these topics to engage in constitutional interpretation (and hence constitutional construction).

Nothing about these facts undermines the project of constitutional theory. In any case, the boundary between constitutional theory and constitutional practice is ill-defined and

20. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 9 (defining "[h]istorical arguments" as those which "depend on a determination of the original understanding of the constitutional provision to be construed"); BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 13 ("A[] *historical* modality may be attributed to constitutional arguments that claim that the framers and ratifiers [of a constitutional provision] intended, or did not intend . . . ."); *id.* ("Historical, or 'originalist' approaches to construing the text . . . are distinctive in their reference back to what a particular provision is thought to have meant to its ratifiers.").

21. Balkin, *The New Originalism and the Uses of History*, supra note 2, at 656–57, 657 n.35, 660–61; *see also* discussion *infra* text accompanying notes 113–121.

22. See *infra* text accompanying notes 197–231.

porous. Legal practice includes plenty of claims about constitutional theory, about the proper way for judges to behave, and about the correct methods of constitutional interpretation. This is hardly surprising. Lawyers want to win arguments; so they will make theoretical claims about constitutional interpretation, and about how and when to engage in judicial review, whenever they think it will make their arguments more persuasive to their intended or imagined audiences (or cast doubt on the arguments of their opponents).

This rhetorical approach to constitutional interpretation has several advantages. It explains how different interpreters can disagree about the Constitution while attempting to be faithful to it. It explains how disputes about policy and politics that are external to law are reflected in disagreements about the proper interpretation of the Constitution that are internal to law. And it explains how attempts at constitutional fidelity over time generate both constitutional disagreement and constitutional change. These are characteristic features of the processes of constitutional decision making. At any point in time they help generate a constrained or bounded disagreement about constitutional questions and a process of change through repeated attempts at implementation in changing factual circumstances.

Lawyers with very different constitutional theories will use the same common topics. It is precisely because lawyers hold the topics in common that they are able to disagree about underlying theories of interpretation and still reason together. Thus, a shared system of rhetoric is consistent with many different kinds of constitutional theories, not merely Bobbitt's. Our system of constitutional rhetoric involves *orthopraxis* (correct practice) about constitutional argument, but not *orthodoxy* (correct belief) about constitutional theory. Bobbitt is correct that the shared use of rhetorical topics helps generate sociological legitimation among lawyers and judges. But this orthopraxis among legal professionals does not ensure sociological legitimacy among the general public, much less moral, procedural, or democratic legitimacy.[23] Nor—as Bobbitt himself would emphasize—do shared forms of argument guarantee convergence on correct answers in contested cases.[24]

23. *See infra* text accompanying notes 279–291.

24. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 27–28.

The remainder of this Article proceeds as follows: Part II of the Article explains the interpretive attitude of fidelity. Part III discusses the use of rhetorical topics in construction. Part IV considers the relationship of constitutional construction to constitutional theory. It reconsiders and critiques Bobbitt's theory of the modalities and argues for a different account of constitutional argument based on rhetorical topics. A brief conclusion follows.

II. INTERPRETIVE ATTITUDE AND INTERPRETIVE TECHNIQUE

A. WHAT CONNECTS CONSTITUTIONAL CONSTRUCTION TO THE CONSTITUTION?

People sometimes describe constitutional construction—especially by judges—as deciding what to do when original meaning "runs out."[25] But the metaphor of "running out" is misleading. It suggests that in constitutional construction, participants have complete discretion to construct in any possible way, and that the zone of construction is a zone of complete freedom for decisionmakers, whether members of the political branches or members of the judiciary. This raises a problem: it implies that there is no connection between the Constitution and the constitutional constructions laid upon it.[26]

25. Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 70 (2011) ("[I]t is not originalism that is doing the work when one selects a theory of construction to employ when original meaning runs out, but one's underlying normative commitments."); *id.* ("So, just as originalists need a normative theory to explain why we today should adhere to the original meaning of the Constitution, they also need a normative theory for how to construe a constitution when its meaning runs out. There is no escaping this.")

26. *See* John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 917–18 (2016) (arguing that if the original meaning "runs out" in the construction zone, judges must defer to legislatures and may not invalidate laws that fall within the construction zone); Mike Rappaport, *Does a Judge Who Decides a Matter Within the Construction Zone Enforce the Constitution? A Question About Construction*, LAW AND LIBERTY (Aug. 4, 2015), http://www.libertylawsite.org/2015/08/04/does-a-judge-who-decides-a-matter-within-the-construction-zone-enforce-the-constitution-a-question-about-construction/ ("[I]f a judge employs values that are outside the Constitution to decide a matter, is he deciding the matter based on the Constitution?"); Mike Rappaport, *More on Construction: A Response to Larry Solum*, LAW AND LIBERTY (Aug. 7, 2015), http://www.libertylawsite.org/2015/08/07/more-on-construction-a-response-to-larry-solum/ (arguing that New Originalists have not adequately explained how construction is connected to the Constitution).

The Constitution delegates constitutional construction to successive generations. But what kind of delegation is this? Is it a delegation for later generations to do whatever they want as long as they maintain logical consistency with the original meaning of the Constitution? Or does construction entail greater responsibilities than avoiding a logical contradiction? If so, what are these responsibilities, and what constrains or guides constitutional construction?

One can restate the problem in two different ways: First, why is construction a construction *of* the Constitution rather than simply the construction of law that furthers present values and policy preferences? Second, how is constitutional construction guided in any way by the Constitution?

New Originalists are not the only theorists who face these problems. They apply to all originalists who accept that the Constitution requires further implementation in order to apply it to new cases, for example, through executive branch practice and through the creation and application of judicial doctrine. In fact, Article III of the Constitution, which gives the federal judiciary the power to hear cases involving the Constitution, and Article VI's Supremacy Clause, which requires state courts to apply the Constitution, seem to presuppose the development of judicial doctrine that implements the Constitution.

But if this is the case, *all* originalists face the same basic problem as New Originalists do. What connects judicial development of doctrine to original meaning? Why is doctrinal development a development *of* the Constitution? Why is it *guided by* the Constitution?

One might try to avoid this problem by claiming that the content and application of the Constitution are essentially closed at the time of its adoption. Original meaning, properly interpreted, leaves essentially no room for judicial discretion in the development of doctrine. All questions of judicial doctrine can, in theory, be answered by a sufficiently careful inspection of original public meaning.[27]

27. This is how John McGinnis and Michael Rappaport attempt to resolve the problem. Using original legal methods significantly narrows the range of possible applications of the text; then interpreters should employ the reading that is supported by the most evidence, even if it is only barely more likely than not. MCGINNIS & RAPPAPORT, *supra* note 10, at 142. Rappaport calls this the "51/49 rule." Mike Rappaport, *Original Methods Originalism Part III: The Minimization of the Construction Zone Thesis*, LAW

This solution seems unpersuasive. Take the area of First Amendment doctrine, by now a luxurious forest of rules, exceptions, sub-exceptions, differing levels of scrutiny, burdens of proof, constitutional privileges, scrutiny rules, and four and five-part tests. Does original meaning specify whether judges should employ a rule or a standard? Does it specify the choice between a constitutional privilege (as in defamation law) or a scrutiny rule (as in public forum doctrine)? In most cases, it does not.

These doctrines, and others like them, have sprung up not because judges are power-hungry tyrants or officious bureaucrats, but because applying the principles of the First Amendment in a wide variety of different institutional contexts and ever-changing factual circumstances is quite difficult. Doing so requires considerable amounts of judgment, balancing of multiple factors, and administrative and institutional considerations. It is implausible that the original meaning, no matter how thickly postulated, specifies uniquely correct answers to all of the technical constitutional questions that appear before the courts. Judicial elaboration of doctrine is necessary, and the elaboration of doctrine means that constitutional law will be path-dependent.

Thus, all originalists, and not merely New Originalists, need an account of constitutional development that shows how it is not merely *logically consistent* with the original public meaning of the Constitution, but is also *guided by* the Constitution and *furthers* the Constitution. New Originalists will phrase this answer in terms of construction; other originalists will phrase the answer in terms of interpretation (including original legal methods).

Non-originalists must also face this question—perhaps especially so, because they do not even require logical consistency with original public meaning.

The answer I propose in this Article, with suitable adjustments in terminology, should be helpful to both originalists and non-originalists of every kind. But in order to give the right answer, it is important to be clear about the question.

AND LIBERTY (June 2, 2017), http://www.libertylawsite.org/2017/06/02/original-methods-originalism-part-iii-the-minimization-of-the-construction-zone-thesis/ (explaining that under "the 51/49 rule that we believe was applied at the time of the Framing. . . . an interpreter would decide close cases by selecting the interpretation that was better supported by the evidence, even if it was only by a little").

B. CONSTRUCTION ACCORDING TO THE LAW AND THE CONSTITUTION

One might imagine that the most important question about construction is what constrains it and makes it predictable and determinate. But constraint, predictability, and determinacy in and of themselves are not the goal. Political science and sociology suggest that political forces and social norms constrain how judges behave; they also shape the direction of constitutional doctrine in the long run.[28] My own scholarship on constitutional development argues that technological and economic change, social and political mobilizations, evolving social norms, and partisan entrenchment of the judiciary shape how members of the judiciary decide constitutional cases in relatively intelligible and predictable ways.[29]

Thus, one might well argue that modern Commerce Clause decisions like *United States v. Darby*[30] were highly probable, if not inevitable, given changes in industrial and transportation technology and the pervasiveness of national markets. One might also argue that these decisions were very likely given a succession of appointments by a liberal Democrat, Franklin Delano Roosevelt, whose party championed New Deal reforms. In like fashion, one might argue that something like *Griswold v. Connecticut*[31] was very likely in light of the sexual revolution and the invention of safe and effective birth control for women.

This is not the kind of constraint that most constitutional theorists—including originalists—are usually looking for. Constitutional theorists want something more than an account of mechanisms of social influence that make judges' decisions

28. *See, e.g.,* Theodore W. Ruger, et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150 (2004); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior*, 1916–88, 35 AM. J. POL. SCI. 460 (1991); *see also* Linda Hamilton Krieger, et al., *When "Best Practices" Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases*, 40 LAW & SOC. INQUIRY 843, 844–49 (2015) (summarizing multiple literatures from political science and sociology on the predictability of judicial behavior).

29. BALKIN, LIVING ORIGINALISM, *supra* note 2, at 277–339; Balkin, *supra* note 14.

30. United States v. Darby Lumber Co., 312 U.S. 100 (1941) (upholding Fair Labor Standards Act of 1938).

31. Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing right of marital privacy in the use of contraceptives).

predictable. They want constraint *according to law*. To be sure, legal reasoning often may take account of changes in social and political realities—as well as changes in technology and underlying factual assumptions. So judges deciding cases such as *Darby* or *Griswold* might justify their decisions by pointing to changes in society and technology. But for construction to be according to law, law must guide or constrain construction through the application of legal methods, legal doctrines, and forms of legal reasoning.

Even this is not enough. Constitutional construction must not be merely guided by law. It must also be guided by and further the Constitution. Constitutional construction must draw on resources provided by the Constitution and promote its purposes. An account of constitutional construction, in other words, must explain how later interpreters can remain faithful to the Constitution over time.

Constitutional construction has two aspects. The first is a particular *interpretive attitude* about the task of construction. The second is a series of authorized *legal techniques* of construction. When interpreters construct, they must have a certain attitude about what they are doing—they must want to further the Constitution rather than simply use the Constitution as an excuse for doing whatever they want to do. They must also employ the kinds of generally recognized legal techniques that allow them to explain to their fellow citizens why their arguments are guided by and connected to the Constitution.[32]

These two elements—interpretive attitude and legal technique—will combine in practice: Ideally, people should have the right interpretive attitude as they employ the appropriate techniques. Nevertheless, these two dimensions of construction are analytically distinct; hence it is important to describe them separately.

C. THE INTERPRETIVE ATTITUDE OF FIDELITY: PUTTING OURSELVES ON THE SIDE OF THE CONSTITUTION

I begin with interpretive attitude. Most theories of constitutional interpretation focus on discovering and elaborating

32. *Cf.* Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 18–19 (1990) (constitutional interpretation presupposes methods that give interpreters authority to speak in the name of the Constitution).

the appropriate techniques for interpreting the Constitution. Many debates among originalists revolve around proper legal techniques for correct interpretation—whether one should look to intentions, understandings, or public meaning, how one should ascertain them, and what methods one should use in the process.

A focus on correct interpretive techniques describes much of non-originalist theory as well. For example, Ronald Dworkin argues that interpreters should employ a moral reading and apply the method of law as integrity;[33] David Strauss counsels that people engage in common law reasoning;[34] John Hart Ely emphasizes the protection of democracy.[35]

Interpretive attitude, however, is equally important. The goal of interpretation is fidelity to the Constitution. Fidelity is more than a set of techniques or methods—it means having the right attitude toward one's task.

In constitutional interpretation, fidelity is not just a good thing. It is the whole point of the enterprise. But fidelity is not simply a property of an interpretation; nor is it merely a correspondence between one's interpretation and the thing one interprets. Rather, fidelity is also a feature of the self who interprets. Fidelity is an attitude that people have toward the object of interpretation and about the process of interpretation.[36]

We attempt to be faithful to the Constitution by putting ourselves "on the side of" the Constitution in order to make it work and to further its purposes and structures.[37] To put ourselves on the side of the Constitution means that we regard it as having its own intelligible set of norms, principles, and purposes that are external to ourselves, and are not simply an extension of our own values and policy preferences. Our job is to apply and fulfill these norms, principles, and purposes in the present, rather than using the task of interpretation as an excuse to engage in a kind of Constitutional ventriloquism—that is, to make the Constitution into a dummy that miraculously speaks our values.

33. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996).

34. DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

35. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

36. JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 103–04 (2011).

37. BALKIN, *supra* note 2, at 78.

An interpretive attitude of fidelity to the Constitution requires more than maintaining a bare logical consistency with the text of the Constitution and its original public meaning. It requires a good faith attempt (1) to assess the Constitution's values and purposes; and (2) to develop constructions that remain consistent with the original public meaning of the text and further its underlying principles and purposes in our contemporary context.

Fidelity also demands charity toward the object of interpretation. It requires that we try to view the Constitution as articulating a coherent set of norms that are also sensible and even valuable.[38] We may not succeed in this attempt. Some laws are simply unjust. The Constitution may turn out to be, as William Lloyd Garrison once said, a covenant with death and an agreement with hell.[39] Or it may turn out to be incoherent and impractical. But we must begin with charitable presuppositions. If we do not, then we cannot be sure that the evils, deficiencies, and incoherence we perceive in the Constitution are due to the Constitution itself or to our own failure adequately to understand it.[40]

D. FIDELITY TO THE CONSTITUTION DOES NOT MEAN LACK OF DISAGREEMENT

People with very different views will often see different things in the Constitution. They may understand the point or the effect of constitutional provisions quite differently. And when the Constitution features a tension between different values and principles—as it so often does—different people may resolve those tensions differently, all the while claiming to be faithful to the Constitution. This should hardly be surprising. When we interpret, we bring ourselves to the task of understanding, equipped with our own values and perspectives. We cannot interpret—indeed, we cannot think—without doing so. As long as different people interpret and apply the Constitution, and interpret and apply it at different times and places, disagreements

38. BALKIN, *supra* note 36, at 41–42, 48, 51 (constitutional interpretation requires constitutional faith, which requires charity and optimism).

39. WALTER M. MERRILL, AGAINST WIND AND TIDE: A BIOGRAPHY OF WM. LLOYD GARRISON 205 (1963) ("That the compact which exists between the North and South is 'a covenant with death, and an agreement with hell'—involving both parties in atrocious criminality; and should be immediately annulled").

40. BALKIN, *supra* note 36, at 107.

about constitutional interpretation—even by participants who seek to further the Constitution in good faith—are unavoidable.

Does fidelity to the Constitution mean the separation of law from politics? Not exactly. Sanford Levinson and I have distinguished between "high politics" and "low politics" in constitutional interpretation (which, in this context, includes constitutional construction).[41] "High" politics is a dispute over the animating vision, purposes, and principles of the Constitution. "Low" politics is a struggle for political or material advantage for one's self or for one's political allies.[42]

Constitutional fidelity surely requires a separation of constitutional construction from "low politics." Yet even when all participants act in good faith with a view to furthering the Constitution and its purposes, struggles over high politics are inevitable in constitutional interpretation. To this extent, fights over constitutional interpretation are "political." Large political principles are often at stake in constitutional disputes. Even so, participants must not treat the task of interpretation as simply the advancement of their values or the values of their political allies. It may often be difficult to tell the difference. Because of the effects of ideology and mechanisms of social cognition, people may confuse their values with the Constitution's values. No doubt some participants are insincere; they only want to pursue their own values under the guise of interpreting the Constitution. Even so, hypocrisy is the compliment that vice pays to virtue. In order to persuade others, people must argue as if they were attempting to be faithful to the Constitution.

Because people may disagree in good faith, the interpretive attitude of fidelity does not guarantee convergence on a single answer, although, at any point in time, it may narrow the range of answers. The interpretive attitude of fidelity imposes a subjective constraint—that is, it requires people to act in good faith. This constraint operates in addition to—but sometimes in opposition to—the sociological and political constraints described above.

41. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062 (2001) (offering "a distinction between . . . 'high politics,' which involves struggles over competing values and ideologies, and 'low politics,' which involves struggles over which group or party will hold power").

42. *Id.*

E. INTERPRETATION BY CITIZENS AND BY GOVERNMENT OFFICIALS

Randy Barnett and Evan Bernick have offered a theory of good faith constitutional construction.[43] They argue that constitutional construction requires an attempt to realize both the "letter" and the "spirit" of the Constitution.[44] They derive this obligation from three ideas. The first is the fiduciary duty that government agents—including judges—owe to the people they govern.[45] Fiduciaries owe a duty of good faith to those whose affairs they manage.[46] Second, Barnett and Bernick argue that government officials, because of their oaths of office, take on a moral obligation to act in good faith.[47] Third, Barnett and Bernick analogize the Constitution to a contract that gives judges and other government officials discretionary power over people—a power that can easily be abused.[48] Government officials—including judges—must interpret and perform their obligations under the agreement in a spirit of good faith.[49]

I would go further. A duty of fidelity in interpretation applies even if one is not a government official and even if the

43. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, SSRN (Oct. 9, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3049056.

44. *Id.* at 2; *see also id.* at 3 (good faith originalist construction seeks to implement that meaning "*faithfully*" by seeking to ascertain and adhere to the "original functions," ends, purposes, or objectives for which that text was adopted—what we call its "spirit").

45. *Id.* at 20–21; *see also id.* at 22–23 (arguing that the Constitution was designed as a fiduciary instrument and that officials have a duty to act in good faith on behalf of the public).

46. *Id.* at 17; *see also id.* at 19 ("Because we are all vulnerable to judicial decisions that bring the government's coercive power to bear upon us to our detriment, or that prevent the government's power from being used to our benefit, federal judges *ought* to be understood to be fiduciaries, with corresponding duties.").

47. *Id.* at 21 ("[O]fficials who are entrusted with power over *other people* that they would not otherwise possess in virtue of a voluntary promise to adhere to the terms of that document are morally bound to keep that promise."); *see also id.* ("[A]n oath to support the Constitution creates a morally binding promise 'to adopt an interpretive theory tethered to the Constitution's text and history.'" (quoting Richard M. Re, *Promising the Constitution*, 110 Nw. U. L. Rev. 299, 323-4 (2016))).

48. *Id.* at 30–33 ("The common evil of opportunism that both the contractual and fiduciary duty of good faith are designed to thwart, taken together with . . . [the danger of] the opportunistic abuse of discretionary power . . ., suggests the utility of Burton's theory of good-faith contractual performance . . . [to] guid[e] constitutional construction by our judicial fiduciaries.")

49. *See id.* at 26 ("The common evil of opportunism that both the contractual and fiduciary duty of good faith are designed to thwart, taken together with [the danger of] the opportunistic abuse of discretion[ary power,] . . . suggests the utility of Burton's . . . [theory of good-faith contractual performance in] guiding constitutional construction.").

Constitution is not best analogized to a contract. In *Living Originalism* and in other work, I have argued that interpretation by citizens is the standard case, and interpretation by government officials is merely a special case.[50] So our account of constitutional fidelity—and thus of constitutional construction—must be one that applies to citizens, and not merely to government officials. Citizens must interpret the Constitution in good faith even if they lack fiduciary duties because they do not hold public office. Interpretive fidelity is not simply an obligation that comes with holding office, or being a party to a contract; it is a presupposition of constitutional interpretation. As I have argued:

> Fidelity is not a virtue but a precondition. It is not just a good thing, but the point of the practice of constitutional interpretation. To claim to interpret the Constitution is already to claim to be faithful to it. Conversely, insisting that one does not care about fidelity does not simply put one at a severe disadvantage in convincing others to one's point of view; it takes one outside of the language game of constitutional interpretation. It is to announce that one is doing something else—whether it is political theory, economics, or sociology, but most assuredly not constitutional law. When we say that fidelity is not important to us, we are no longer interpreting the Constitution, we are criticizing it. Indeed, even when we criticize the Constitution, we are in some sense offering what we believe to be a faithful interpretation of it. We are saying that this is what the Constitution really means and that we find it wanting. When [William Lloyd] Garrison called the Constitution an agreement with hell, it was because he assumed that a faithful interpretation protected slavery.[51]

On the other hand, constitutional fidelity may require more from government officials than from citizens precisely because government officials have responsibilities to the public that ordinary citizens do not, and these responsibilities are especially important because the legal system clothes government officials with the power of the state and charges them with enforcing the law against private citizens. These obligations of public officials concern not only the duties of good faith and fiduciary obligation that Barnett and Bernick describe, but also the importance of stability and predictability, the promotion of rule of law values, the need to take into account existing constitutional doctrine, the

50. BALKIN, *supra* note 2, at 17.
51. BALKIN, *supra* note 36, at 106.

practices and expectations of other government officials, and the public's expectations about legality and fairness.

Constitutional change occurs as positions that were once considered "off-the-wall" later become "on-the-wall" and even widely accepted or orthodox. Private citizens, motivated by individual conscience or political zeal, and legal scholars, in their quest to advance scholarship, are generally free to make whatever constitutional claims they believe are the best interpretations of the Constitution, even if their views are widely considered off-the-wall. Our constitutional system protects and values the claims of constitutional dissenters, because constitutional dissenters sometimes turn out to be the prophets of the constitutional law of the future.[52] Attorneys representing private citizens may also make off-the-wall claims, consistent with norms of professional responsibility and their duties to represent their clients zealously. But when government officials enforce the law (as opposed to making political statements), and especially when they enforce the law against private citizens, people expect them to limit themselves to official constitutional interpretations that are on-the-wall, even if disputable and controversial.[53] In Section III, I will argue that the expectation that government officials make claims that are on-the-wall offers an additional, intersubjective constraint on constitutional construction.

F. FIDELITY TO THE CONSTITUTION REQUIRES FAITH IN THE CONSTITUTIONAL PROJECT

Fidelity *to* the Constitution also requires a certain degree of faith *in* the Constitution.[54] To be faithful to something or someone is to believe in something or someone. Fidelity, in this sense, is a *relationship* between ourselves and another. You are faithful to the other because you expect them to be faithful to you, even

52. BALKIN, *supra* note 2, at 95–96.

53. As Barnett and Bernick note, this creates a possible tension between the duties of government officials. Government officials may believe that their fiduciary obligation to the original purposes of the Constitution require a significant departure from existing law, even changes that are currently considered off-the-wall. Barnett and Bernick argue that government officials nevertheless have a duty to implement such a change, even if doing so defeats the expectations of citizens, lawyers, and fellow government officials. *See* Barnett & Bernick, *supra* note 43, at 21 n. 107 (arguing that officials have a fiduciary duty to enforce the Constitution at the time of adoption and not the public's understanding of the Constitution at the time they take their oaths).

54. The argument in the next five paragraphs is drawn from BALKIN, *supra* note 36, at 2, 124–25; and BALKIN, *supra* note 2, at 77–81.

when you cannot be certain of this. Thus, fidelity involves a degree of trust, a leap of faith. Conversely, to be faithless means both to lack faith and to betray a trust. When one is faithless, one becomes untrustworthy; often because one has lost faith in the other.

In much the same fashion, constitutional fidelity requires a leap of faith in the Constitution. If you do not have faith in the object of interpretation, then you will be likely to treat it as an obstacle or inconvenience, something to get around by clever argumentation. This approach to constitutional interpretation lacks an attitude of fidelity toward the Constitution.

Saying that we have faith in the Constitution does not mean merely that we have faith in a particular text. It means that we have faith in the constitutional project of government under the Constitution. This project is the work of many generations. It began before us, and, we hope, it will continue after us. Thus, when we say that we have faith in the Constitution, what we are really saying is that we have faith in the American people living under the Constitution, and that we have faith in the development of the institutions of self-government through adherence to the Constitution. There is no guarantee, however, that the Constitution—that is, the project of constitutionalism in the United States—will turn out to be worthy of our faith. The constitutional system may be deeply unjust and never get much better. Even if it is broadly acceptable, things may fall apart. Constitutional institutions may decay. The Constitution may fail, as it did once before in the 1860s. Despite all of our best efforts and those of later generations, the Constitution may turn out to be a covenant with death and an agreement with hell.

This constitutional faith may not be much of a gamble if we think that the Constitution-in-practice is basically just and our system of government legitimate and worthy of respect. But even if the Constitution-in-practice is currently very unjust, and even if we believe that our institutions of democracy have decayed or are under threat, constitutional faith means that we continue to believe the constitution-in-practice and our constitutional democracy will be redeemed. An attitude of constitutional fidelity presupposes that we think that fidelity is worth the effort, even when we know—or suspect—that others do not behave in the same way.

In sum, constitutional fidelity is not simply a correspondence between an interpretation and a text. It is an attitude toward the

Constitution and the project of self-government under the Constitution. Fidelity to the Constitution requires faith in the Constitution, and—especially when things are going badly—in the redemption of the Constitution. What is redeemed, however, is not simply a set of rules or promises in a document, but a trans-generational constitutional project and a people. Behind a constitution are the people who live within its political framework. To make a leap of faith in the Constitution is to believe in the people who engage in politics within it. Constitutional fidelity requires constitutional faith, which is a species of political faith. And political faith is a bet not on particular words but on the members of a political community who chose to live by those words.

G. FIDELITY REQUIRES UNDERSTANDING ONE'S POSITION IN HISTORY

Constitutional fidelity also requires understanding one's position in history. As people live within a constitutional system, they move further and further from the moment of adoption, and a history of interpretations and counter-interpretations accumulates. That is why constitutional construction is not simply making up things however one likes. Constitutional construction is a multigenerational project. Later interpreters do not write on a blank slate. They operate within an ongoing tradition of readings and re-readings of the Constitution, in the shadow of a history of arguments and counter-arguments about the Constitution, and against the background of previous state-building constructions, and good or bad things done in the name of the Constitution. To be sure, later generations build on the work of previous generations and can correct their errors and mistakes. But usually they leave in place as much as they correct.

Each successive group of interpreters finds itself at the end of a line of previous readings and disputes. Their position does not make them the culmination of the constitutional tradition, but merely the latest installment. Their position in history should, however, affect their interpretive attitude.

Being later in time does not guarantee that one is wiser or more moral than earlier generations. But later generations have (at least potentially) access to more history than earlier generations; they may be able to know more about how the Constitution functions in different circumstances, and especially

under conditions of stress, emergency, conflict, and rapid change. There is no guarantee, however, that later generations will take advantage of this history. Indeed, precisely because later generations are born later, they have not experienced the same crises and dangers, and they may forget (or be unable to comprehend) old and hard-won lessons.

Because every generation emerges as the latest installment of a line of previous readers, their position in time demands a particular interpretive attitude about the constitutional project, expressed through the ideas of *redemption*, *coherence*, *self-education*, *humility*, and *charity*.

The concept of redemption in constitutional interpretation means that in interpreting the Constitution, we should do our best to fulfill the Constitution's purposes and promises in our own day. Redemption may be necessary because previous generations have fallen short of the Constitution's promises, or because we ourselves have fallen short.

Coherence means that we should strive to see the Constitution as articulating a coherent scheme of political values. To do this, we may have to accept some parts of the tradition as worth preserving and reject other parts.

A duty of self-education also follows from being last in line. The central advantage of later readers over earlier ones is not that they are wiser but that they have access to more information about what the Constitution has meant to people and about how the Constitution operates over time in multiple situations. Therefore we, as the latest readers in the line, should try to understand the history of previous constitutional controversies, including, but not limited to, the controversies of the Founding era.

The idea of interpretive humility is backward-looking and forward-looking. Backward looking humility means that contemporary interpreters should recognize that earlier interpreters of the Constitution have something to teach them about its principles and purposes, even if they disagree with them. Forward looking humility is the recognition that we will be judged by later generations, often in ways we cannot yet imagine.

Finally, interpreters have obligations of charity in interpretation. Later readers have an obligation of charity both to the adopting generation and to each successive generation. They

should try to understand why people did what they did in the context of their time and try to see what was valuable and useful in previous readings of the Constitution. Previous generations may have done very unjust things, and later interpreters should not hesitate to recognize them as unjust. After all, the U.S. Constitution was founded as a republic that permitted and protected the institution of slavery. Even so, later interpreters should attempt to view the work of previous generations in its best light; they should try to understand its lessons for the present even when they find it wanting or morally wrong.

This charity also connects to our position in time. We are the inheritors of the readings of previous generations, and we will bequeath our own readings to later generations who will someday take our place at the end of the line. It is very likely that later generations will consider some of what we do to be unjust, morally compromised, and even depraved. If we want later generations to view our own work with charity, we must be willing to view earlier generations with the same degree of charity.

III. CONSTITUTIONAL TOPICS IN CONSTITUTIONAL CONSTRUCTION

The techniques of constitutional construction are the standard forms of common law argument. Once the Constitution was adopted, people began to treat it as law. Accordingly, they used the techniques for construing texts that they had inherited from the common law.[55] These techniques are among the original legal methods for interpreting the Constitution and they also form part of the original "law of interpretation."[56]

55. BOBBITT, CONSTITUTIONAL INTERPRETATION *supra* note 18, at 5 ("Since the Constitution was a written law, it had to be *construed*, and this was to be done according to the prevailing methods of legal construction . . . the forms of common law argument, those forms prevailing at the time of the drafting and ratification of the U.S. Constitution."); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1758–62 (1994) (arguing that in the process of making the Constitution a political as well as legal document, the Founding generation adapted a range of different legal methods); *cf.* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 1815-35, at 112–18 (1988) (noting the wide range of sources that early jurists drew on and adapted to constitutional argument).

56. William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1131-32 (2017) ("The 'original legal methods' are, in our view, the law of interpretation as it stood at the Founding."). Thus, there are important points of connection between the account of constitutional construction I offer in this Article and John McGinnis and Michael Rappaport's claim that interpreters should employ original

The most famous account of these techniques is Philip Bobbitt's theory of "modalities" of constitutional interpretation. He identified a list of six styles of argument which have become more or less standard in constitutional theory: text, history, structure, doctrine, prudence, and ethos.[57] Later on in this Article, I will offer a different list, better designed to explain how lawyers use history when they engage in constitutional construction.[58]

Because Bobbitt's account has been so influential, legal theorists may tend to associate the use of modalities of constitutional argument with the whole of Bobbitt's theory. That theory is both inconsistent with originalism and generally offered as a pluralist alternative to it.[59] It also argues that when different modalities of analysis conflict, interpreters must decide by resort to individual conscience.[60] Hence people may assume that any theory of construction that employs common-law modalities of argument is (1) non-originalist; and (2) bestows considerable freedom on interpreters to decide constitutional questions according to their individual consciences. Neither of these assumptions is correct.

This Part argues that the standard forms of constitutional argument are rhetorical topics. This account does not require that one accept Bobbitt's entire system, and it is consistent with both originalist and non-originalist approaches to constitutional interpretation. In Part IV, I discuss Bobbitt's theory and its differences from my account in more detail. For the moment, it is sufficient to note that one may detach most of Bobbitt's theoretical apparatus from his central insight: Constitutional argument is structured in terms of recurring forms of argument; these forms of argument provide a kind of know-how that helps lawyers analyze constitutional problems and make constitutional claims. These recurring forms of argument originate in the common law, and people adapted them to constitutional argument when the Constitution became law. Although these forms of argument may have evolved a bit over time (in ways I

legal methods and William Baude and Stephen Sachs' arguments about the law of interpretation. I will discuss the similarities and differences between our approaches later in this essay. *See infra* text accompanying notes 129–155.

57. BOBBIT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 12–13.

58. *See infra* text accompanying notes 109–121.

59. BOBBIT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 25 (arguing that originalism is circular).

60. *Id.,* at 114, 168; Bobbitt, *Reflections*, *supra* note 18, at 1873–74.

will discuss later on), people have employed the standard forms of argument more or less continuously from the Founding onwards.

A. THE MODALITIES AS RHETORICAL TOPICS

The history and theory of rhetoric offer the best way to understand the modalities of constitutional argument. The recurring forms of argument in constitutional law are what the rhetorical tradition that begins with Aristotle calls topics or *topoi*.[61] In particular these forms of argument are what Aristotle and later rhetoricians would call "special topics."

In rhetoric, a topic is something to talk about, and therefore a way of approaching a question, analyzing it, and constructing arguments to discuss it.[62] The use of rhetorical topics to make arguments is known as the rhetorical art of invention.[63]

61. ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 44–46 [1358a] (George A. Kennedy, trans., 2d ed., 2007) [hereinafter ARISTOTLE, ON RHETORIC]; MICHAEL H. FROST, INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE 27 (2005); David Fleming, *Becoming Rhetorical: An Education in the Topics*, *in* THE REALMS OF RHETORIC: THE PROSPECTS FOR RHETORIC EDUCATION 93, 95–97 (Joseph Petraglia & Deepika Bahri eds., 2003); J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 211 (Peter Brooks & Paul Gewirtz eds., 1996).

62. ARISTOTLE, *Topica*, *in* THE BASIC WORKS OF ARISTOTLE 187, 188 [100a] (Richard McKeon, ed., W.A. Pickard-Cambridge trans., 1941) ("Our treatise proposes to find a line of inquiry whereby we shall be able to reason from opinions that are generally accepted about every problem propounded to us, and also shall ourselves, when standing up to an argument, avoid saying anything that will obstruct us."); Balkin, *supra* note 61, at 213 ("The point of identifying topics, making lists of them, and committing them to memory was to have at one's immediate disposal a checklist of things to talk about no matter what subject one was presented with and no matter what problem of analysis one faced.").

63. The classical study of rhetoric was organized into canons or characteristic skills: invention (*inventione* in Latin, *heurisis* in Greek); arrangement (*dispositio*, *taxis*); style (*elocutio*, *lexis*); memorization (*memoria*, *mnémé*); and delivery (*pronunciatio*, *hypokrisis*). Cicero, De Inventione, I.9 in 2 CICERO 1, 18-19 (H.M. Hubbell trans., 1949); [Cicero], Rhetorica Ad Herennium I.2, *in* 1 CICERO 6–7, 7 n.a (Harry Caplan trans., 1954) [hereinafter [Cicero], ad Herennium]; Balkin, *supra* note 61, at 212, 273 n.4.

The first canon of rhetoric, invention, is the art of discovering what to say. It is the skill of "discovering and formulating arguments on any subject, opinions on the resolution of any problem, or reasons for or against any proposed course of action." *Id.* at 212. Viewed from this perspective, the art of rhetoric is not primarily about ornament or display. Rather, it is a pragmatic art. First, we must understand the situation before us; then we must find ways to analyze problems, solve them, and explain to others what we have found and what should be done. *Id.*

Aristotle distinguished between deliberative, judicial, and epideictic rhetoric. Deliberative rhetoric argues for what we should do; judicial rhetoric attempts to analyze what has happened; both focus on practical reasoning and on making decisions. Epideictic

The Greek word *topos* means "place," and it has several interlocking connotations. First, topics are metaphorical places where one might look for arguments; alternatively, they are signposts along a journey to find arguments.[64] Some writers have compared topics to places in the mind in which one searches for arguments and from which one fetches formulas and ideas.[65] And just as things appear differently from different locations, one can also think of topics as perspectives or distinctive ways of looking at things.[66]

The concept of *topoi* connects the study of rhetoric with practical reasoning. Topics are not only recipes for making speeches; they are also methods of analysis and problem-solving. Viewed as a form of practical reason, rhetorical invention is the art of discovering the most plausible and convincing arguments for a given audience.[67] The realm of rhetorical invention concerns the kinds of questions that cannot be demonstrated for certain, as in mathematics, but for which there are a range of possible answers, some more plausible and more reasonable than others. Plausibility, as Aristotle says, means plausible to some person or

rhetoric, by contrast, is about offering praise or blame, and although it may require practical reasoning, it does not call for immediate action. ARISTOTLE, ON RHETORIC, *supra* note 61, at 46–50 [1358b-1359a]; Iain Scobbie, *Rhetoric, Persuasion, and Interpretation in International Law*, *in* INTERPRETATION IN INTERNATIONAL LAW 61, 66 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015).

64. Fleming, *supra* note 61, at 96; Michael C. Leff, *The Topics of Argumentative Invention in Latin Rhetorical Theory from Cicero to Boethius*, 1 RHETORICA 23, 24 (1983) ("[T]he rhetor is a hunter, the argument his quarry, and the topic a locale in which the argument may be found").

65. *See* CICERO, TOPICA, II.6–II.8, *in* 2 CICERO, *supra* note 63, at 375, 386–87, 386 n.b, (describing *topoi* as places from which one might fetch different kinds of arguments); Fleming, *supra* note 61, at 96. Because topics are often organized into checklists, one might also compare them to memory palaces. Guenther Kreuzbauer, *Topics in Contemporary Legal Argumentation: Some Remarks on the Topical Nature of Legal Argumentation in the Continental Law Tradition*, 28 INFORMAL LOGIC 71, 74-75 (2008) (citing Christof Rapp, *Aristotle's Rhetoric*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 1, 2010), https://plato-stanford.edu/entries/aristotle-rhetoric/).

66. *See* Balkin, *A Night in the Topics*, *supra* note 61, at 213 & 273 n.6 (comparing *topoi* to a horizon or perspective in hermeneutical theory; this horizon is formed by the place where one stands or the direction in which one looks at things.).

67. ARISTOTLE, ON RHETORIC, supra note 61, at 37 [1356a] (defining rhetoric as "the ability … to see the available means of persuasion" in a given case.); *id.* at 39 [1356a]("Persuasion occurs through the arguments [*logoi*] when we show the truth or apparent truth from whatever is persuasive in each case."); *cf.* ARISTOTLE, NICHOMACHEAN ETHICS, in THE BASIC WORKS OF ARISTOTLE, supra note 62, at 936 [1094b] ("it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs.").

some audience.[68] Hence rhetorical invention involves finding ways to convince other people in our community—or our audience—about the most reasonable solution to a problem, or the best way to go forward.

This account of rhetoric as problem-solving and practical reasoning contrasts with familiar ideas of rhetoric as mere technical display, emotional appeal, or the devious arts of the demagogue or con artist. Moreover, this substantive vision of rhetoric presumes what Chaim Perelman called a "realm of rhetoric."[69] It envisions

> [A] large intellectual sphere in which it is meaningful to speak of arguments that are "reasonable" and "unreasonable" and in which discussion is perceived as useful and meaningful. This realm of rhetoric, of civil and reasonable discourse, lies between the extremes of a world of certain truth and a world of arbitrary wills, each of which exists in a world without discussion, the one because catechism—deduction and demonstration—has taken the place of discussion, and the other because nothing remains that can be meaningfully discussed.[70]

We turn to rhetoric, and thus to topics, when we must consider questions whose answers cannot be known for certain, and when we ask instead what is more or less reasonable, and more or less plausible to our audience. This is the realm of legal and constitutional argument.[71]

Aristotle and later rhetoricians divided topics into *general* and *special*.[72] General topics (*topoi* and *koinoi topoi*) are concepts

68. ARISTOTLE, ON RHETORIC, *supra* note 61, at 41 [1356b].

69. CHAIM PERELMAN, THE REALM OF RHETORIC (1982).

70. Bernard E. Jacob, *Ancient Rhetoric, Modern Legal Thought, and Politics: A Review Essay on the Translation of Viehweg's "Topics and Law,"* 89 NW. U. L. REV. 1622, 1644 (1995) (reviewing THEODORE VIEHWEG, TOPICS AND LAW (W. Cole Durham, Jr., trans., 1993) (footnote omitted)).

71. Giambattista Vico, who sought to rehabilitate the classical study of rhetoric in the early modern period as an alternative to Cartesian rationalism, held that topical reasoning was crucial for reasoning both in law and in what we would now call the humanities. GIAMBATTISTA VICO, ON THE STUDY METHODS OF OUR TIME 15 (Elio Gianturco trans., Cornell Univ. Press 1990) (1709) ("Those who know all the *loci* [Latin for *topoi*], i.e., the lines of argument to be used, are able . . . to grasp extemporaneously the elements of persuasion inherent in any question or case.").

72. Aristotle sometimes uses *topoi* generally to speak of all kinds of topics. More specifically, he sometimes uses *topoi* to refer to general *strategies* of argument in Book I of the Rhetoric, and *koina* or *koinoi topoi* to refer to common *subjects* of argument featured in Book II. ARISTOTLE, ON RHETORIC, supra note 61, at 50 (commentary by George A.

and strategies for argument that offer people ways to invent something to say about almost any subject. Aristotle gives as examples (1) part and whole; (2) more and less; (3) opposites; (4) time; (5) definitions; (6) categorization; (7) cause and effect; and (8) possible and impossible.[73] More contemporary examples are the reporters' familiar set of questions: who, what, why, where, when, and how. Because general topics are so abstract, and can be used for almost any question, they have little substantive content.[74]

Special topics (*idia*) are strategies and concepts that are relevant to a specific body of knowledge, subject matter or professional practice. They are modes of analysis associated with a field of knowledge such as medicine or law.[75] Special topics allow people to make arguments within a particular field of knowledge. Diagnostic criteria are special topics in medicine; doctrinal categories are special topics in law. These topics are *special* in the sense of "specialized." For example, medicine, and law have topics that are useful for discussing and studying these particular subjects but may not be relevant to others.[76]

Examples of contemporary topics in American law are (1) burden of proof; (2) rules versus standards; (3) justified reliance; (4) cheapest cost avoider; (5) fiduciary obligation; (6) the political safeguards of federalism; and (7) discrete and insular minority. Some of these topics are drawn from legal doctrines; others are drawn from familiar theories about legal doctrine.

Kennedy; Fleming, *supra* note 61, at 97–98. For present purposes, I group both the common strategies and the common subjects together as general or common topics.

73. ARISTOTLE, ON RHETORIC, *supra* note 61, at 51 [1359a], 65 [1363b], 172–184 [1397a–1400b] (offering catalogs of common topics).

74. For example, if asked to give a speech on elephants, one could talk about the parts of the elephant, the size of elephants, the definition of an elephant, the differences between elephants and other species, and so on. As this example suggests, these abstract and general topics only help begin the process of discovery. In most cases a speaker has to add a great deal more substance (and do considerably more research) to construct an interesting argument. Balkin, *supra* note 61, at 213.

75. Aristotle mentions physics as an example. ARISTOTLE, ON RHETORIC, *supra* note 61, at 45 [1358a]. A significant portion of Book I of Aristotle's *Rhetoric* lists special topics (*idia*) about politics, ethics, and psychology. *Id.* at 51–110 [1359a–1377b].

76. Just as there is some dispute about how Aristotle divided up the class of topics, —for example, whether there are actually three categories rather two—there are disputes about how he characterized the difference between general and special topics. Fleming, *supra* note 61, at 97–100. In any case, the rhetorical tradition following Aristotle distinguished between general topics relevant to (virtually) all questions and special topics relevant to more specific or specialized fields of study (like law).

As one can see from these examples, "any theoretical enterprise tends to develop its own set of special topics as soon as it creates its own set of distinctive concepts and approaches."[77] Usually, the set of special topics in any area of thought is not closed. As time goes on, participants will add new concepts and theories. Although American lawyers still argue using topics that existed in the British common law before independence, most legal topics developed later on. Moreover, the preponderance and dominance of certain topics may change over time. Some topics may recede in importance, while other topics become increasingly prominent.

Topics are an aspect of culture and a reflection of culture. The accumulation, prominence, and development of topics in a given culture reflect that culture's growth and evolution. For example, one way of measuring the influence of other disciplines on law is to note how often or how pervasively topics from other disciplines (such as economic concepts and theories) become part of the discourse of legal scholars, administrators, and judges.

Topics have a dual character. On the one hand, they are *concepts* or *propositions*; on the other, they are *strategies* or *problem-solving techniques* for argument. Topics often serve as devices for diagnosing and solving problems, or for the organization and exposition of ideas. Usually topics can be summed up or memorized in a few words, a checklist, or a formula. (Think about legal outlines and lists of legal categories.) Viewed from this perspective, topics are heuristics; they offer a starting point or a roadmap for analyzing problems and proposing solutions.[78] The use of topics in law, Theodore Viehweg has explained, "is a technique of problem oriented thought that was developed by rhetoric."[79]

Topics are useful because people can base arguments on them *and* because they are generally regarded as plausible grounds for making arguments. Topics, in other words, draw on knowledge and beliefs held in common in a given community, whether a knowledge community (for example, an academic discipline or profession), a political community, or a religious

77. Balkin, *supra* note 61, at 213.

78. *Id.* at 214.

79. THEODOR VIEHWEG, TOPICS AND LAW: A CONTRIBUTION TO BASIC RESEARCH IN LAW 1 (W. Cole Durham trans., 1993); *id.* at 25 ("The function of topoi . . . is to serve the discussion of problems.") (emphasis omitted).

community.[80] This suggests another duality: Topics both involve *strategies for analysis* and reflect conditions of *shared belief*. Communities of knowledge and the topics they regularly employ in reasoning and argument are mutually constitutive. To be a well-trained lawyer in the United States is to be able to use a certain set of topics in persuading other lawyers and to find these approaches plausible and persuasive.

Some special topics are commonplaces. Commonplaces are ideas, views or expressions that are held in common in a given culture. Such commonplaces include "concepts, subjects and maxims that are widely shared in the culture or are associated with wisdom that has been distilled into commonsense."[81] They also include widely held beliefs and opinions in a political, religious, professional, or scholarly community.[82] One should distinguish these "commonplaces" from what Aristotle originally meant by *koinoi topoi* or common topics. Aristotle's common (or general) topics apply universally to any question; commonplaces are widely agreed on beliefs or presuppositions in a given community or within a given area of inquiry. They may be special topics in Aristotle's original sense—for example commonplaces about politics.[83] As I shall explain, the standard forms of constitutional argument rest on commonplaces about constitutional interpretation.

80. Guenther Kreutzbauer explains the idea of topics along similar lines: "Topoi are *general propositions or concepts* that provide *premises of arguments* used in a certain discourse and are *collectively accepted* by the participants in the discourse as being plausible. They can tackle problems of abstract philosophy, of a specific profession or of human life in general. They usually have fixed structure and are linguistically expressed by one (or a few) word(s) or sentence(s), have a fixed structural and linguistic design, and are generally formulated in a rhetorically elaborate style." Kreuzbauer, *supra* note 65, at 79 (2008).

81. Balkin, *supra* note 61, at 212; *see also* Leff, *supra* note 64, at 23 ("[R]hetoricians must draw their starting points from accepted beliefs and values relative to the audience and the subject of discourse. When these beliefs and values are considered at a high level of generality, they become 'commonplaces' or 'common topics' for argumentation . . . .").

82. Thomas J. Darwin, *Pathos, Pedagogy, and the Familiar: Cultivating Rhetorical Intelligence*, *in* THE REALMS OF RHETORIC: THE PROSPECTS FOR RHETORIC EDUCATION, *supra* note 61, at 23, 28 ("Topical 'reasoning' involves the ability to adapt and manipulate one's repertoire of cultural common sense (expressed in commonplaces) to fit new or tenuous situations.").

83. *Cf.* Fleming, *supra* note 61, at 103 ("[W]hat recent rhetoricians have described as the "special" topics—the particular practices and beliefs of specific communities seen from a vantage point *outside* of them—could just as easily be seen as "common" topics when seen from a vantage point *inside* of them.").

In sum, in a given field of knowledge special topics include (1) key ideas and concepts; (2) commonplaces and widely shared assumptions; and (3) problem-solving tools and diagnostic checklists.

In the ancient world, lawyers and statesmen studied legal argument in terms of topics. Cicero and Quintilian wrote treatises on rhetoric with lists of topics for the benefit of advocates.[84] Many of Cicero's topics—and his applications of them—were designed to be used in legal disputes in the Rome of his time.[85] This is hardly surprising: it exemplifies the close connections between legal practice and topical reasoning. The goal of memorizing and practicing topics was to allow advocates to analyze factual situations as legal problems and then to make arguments about how to characterize both the facts and the law.

Today in American law schools, law students answer "issue spotters," exam questions that test their ability to recall key doctrinal concepts (which themselves are legal topics) and apply them creatively to factual situations. The very notion of the "issue spotter" as the standard form of legal examination shows how lawyers use topical categories to reason and to make arguments.

Most legal doctrines generate special topics for legal analysis, argument and judgment. That is not because legal doctrines are nothing more than rhetorical topics; rather it is because legal doctrines produce categories and tests that are helpful to think with. They provide methods for the organization of social experience when viewed through the eyes of the law. For the same reason, doctrinal categories and tests also serve as problem-solving devices. Thus, "legal doctrine has a dual nature, both as authority and as topos. Because legal doctrines and distinctions are backed by the authority of the state, they help constitute what a legal problem is in a given legal culture."[86]

Analyzing fact patterns, classifying them in terms of legal categories, and then using these facts and categories to argue for one's position is what legal advocates have done from Cicero's

84. Cicero, *supra* note 63; CICERO, *supra* note 65; [Cicero], *supra* note 63; QUINTILIAN, THE ORATOR'S EDUCATION (Donald A. Russell trans., 2002).

85. *See* sources cited *supra* note 84; FROST, *supra* note 61, at 27–30 (explaining that classical rhetoricians devised topic catalogs based on the needs of legal advocates). The section of Aristotle's *Rhetoric* on judicial rhetoric also offers a list of topics for arguing legal cases. ARISTOTLE, ON RHETORIC, *supra* note 61, at 83–110 [1368a-1377b].

86. Balkin, *supra* note 61, at 219.

day to our own. In the twentieth century, two legal scholars, Chaim Perelman and Theodor Viehweg, sought to revive the classical tradition of rhetoric by focusing on invention and topical argument.[87] Significant parts of Perelman and Olbrechts-Tyteca's *The New Rhetoric* are a contemporary topic catalog.[88]

Viehweg's 1953 book *Topics and Law* argued that much legal reasoning is problem-oriented reasoning using topics.[89] This argument was controversial in civil law countries like Viehweg's Germany because the civil code appears to be a systematic and deductive system of reasoning.[90] It is easier to see the force of Viehweg's argument in common-law jurisdictions like the United States. In common law systems, much of doctrine is structured in terms of topics, new precedents often create new topics for legal analysis, and lawyers naturally argue using the topics they find in previous precedent. In fact, the West Keynote System, developed in the twentieth century to help American lawyers find relevant precedents, is an elaborate topic catalog.[91]

During the heyday of critical legal studies, Duncan Kennedy and I helped create a field called legal semiotics.[92] Legal semiotics

87. CHAIM PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION (John Wilkinson & Purcell Weaver trans., 1969); VIEHWEG, *supra* note 79; *see also* Jacob, *supra* note 70.

88. *See* Barbara Warnick, *Two Systems of Invention: The Topics in the* Rhetoric *and* The New Rhetoric*, in* REREADING ARISTOTLE'S RHETORIC 107 (A.G. Gross & A.E. Walzer eds., 2000) (comparing Aristotle's and Perelman's topic catalogues).

89. VIEHWEG, *supra* note 79, at 69–85. On the influence of Viehweg and the Mainz school that he created, see Katharina Sobota, *System and Flexibility in Law*, 5 ARGUMENTATION 275 (1991); W. Cole Durham, *Translator's Foreword* to VIEHWEG, *supra* note 79, at xix–xxii.

90. Balkin, *supra* note 61, at 219; W. Cole Durham, *Translator's Foreword* to VIEHWEG, *supra* note 79, at xix–xxv.

91. *See* Explanation of How the Topic and Key Number System Works, WESTLAW, https://lawschool.westlaw.com/marketing/display/RE/24 (last visited Apr. 23, 2018) ("The American system of law is broken down into Major Topics. . ..Each of those topics is divided, in greater and greater detail, into individual units that represent a specific legal concept . . . .").

92. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION (1997); Balkin, *supra* note 61, at 216; J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831 (1991); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991) [hereinafter Kennedy, *Semiotics*]; J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIAMI L. REV. 1119 (1990); J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (book review) [hereinafter Balkin, *Nested Oppositions*]; J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986) [hereinafter Balkin, *Crystalline Structure*]; Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Jennifer Jaff, James Boyle, and Jeremy Paul also made important contributions. *See* Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779 (1991); Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915 (1988); Jennifer Jaff,

identifies recurrent argument forms in different fields of law such as contracts, torts and criminal law.[93] Examples in tort law are arguments from fault, causation, rights, incentives, consequences, rules versus standards, and consent.[94] These standard forms of argument, in turn can be transformed or flipped to produce opposed sets of legal arguments.[95] These forms of argument recur at more general and more specific levels of doctrine; they are even useful in debating the application of doctrine to specific fact patterns. As a result, legal doctrine often has a fractal or crystalline structure, in which debates about general features of doctrine are replicated at more specific levels of articulation and application.[96] The recurrent argument forms that legal semiotics studies are special topics for these fields of law. Indeed, one of my first law review articles is essentially a catalog of legal topics and legal arguments in tort and criminal law.[97]

Roughly around the same time in the 1980s, Philip Bobbitt and Richard Fallon offered what are now well-known catalogs of the standard forms of constitutional argument that lawyers and judges regularly employ. Bobbitt said that constitutional arguments came in six different forms: text, history, structure, prudence (including consequences), doctrine (including judicial decisions and interbranch conventions), and ethos.[98] Fallon said that constitutional arguments came in five basic versions: text, historical intent, theory (including a wide range of different justifications), precedent, and value (including moral theory, political theory, and natural law).[99] Bobbitt's list of modalities

Frame-Shifting: An Empowering Methodology for Teaching and Learning Legal Reasoning, 36 J. LEGAL EDUC. 249 (1986); James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985).

93. Balkin, *supra* note 61, at 216–17.

94. *Id.* at 217–18; Balkin, *Crystalline Structure*, *supra* note 92.

95. Kennedy, *Semiotics*, *supra* note 92.

96. *See* Balkin, *Crystalline Structure*, *supra* note 92; Kennedy, *Semiotics, supra* note 92 (describing "nesting"); Balkin, *Nested Oppositions*, *supra* note 92.

97. Balkin, *Crystalline Structure*, *supra* note 92.

98. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 7–8; BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 12–13. Although the first of these books was published in 1982, Bobbitt first presented his list of modalities in his Dougherty Lectures in April 1979. Philip C. Bobbitt, *Constitutional Fate*, 58 TEX. L. REV. 695 (1980).

99. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1244–46, 1252–58 (1987) [hereinafter *Constructivist Coherence*]. Robert Post has offered another categorization of kinds of appeals to authority in constitutional argument, which is a subset of Bobbitt's and Fallon's. Post, *supra* note 32, at 18–19 (discussing three different ways that the Constitution gains

provides a useful shorthand for teaching students about different approaches to constitutional interpretation, and it has been especially influential in constitutional theory.

Bobbitt adopted the term "modalities" because he wanted to make an analogy to modal logic, which concerns the relationship between different modes of truth such as actuality, possibility, and necessity.[100] Analogously, Bobbitt claimed that the modalities of constitutional argument represented the different ways in which propositions of constitutional law could be true, and because they represented different modalities of truth, they were incommensurable.[101] Since Bobbitt coined the term in his 1982 book, *Constitutional Fate*, "modalities" has caught on as the standard way to describe the basic forms of argument in constitutional law.

In fact, the modalities of constitutional argument do not have very much to do with modal logic. Bobbitt and Fallon were simply continuing the basic approach of classical rhetoric. Like Kennedy and me, they were reinventing the wheel—a very ancient wheel—by providing topic catalogues for modern constitutional discourse.[102]

The "modalities" of American constitutional discourse are rhetorical topics. More precisely, they are a class of special topics for American constitutional law; and they have all of the characteristics of special topics. First, the modalities offer

authority before the public—through the authority of consent (original intent), the authority of law (precedent), and the authority of our national ethos or tradition).

Jamal Greene has offered a catalog of legal arguments with two dimensions. Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013). One dimension consists of topics for invention: text, history, structure, doctrine, and consequences. *Id.* at 1424. A second dimension consists of modes of address to the audience: logos (appeals to reason), ethos (appeals based on the character or integrity of the speaker), and pathos (appeals to emotion). *Id.* at 1398–99, 1443; s*ee also* Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1360–62 (2016) (critiquing Greene's account and offering a different classification scheme). Greene's second dimension, the three modes of address, do not focus on how to analyze and solve a problem—the concern of this Article—but rather on how to win over an audience through various kinds of appeals.

100. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 11–12.

101. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 12 ("[*C*]*onstitutional modalities* [are] the ways in which legal propositions are characterized as true from a constitutional point of view."); *id.* at 164 (noting the "incommensurate nature of the various modalities of argument").

102. This is also how I understand Karl Llewellyn's work on techniques of precedent and canons of statutory interpretation. *See infra* note 249; *see also* Starger, *supra* note 99 (arguing that Bobbitt's modalities are actually rhetorical topics).

standard ways to discover and invent arguments for proposed interpretations of the Constitution. Second, the modalities rely on widely shared views about what justifies a proposed constitutional interpretation or makes an argument about constitutional interpretation both valid and plausible. In other words, they rest on commonplaces about constitutional interpretation. Third, the modalities serve as a heuristic or diagnostic tool. They operate as a checklist for analyzing situations and making arguments about the Constitution. Faced with a novel problem of constitutional law, students can work their way through the standard forms of argument, just as a journalist can organize a story by asking who, what, why, where, when, and how.

American constitutional law has hundreds, if not thousands of other special topics besides the modalities: justiciability, levels of scrutiny, less restrictive alternatives, clear and present danger, limited and enumerated powers, smoking out unconstitutional motivation, the concept of commercial speech, the *Central Hudson* test for regulating commercial speech,[103] and so on. Some of these topics emerge from existing doctrine; others reflect widely used ideas in constitutional theory.

Most doctrinal categories in constitutional law are special topics, but they only apply to certain questions. *Youngstown* analysis—which classifies Executive Branch action into one of three different boxes[104]—applies to separation of powers questions, but not to many other constitutional questions—for example, whether the Constitution protects the right of same-sex marriage. Other doctrinal frameworks, like levels of scrutiny, and multi-part tests, are special topics that help us analyze some constitutional questions but not others. In addition to doctrinal topics, theoretical concepts in constitutional law like "process-protection," "smoking out invidious motivation," "clear and present danger," "the states as laboratories for experimentation," or "the political safeguards of federalism," are also special topics, but, again, they are relevant only to some questions in constitutional law.

103. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563–66 (1980) (offering a four-part test for determining the constitutionality of regulations of commercial speech.).

104. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (offering a three-part test for determining the constitutionality of executive action in foreign affairs).

The modalities of constitutional argument, on the other hand, are a distinctive subset of the special topics in American constitutional law. First, they involve *commonplaces about constitutional interpretation*—that is, they rely on widely shared views in American legal culture about what makes a constitutional interpretation valid.[105]

Second, the modalities offer general ways to create and justify legal interpretations of the Constitution irrespective of the subject at hand. More correctly, they represent classes of roughly similar approaches to interpretation. Within each modality or class of arguments there are many more specific forms—which we might call "subtopics." For example, John Hart Ely's theory of representation-reinforcement is a subtopic of the more general modality of structural argument;[106] Alexander Bickel's theory of "the passive virtues,"[107] and Cass Sunstein's theory of judicial minimalism[108] are subtopics of the more general class of prudential argument; and the various common law canons of interpretation are subtopics of the more general category of textual argument.

The modalities, in short, are the most general of the special topics about interpretation in American constitutional law. They are most general not because they are the most *abstract*, but because they are the most *general-purpose*. One can use them to generate arguments about most constitutional issues, and they are relevant to almost every constitutional question, because we employ these topics whenever we want to understand the Constitutional text or the Constitution as a whole. If we think of topics as strategies for argument, then the modalities are the basic moves of legal exegesis in the American constitutional tradition. That is why they seem so elemental, and that is why Bobbitt viewed them as central features of the practice of constitutional argument. For these reasons, I will continue to use Bobbitt's term "modalities" to distinguish these "most general special topics

105. *Cf.* Post, *supra* note 32, at 19 (explaining that each form of argument "appeals to a different conception of constitutional authority").

106. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 133 (noting Ely's connection to previous structural theorists such as Chief Justice Marshall and Charles Black).

107. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

108. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

about interpretation" from the many other special topics in American constitutional law.

If we understand the modalities as special topics, much of Bobbitt's theoretical system becomes unnecessary, as I will explain more fully in Part IV. In particular, we need not accept Bobbitt's view that there are six and only six categories, and that they are incommensurable. Rhetorical topics do not have a fixed number, nor do they have natural boundaries. Topics are pragmatic classifications by people within a culture (or field of knowledge) of standard ways of analyzing problems and making arguments within the culture. A culture's *topoi* are useful for persuasion precisely because they are common tools of analysis that reflect shared cultural assumptions.

The list of topics in a given culture will grow and evolve as the culture grows and evolves. Moreover, depending on the problem before us, it might be helpful to divide up these topics in different ways. My list of topics is different than Bobbitt's because his list is not very good for thinking about the different ways that lawyers use history, whereas I created mine specifically for that purpose.

The evolution of special topics in constitutional law is the history of legal analysis and problem solving by people arguing about the Constitution. New doctrinal and theoretical categories are added all the time, while others fall into desuetude. But the most basic of these special topics—the modalities—have been with us from the beginning.

B. THE COMMONPLACES OF CONSTITUTIONAL ARGUMENT

I divide constitutional arguments into eleven different *topoi* or modalities.[109] They represent eleven different ways that lawyers argue about the Constitution. They are distinctive because they presuppose eleven different but widely-shared theories—that is, commonplaces—about how to justify a constitutional interpretation. For the same reason, they offer eleven different ways to employ history in constitutional argument.

Most lawyers' arguments about the Constitution fall into the following basic categories:

109. The list of topics is taken from Balkin, *supra* note 2, at 659–61.

1. Arguments from *text*. These include arguments about definitions of the words and phrases in the text; arguments that compare and contrast different parts of the text; arguments that compare the text with other texts; and arguments that employ traditional canons of statutory interpretation.

2. Arguments about constitutional *structure* and the structural logic of the constitutional system. These are arguments about how the constitutional system as a whole should operate and how the various parts of the system should interact with each other. These include arguments about the proper functioning of federalism, the separation of powers, democracy, and republican government.

3. Arguments from *purpose*. These are arguments about the point or purpose of the Constitution. They include arguments about the purposes, intentions, and expectations of the people who lived at the time of the adoption of the Constitution and its subsequent amendments, as well as purposes attributed to the Constitution over time.

4. Arguments from *consequences*. These are arguments about the likely consequences of interpreting the Constitution in one way rather than another. Arguments from consequences include arguments of institutional prudence: arguments that consider the political and practical consequences of a proposed interpretation (or implementing doctrine), the likely responses of other institutions or persons if the interpretation were accepted, and how well or how badly other actors will be likely to administer the interpretation in the future.

5. Arguments from *judicial precedent*. These are arguments based on previous judicial decisions, about what is holding and what is dicta, about what is controlling authority and what is merely persuasive authority. They include familiar common law arguments for distinguishing cases, generalizing from cases, reasoning from case to case, and reasoning by analogy. Arguments from precedent include arguments based on the doctrinal topics that previous precedents generate. As a result, arguments from judicial precedent collectively form a very large family of topics and subtopics.

6. Arguments from *political convention*. These are arguments about political conventions and settlements that arise within institutions or branches of government (for example, within the

Executive Branch); or among institutions or branches of government (for example, conventions that arise between the Executive Branch and Congress).

7. Arguments from the people's *customs* and lived experience. These arguments consider the public's customs, expectations, and ways of life and whether a proposed interpretation of the Constitution will conform to, vindicate, assist, defy, or disrupt them.

8. Arguments from *natural law or natural rights*. These arguments concern rights that governments exist to secure and protect (natural rights); as well as arguments about what kinds of laws are necessary to protect human flourishing (natural law).

9. Arguments from *national ethos*. Arguments from ethos appeal to the character of the nation and its institutions and to important, widely shared and widely honored values of Americans and American culture.

10. Arguments from *political tradition*. Arguments from political tradition appeal to cultural memory, to the meaning of key events in American political history, and to the lessons to be drawn from those events.

11. Arguments from *honored authority*. Arguments from honored authority appeal to the values, beliefs, and examples of culture heroes in American life. Examples of culture heroes include the founders as a group and key founders like George Washington and James Madison; or important historical figures like Abraham Lincoln or Martin Luther King.

Because the modalities are topics, one of their central purposes is to help us analyze situations and create arguments. One can think of these modalities as a checklist, a series of questions that a lawyer or law student might run through to analyze a case or a constitutional question. Accordingly, I have divided up the arguments in a way that makes it easy for a lawyer, judge, or law student to run through them in search of things to say.

In many cases, an argument might reasonably fall into more than one category: structural arguments, for example, are often also either arguments about constitutional purposes or arguments

about consequences. Moreover, many originalist arguments are hybrids that simultaneously employ more than one category.[110]

One could expand the list of topics further, or combine or divide the classes of arguments differently. For example, one might separate arguments from natural law from arguments from natural rights. Conversely, one might group different categories together. Consider the last three topics, 9 through 11: arguments from ethos, political tradition, and honored authority. These arguments are especially important to lawyers' use of history; many arguments that invoke history are (also) arguments from ethos, political tradition, and honored authority.[111] Because these categories appeal to cultural memory and to the social meaning of persons and events, the three categories tend to fade into each other. Hence, one might group them together and refer to them collectively as arguments from ethos, tradition, and honored authority. Then there would be nine topics rather than eleven.

C. TOPICS AS IMPLICIT THEORIES OF JUSTIFICATION

How one divides up arguments into topics depends on what one is trying to achieve. I divide classes of arguments according to their implicit theories of justification. Each modality refers to a different theory about why a particular kind of argument furthers and implements the Constitution.[112]

Earlier I noted that the many special topics are commonplaces—widely accepted premises in a culture that people use to justify their positions. The modalities of constitutional argument rest on commonplaces about constitutional interpretation. Each modality offers an implicit theory for why arguments of a certain kind should be accepted as valid or as persuasive when people interpret the Constitution, and why such arguments further the Constitution and are faithful to the Constitution. The reason why people think it is appropriate to make arguments from text in interpreting the Constitution are different from the reasons why they believe it is appropriate to make arguments from structure or consequences, for example. Hence, we can restate each of the modalities in terms of a commonplace theory of justification:

110. *Id.* at 652–53, 700.
111. *Id.* at 672–679.
112. *Id.* at 651–52, 658–59, 664.

1. Arguments from *text*: One should interpret a written Constitution consistent with the meaning of its text and inferences that can reasonably be drawn from the text.

2. Arguments from constitutional *structure*: One should interpret the Constitution according to its structural logic and consistent with the proper operation and interaction of the different parts of the constitutional system; conversely, an interpretation is improper if it undermines the structural logic of the system and the proper operation or interaction of its various parts.

3. Arguments from *purpose*: One should interpret the Constitution according to its purposes, including the purposes, goals, understandings, and expectations of those who drafted, adopted, or ratified it.

4. Arguments from *consequences*: Where the constitutional text is otherwise unclear, ambiguous, or vague, one should interpret the Constitution so as to produce the best consequences; moreover, in implementing the Constitution, one should consider the political and practical consequences of a proposed interpretation, how other actors will administer it, and the likely responses of other institutions or persons.

5. Arguments from *judicial precedent*: In interpreting the Constitution, one should follow, develop, and apply existing doctrines according to the rule of law, general and impartial reasons, and the practices of judicial precedent.

6. Arguments from *political convention*. All other things being equal, in interpreting the Constitution, one should defer to settled precedents, practices, and conventions within and among the political branches.

7. Arguments from *custom* and lived experience: All other things being equal, interpretations of the Constitution should be guided by the customs, expectations, and ways of life of those who live under it; conversely, interpretations that disrupt or undermine people's expectations, customs, and ways of life should be suspect.

8. Arguments from *natural law or natural rights*: One should interpret the Constitution to protect those rights that governments are or should be instituted to preserve and protect; one should interpret the Constitution consistent with the requirements of human flourishing and human nature.

9. Arguments from *national ethos*: One should interpret the Constitution consistent with the character of the nation and its institutions and with important, widely shared and widely honored values of Americans and American culture.

10. Arguments from *political tradition*: One should interpret the Constitution consistent with the values of the American political tradition and the meaning and lessons of important events in American history.

11. Arguments from *honored authority*: In interpreting the Constitution, one should look to the values, statements, and examples of honored figures in American life, including the Founding generation and important historical figures like George Washington and Abraham Lincoln who symbolize American values and teach valuable lessons.

D. DIFFERENCES IN CLASSIFICATION

My focus on underlying theories of justification explains the differences between my list of eleven common topics and Bobbitt's and Fallon's topic catalogs. In some cases, I classify arguments differently. For example, Bobbitt does not treat arguments from original meaning as textual arguments; textual arguments, he says, concern only contemporary meaning.[113] He also does not accept as valid constitutional arguments based on natural rights or natural law.[114] I disagree on both counts. In other cases, Bobbitt's and Fallon's lists do not crisply distinguish between what I consider to be quite different theories of justification. For example, Bobbitt's modality of "doctrinal" argument appears to lump together appeals to judicial doctrine—which gain their authority from rule-of-law values—with arguments from political settlements and interbranch conventions, social customs, and cultural traditions.[115] In my view,

113. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 26.

114. Bobbitt, *Reflections*, *supra* note 18, at 1911, 1913, 1916–17.

115. This is because in each situation the interpreter crafts a set of applicable rules or principles out of past practices; for example, one might infer the existence of an interbranch convention by noting how Congress and the President have interacted in certain situations over long periods of time. *See* BOBBITT, CONSTITUTIONAL INTERPRETATION *supra* note 18, at 78–79 ("The most important doctrinal approach … is not one simply applying a test from precedent, but, . . . crafting a test from precedential materials.").

each of these arguments rest on different kinds of justifications.[116] Fallon has two fairly capacious categories in his list: arguments from "theory" and arguments from "value."[117] These categories, as Fallon himself recognizes, comprehend a wide array of different and potentially incompatible justifications.[118]

A second reason why my list of topics looks different from Bobbitt's and Fallon's is that their catalogs are not very good at explaining how lawyers use history in constitutional interpretation. When it came to history, Bobbitt and Fallon were heavily influenced by the debates over originalism that were just getting started in the early 1980s. Each of them described a category of "historical" arguments, but they identified arguments from history with arguments about the intentions or understandings of the framers.[119]

By speaking in this way, they encouraged people to think that historical arguments were just arguments about adoption history, and, in particular, arguments about original understanding or original intentions. Each of them associated historical argument with originalism, and originalism with historical argument. Given the debates that were roiling law schools at the time, this may have been an excusable oversight. But it fostered unnecessary confusion.

First, lawyers use history in many other ways than simply inquiring into original intention or original understanding.

116. It is also possible, as Ernest Young has urged, that none of Bobbitt's modalities actually covers customs, conventions, settlements, or other nonjudicial precedents. *See* Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice In Federal Courts Law*, 58 WM. & MARY L. REV. 535, 546–47 (2016).

117. Fallon, *Constructivist Coherence*, *supra* note 99, at 1200–02 (describing different types of arguments from constitutional theory); *cf. id.* at 1204–09 (describing a wide range of different kinds of philosophical theories that might generate arguments from value).

118. *Id.*

119. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 9 (defining "[h]istorical arguments" as those which "depend on a determination of the original understanding of the constitutional provision to be construed"); BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 13 ("A[] *historical* modality may be attributed to constitutional arguments that claim that the framers and ratifiers [of a constitutional provision] intended, or did not intend . . . ."); *id.* ("Historical, or 'originalist' approaches to construing the text . . . are distinctive in their reference back to what a particular provision is thought to have meant to its ratifiers."). Similarly, Richard Fallon's list of constitutional arguments refers to "[a]rguments of historical intent," which he identified with "the intent of the framers." Fallon, *Constructivist Coherence*, supra note 99, at 1244, 1254. Both Bobbitt and Fallon wrote at a time when the focus of originalist theory was shifting from original intention and understanding to original meaning.

Lawyers look to post-adoption history as well as adoption history. And when they look to history, they are not always trying to discover commands in the past that bind us in the present. For lawyers, history may serve as a negative example rather than a positive command. It may explain how things came to be. It may emphasize what has changed and how different the past is from the present.

Second, calling a certain class of originalist arguments "historical" arguments tends to suggest that originalism is the only approach to constitutional law that is genuinely "historical," and that those who reject originalist arguments also reject a historical approach. That has never been the case.

Third, identifying historical arguments with arguments from original intent encouraged the idea that "originalism" is centrally about discovering original intentions. But even as Bobbitt and Fallon wrote, originalism was changing, and most originalists today focus on original public meaning rather than original intentions.

Fourth, Bobbitt's and Fallon's lists suggested that originalism, i.e., "historical" argument, was a single, distinctive mode of argument. But originalism is actually a large family of competing theories, not a single theory. In addition, there is not a single style of argument called "originalist" argument. Lawyers use adoption history to make originalist arguments that employ each of the standard modalities of constitutional argument.[120]

Perhaps the most important difference between my list of arguments and Bobbitt's and Fallon's is that there is no separate class of "historical" arguments. That is not because no forms of argument use history; rather, it is because all of them can use history and usually do. Each mode of justification makes different kinds of history relevant, and shapes the way that lawyers search for, describe and use history.

For each modality of constitutional argument—text, structure, purpose, consequences, and so on—there is a different way to use history. Because I divide arguments into eleven different categories, it follows that there are (at least) eleven different distinctive uses of history in constitutional argument.

120. Balkin, *The New Originalism and the Uses of History*, *supra* note 2, at 691–707.

One can compare Bobbitt and Fallon's approach with mine using these two diagrams:[121]

Figure 1: Modalities of Constitutional Argument

Text	History (the intentions and understandings of the framers)	Structure	Prudence (primarily about judicial restraint, but also includes arguments from consequences generally)	Precedent (includes arguments about tradition, political settlement, political convention and social custom)	Ethos (appeals to the philosophy of limited government)

Bobbitt's model of modalities of constitutional argument.

In Bobbitt's model, historical argument is a separate modality: it concerns Framers' intent or understanding, and focuses on the history of adoption. Note also that arguments from judicial precedent, tradition, political convention, and custom are treated as a single type of argument.

Figure 2: Historical Argument in Constitutional Construction

History can be used to support all styles of argument

Text	Structure	Purpose	Consequences	Judicial Precedent	Political Settlement & Political Convention	Custom	Natural Law	Ethos	Tradition	Honored Authority

A basic model of styles of argument in constitutional construction.

121. *Id.* at 661.

By contrast, my catalogue of topics classifies and separates arguments according to different ways of justifying a position. Note that there is no separate modality of historical argument; instead, history is available to support each style of justification. Moreover, history is not limited to the Framers' intentions, meanings, or understandings; no distinction is made between adoption and nonadoption history.

E. THE MODALITIES ARE INCOMPLETELY THEORIZED JUSTIFICATIONS

The standard topics that lawyers use in constitutional argument are useful because they rest on commonplaces about constitutional interpretation—their underlying theories of justification are widely accepted. In fact, these theories are widely accepted only when stated in the most general way—for example, that "one should follow the text." Lawyers often disagree about theories of interpretation, about which kinds of considerations are the most important, and about how to justify constitutional claims. These disagreements are also part of legal culture and of the practice of constitutional argument.

First, as one can see from the above list, the implicit justifications underlying the modalities are fairly shallow and undeveloped. That is often true of rhetorical commonplaces. They are widely accepted precisely because people don't think very deeply about why they are so.

Second, people might disagree about the scope and the boundaries of these widely shared theories. Everyone might agree that one should follow the text. But people might disagree about what constitutes a valid argument from the text. Some people (like Bobbitt himself) might argue that textual arguments concern only the contemporary meaning of the text;[122] others might insist that the only legitimate arguments from the text concern its original meaning. (In my view, both qualify as textual arguments, although contemporary meanings are only relevant to construction.) Some people might argue that one must interpret the constitutional text as an ordinary person would understand

122. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 25–26.

it;[123] while others might insist that the text must be read in the way that a well-trained lawyer (at the time of adoption) would read it.[124] All of these contrasting views fall within the general class of textual argument.

Arguments from text usually include arguments that employ familiar canons of construction. But people might disagree about the nature and scope of these canons. They might disagree about whether the canons of interpretation can be conclusive, especially because in many cases canons have counter-canons. People might distinguish between canons that are default assumptions or common-sense assumptions about how to read language, and other, more substantive canons of construction, which state a preference for certain kinds of policies where the text is unclear. (An example is the rule of lenity in criminal law.) Linguistic and grammatical canons, they might argue, should be included as part of textual argument, but not substantive canons. Finally, people might disagree about which canons are appropriate or legitimate in constitutional interpretation and about the best way to state and apply them. For example, some people might argue that canons that are appropriate for statutes, wills, contracts, or treaties are not appropriate for constitutional interpretation because constitutions have a different nature than these other legal documents. One could find similar disagreements within each of the modalities.

Third, even if people agree that a particular form of argument is valid, they might still disagree about why it is valid. Take arguments from purpose. At the most general level, most lawyers might agree that lawyers should interpret the Constitution according to its purposes. But there might be many different competing theories explaining *why* people should interpret according to purpose. Disagreements about why one should interpret according to purpose, in turn, may connect to disagreements about what kinds of purposes should count as

123. District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) ("In interpreting this text, we are to be guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their natural and ordinary as distinguished from technical meaning.'").

124. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U.L. REV. 751, 770–72 (2009) (arguing that it is "mistaken" to apply the meanings of ordinary persons rather the meanings of well-trained lawyers, who can explain the Constitution's operation to the public).

relevant. For example, people might disagree about whose purposes are relevant (framers, adopters, the general public). People might disagree about whether one should look to actual beliefs or merely to a constructed purpose inferred from the text. Finally, people might disagree about the level of generality at which to state purposes or intentions. Each of these disagreements about the scope of arguments from purpose may reflect deeper theoretical disagreements about why purpose counts in interpreting the Constitution.

In his work on legal reasoning, Cass Sunstein explains the phenomenon of "incompletely theorized agreements."[125] He notes that people with very different moral or political theories can still converge on what he called "narrow" or "shallow" agreements on substantive issues.[126] Commonplaces in rhetoric operate in an analogous way. Topics like the modalities allow people with very different theories of legal authority to use common forms of argument to make legal arguments that are comprehensible (and potentially persuasive) to each other. People don't have to completely agree about the scope of textual arguments or even why textual arguments are valid in order to make them. People can switch from abstract to concrete accounts of purpose as they move from case to case; they can offer arguments about constitutional structure without agreeing in all respects on the correct theory of constitutional structure, and so on. Hence, we might call the theories of justification associated with the modalities *incompletely theorized justifications*.

The difference from Sunstein's model is that we are not converging on *specific substantive conclusions* in constitutional law, but rather on *ways of arguing* for particular positions in constitutional law.[127] Under Sunstein's account, for example, most lawyers can agree that racial discrimination violates the Constitution, but still disagree about what constitutes racial discrimination and the reasons why discrimination violates the Constitution. My point is that most lawyers will agree that arguments from purpose are a valid way to justify a constitutional

125. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

126. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–11 (1999).

127. Sunstein, *supra* note 125, at 1734–37 (explaining that incompletely theorized agreements refer to agreements about outcomes or results, backed by different justifications).

interpretation, but they may still disagree about what constitutes a valid argument from purpose and why we should accept these arguments. The modalities offer a common language for lawyers both to persuade others and to disagree with them.

There is one other important difference: Sunstein offered the idea of incompletely theorized agreements to explain why judges should make minimalist decisions—decisions that are either narrow in their scope or shallow in their theoretical ramifications.[128] But the incompletely theorized justifications we find in constitutional topics do not give us any particular reason for adopting minimalism. One can use the very same modalities to argue for maximalist positions as well as minimalist positions. Rather, we should understand Sunstein's argument for judicial minimalism as itself an example of how lawyers use rhetorical topics in making theoretical claims. Sunstein's argument for judicial minimalism is an argument of institutional prudence that asserts that a minimalist approach to interpretation will have the best consequences.

F. THE MODALITIES, ORIGINAL LEGAL METHODS, AND ORIGINAL LAW

Constitutional construction uses the commonplaces of constitutional argument. These commonplaces originate in the common law at the time of the Founding. Bobbitt pointed out that "we have the modalities we do because the Anglo-Americans took the forms of argument at common law and superimposed these on the state when they imposed a written, limiting constitution on the state."[129]

This claim connects my arguments about the use of topics in constitutional construction with two alternative versions of originalism. The first is original legal methods originalism, championed by John McGinnis and Michael Rappaport;[130] the second is original law originalism, introduced by William Baude and Stephen Sachs.[131]

128. SUNSTEIN, *supra* note 126, at ix–xiii, 4–6.

129. Bobbitt, *Reflections*, *supra* note 18, at 1891.

130. MCGINNIS & RAPPAPORT, *supra* note 10.

131. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV L. REV. 1079 (2017); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J. L. & PUB. POL'Y 817 (2015).

McGinnis and Rappaport argue that we should interpret the Constitution according to the original legal methods that lawyers at the time of adoption would have used; we should use the methods of 1787 for the original Constitution, the methods of the 1860s for the Reconstruction Amendments, and so on.[132]

In *Living Originalism*, I offered several criticisms of this approach. Drawing on the work of several historians of the Founding era, I pointed out that there may have been no consensus about the interpretive methods that people should use to interpret the new Constitution, because nothing like the 1787 Constitution had been enacted before, and there was some dispute whether the proper analogy was to contracts, trusts, wills, treaties, or previous state constitutions.[133] There was also a dispute about whether the text, or parts of the text, should be interpreted as ordinary language accessible to citizens or as specialized legal language.[134] A final problem is that McGinnis and Rappaport were trying to set out the basic theory of original legal methods rather than give a detailed account. Although they offered a few suggestions based on readings of Blackstone and other authors,[135] they did not attempt serious historical research into discovering the original legal methods of 1789, much less the

132. MCGINNIS & RAPPAPORT, *supra* note 10, at 116, 138 ("If enactors of subsequent amendments deemed other rules applicable to those amendments, those interpretive rules would apply.").

133. *See* Saul Cornell, *The People's Constitution vs. The Lawyers' Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295 (2011); Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907, 912–13 (2008); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 555–56, 561, 571–73 (2003); BALKIN, LIVING ORIGINALISM, *supra* note 2, at 47 n. 18, 353–56. *See also* Kurt T. Lash, *Originalism All the Way Down?*, 30 CONST. COMMENT. 149, 161 (2015) (reviewing MCGINNIS & RAPPAPORT, *supra* note 10) (denying that there were pre-existing methods for interpreting the new federal Constitution, because no such constitution had ever existed before).

134. *Compare* Cornell, *supra* note 133, at 304–05 *and* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 6–7 (2004) (arguing for popular understandings) *with* MCGINNIS & RAPPAPORT, *supra* note 10, at 130–32 (arguing that lawyers' understandings count over popular understandings) *and* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law* (2017) (San Diego Legal Studies Paper No. 17-262), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2928936 (arguing that most of the Constitution's language involves legal terms of art). *See also* Baude & Sachs, *The Law of Interpretation*, *supra* note 131, at 1141–42 (arguing that the question of whether elite lawyers' interpretive rules control is itself a legal question.).

135. MCGINNIS & RAPPAPORT, *supra* note 10, at 133–38.

original legal methods of 1865, 1868, and so on.[136] Nor did they take into account the possibility of serious differences in perspective between 18th and 21st century lawyers in how they understood the practice of interpretation.[137] Instead, McGinnis and Rappaport assumed that even though they were 21st century lawyers, the practices of 18th century lawyers were sufficiently intelligible to them that they could understand and reproduce the same moves that these lawyers made.

Despite these concerns, I did share one point of agreement with McGinnis and Rappaport. I noted that if all they meant by "original legal methods" were the standard forms of legal argument inherited from the common law, there would be a great deal of convergence between their views on constitutional interpretation and my views on constitutional construction.[138] In *Living Originalism*, I argued that in constitutional construction, lawyers should use familiar common-law modalities of argument.[139] In fact, the only examples of original legal methods that McGinnis and Rappaport identified in their 2013 book *Originalism and the Good Constitution* were common law modalities: arguments about the original meaning of the text, arguments from canons of statutory construction, arguments from structure, and arguments from purpose or intention.[140]

McGinnis and Rappaport deny that there is any evidence of construction in the Founding period;[141] yet at the same time, they point to evidence that lawyers used standard common-law forms of argument—the very techniques that I assert are used in

136. *Id.* at 133 ("We do not have space to provide a comprehensive account of the original interpretive rules."); *id.* at 138 (assuming no significant changes in interpretive rules at least until the beginning of the 20th century).

137. *See, e.g.,* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (forthcoming 2018).

138. Jack M. Balkin, *Nine Perspectives on Living Originalism*, U. ILL. L. REV. 815, 824–25 (2012).

139. BALKIN, LIVING ORIGINALISM, *supra* note 2, at 4, 46, 89, 129, 205, 229, 256–57, 272, 333, 341–42 (explaining that in constitutional interpretation and constitutional construction interpreters should use all of the traditional modalities of constitutional argument).

140. MCGINNIS & RAPPAPORT, *supra* note 10, at 133–38 (arguing that original methods included textualism and intentionalism); *id.* at 142 ("When the interpretation of language was unclear, the interpreter would consider the relevant originalist evidence—evidence based on text, structure, history, and intent—and select the interpretation that was supported more strongly by that evidence.").

141. *Id.* at 144–45 (citing to Blackstone and Joseph Story).

constitutional construction! This suggests that our approaches have more in common than one might think.

The central difference between our approaches, I think, does not concern original *legal methods* but original *legal meanings*. McGinnis and Rappaport argue that the Constitution is a lawyer's document, and that most of its language involves legal terminology.[142] Accordingly, they ask how 18th century lawyers, applying original legal methods, would have understood and applied the legal meaning of the Constitution. They assume that in most cases lawyers would have converged on a single legal meaning of the Constitution's words and phrases.[143] They argue that this professional legal meaning does not change over time, although, of course, it may produce unexpected results given changes in facts. By contrast, I argue that we are not bound by Founding-era lawyers' initial constructions of the text, although their constructions should surely inform our own. Rather, each generation must engage in construction of the text, building on the constructions of previous generations dating back to the time of adoption.[144]

Should we conclude that the above list of eleven topics constitute original legal methods or are part of original legal methods? I want to make a more modest claim: These eleven topics are the descendants in contemporary legal practice of the various methods that Founding-era lawyers used to argue with each other. We can trace examples of these topics back to the Founding, and for that matter, to Reconstruction. Lawyers may employ these arguments in different ways today than they did at the Founding. But I maintain that there is nothing inappropriate about lawyers using contemporary versions of these topics in interpreting the Constitution today.

I offer this more modest claim for two reasons. First, I expect that as historical research proceeds, we will find considerable differences between how we think about law, legal argument and constitutions today and the way that lawyers at the Founding (or

142. McGinnis & Rappaport, *The Constitution and the Language of the Law*, *supra* note 134.

143. MCGINNIS & RAPPAPORT, *supra* note 10, at 140 ("[T]he evidence suggests that ambiguity and vagueness were resolved by considering interpretive rules that resulted in a single interpretive meaning.").

144. *See, e.g.,* BALKIN, LIVING ORIGINALISM, *supra* note 2, at 227–28 (arguing that we do not have to accept lawyers' initial constructions of the Reconstruction Amendments on questions of race).

Reconstruction) did.[145] Second, I believe that even if our practices of argument have changed in important respects, it is still perfectly legitimate to apply them in constitutional construction. That is because these contemporary methods are part of our contemporary "law of interpretation," to use Baude and Sachs' phrase.[146]

Even without extensive historical research, we have at least some evidence that the way lawyers used common topics at the Founding may not correspond in all respects to the way that people would use them today.

Three examples will illustrate the point. First, H. Jefferson Powell famously argued that the Founding generation, following British practice, did not make arguments from legislative intention; rather, they made arguments about the purpose or intent of a statute drawing from the text of the statute.[147] A few arguments based on the original intention of the framers or the understanding of the ratifiers did appear in the 1790s; for example, in the debate over the Jay Treaty.[148] Today, however, arguments from original intention are commonplace. Arguments from original intention and legislative history are subtopics of the larger class of arguments from purpose and intention. These subtopics became commonplaces in constitutional argument only after the Founding. Even so, I would count them as valid forms of argument in constitutional construction today.

Second, although the Founding era certainly knew how to make arguments from consequences, a certain class of arguments, namely arguments about judicial prudence and restraint, develop during the first half of the 20th century. Such arguments are most famously associated with progressive Justices like Frankfurter and Brandeis (for example, in *Ashwander v. TVA*).[149] Founding-era lawyers had arguments that we might today call arguments for judicial restraint, but they were based on a different conception of

145. GIENAPP, THE SECOND CREATION, *supra* note 137.

146. *See supra* note 131.

147. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 897–98, 903 (1985).

148. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 360–65 (1996).

149. Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J. concurring); BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 64–67; BOBBITT, CONSTITUTIONAL INTERPRETATION, supra note 18, at 101–02.

the judicial role.[150] We speak of judicial restraint today precisely because the role of the judiciary has evolved from the Founding era.[151] The modern subtopics of judicial restraint and institutional prudence become common topics in constitutional law many years after the Founding; even so, I consider them valid arguments in contemporary constitutional construction.

Third, arguments that employ public choice theory or political science literatures on representation and voting systems are subtopics within structural argument: they show how different kinds of institutional designs have different kinds of effects for republican government. But the framers did not have access to this literature and they did not use this terminology, even though, of course, we may attempt to translate the arguments they did make into contemporary political science terminology. These subtopics developed long after the Founding. But this makes them no less valid for constitutional construction today. (The same is true of many doctrinal topics—for example, *Youngstown* analysis, and the idea of representation reinforcement made famous by footnote 4 of *Carolene Products*).[152]

We can generalize this point. Because special topics in law (or the sciences) inevitably rest on the growth of professional knowledge, the number and kind of subtopics may evolve as knowledge develops. Hence many subtopics in common use today would have been unknown at the Founding, but they are valid arguments in constitutional construction today.

How lawyers make arguments today may not correspond in all respects to the way that lawyers made arguments at the Founding precisely because Founding-era lawyers lived in a different world with a different set of assumptions about the law (including the common law), the nature of constitutions, and the nature of government.[153] They tended to speak in terms of

150. *See, e.g.,* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 34–38 (1990).

151. Larry D. Kramer, *The Supreme Court 2000 Term - Foreword: We the Court*, 115 HARV. L. REV. 5, 120–23 (2001) (arguing that the modern conception of judicial restraint emerged during the New Deal period from the acceptance of a very powerful Court that was effectively supreme in the field of constitutional interpretation, in contrast to the Founding-era model of departmentalism and popular constitutionalism).

152. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 636–38 (1952) (Jackson, J., concurring); United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

153. GIENAPP, THE SECOND CREATION, *supra* note 137.

discovering what the common law always already required; today we speak of developing the common law in a principled fashion. What an argument meant to them in the context of their times might not be what it means to us in the context of our own. The way we argue today has evolved in legal practice from the kind of arguments that earlier lawyers made; even so, these changes in jurisprudential outlook do not render our common topics invalid for contemporary construction.

William Baude and Stephen Sachs's conception of original law originalism is closer to this position. They argue that interpreters should apply the law at the time of the Founding, the legal methods that existed at the time of the Founding, and the common law legal doctrines of interpretation that existed at the time of the Founding. But they add that interpreters should also apply any legitimate changes in law, in legal methods, or in the law of interpretation that have occurred since the Founding.[154] Like McGinnis and Rappaport, Baude and Sachs have not yet attempted a thorough historical study of the original legal methods, or the original law of interpretation at the Founding. Nor have they done significant historical research into all of the moments of change in interpretive rules that have occurred since the Founding and whether each of these changes were legitimate. Instead, they appear to work on the assumption that unless there is evidence to the contrary, contemporary lawyers are using the legitimate descendants of original legal methods and the original law of interpretation.[155] They operate on a defeasible presumption of continuity and legitimacy.

154. *See* Baude & Sachs, *The Law of Interpretation*, *supra* note 131, at 1127 (arguing that canons of interpretation apply if they existed at the Founding or resulted from legitimate changes in interpretive rules since the Founding); *see also id.* at 1130 ("[A]t a first approximation, we'd say that the appropriate theory of construction is simply to apply the law of interpretation."). Baude and Sachs argue that some kinds of interpretive practices are "application rules," because they explain what future decisionmakers should do at the time of application. *Id.* at 1133. Because they operate at the time of application and not at the time the text is enacted, "a change to an application rule can have full effect in all future cases to which the rule applies, even if they involve texts that were adopted long ago." *Id.* at 1134. According to this account, to the extent that topics for construction involve application rules, even if they change over time, interpreters may still use them to apply the Constitution to new fact situations.

155. *See id.* at 1132 (suggesting that if the interpretive rules are understood correctly, there may have been much less change than one might imagine.).

G. THE TOPICS IN JAMES MADISON'S SPEECH ON THE FIRST BANK OF THE UNITED STATES

The casebook that I co-edit with Sanford Levinson, Akhil Amar, and Reva Siegel emphasizes the role of the modalities in interpreting the Constitution.[156] We begin the book with James Madison's 1791 speech on the constitutionality of the First Bank of the United States.[157] We do so precisely because it mentions so many of the modalities. Madison's speech is useful not merely because he is a famous founder, but because of what his speech reveals about the practice of constitutional argument at the Founding. Madison's speech relies on commonplaces about interpretation; he assumed that he and his audience shared many assumptions about how to analyze a constitutional problem and make a constitutional argument. Here are the principles that Madison says we should consider in interpreting the Constitution:

> [1] An interpretation that destroys the very characteristic of the Government cannot be just.
>
> [2] Where the meaning is clear, the consequences, whatever they may be, are to be admitted—where doubtful, it is fairly triable by its consequences.
>
> [3] In controverted cases, the meaning of the parties to the instrument, if to be collected by reasonable evidence, is a proper guide.
>
> [4] Contemporary and concurrent expositions are a reasonable evidence of the meaning of the parties.
>
> [5] In admitting or rejecting a constructive authority, not only the degree of its incidentality to an express authority is to be regarded, but the degree of its importance also; since on this will depend the probability or improbability of its being left to construction.[158]

Proposition (1) describes structural argument; (2) an argument from consequences; (3) and (4) could be arguments from text or from purpose and intention; and (5) is a subspecies of structural argument resting on the idea that the federal government is one of limited and enumerated powers.

156. BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING (7th ed. 2018).

157. *Id.* at 29–32 (reprinting James Madison's Speech to the House of Representatives (1791), *in* JAMES MADISON, WRITINGS 480–90 (Jack Rakove ed., 1999)).

158. *Id.* at 29.

Textual arguments include arguments that compare different parts of the text as well as arguments from widely shared canons of construction. Later in his speech, Madison employs common law canons of construction to argue that we cannot imply the power to create a bank from enumerated powers like the Coinage Clause.[159] Madison uses the canon of redundancy—that, all other things being equal, we should not interpret a text so that its provisions are unnecessary or redundant.[160] This canon counsels against the argument that Congress has whatever powers might be related to or implied by the list of enumerated powers, because a broad reading of implied Congressional power would make several of the enumerated powers redundant: "Congress have power 'to regulate the value of money'; yet it is expressly added, not left to be implied, that counterfeiters may be punished." Similarly, "[t]he regulation and calling out of militia are more appurtenant to war than the proposed Bank to borrowing; yet the former is not left to construction."[161]

Madison also makes arguments from purpose and intention to explain the proper interpretation of the necessary and proper clause: "The clause is in fact merely declaratory of what would have resulted by unavoidable implication, as the appropriate, and, as it were, technical means of executing those powers. In this sense it has been explained by the friends of the Constitution, and ratified by the State Conventions."[162] He also points to the Ninth and Tenth Amendments as concurrent expositions that provide evidence of the adopters' purpose to restrict federal power.[163]

Madison also rejects the argument for a broad reading of implied powers because of its consequences: "If implications, thus remote and thus multiplied, can be linked together, a chain may be formed that will reach every object of legislation, every object within the whole compass of political economy."[164]

Madison also mentions arguments from precedent, or more correctly, from previous practice by the political branches, working under the assumption that the new Constitution gives

159. *Id.* at 30.

160. John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629 (2016) (discussing the interpretive principle "that law should generally be understood or designed to minimize redundancy").

161. BREST ET AL., *supra* note 156, at 30.

162. *Id.*

163. *Id.* at 32.

164. *Id.* at 30.

Congress all of the powers it enjoyed in the Articles of Confederation: "The case of the Bank established by the former Congress has been cited as a precedent."[165] But Madison argues that it is not an appropriate precedent: "This was known, he said, to have been the child of necessity. It never could be justified by the regular powers of the articles of Confederation."[166]

Madison concludes his speech with a flurry of different modes of argument: "It appeared on the whole, he concluded, that the power exercised by the bill was condemned by the silence of the constitution [text]; was condemned by the rule of interpretation arising out of the constitution [same]; was condemned by its tendency to destroy the main characteristic of the constitution [structure]; was condemned by the expositions of the friends of the constitution [to] the public [purpose or intention]; was condemned by the apparent intention of the parties which ratified the constitution [same]; was condemned by the explanatory amendments proposed by Congress themselves to the Constitution [same]; and he hoped it would receive its final condemnation, by the vote of this house."[167]

If we look to early decisions of the Supreme Court, we will find the other modalities of argument. *Calder v. Bull* makes arguments from natural law, natural rights, precedent, and customary practice;[168] the various opinions in *Chisholm v. Georgia* offer arguments from natural rights, ethos and political tradition, as well as from structure, purpose, and text;[169] Iredell's dissent in

165. *Id.*

166. *Id.*

167. *Id.* at 32.

168. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (holding that the Connecticut legislature did not violate the Ex Post Facto Clause of the U.S. Constitution by granting a new trial in a probate case); *id.* at 388-89 (opinion of Chase, J.) (arguing that legislatures may not violate principles of republican government, the social compact, and natural law, but that Connecticut had not done so in this case); *id.* at 391–92 (arguing for the construction of Ex Post Facto clause based on precedents of prior state constitutions); *id.* at 393 (arguing from British precedents and Blackstone's Commentaries); *id.* at 395–97 (opinion of Patterson, J.) (arguing for meaning of Ex Post Facto Clause from established customs, practices and usages of the state of Connecticut and other states); *id.* at 399–400 (opinion of Iredell, J.) (arguing from purpose of Ex Post Facto Clause to limit it to criminal cases).

169. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that citizens of other states may sue the State of Georgia in federal court); *id.* at 456–68, 466 (opinion of Wilson, J.) (arguing from social contract theory and "the principles of general jurisprudence"); *id.* at 462–64 (arguing from ethos of American government, which is based on popular sovereignty and rejects monarchy, as well as from the text of the Preamble); *id.* at 464–66 (arguing from "the general texture of the Constitution" and from the intentions of the

Chisholm argues from English common law precedents and from Blackstone's account of natural law.[170]

H. THREE KINDS OF CONSTRAINTS ON CONSTITUTIONAL CONSTRUCTION

The modalities play a special role in constitutional interpretation. They connect the Constitution's original meaning to the practice of constitutional construction. Constitutional constructions that employ standard modalities of argument rest on widely accepted theories—commonplaces—about the permissible ways to justify an interpretation of the Constitution. The connection between topics and widely accepted justifications allows us to say that constructions are guided by and attempt to further the Constitution.

One can therefore say that constructions are connected to the Constitution, or, in the alternative, that the Constitution guides and contributes to constitutional construction, when (1) people in a shared practice of legal argument, (2) employ shared topics for analyzing, arguing, and solving constitutional problems and developing constitutional doctrines, and (3) when these common topics, in turn, rest on widely accepted theories of justification. Call this the *objective constraint* on constitutional construction. It is objective because it depends on the social fact of wide acceptance of particular topics and justifications.

people who instituted it); *id.* at 466 (arguing from the text of Article III); *id.* at 466–68 (opinion of Cushing, J.) (arguing from the text of Article III); *id.* at 468 (arguing from federal structure); *id.* at 470–72 (Opinion of Jay, C.J.) (arguing from ethos and traditions of the United States as a government created by a free and sovereign people in which government officials are agents of the people, in contrast to European states, which are based on feudalism and monarchy); *id.* at 473 (arguing from ethos or character of American government: "the equal rights we claim; with the equality we profess to admire and maintain, and with that popular sovereignty in which every citizen partakes"); *id.* at 474–78 (arguing from text of the Preamble and Article III); *id.* at 477 (arguing from "the great and leading principles of a free and equal national government, one of the great objects of which is, to ensure justice to all: To the few against the many, as well as to the many against the few").

170. *Id.* at 437 (Iredell, J., dissenting) ("[I]t is incumbent upon us to enquire, whether previous to the adoption of the Constitution (which period, or the period of passing the law, in respect to the object of this enquiry, is perfectly equal) an action of the nature like this before the Court could have been maintained against one of the States in the Union upon the principles of the common law."); *id.* at 442 (quoting Blackstone's view that the sovereign allows lawsuits at his discretion and arguing that this view "is exactly consonant to what is laid down by the writers on natural law.").

This objective constraint is a necessary but not a sufficient condition. As noted in Part II above, when participants engage in constitutional construction, fidelity to the Constitution requires them to have a particular interpretive attitude both about the Constitution and about their work. This interpretive attitude operates as a *subjective constraint* on their arguments.

Finally, there is an *intersubjective constraint*. Professional legal norms and processes of social influence shape when lawyers and judges regard proposed constructions as off-the-wall or on-the-wall.[171] Good faith constructions, especially by non-lawyers and political activists, may sometimes be off-the-wall from the perspective of most lawyers and judges, because of their professional training and shared professional norms. Therefore most lawyers and judges will consider these proposed constructions bad or failed attempts at construction. The expectation that government officials should limit themselves to on-the-wall constructions constrains construction in a third way; it is intersubjective because it relies on what members of the professional community think about each other's work. (In fact, what I have called the "objective" constraint of arguing through the modalities is also intersubjective.) Lawyers and judges discipline each other through professional education and socialization, and through the ways that they argue with each other.

Nevertheless, people's views about the plausibility of particular arguments can change over time. Professional norms are hardly insulated from the outside world. Processes of social influence both within and outside of the legal profession allow constitutional dissenters to try to change people's minds through legal and moral argument and through political mobilization. Sometimes, as a result of these processes, proposed constructions will move from off-the-wall to on-the-wall, and sometimes they will even become common sense or orthodox later on.[172]

At any point in time, intersubjective constraint can keep constructions of the Constitution within certain limits. Nevertheless, it can also work at cross-purposes with fidelity to original meaning. That is because the dominant consensus among lawyers and judges about the Constitution may be contrary to its

171. BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 36, at 179–180.
172. *Id.* at 181–82.

original meaning, or to its spirit and underlying purposes. If lawyers and judges stick only to on-the-wall arguments, they may actually hinder the enforcement of original meaning. Constitutional dissent is necessary to rectify these mistakes. Like other constitutional dissenters, many originalists have made off-the-wall arguments in an attempt to restore the Constitution's meaning, spirit, and underlying purposes. This example shows why constitutional dissent—including arguments regarded as off-the-wall at a given point in time—is an important feature of any system of constitutional construction.

In sum, constitutional construction is constrained in three ways: by objective constraints—the use of common topics; by subjective constraints—interpretive attitudes of fidelity and good faith; and by intersubjective constraints—the professional norms and social processes of influence that determine, at any point in time, which constructions are judged on-the-wall and off-the-wall. Despite these three kinds of constraints, however, there will still be many disagreements about the best construction of the Constitution. For example, several possible positions on a given question can be on-the-wall at any point in time.

I. CONSTRUCTION ACCORDING TO THE LAW AND THE CONSTITUTION

In describing these various constraints on constitutional construction, I do not deny that participants in constitutional argument may have a range of different political values and policy preferences, and that they attempt to further those values and preferences through constitutional argument and constitutional development. Nor do I deny that the development of constitutional construction often reflects struggles between people's political values and policy preferences. Nothing I say here is inconsistent with either the perspective of political science or the legal realist account of constitutional decisionmaking. Often the development of constitutional doctrine is the result of struggles over what Sanford Levinson and I call the "high politics" of constitutional principle and value.[173] That "high politics" is shaped by contemporary problems, interests, and political mobilizations. So it was in the years immediately after the Founding; so it is to this day.

173. *See supra* note 41.

I am interested in a different set of questions. First, how can people, acting in good faith, be guided by the Constitution in their development of constitutional doctrine? Second, how can people, acting in good faith, attempt to maintain fidelity to the Constitution as they adapt to successive waves of political, economic, demographic, and technological change? Third, how can people who may have very different values and interests engage in reasoned discussion and analysis about the best way to implement and apply the Constitution, so that they can understand themselves as engaged in a common enterprise? Fourth, what tools of analysis can people bring to bear for these tasks? Fifth, how do these tools connect their work—including their inevitable disagreements—to the furtherance of the Constitution?

Understanding the modalities as commonplaces and special topics allows us to answer these questions.

First, the topics help ensure that construction is according to law. When Madison makes his arguments about the First Bank, he reasons about the best construction of the Constitution using standard common law approaches of text (including canons of construction), purpose, intention, consequences, and so on. He uses these topics to make legal arguments, apply legal sources, and draw legal conclusions. In common law systems, the work of constructing doctrine involves, to a very great extent, employing standard topics and approaches to articulate legal theories and offer legal arguments about how best to continue existing practices.

Second, the use of common topics allows the Constitution to guide or contribute to construction, even when original meaning "runs out." Consider once again Madison's 1791 speech against the constitutionality of the First Bank. Madison's position was not the only possible construction of the Constitution. The President and most members of Congress disagreed with him at the time and his view was ultimately not adopted.[174] Indeed, Madison himself later came to accept the constitutionality of a national bank. He signed a bill authorizing a Second Bank in light of

174. The standard account of the fight over the First Bank is BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 114–43 (1957).

"deliberate and reiterated precedents," as well as "expediency and almost necessity."[175]

Madison's proposed construction of the Constitution in 1791 was not required by original meaning; it was only a possible implementation, one among many others. It also happened, in 1791, to be Madison's policy preference.[176] Many, if not most, proposed constructions have these features: they are not required by original meaning and they further an advocate's policy preferences (or a client's interests).

If Madison's argument about the bank is not the only position consistent with original public meaning, and if it also happened to reflect Madison's preferred policy, what makes his argument a construction *of* the Constitution as opposed to *merely* Madison's policy preference? What connects Madison's use of common law modalities to the furtherance of the Constitution?

Note that it is not enough to say that Madison's argument is a faithful construction of the Constitution because James Madison made it, because anyone else acting in good faith—including people who were not among the Founding generation—could have made the very same argument. It cannot be that a legal argument is a permissible construction of the Constitution if made by an honored authority, but it is not a permissible construction if made by any other citizen.

When lawyers use the topics, they attempt to analyze and solve legal problems posed by a legal text. Madison's speech attempts to resolve the question of whether the United States can charter a bank by using common law topics, considering alternative solutions and discarding them. In the process, he tries to persuade his audience that his analysis and his solutions are the best ones. These tasks—problem formation, problem analysis, problem solution, and audience persuasion—are the point of a topical approach to legal argument.

Madison says, "where [the meaning of the text is] doubtful, it is fairly triable by its consequences."[177] When the meaning of text

175. *Id.* at 210.

176. *See* Roderick M. Hills, Jr., *Exorcising McCulloch: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, 161 U. PA. L. REV. 1235, 1243 (2013) (arguing that behind Madison's constitutional objections "was a deeper ideological opposition to high finance, associated with large Northeastern cities" and a fear that powerful banks would dominate and corrupt politics).

177. BREST ET AL., *supra* note 156, at 29.

is doubtful, a problem arises. How do we solve it? Each modality offers us ways of solving the problem. In this case, Madison says that we may "try" (i.e., test out) possible solutions by asking what consequences they might have. (One can do a similar test with respect to the criteria of each of the modalities.) If the consequences of a particular solution are bad or absurd, then perhaps this solution is not the best way to implement the Constitution. Perhaps adopting this solution is not the right way to further the constitutional project. Perhaps it is not consistent with the spirit and purpose of the Constitution.

I say "perhaps" because it is always possible that the best implementation doesn't have the best consequences. Topics are guides for our thinking, tools for analysis and practical judgment. Because they are only guides or tools, they do not offer necessary and sufficient conditions for a correct answer. At most we can say that bad or absurd consequences are persuasive evidence that our analysis is faulty; they are merely an indicator that we are going down the wrong path to a solution.

J. THEORIES OF JUSTIFICATION CONNECT CONSTRUCTIONS TO TOPICS, AND TOPICS TO THE CONSTITUTION

What makes an argument that employs one of the standard topics (text, purpose, structure, consequences, etc.) useful evidence of what the Constitution requires? What connects widely-accepted rhetorical topics to the furtherance of the Constitution?

The answer is that the modalities rest on justificatory theories. Each modality is premised on an implicit theory of justification about what makes a constitutional interpretation a good interpretation.

Take arguments from consequences as an example. The implicit theory of justification goes something like this: All other things being equal, when the text is unclear, the best implementation of the Constitution is the one that avoids bad or absurd consequences. When we reason this way, we seek to further the Constitution rather than merely impose our own policy preferences. To be sure, we may also be arguing for a position that accords with our policy preferences—but the point is that we are explaining to other people why our proposal furthers the Constitution and is a good implementation of the Constitution.

Structural arguments assert that, to paraphrase Madison, proposed interpretations that undermine the Constitution's structures and functions are bad interpretations; conversely, we should endeavor to interpret the Constitution so that its structures and functions operate properly. Again, to reason this way is to put ourselves on the side of the Constitution, and attempt to make it work.

When I introduced the eleven modalities, I also offered a list of the implicit theories of justification that underlie them. Each of these theories explains why arguments of that form are valid interpretations, and why they are a valid way to implement and further the Constitution.

Hence, whenever we make an argument that uses the modalities, our arguments always rest implicitly on a theory of justification that explains how and why our arguments connect to the work of implementing and furthering the Constitution. To be sure, just because our arguments rest on a deeper theory of justification does not mean that our arguments are good arguments. It merely means that we have proposed one way to implement and further the Constitution. If we think that a proposed construction is bad, then we also think that the argument does not further and implement the Constitution (and the constitutional project) very well, and that is why it is a bad argument. On the other hand, if we think that a construction is particularly good, then we think it does a good job of furthering and implementing the Constitution (and the constitutional project), and that is why it is a good argument.

This approach brings together the three kinds of constraints on construction—objective, subjective, and intersubjective. Proposed constructions purport to further the Constitution because they rest on widely shared normative theories about the kinds of approaches that implement and further the Constitution. But this by itself is not sufficient. Even if participants act in good faith, the proposed construction may be a bad one or at the very least implausible. Nevertheless, what makes a construction appear good or bad may change over time as people argue about the Constitution and seek to persuade each other.

K. COHERENCE AND RECIPROCAL INFLUENCE

So far I've argued that topics are devices for considering, analyzing and evaluating proposed implementations of the

Constitution. These tools for analysis do not exist in splendid isolation from each other. They are connected. If the consequences of a proposed solution are bad or absurd, then maybe this is not what the Constitution is designed to do (it is not consistent with its structure). And if the consequences are bad or absurd, perhaps this solution is not what the Constitution is trying to achieve (it is not consistent with its purposes). Perhaps this is not the best reading of the text. Perhaps it is not consistent with a constitution that protects the rights and interests that governments are designed to protect (natural rights). Perhaps it is not consistent with the political values underlying the Constitution (political tradition or ethos). Again, the operative word is "perhaps;" we are in the world of plausibility, not certainty.

Arguments from one modality may therefore influence our judgments about the other tools we employ. The influence is reciprocal. Consider a reading that we believe is contrary to the Constitution's structure, or in Madison's words, "destroys the very characteristic of the Government."[178] If a proposed construction violates constitutional structure, then perhaps it is contrary to the Constitution's purposes; it endangers the rights and interests that governments are designed to protect; it is not the best reading of the text; and it is not consistent with the American political tradition, rightly considered, or with the political values that underlie the Constitution. If a proposed reading is contrary to the Constitution's structure, we should rethink our assumption that it has good consequences. Perhaps it will have bad consequences in the long run; perhaps we should rethink how we understand or measure what consequences are good or bad.

One can express this relationship in positive as well as negative terms: a construction that protects the rights and interests that governments are created to protect may also (but need not) be more likely to be consistent with constitutional purposes, respect constitutional structures, avoid bad consequences, be the best reading of an unclear text, and so on. Often what makes an argument a good argument within any given modality may be influenced by how we think about the problem from the standpoint of the other modalities. Take the example of

178. *Id.*

consequences once again. Our judgment of what constitutes "good consequences" might change once we reflect on the potential structural damage to our democratic system, to the rule of law, to our political traditions, and so on.

This suggests an important difference from Bobbitt's approach. Bobbitt holds that the modalities are incommensurable. Our views of the best arguments within one modality cannot reasonably affect our views of the best arguments within another modality because the modalities share no common metric. That position makes the most sense if one accepts his original analogy between modalities and different ways of being true. It makes far less sense if one thinks of modalities as rhetorical topics—that is, as tools for analysis, problem solving, persuasion and practical judgment. There are not multiple, incommensurable truths, but a single, practical problem to be solved. One perspective for solving a problem might well influence how we think about the problem from another angle. After all, what we are trying to do is solve a problem, and persuade others that our solution is the best one. So coherence between different ways of attacking the problem may be a virtue, not a vice—much less a logical impossibility.

In contrast to Bobbitt, Richard Fallon argued that lawyers implicitly approach constitutional argument with a theory of "constructivist coherence":[179] He meant that lawyers expect, or at least hope, that their judgments from one perspective can and should inform their judgments from another, and they should work toward the most coherent solution that is practically possible.[180] In this respect, the topical approach to constitutional construction is closer to Fallon's model than to Bobbitt's.

L. THE ROLE OF DOCTRINE IN CONSTITUTIONAL CONSTRUCTION

Madison's speech on the First Bank suggests how topical analysis and argument can be guided by the Constitution and further the Constitution. When Madison spoke, however, there was not a body of judicial doctrine expounding the Constitution.

179. Fallon, *Constructivist Coherence*, *supra* note 99, at 1192–93.

180. *Id. See also* Akhil Reed Amar, *The Document and the Doctrine*, 114 HARV. L. REV. 26, 31 (2000) (explaning that originalists and textualists "seek to braid arguments from text, history, and structure into an interpretive rope whose strands mutually reinforce").

That is not the case today. When lawyers make arguments, and when judges decide cases, they do so in the midst of a thicket of previous judicial decisions. How does the analysis apply in these situations?

It applies in precisely the same way. When I apply the four-part test for regulation of symbolic speech in *United States. v. O'Brien*[181] today, I am also constructing according to law and the Constitution. I use the various modalities of constitutional argument to apply an existing doctrinal structure that itself purports to be a construction of the First Amendment. That is, my proposed construction builds on previous constructions of the Constitution that, because of the doctrines of precedent, have the force of law.

Doctrine has a dual nature. It is both existing law and a set of topics. One can think of previous case law both as law and as a short cut or heuristic for solving legal problems. Analyzing problems through doctrine avoids having to reinvent the wheel when we face a new constitutional problem.

Viewing doctrine as a short cut or heuristic reveals not only its advantages but also its limitations. Over time, the sequence of short cuts and heuristics can travel some distance from the Constitution's meaning or from the best construction of its meaning. That is why, especially in constitutional law, existing doctrine cannot be a conclusive determination of the Constitution's meaning in practice.

The term "doctrinal argument" has two senses. The first, narrower, sense is reasoning from existing precedents and applying precedents to facts. The second, broader sense of doctrinal argument means making arguments of any kind and of any modality in the midst of existing bodies of doctrine. Thus, the first sense of doctrinal argument is a synecdoche for the second, broader sense. It is a part that stands for a larger whole.

People may assume that because most contemporary constitutional law occurs in the context of thick bodies of caselaw, that lawyers only engage in one modality of argument—doctrinal argument, in the narrower sense of reasoning from case to case and applying existing doctrinal structures to new factual situations. For that reason, one might assume that theories of

181. 391 U.S. 367, 377 (1968) (offering four part test governing regulations of symbolic speech).

"common law constitutionalism"—like that championed by David Strauss[182]—are theories that use only precedential argument or that elevate this one modality over all of the others.

In fact, arguments within existing doctrine—like those in the Supreme Court and the lower federal courts—often employ many different modalities of argument, and the best "doctrinalists" are really the masters of multiple modalities, not a single one. Lawyers embed considerations of purpose, text, structure, consequences, past practice, and tradition—among others—within their discussions of doctrine.[183] This is especially so when lawyers look to the purposes behind existing doctrines in order to decide how to apply or modify them in new situations. Lawyers articulate the purposes behind doctrines in terms of the other modalities of constitutional argument.

Sometimes, in other words, lawyers and judges recognize that constitutional doctrine is not the Constitution itself but only the current way of implementing the Constitution. They understand that doctrine is only a means to a more important end—upholding and enforcing the Constitution. When this happens, they treat doctrine's short cuts and heuristics *as* short cuts and heuristics, and they modify them accordingly, using the other modalities to justify their approach. Even when lawyers and judges merely apply existing doctrines—without purporting to change them—they may use the other modalities to justify their applications.

To be sure, much doctrinal argument, especially in lower courts, operates within the framework of previous caselaw; it works on the assumption that existing doctrines are (sufficiently) sound constructions of the Constitution. There are good reasons why courts should do this, which mesh with larger justifications for systems of judicial precedent. First, as noted above, doctrinal constructions save time so that each judge does not have to reinvent the wheel in deciding a new constitutional case.[184]

182. STRAUSS, THE LIVING CONSTITUTION, *supra* note 34.

183. *See* BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 55 ("[E]ven within an appellate opinion that relies on precedent and sees its purpose as crafting precedent, the various other modalities have important roles").

184. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."); Oona Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 626 (2001); Jonathan R. Macey, *The Internal*

Second, doctrinal constructions serve rule of law values to the extent that they promote predictability and uniformity in the application of law.[185] Third, as a matter of intellectual humility, and because of their own limited perspectives, later courts should not lightly assume that their own constructions of the Constitution are superior to the constructions of earlier courts.[186]

Everything is a matter of degree, of course: If later courts come to the firm conclusion that the constructions of earlier courts are truly inconsistent with what the Constitution requires, later courts may feel duty bound by their oath to uphold the Constitution to adjust these earlier constructions. But if earlier constructions offer reasonable-if-imperfect solutions and remain workable, courts should continue to work with them and improve them, imperfect as they are. In addition, lower federal courts have a special institutional obligation to respect and work within the boundaries set by the constructions of higher courts. The process of applying existing constructions to new facts, moreover, will eventually produce new distinctions and new doctrines, a process that may move the doctrinal structure closer to better implementations of the Constitution.

Much doctrinal argument does not rest content with merely applying existing doctrines to new facts. Rather, it involves self-conscious changes in doctrine by adding new concepts and distinctions.

In *United States v. Lopez*,[187] for example, the Supreme Court limited the powers of Congress under the Commerce Clause by creating a new doctrinal distinction between economic and non-economic activities. It held that Congress could regulate economic activities that, viewed in the aggregate, had a substantial effect on interstate commerce, but not non-economic activities.[188] This decision did not merely apply previous

and External Costs and Benefits of Stare Decisis, 65 CHI.-KENT L. REV. 93, 102 (1989); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 599 (1987).

185. Schauer, *Precedent*, *supra* note 184, at 595–98 (discussing arguments from fairness and predictability).

186. Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 212 (2014); David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 857 (2007); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 891–95, 902, 913 (1996).

187. 514 U.S. 549 (1995).

188. *Id.* at 559–61.

precedents; it created a new way of analyzing regulations under the Commerce Power.

The justification for *Lopez*, therefore, cannot be that the Supreme Court was simply following existing doctrine. It is true that the Court employed a traditional form of doctrinal argument: it created a new rule from its interpretation of the facts of previous cases.[189] But the Court also employed other modalities of constitutional argument to support the new rule it created. The Court offered arguments about the Constitution's text, structure, and purpose. It argued that the purpose and structure of the Constitution, and the enumeration of powers in Article I, section 8, required the Court to maintain boundaries between local and national subjects of regulation in order to preserve the benefits of federalism.[190] The Court also argued that any reading of the Constitution that produced the equivalent of a general federal police power was incorrect, because it would undermine the Constitution's basic structural assumptions.[191]

In sum, "doctrinal argument" is not simply the use of the modality of judicial precedent. Courts use most if not all of the modalities of argument when they reason within existing doctrines; they also use these modalities when they alter old doctrines or substitute new ones. Viewed as tools for analysis and argument, the modalities are just as useful within thick bodies of doctrine as they are in questions of first impression.

IV. CONSTITUTIONAL TOPICS AND CONSTITUTIONAL THEORY

So far I have noted three important differences between the topical approach to constitutional construction and Philip Bobbitt's famous theory of constitutional modalities. First, the list of standard topics is different, in part because Bobbitt's model is not very good for understanding how lawyers use history. Second, in contrast to Bobbitt's position, the topics do not have to be

189. *Id.*

190. *Id.* at 566–67 (referring the enumeration of powers in Article I, section 8); *id.* at 567–68 (arguing that the contrary view "would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States . . . [and] would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, . . . and that there never will be a distinction between what is truly national and what is truly local").

191. *Id.*

incommensurable. Third, I argue that the topics are consistent with both originalist and non-originalist theories of interpretation. By contrast, Bobbitt rejects originalism as an "ideology," in part because originalists believe that the original meaning (or intent or understanding) takes precedence over all other kinds of considerations.[192]

These differences, in turn, reflect deeper disagreements about the relationship between constitutional rhetoric and constitutional theory. This section goes more deeply into these differences, using Bobbitt's theory as a foil to state my own views.

First, Bobbitt's theory asserts that the modalities are incommensurable: the best argument from modality *A* can have no influence on what should be the best argument from modality *B*, and vice-versa. My view, by contrast, is that the modalities are just rhetorical topics that we use to solve problems and persuade other people. We define their boundaries pragmatically rather than rigidly, and different problem-solving approaches may fade into each other. Moreover, because people employ topics to analyze and solve problems, they may well assume that different ways of looking at a problem might helpfully converge on a single answer or a small set of answers. Or people may reason through a process of reflective equilibirum between different topical approaches.

Second, Bobbitt's theory insists that the modalities must have equal status. But this assumption, too, is unnecessary. Lawyers and judges embrace multiple interpretive theories, some of which adopt a hierarchical ordering—for example, that textual arguments are more important than arguments from narrative ethos. Topics are tools for thinking, and these tools can fit into many different kinds of theoretical structures. Lawyers' use of topics is consistent with many different kinds of constitutional theories, including originalist theories. In fact, most theories of constitutional law— such as process protection, judicial minimalism, or original public meaning originalism—usually can be deployed as topics for legal arguments *within* the practice of constitutional law.

192. Bobbitt, *Is Law Politics?*, *supra* note 18, at 1255 (describing originalism as an ideology involving a misplaced search for determinate answers that obviates the need for moral responsibility).

Third, Bobbitt maintains that when there are conflicts between the modalities, the only way to decide cases is by recourse to individual conscience. My account of legal argument focuses on the shared assumptions of communities and on social processes of mutual influence and persuasion rather than on the private consciences of individuals. This approach better explains the role of social influence in deciding what kinds of constructions are more plausible and less plausible at any point in history, and how positions move from "off-the-wall" to "on-the-wall" over time.

Fourth, Bobbitt has argued that only his theory of the modalities explains the legitimacy of constitutional law and judicial review; and that all other constitutional theories are either fruitless or impossible. But the very fact that constitutional topics are widely shared features of constitutional culture suggests a different perspective on constitutional theory: Common topics provide a common playing field for theoretical disputes both within and outside of legal argument. As a result, people with very different theoretical commitments can and do use the same basic rhetorical techniques, fitting them into different theoretical structures. That is why apparently contradictory theories—for example, originalist and non-originalist theories—share so much in common, and why lawyers holding these views are able to participate in legal debates together.

Moreover, arguing about constitutional theory—for example, about the proper role of the judiciary, and about which kinds of arguments should control in which kinds of situations—is a regular feature *within* legal argument, rather than extraneous to the practice.[193] Many theoretical disputes about the Constitution are internal to the ordinary practice of legal argument; they do not lie outside of it. Bobbitt believes that legal arguments that attempt to justify or provide ground rules for judicial review are fruitless; yet these arguments appear regularly

193. Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2303 (2017) ([Bobbitt's] view "ignores the permeability of first-order constitutional argument to second-order debate about appropriate grounds for decision within our existing constitutional practice. Methodological argument about the premises that should control constitutional decisionmaking is familiar and intelligible . . . ."); Jack M. Balkin, *The American Constitution as "Our Law"*, 25 YALE J.L. & HUMAN. 113, 141–43 (2013) (explaining that the history of constitutional argument is also the history of people arguing about the best way for judges to interpret the Constitution).

within constitutional litigation.[194] This suggests that they play an important role within the practice of constitutional argument. This turns Bobbitt's position on its head: if practice provides legitimacy, the practice we actually have involves lawyers making lots of arguments about what justifies the practice or what would make the practice better.

Finally, Bobbitt's account of "legitimacy" is idiosyncratic. It does not correspond to the way that most political and legal theorists talk about the various kinds of legitimacy—sociological, procedural, and moral. As a result, most constitutional theory asks questions that are orthogonal to what Bobbitt is trying to demonstrate. In fact, one can accept Bobbitt's claim that the practice of constitutional argument generates a certain kind of legitimacy—in his sense of the word—and still pursue most other kinds of constitutional theory. And to the extent that constitutional theorists have different goals than Bobbitt's—for example, when they ask which design of constitutional institutions would best serve certain values or functions—his objections do not really touch their work.

A. BOBBITT'S THEORY OF CONSTITUTIONAL CONSCIENCE

To explain these points, it is necessary to describe Bobbitt's constitutional theory in some detail. His theory is quite sophisticated, carefully constructed and has many interlocking parts. It is also important to recognize that Bobbitt seeks to answer very different questions than most other constitutional theorists, and so much of what concerns him is orthogonal to other constitutional theories.

Perhaps the best place to begin is with Bobbitt's distinction between *constitutional discourse* and *constitutional argument*.[195] Constitutional discourse is ordinary talk about the Constitution that anyone might engage in. Constitutional argument, by contrast, is legal argument of the kind made and recognized by lawyers and judges. In addition, arguments about how to design

194. Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107, 1144 (2008) ("[O]ur existing practices of constitutional adjudication and argument have multiple levels. . . [and] are, moreover, open and reflexive, permitting and even inviting arguments about what *ought* to count as good first-order constitutional arguments even if they are not, now, widely credited as such.").

195. Bobbitt, *Reflections*, *supra* note 18, at 1911.

constitutions, about what justifies constitutions, or about what features would improve a constitutional system, count as constitutional discourse, not constitutional argument.[196] That is because they speak from outside the system rather than from within it. Bobbitt points out, for example, that an argument from the *Federalist*, made before adoption of the Constitution about whether to adopt it, is constitutional discourse. But the very same set of words offered in the context of a lawyer's brief about how to interpret the Constitution is constitutional argument.[197]

In constitutional argument, Bobbitt believes, there are six and only six modalities.[198] Bobbitt acknowledges that people may engage in other kinds of reasoning in constitutional discourse, but he denies that any other forms of reasoning count as constitutional argument.[199]

For example, Bobbitt specifically denies that arguments from natural law and natural rights are part of constitutional argument.[200] Natural rights arguments assert that the purpose of government (and thus of government under the Constitution) is to protect certain rights; natural law arguments assert that certain legal norms are required by human nature and human flourishing. Bobbitt maintains that no such arguments appear in judicial decisions or in legal briefs or oral arguments before courts, although he concedes that they might have appeared in the distant past, and might still appear today in political theory or in non-legal conversation.[201] When lawyers and judges quote the

196. *Id.* at 1923–24 (explaining that constitutional discourse involves a normative assessment of the practice of constitutional argument that is not within the practice and does not affect its legitimacy); *id.* at 1951 ("Constitutional interpretation by formal decisionmakers committed to confine their decisions to legal bases is not the same practice as constitutional discourse, which, among other things, evaluates those decisions.").

197. *Id.* at 1911.

198. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 22 ("There is no constitutional legal argument outside these modalities.").

199. *Id.*; Bobbitt, *Reflections*, *supr*a note 18, at 1911–12. *See also id.* at 1936–37 ("I derive the modalities that determine the truth status of legal arguments from an examination of Supreme Court opinions, oral arguments by lawyers, presidential papers, and congressional hearings because these incidences of constitutional decisionmaking are constrained by their status as decisions according to law.").

200. *Id.*, at 1911, 1916–17.

201. *Id.* at 1916–18 (explaining that natural law and natural rights arguments do not count because although they have been used in the past, they are rare in contemporary Supreme Court opinions).

Although Bobbitt denies that appeals to natural law and natural rights are legitimate part of constitutional argument, a cursory inspection of recent Supreme Court opinions shows that natural law and natural rights arguments are not all that rare. *See, e.g.*,

Declaration of Independence, for example, it might seem as if they were making an appeal to natural rights, but Bobbitt explains that they are probably really making an argument from constitutional ethos.[202]

Bobbitt does not deny that the boundaries of acceptable constitutional argument might change over time.[203] He simply insists that natural law arguments fall outside the boundary. It was for this reason that Sanford Levinson and I have called Bobbitt a

Williams v. Pennsylvania, 136 S. Ct. 1899, 1912 (2016) (arguing that due process requires states "to adopt those practices that are fundamental to principles of liberty and justice, and which inhere 'in the very idea of free government' and are 'the inalienable right of a citizen of such a government'"); Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015) (arguing that same-sex couples' "immutable nature dictates that same-sex marriage is their only real path to this profound commitment"); *id*. at 2612 (Roberts, C.J., dissenting) ("[T]he Court invalidates the marriage laws of more than half the States and orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?"); *id.* at 2636 n.5 (Thomas, J., dissenting) ("The traditional definition of marriage has prevailed in every society that has recognized marriage throughout history."); *id.* at 2637–38 (Thomas, J., dissenting) (arguing that courts should defer to representative government, which is a device designed to protect people's natural rights from arbitrary interference); United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality opinion) ("The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person."); DA's Office v. Osborne, 557 U.S. 52, 93 (2009) (Stevens, J., dissenting) ("The liberty protected by the Due Process Clause is not a creation of the Bill of Rights….the liberty safeguarded by the Constitution has far deeper roots. See Declaration of Independence P 2 (holding it self-evident that 'all men are. . . endowed by their Creator with certain unalienable Rights,' among which are 'Life, Liberty, and the pursuit of Happiness')"); Washington. v. Glucksberg, 521 U.S. 702, 743 (1997) (O'Connor, J., concurring) ("I insist that the source of Nancy Cruzan's right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law.").

Moreover, because the Supreme Court has incorporated an inquiry into natural rights into its doctrines, there are many doctrinal arguments that appeal to those rights that governments exist to protect. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) ("The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."'").

Bobbitt points out that different judges tend to emphasize some modalities more than others. BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 8. Among recent Justices, Justices Kennedy, Stevens and Thomas have been most attracted to natural rights arguments. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2637-38 (Thomas, J., dissenting); United States v. Alvarez, 567 U.S. 709 at 728 (plurality opinion of Kennedy, J.); Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) ("I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.").

202. Bobbitt, *Reflections*, *supra* note 18, at 1918.

203. *Id.* at 1919.

"constitutional grammarian."[204] His theory demands that when people engage in constitutional argument (as opposed to constitutional discourse), they must make the correct kinds of arguments correctly, and much of his work has tried to show that people have been using the modalities incorrectly or have misunderstood the kinds of arguments that they have actually made.[205]

Next, Bobbitt argues that the six modalities are of equal importance in constitutional argument and wholly incommensurable.[206] The equal status of the modalities means that, for example, arguments from text can have no greater priority or importance than arguments from ethos or consequences.[207] The incommensurability of the modalities means that the plausibility or implausibility of an argument from one modality cannot properly affect the plausibility or implausibility of arguments from another modality. If textual arguments, for example, could help us arbitrate which are the best arguments from structure, or arguments from original understanding could settle which textual argument is the best one, the argument forms would not be, strictly speaking, incommensurable.

Bobbitt claims that the general acceptance of the modalities explains why the practice of constitutional argument and the

204. J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771 (1994).

205. *See, e.g.*, BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 61 (arguing that Justice Holmes' opinion in Missouri v. Holland has long been misunderstood as a prudential argument when it is really a doctrinal argument.); *id.* at 95-101 (arguing that Judge Robert Bork did not understand that his dominant tendency was prudentialism, not originalism); *id.* at 105–06 (arguing that members of the Senate Judiciary Committee did not understand that Bork was actually a prudentialist and not an originalist); *id.* at 131–38 (arguing that Mark Tushnet does not understand the nature of textual, structural, or ethical argument); Bobbitt, *Is Law Politics?*, *supra* note 18, at 1245 ("Tushnet often confuses the various modalities, and this failure to distinguish carefully and consistently among each of them leads to various analytical errors.").

206. Bobbitt, *Reflections*, *supra* note 18, at 1954 ("[I]t is a fundamental part of my views that the modalities may conflict, that they are incommensurable, and thus that no decision-procedure can determine the outcome in advance without sacrificing legitimacy.").

207. *See id.* at 1886 ("A theory that was comprehensive and provided certainty by privileging some modalities, as for example, by a hierarchical arrangement, could not be complete because it would require the inclusion of new principles to legitimate the hierarchy, and then new rules to legitimate the operation of these principles, and so on."). Equal status follows from Bobbitt's idea of incommensurability: if the modalities were not of equal status, then it would be possible to know in advance what to do when a modality of greater priority conflicts with one of lesser priority.

institution of judicial review are legitimate. Bobbitt argues that the practice of constitutional argument, and thus of judicial review, is self-legitimating.[208] Legitimacy arises from the practice of constitutional argument according to the underlying grammar of the system.[209] Because the practice of constitutional argument is self-grounding, constitutional discourse outside the practice does not and cannot bestow legitimacy on it. Legitimacy is not grounded on and does not depend on any larger political or moral theory. Indeed, Bobbitt believes that any attempt to ground constitutional argument on a political or moral theory outside the practice of constitutional law is fruitless.[210]

The practice of constitutional argument began when the Constitution became part of American law. The Founding generation applied then-existing practices of common law argument to the interpretation of the Constitution, and ever since what makes the practice of constitutional argument (and judicial review) legitimate is that it is *our* practice and that we continue to employ this practice as a constitutive part of our legal culture.[211]

The equal status and incommensurability of the modalities is a basic feature of the practice. Therefore denying the equal status of the modalities or attempting to elevate one modality above another undermines the legitimacy of the system.[212]

208. *Id.* at 1938 ("legitimacy flows from following various legal rules. These rules depend upon modalities of argument—ways in which particular arguments are assessed, rather than arguments themselves. . . . There is nothing more to legitimacy than that. Justification comes from external sources and does not establish or undermine legitimacy."); *id.* at 1914 ("Legitimation occurs when actors charged with deciding according to law frame their appeals and their explanations in the ways of which my sketch of the modalities is a description.").

209. *Id.* at 1914, 1938.

210. *Id.* at 1938 (arguing that attempts to justify legitimacy are either circular or lead to a problem of infinite regress). Bobbitt believes that most constitutional theory simply asks the wrong questions. *See id.* ("[T]he counter-majoritarian objection has been kept alive so long because constitutional scholars played a kind of shell game—they questioned the legitimacy of judicial review by demanding justifications. Had they been willing to concede the legitimacy of the practice and simply asserted that, though legitimate, they believed it lacked an appealing political theory, I doubt there would have been much fuss about the matter.").

211. *Id.* at 1952 ("For me, the use of the six forms of constitutional argument is the way we decide constitutional questions in the American legal culture. The use of these six forms maintains the legitimacy of judicial review."); *id.* at 1914 ("To put it briefly: *Practice legitimates because legitimacy is a matter of practice*.").

212. Bobbitt argued that Robert Bork's originalism undermined constitutional legitimacy because Bork asserted that decisions that could not be squared with the original understanding were not legitimate. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 107–08. By claiming that one modality trumped the others, Bork was asserting

From time to time, Bobbitt explains, law professors purport to ground the practice of constitutional argument and judicial review on constitutional theories. In his view, all of these theories are mistaken from the outset. They almost always seize on one of the forms of common law argument—for example original intent or consequences—and make it the ground of constitutional legitimacy.[213] This mistakes the true basis of legitimacy—the practice itself—and converts what is merely one form of argument into an "ideology."[214] Pragmatism is an ideology that converts arguments from prudence or consequences into the ground of constitutional legitimacy; originalism is an ideology that converts arguments from "history" (i.e., original intention) into the ground of constitutional legitimacy, and so on.[215] Attempting to elevate one modality among others is an illegitimate move in constitutional argument, and undermines the legitimacy of the system.[216] This is why Bobbitt opposes all versions of originalist theory, although, to be sure, he recognizes the legitimacy of the kinds of arguments (text, structure, original meaning/intention/understanding) that originalists make.

Bobbitt also strongly distinguishes between legitimacy and justification.[217] By "legitimacy," Bobbitt does not mean "moral legitimacy," that is, the degree to which a regime is just and/or protects human rights; or democratic legitimacy, that is, the degree to which a regime is responsive to popular will or popular opinion. Nor is a regime legitimate because there are sound prudential reasons for maintaining it. Thus, Bobbitt's concept of legitimacy has nothing to do with "legitimation"—that is, providing an apology or justification for a state of affairs.

Rather, by "legitimacy," Bobbitt means that people generally accept a legal regime and work and reason within it. He argues

that the other modalities were insufficient to explain constitutional decisions. "[A]n attack on those modalities is an attack on the legitimacy of the decisions they support." *Id.* at 108.

213. *Id.* at 27–28, 114, 176; Bobbitt, *Is Law Politics?*, *supra* note 18, at 1234.

214. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18 at 22; Bobbitt, *Is Law Politics?*, *supra* note 18, at 1234.

215. *Cf.* Bobbitt, *Is Law Politics?*, *supra* note 18, at 1251 (arguing that Mark Tushnet adopts the ideology of pragmatism because he sees everything through the lens of prudentialism); *id.* at 1255 (suggesting that originalists turn historical argument into an ideology that seeks determinative answers).

216. Bobbitt, *Reflections*, *supra* note 18, at 1924 (explaining that "Tushnet's sole reliance on prudentialism is illegitimate as a matter of law," even if it is a legitimate approach to "academic assertion and discussion").

217. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18 at 27–28, 114, 176.

that the legitimacy of the American constitutional system arises from the self-grounding practice of making arguments using the modalities.[218]

To justify the practice means trying to ground the practice in some set of reasons that are prior to it. This is what most constitutional theory tries to do, and Bobbitt argues that when constitutional theorists attempt this, they confuse justification with legitimacy.[219] We cannot make the practice legitimate by offering arguments for why it is a good thing or a bad thing.[220] The practice is legitimate because we participate in it, and because doing so is part of who we are.

It is true that people can justify particular positions *within* the practice; they do this by making constitutional arguments according to the modalities. But these arguments cannot justify the practice itself.[221] Justification *within* the practice is not justification *of* the practice from the outside. Law, and therefore constitutional law, Bobbitt explains, is something that we do, not something we have as a consequence of something we do.[222] The continuation of our practices ensures their legitimacy. This is one explanation of the title of his book *Constitutional Fate*. It is our constitutional fate to use the modalities which we inherited from the common law; doing so legitimates the constitutional system and the practice of judicial review. Our practice of constitutional argument is our constitutional fate. Our constitutional fate is our practice of constitutional argument.

Bobbitt's account also gives an explanation of constitutional disagreements and how to resolve them. This is Bobbitt's theory of *conscience*.

Bobbitt argues that within each modality, lawyers use their professional judgment and the norms of inquiry associated with each modality to decide which argument is best. So, for example,

218. *Id.* at 114; Bobbitt, *Reflections*, *supra* note 18, at 1872, 1952.

219. *Id.* at 1869 ("For some time, the academic debate about U.S. constitutionalism has looked for justifications for our practices, believing this would confer legitimacy on them. In my work, I have endeavored to derive legitimacy from the practices themselves, reserving the task of justification for other purposes.").

220. *Id.* at 1870 ("justification does not assure legitimacy"); *id.* at 1898 ("It would be a mistake to think that a political theory (like majoritarianism),which can justify a system, can also legitimate it.").

221. *Id.* at 1952 (asserting that "the various modalities of constitutional argument do legitimate, but they do not justify").

222. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 24.

he argues that professional norms of history will determine which argument within the modality of "history" (i.e., original intention) is the best one.[223]

This approach, however, does not apply to contrasting arguments from different modalities. To be sure, it is possible that the best arguments across the different modalities will not conflict. In that case, there is a correct answer to a particular constitutional question. But sometimes, perhaps often, the best arguments among the various modalities do conflict. The best argument from modality *A* (judged by norms of inquiry characteristic to that modality) may conflict with the best argument from modality *B* (also as judged by norms of inquiry characteristic to that modality). In that case, there is no meta-principle that can decide between the two arguments. The modalities are completely incommensurable with each other.[224] Instead, lawyers and judges must turn to their individual consciences to decide which argument is the best one.[225] Because the consciences of individuals may differ, the practical result is that the development of constitutional doctrine—where the modalities conflict—depends on the conscience of constitutional decisionmakers.

Bobbitt distinguishes between how we *decide* cases from how we *explain* them to others.[226] Within the practice of constitutional argument, we always explain our decisions to others through the modalities of constitutional argument, and that is what makes the practice legitimate.[227] But that is not how we decide cases when the modalities conflict. In these cases, we decide according to conscience. The distinction between the forms of public explanation and the process of private decision is most important when the modalities conflict, as they often do.

Bobbitt views this feature of constitutional argument—that the modalities are often incommensurable and that individual conscience is necessary to decide cases —not as a problem for

223. Bobbitt, *Reflections*, *supra* note 18, at 1923. *See infra* the discussion accompanying notes 238–250.

224. *Id.* at 1954 (arguing that "the modalities may conflict, that they are incommensurable, and thus that no decision-procedure can determine the outcome in advance without sacrificing legitimacy").

225. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 163–64, 183–84.

226. *Id.* at 114, 153, 163–64, 169.

227. Bobbitt, *Reflections*, supra note 18, at 1914.

constitutional argument, but as its saving grace.[228] This feature makes individual conscience indispensable to the resolution of many constitutional disagreements, and thus implicit in the legitimacy of the constitutional system. An important feature of Bobbitt's work is that in constitutional law, the moment of moral decision, and thus the responsibility of conscience, can be postponed, but it can never be avoided.[229]

The role of individual conscience in the practice of constitutional law is crucial because it allows for the possibility of justice in the otherwise self-contained and self-legitimating system of constitutional argument.[230] Because the modalities sometimes conflict, decisionmakers, relying on individual conscience, can decide to do what is right and just by choosing the position that furthers justice. The more often the modalities conflict, the greater the space for individual conscience.

As one can see from the above discussion, conscience is among the most important ideas in Bobbitt's system. All of his other claims about the practice of constitutional argument revolve around his views about the importance and necessity of individual conscience. That all constitutional argument occurs within a fixed set of modalities, that the modalities are of equal status, that they are incommensurable, and that there is no general principle of priority among them, are not, in Bobbitt's view, defects of the system. Rather, they are important and valuable features of the system. These features of constitutional argument preserve a role for individual conscience, and hence for the possibility that our system of government will achieve a greater degree of justice over time.[231]

228. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 114, 163–64, 177; *see also id.* at 170 ("The justice of the system lies in the extent to which it is able to confer legitimacy on the right moral actions of its deciders. It is thus in the very fact that legitimacy rationales *do* conflict that enables justice to be done.").

229. Bobbitt, *Reflections*, *supra* note 18, at 186 ("We are incapable of making something that will obviate (rather than suppress) the requirement for moral decision.").

230. *See supra* note 208.

231. As Bobbitt explains:

> *Constitutional Fate* asks, "What legitimates judicial review?" and proposes an antifoundationalist answer. That is, I located legitimation in a particular practice, rather than in a prior, external rationale. *Constitutional Interpretation* asks, "What makes the system of constitutional decisionmaking just?" The answer I offered was an antirepresentationalist one. Treating the issue as one in which "just" is a judgment of the system as a whole, I argued that the American system permits acts of conscience to be decisive, instead of determining that particular

One can now better understand why Bobbitt insists that all of the modalities must be on an equal footing and completely incommensurable; and that no form of argument (say, arguments from the original public meaning of the text) can be lexically prior to any others. To assert that one modality was subordinate to any other, or that the modalities were commensurable with each other would deny the central role of conscience in arbitrating among them.[232]

Bobbitt's theory leads to considerable freedom for constitutional interpreters. Indeed, this freedom is virtually required by his conception of conscience. Bobbitt explains that this is not the freedom to do whatever one likes, but rather the freedom to employ one's conscience in deciding what is truly just.[233]

People may therefore assume that any constitutional theory that utilizes the modalities, or standard forms of constitutional argument, must depend on conscience in the same way. It must feature the same degree of interpretive freedom, it must feature equal and incommensurable modes of argument, and it must be irredeemably opposed to all forms of originalism. But this is not the case.

Bobbitt started with an undeniable fact about legal practice—that lawyers use a set of standard rhetorical methods inherited from the common law to interpret the Constitution. He then built a grand theoretical edifice atop of it. But one does not have to accept the entire edifice to accept his starting point. When expressed in the language of rhetorical topics, many of his claims about the modalities are unnecessary, and others seem disputable.

B. TOPICS ARE NOT SILOS

Lawyers employ common topics with an eye to analyzing situations, solving problems and persuading other people. I agree with Richard Fallon that lawyers use topics with a defeasible assumption of coherence: When lawyers ask constitutional

> outcomes are just when correlated with the outcome hypothesized by a theory of justice.

Bobbitt, *Reflections*, *supra* note 18, at 1872 (internal citations omitted).

232. Or, as Bobbitt puts it, the creation of an algorithm that would relieve us of moral decision would be pernicious, because it would disable the power of moral reflection and choice. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 154–55, 162.

233. Bobbitt, *Reflections*, *supra* note 18, at 1874.

questions and attempt to solve constitutional problems, they operate on the assumption that employing different ways of looking at a problem can help them converge on a single answer or a small set of answers.[234] This assumption is defeasible because it may not turn out to be the case; even so, interpreters should start out by assuming that it is the case and do their best to make the answers fit together.

Moreover, the process of interpretation is not individual but social; we do it not only to convince ourselves but also to convince other people. Therefore, as we test and refine our analyses, we always have in mind an imagined audience of other people we want to persuade; we consider their imagined views as we decide the best way to ask questions and answer them. We hear not only the imagined voices of people who we think mostly agree with us but also (and especially) those we think will disagree, because their arguments most need to be met and rebutted. The imagined audience not only shapes how we express our arguments; it also shapes what we think are plausible and implausible claims, reasonable and unreasonable moves in our arguments.

This approach to interpretation makes more sense of the way that lawyers actually use the topics in legal argument than Bobbitt's theory of incommensurability and individual conscience. It also better accommodates the roles of mutual give-and-take and social influence in deciding what kinds of constructions are off-the-wall and on-the-wall at any point in time, and how positions move from less plausible to more plausible over time.

My argument will proceed in two steps. First, I will explain why Bobbitt's model of incommensurability—which treats the modalities as rhetorical silos—does not succeed on its own terms. Then I will argue that the social nature of legal argument—among members of a community who very often disagree—makes it far more plausible to understand lawyers as striving for coherence and reflective equilibrium among the different means of problem-solving and persuasion.

234. Fallon, *Constructivist Coherence*, *supra* note 99, at 1193.

1. Topics do not have to be incommensurable

Bobbitt's view that the topics are incommensurable is not a good account of lawyerly practice. To see why, one might begin by distinguishing three different claims about legal arguments:

(1) Given arguments from different modalities (i.e., topics), there is no general formula or decision procedure for deciding which argument is better when they conflict, even if in some cases certain arguments are better than others. Instead, we have to judge each conflict on its own terms, and the argument that proves better in one context might prove worse in another.

(2) Arguments from one modality should not affect our judgment about whether arguments within another modality are more or less plausible. That is, it is not possible to engage in methods of coherence-based reasoning or reflective equilibrium to reach a conclusion. No matter how strong we think a textual argument is, for example, it should not give us any reason to change our minds about what constitutes the best structural or prudential argument.

(3) Given conflicting arguments from different modalities—for example, text and structure—we have no reasons to prefer one argument to another. Hence the decision between them must be left to individual conscience. To be sure, we may *justify* our decision to others in public by making a textual or structural argument, but the textual or structural argument is not the basis of our private decision.

Proposition (1) is not a very controversial claim. It allows for coherence-based reasoning and reflective equilibrium between different kinds of arguments. Many people—and even some originalists—would accept it, at least if one limits it to cases of constitutional construction, in which original public meaning does not resolve the question. Proposition (1) does not even rule out the possibility that some kinds arguments (for example, textual) are *usually* more important than others (consequences, natural law, etc.), as a rule of thumb.

Bobbitt, however, takes a much stronger position than (1). He appears to hold proposition (2); and sometimes he seems to argue for (3).[235] Proposition (3) makes how people decide according to conscience somewhat mysterious. If so, it is a mystery

235. Bobbitt, *Reflections*, *supra* note 18, at 1874, 1882–85, 1923.

that Bobbitt invites. He speaks of conscience as an "unreasoning decision,"[236] and he argues that "[i]t is only when assailed by doubt—when nothingness prevails and there is no point to further legitimate judgment—that one resorts to one's conscience."[237]

In any case, Bobbitt's strong version of incommensurability between different modalities is untenable because it depends on a rigid and ultimately untenable distinction between intermodal and intramodal conflicts.

Intermodal or cross-modal conflicts are conflicts between the best arguments in two different modalities, for example, between the best textual and the best structural argument. *Intramodal* conflicts are disputes *within* a given modality about which version of an argument within that modality is the best one.

For example, an argument that employs an abstract characterization of the original understanding might conflict with an argument that employs a relatively concrete characterization of the original understanding. The petitioner argues that the framers and adopters of the Fourteenth Amendment intended to ban all class and caste legislation; therefore sex discrimination is unconstitutional. The respondent argues that the framers and adopters of the Fourteenth Amendment did not intend to abolish the common-law coverture rules by which women lost almost all of their rights on marriage; hence sex discrimination is not unconstitutional.

Another example of an intramodal conflict would be one between a textual argument that uses the canon *expressio unius est exclusio alterius* and another textual argument that invokes the absurdity canon. The petitioner argues that the First Amendment does not apply to the President because it says "Congress shall make no law;" the respondent applies that this reading would have absurd results because it would allow both the President and the federal judiciary to run roughshod over freedom of religion, speech, and press.

As these examples demonstrate, intramodal conflicts are ubiquitous in constitutional argument. In fact, whenever we find a conflict *between* modalities we can usually find a corresponding conflict *within* a single modality.

236. *Id.* at 1923.
237. *Id.* at 1874.

Bobbitt argues that we cannot resolve intermodal conflicts except by conscience. In contrast, he argues that we can almost always resolve intramodal conflicts by using the norms that are characteristic of each modality[238]: "[W]ithin a single modality," he explains, "the arguments are entirely comparable; the standards for the better argument are supplied by the modality itself. For example, there are well-developed canons of historical assessment against which can be measured competing historical arguments in constitutional law."[239] The only exception is where deciding between two different arguments requires facts that we do not or cannot know, for example, when there is a gap in the historical record.[240] Then "there is … a role [for conscience], but it is distinct from that played when the modalities conflict."[241] In this situation, a legal interpreter turns to conscience not because the arguments are incommensurable, but because there is a dispute about the facts and the interpreter lacks sufficient knowledge to resolve it. However, if one discovers additional facts, then the conflict will disappear and lawyers can settle on the best argument.[242]

To justify this difference between intermodal and intramodal conflicts, Bobbitt must make two further claims, each of which is implausible.

First, Bobbitt must hold that every kind of legal argument can be classified according to one and only one modality. Suppose that a certain type of argument *A* could be classified as either an historical argument (i.e., in Bobbitt's system, an argument from original intention or understanding) or as a structural argument. Then by hypothesis *A* would be commensurable with all other historical arguments and it would also be commensurable with all other structural arguments. But that would mean that historical and structural arguments are commensurable, and so people do not need to resort to individual conscience to resolve conflicts

238. *Id.* at 1923. Bobbitt is emphatic on this point. It is, he says, a "gross misreading" to suggest "[t]he role I reserve for conscience (as that faculty by which we choose among incommensurables) must be available to choose among competing arguments within a modality" *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* ("The difference between this situation and that of a conflict between (or among) the modalities, rather than within a single one, is that some fact . . . can always appear to bring harmony within a modality, whereas no fact can accomplish this among different forms of argument.").

among them. But this is impossible according to Bobbitt's theory. Hence each kind of argument can belong to one and only one modality; all other categorizations of arguments must be incorrect. Although Bobbitt has sometimes described his categorization system as merely provisional,[243] he cannot really maintain that view if he wants arguments from different modalities to be incommensurable.

It is therefore not surprising Bobbitt has had to act as a sort of constitutional grammarian, correcting other people's understanding of their arguments, and insisting on his particular system of classifications. Bobbitt has disclaimed any intention to impose his normative views; he insists that he is merely describing our practices of argument as they really are.[244] Yet he must play the role of constitutional grammarian in order to preserve the central role of conscience in his system, because a special role for conscience is unnecessary if the modalities are generally commensurable.

One can see the point in another way. In this Article I have mentioned three different ways of dividing up constitutional argument: Bobbitt's, Fallon's and mine. I argue that my division of the topics better accounts for how lawyers use history in constitutional argument than either Bobbitt's or Fallon's. So if one focuses on uses of history, one should use my account. On the other hand, Bobbitt's catalog has proved very useful for teaching first-year law students how to make constitutional arguments. My view, consistent with the classical rhetorical tradition, is that the way people describe and classify topics should be pragmatic. It should be driven by one's practical goals, and not by a belief in natural kinds of arguments. One need not assume that a complex social practice has to divide up in a single way; we should use whichever classification system best helps us achieve our particular purposes.

At various points, Bobbitt seems to agree.[245] But he cannot be so relaxed on this point, because of his views on incommensurability and the role of conscience. If one recognizes more than one classification system, one quickly gets into trouble. There are any number of arguments that fall under the same

243. *Id.* at 1915–16.
244. *Id.* at 1913–14, 1917, 1922.
245. *Id.* at 1915–16.

modality in Bobbitt's model but fall in different modalities in my topic catalog or Fallon's; conversely, there are any number of arguments that Bobbitt treats as falling into different modalities but that fall into the same modality in either Fallon's system or mine. For example, Bobbitt lumps together arguments from judicial precedent, inter-branch conventions, and custom, while I treat them as three different kinds of arguments. Bobbitt distinguishes arguments from original meaning (which form part of his historical modality) and arguments from contemporary meaning (which fall into the modality of text), while I lump them together as textual arguments.[246]

It follows that many pairs of arguments, *A* and *B*, are commensurable if one uses Bobbitt's classification system and incommensurable if one uses Fallon's or mine, and vice versa. That is, one can make two arguments commensurable or incommensurable just by changing the classification system. (Note that this need not be true of all pairs of arguments, but it will be true of some of them.) Again, for Bobbitt, this result is impossible. Hence he must hold that there can be only one correct way of classifying legal arguments, and all others must be mistaken.

Put another way, Bobbitt can maintain that the way people classify arguments is pragmatic and provisional, or he can maintain that arguments from different modalities are incommensurable and that conflicts between them can only be resolved by individual conscience; he cannot maintain both things.

It now becomes easier to see what is at stake in the choice between Bobbitt's theory of distinct modalities and my pragmatic account of rhetorical topics. If Bobbitt is correct that modalities constitute different and incommensurable ways for a legal proposition to be true, then they must correspond to clear distinctions in social practice. But if they are just rhetorical topics, they are more like a checklist for analysis and argument construction, a set of commonplaces that people turn to for invention. They do not have to have clear boundaries, they may fade into each other, people can divide them up in different ways, and they need not be incommensurable in the way that Bobbitt describes.

246. See text at notes 113-118, *supra*.

2. The problem of intramodal conflicts

Bobbitt's arguments also depend on a second claim, which, if anything, seems even more implausible. Bobbitt argues that, absent gaps in the factual record, lawyers must be able to resolve all conflicts within a single modality by using a set of generally recognized standards internal to the modality.[247]

Why is this assumption implausible? Recall my earlier point that because the modalities are commonplaces, they rest on incompletely theorized justifications—generalized claims about the importance of text, structure, and so on, that people can specify in many different ways. In other words, one can think of the modalities as big buckets of roughly similar kinds of arguments that do not have to agree with each other in all respects.

Within each modality of argument, there are many different versions and approaches. These are the subtopics of a given modality. The number of subtopics in any given modality is likely to increase over time as lawyers build on the sophistication and creativity of previous lawyers.

Examples of these different subtopics are different ways of characterizing purpose or intention (for example, general and abstract accounts of intention; looking to subjective inventions; looking to objective evidence of purpose); different ways of characterizing and drawing inferences from texts (for example, the various canons of statutory construction); different theories of constitutional structure (for example, dual federalism, process-protection, subsidiarity, unitary executive, political safeguards of federalism, etc.); different ways of articulating and measuring the best consequences (for example, welfarism, rule-consequentialism, wealth maximization, individual human flourishing); different doctrinal techniques for applying precedents (for example, broad holdings versus narrow holdings, multiple ways of characterizing holding and dicta, conflicting methods for distinguishing or expanding precedents); different doctrinal categories for characterizing a given situation (for example, clear and present danger, symbolic speech, public

247. *Id.* at 1923 ("[W]ithin a single modality, the arguments are entirely comparable; the standards for the better argument are supplied by the modality itself. For example, there are well-developed canons of historical assessment against which can be measured competing historical arguments in constitutional law.").

forum, compelled affirmation of belief, content-based regulation); and so on. These subtopics are also special topics in legal rhetoric; they also serve as ways of characterizing, analyzing, and solving legal problems.

Because they approach legal questions from different perspectives, these different subtopics will often generate conflicting answers. That is why lawyers are often able to respond to an argument from a given modality by invoking a different subtopic within the same modality. If petitioner argues from abstract intentions, respondent might invoke concrete intentions; if petitioner makes a representation-reinforcement argument, respondent might invoke the principle of state sovereignty, and so on.

Nor will lawyers and judges restrict themselves to one subtopic. They will alternatively adopt and reject different conceptions of purpose and structure as they move from decision to decision. It is catch-as-catch-can. This opportunism should hardly be surprising if one recalls what topics are: resources for the invention of arguments that can persuade others.

Bobbitt assumes that all conflicts within a modality can be resolved through well-developed and generally accepted norms that are characteristic to each modality.[248] But in many, if not most of these situations, there are no such widely accepted norms. If there were a general way to decide between abstract and concrete versions of original intention and understanding, lawyers would have settled on it a long time ago. There is no general decision procedure for arbitrating between dueling textual canons, even if there are many situations in which one canon is more persuasive than another. Bobbitt's assertion that lawyers (much less historians) have a well-developed professional set of norms for arbitrating between dueling interpretations of the same historical facts seems naive. Not all disputes among lawyers, historians—or between lawyers and historians—can be blamed on professional incompetence or missing facts. In fact, the more competent professionals are, they more likely they are to produce conflicting arguments within each modality.

Skepticism grows as one moves through the various modalities. Take arguments from precedent. Common-law reasoning allows many different ways of characterizing

248. *Id.*

precedents—broadly, narrowly, excluding different classes of previous cases as mistakes, and so on.[249] There are standard and familiar ways of characterizing facts in different ways, including both the facts in the case at hand and the salient facts of previous decisions. This play in the joints is a feature of precedential argument, not a bug. The notion that common law reasoning converges on unitary answers about the correct way to read precedents in contested cases seems implausible.

It is even less clear that ideas internal to legal reasoning can tell us which account of consequences is the legally correct one. Philosophers have long debated which version of consequentialism makes the most sense; even if one restricts one's self to professional debates among lawyers, there are many ways of characterizing and measuring consequences (which consequences, to whom, and over which area or time period?). And the notion that "there are well-developed canons of . . . assessment"[250] for Bobbitt's category of ethical argument is mysterious, to say the least.

Why does this matter? Well, if Bobbitt's thesis about intramodal conflicts turns out to be false, then it may not make much sense to speak of conflicts *between* modalities at all. The very idea of an intermodal conflict assumes that there really is a single best argument in two different modalities and that these arguments conflict. But if there is not a demonstrably single best argument within each modality, then the two modalities do not actually conflict. Instead conflicts within one modality correspond to conflicts within another modality. Modalities *A* and *B* do not really conflict if within each modality there are reasonable arguments on both sides and there is not a single generally-accepted decision procedure within the modality that can resolve the conflict between them. Many apparent examples of cross-modal conflict may actually reflect the fact that we have not

249. *See, e.g.*, KARL LLEWELLYN, THE COMMON LAW TRADITION 77–91 (1960) (discussing various permitted moves in doctrinal argument); KARL LLEWELLYN, THE BRAMBLE BUSH 74–75 (1951) (1930) (describing broad and narrow techniques of reading precedents). One can understand Llewellyn's work on precedent as more than merely Legal Realist skepticism, but rather as offering topic catalogs for lawyers; the same applies to his famous essay on dueling canons of statutory interpretation. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

250. *Id.*

thought hard enough about counter-arguments within each modality.

The existence of multiple reasonable positions within each modality helps explain why a coherence-based approach to legal argument makes more sense than a strong claim of incommensurability. We don't have to abandon one modality to accept another; we just have to switch our allegiances to another reasonable argument within the modality.

C. PEOPLE USE TOPICS TO REASON BY COHERENCE AND REFLECTIVE EQUILIBRIUM

The idea of "incommensurable" justifications might suggest that the modalities are walled off from each other, as if they were in separate silos. But this is not how either legal culture or legal topics actually work.

First, the justifications underlying different topics overlap. Because structural arguments concern proper function, they overlap with arguments about purpose (for example, in arguing how the system is supposed to work) or consequences (in arguments about whether the system is functioning well or badly). Arguments from text and purpose may overlap because people may infer purpose from the text. Arguments from political tradition can overlap with arguments from purpose, because people often identify the values of the tradition as purposes of the Constitution. Arguments from inter-branch conventions may overlap with judicial precedents about these conventions. Arguments from custom and natural law may overlap because in order to understand what makes human beings flourish, one might want to look to how people arrange their affairs over long periods of time; custom may reflect the "wisdom of crowds" about the conditions of human flourishing.

Second, the modalities offer explanations for why other modalities are good arguments. For example, one might offer structural reasons to explain why judges should take into account considerations of institutional prudence. One might argue that lawyers should look to natural law (1) because doing so produces the best consequences; (2) because the text of the Constitution implies it (for example, in the Ninth Amendment and the Privileges or Immunities Clause); or (3) because the framers expected that people would look to natural law in interpretation. One might defend interpretation according to original meaning

(an argument from text) (1) because it offers the best consequences; (2) because it is most consistent with the structure of a constitution grounded on popular sovereignty; (3) because the framers and adopters expected it; (4) because it is required by rule of law principles; or (5) because it is characteristic of the traditions of American legal practice. These examples show how different commonplaces mutually support each other. Indeed, if one thinks of the modalities as commonplaces, it would be surprising if this were not the case.

Third, as noted above, Fallon pointed out that lawyers and judges often experience arguments from different modalities as pointing toward the same result.[251] The reason is that when we are trying to decide which argument from modality A is the best one, our judgments may be influenced by our views about which version of an argument from modality B is best, and vice-versa. People may update and modify their initial impressions about which argument is best after they look at the problem from another angle. Again, if one thinks of modalities as special topics, there is nothing mysterious about this. That is precisely what using different topics achieves: topics offer multiple perspectives for solving a problem, and as we approach the problem from different angles, we may update our initial impressions.

Here is a simple example. The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."[252] Does the First Amendment apply to the Executive and Judicial branches of government? At first glance, the text would appear to say no. There is even a familiar textual canon that supports this result: *expressio unius est exclusio alterius*. When one or more things in a class are clearly specified in a law, the other elements of the class are excluded. Moreover, because the omission of the Executive and Judicial Branches would have such important consequences, we must presume that the omission was deliberate and that the framers and adopters thought carefully about the wording.[253]

251. Fallon, *Constructivist Coherence*, *supra* note 99, at 1193.

252. U.S. CONST. amend. 1.

253. Hence, a few law professors have bit the bullet and insisted that the First Amendment really does apply only to Congress, and not to the President, to the Judiciary, or to the President and the Senate (as opposed to the entire Congress) in making and ratifying treaties. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1250 (2010); GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF

So far it looks as if the best argument from text is that the First Amendment applies only to Congress. But now consider the problem from the perspective of the other modalities.[254] First consider consequences: Judges would be able to issue injunctions and contempt citations against newspapers that criticized or disrespected them under their contempt power. The President, as commander-in-chief of the Armed Forces, could require that all soldiers pray to the same God.[255]

Next consider purpose: The goal of the Establishment and Free Exercise Clauses is to secure religious liberty. But religious liberty would be thoroughly undermined if government officials outside Congress could abridge it at will and with impunity.

Next consider structure: The American government is a republic based on popular sovereignty. Federal government officials act as agents of We the People. Because they are only agents, We the People must have the right to criticize their conduct, which means that citizens must also be able to discuss public issues freely. It would undermine the structure of republican government if government officials could punish or hinder citizens from criticizing official conduct and discussing matters of public concern. Hence guarantees of speech and press must apply to all branches of government.[256]

Next consider precedent: Every federal court that has considered the issue since the early 19th century has assumed that the First Amendment applies to all three branches of government.[257]

EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY 42 (2004); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1201 (1986).

254. Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1241 (2015) (using this example to demonstrate that "the same considerations that are potentially relevant in resolving the meaning of ambiguous text can also affect the perceived clarity of the text in the first instance.")

255. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 316 (2005); BALKIN, LIVING ORIGINALISM, *supra* note 2, at 204–05.

256. *Cf.* AMAR, *supra* note 255, at 316 ("[T]he amendment declared certain preexisting principles of liberty and self-government —'the free exercise of religion' and 'the freedom of speech, [and] of the press'—that implicitly applied against all federal branches (not just Congress) and all federal actions (not just laws).").

257. Magill v. Brown, 16 F. Cas. 408, 427 (C.C.E.D. Pa. 1833) (Baldwin, J.) (arguing that the First Amendment "wholly prohibits the action of the legislative or judicial power of the Union on the subject matter of a religious establishment, or any restraint on the free exercise of religion."); Shrum v. City of Coweta, 449 F.3d 1132, 1142 (10th Cir. 2006) (majority opinion of McConnell, J.) ("As this history shows, there was no intention to confine the reach of the First Amendment to the legislative branch."); Bradley and Siegel,

Next consider natural rights: The freedoms of speech and religion are rights governments are instituted to protect. Therefore all branches of government must respect them.

Next consider ethos and political tradition: Freedoms of speech, press, and religion are central to a free society and to a democratic republic. Failing to apply these guarantees to all federal officials would be inconsistent with the character of our institutions and the American people themselves.

Given these arguments, does our initial the textual argument look so clear cut? No, it does not. In fact, these reasons may spur us to think of other textual arguments.

Perhaps the term "Congress" is a nonliteral usage.[258] Just as the words "speech" and "press" apply to more than just speaking and to using a printing press, perhaps the word "Congress" is actually a synecdoche—a figure of speech in which a part stands for a greater whole. So maybe "Congress" means something like "the Federal government as a whole" or "the Federal government acting according to law." That would make sense given that Congress was by far the largest and most important branch of government at the Founding.

There are two other reasons why we should read the text to subsume the other branches of government in the term "Congress." First, as noted above, Congress was widely expected to be the most important branch in 1791. Second, it was generally assumed that government agents could and should only act according to law; i.e., consistent with the norms that bind the legislator, Congress. All other actions would be *ultra vires*. Thus, the inclusion of other branches literally goes without saying, and that is why nothing is explicitly said in the text.

Finally, the fact that the text requires Congress to respect guarantees of speech, press, and religion does not preclude other branches from being bound for reasons of structure, prudence, precedent, ethos, or tradition. Unless we have strong reasons to the contrary, we should not read "Congress shall make no law" to mean that "All other branches may make law."

Constructed Constraint and the Constitutional Text, supra note 254, at 1244 ("American constitutional practice, however, has always viewed the First Amendment as relevant to the conduct of the entire federal government, not just Congress.").

258. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 34 (2012); BALKIN, LIVING ORIGINALISM, *supra* note 2, at 204–05.

By the time we finish working through the other modalities, our initial textual argument looks much less convincing; and we might decide that one of the other textual arguments is actually the best one, all things considered. Because arguments from the other modalities seem so strong, we may revise our initial impression about which argument is best within a given modality. Put another way, our judgments using one tool or perspective for problem-solving can be influenced—and perhaps should be influenced—by what we learn from using other tools and perspectives.[259] By using all of the forms of argument to check and inform each other, we may often converge on a best answer. Fallon calls this approach "constructive coherence."[260]

That experience would make little sense if the modalities were truly incommensurable with each other. But once again, if one thinks about them as special topics—that is, heuristics or aids to understanding and analyzing a problem—this process of mutual influence seems entirely natural.

D. CONSTITUTIONAL INTERPRETATION IS SOCIAL

Bobbitt emphasizes the incommensurability of modalities because he wants to clear a space for individual conscience. Accordingly, he distinguishes between how we decide—through the exercise of individual conscience—and how we explain our decisions to others—through shared modalities of legal argument. This, however, might generate a mistaken impression: On the one hand, we have social processes of persuasion; on the other we have the individual moment of decision far from the madding crowd's ignoble strife. If we think of the modalities as rhetorical topics, we will get a more realistic picture of how constitutional judgment really works.

First, people make, evaluate, and choose among legal positions using rhetorical tools of analysis, not outside them. They are tools to think with, not to think around. Moreover, these tools of thought offer contrasting perspectives on problems that people can consider together, rather than in isolation from each other. Reflective equilibrium in a community of mutual influence is a

259. See Bradley & Siegel, *Constructed Constraint and the Constitutional Text*, *supra* note 254, at 1243 ("[A] variety of modalities come into play, often in an interactive fashion, in constructing understandings about clarity and ambiguity in the constitutional text.") .

260. Fallon, *Constructivist Coherence*, *supra* note 99, at 1192–93.

better account of legal decision making than a solitary retreat to individual conscience.

Second, individual conscience does not operate in a vacuum. Our sense of what is just and unjust, as well as what is reasonable and unreasonable, on-the-wall and off-the-wall, is shaped by the opinions and beliefs of the people around us, even when we reject it in part. A strong distinction between social influence and individual conscience is spurious, a point on which Bobbitt and I agree.[261]

Constitutional judgment, even within the mind of a single individual, is social and subject to multiple forms of social influence. Constitutional judgment occurs within a social practice of arguing with other people, reflecting on their best arguments, finding ways to persuade them, and readjusting and re-characterizing one's best arguments in light of what one imagines other people will think. That is, constitutional judgment is performed before the imagined audience of one's community (or communities).[262] These audiences include fellow judges, lawyers, professionals, scholars, family members; members of the same political party, religion, organization, or social movement; media, and the general public.[263] In forming constitutional judgments, we take into account what these real or imagined audiences think, whether they will find what we say reasonable or unreasonable, plausible or implausible, and we shape and revise our judgments accordingly. This is true even of the iconoclast or of those who pride themselves on their individuality, authenticity, and

261. *See id.* at 1966 ("That an act of conscience may be motivated by many conscious and unconscious cultural, historical, political, and moral convictions is probably true. But these convictions cannot legitimate the act, nor is it necessary that they do so, so long as the decisions can be retrospectively explained in terms of the accepted modal arguments.").

262. *See* LAURENCE BAUM, JUDGES AND THEIR AUDIENCES (2006) (arguing that judges decide cases with actual or imagined audiences of colleagues, acquaintances, family members, and others in mind).

263. *See* Peter Brooks, *The Law as Narrative and Rhetoric*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW, *supra* note 61, at 14, 21 ("[T]he audiences from which assent must be won are often multiple. In many a Supreme Court opinion . . . one can detect the Court's attempts to address different listeners: dissenting Brethren first of all, then lower court judges, then state legislatures and the police forces of the nation, then the public at large."); James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 Trial Judges' J. 49, 49–50 (1969) (explaining that judicial opinions are exercises in persuasion before different kinds of audiences); Abner J. Mikva, *For Whom Judges Write*, 61 S. CAL. L. REV. 1357, 1366 (1988) ("It is clear . . . that the audiences for judges' opinions have gradually grown in both size and diversity.").

incorruptibility. The effect of audience influence is obvious for lawyers, who need to persuade judges. But it is also true of judges, who want to decide cases and justify their views in ways that will be persuasive to fellow judges, other lawyers, and to the public at large.

Third, individual constitutional judgment does not float free from the socially shared tools of constitutional reasoning and constitutional argument. The distinction between how people decide questions and how they explain their decisions to others is not clear-cut. People may use some of the same tools to reason that they use to persuade others, even if the processes of decision and persuasion are not identical. The process of constitutional interpretation is social, even—and especially—when different kinds of arguments conflict.

The notion of decision according to individual conscience can be misleading: People do not reason in isolation, like lonely hermits. They reason in discussions and arguments with other people. Even when we are alone, we imagine the responses of others in our heads. And when people reason, they employ common tools of argument and analysis. Rhetorical topics have this dual character: they are simultaneously individual and social. They are tools for individual thought and invention, and they are also tools that people share with others for analysis and persuasion.

Both Bobbitt and I offer theories of constitutional rhetoric, but we emphasize different things. Bobbitt emphasizes grammar; I emphasize problem-solving; Bobbitt emphasizes clear distinctions among forms of argument; I emphasize pragmatic boundaries; Bobbitt emphasizes the necessity of decision; I emphasize the role of persuasion; Bobbitt emphasizes individual conscience; I emphasize mutual social influence.

E. COMMON TOPICS ARE CONSISTENT WITH MANY DIFFERENT KINDS OF CONSTITUTIONAL THEORIES

Bobbitt holds that all constitutional theories that attempt to justify the constitutional system and judicial review are doomed to failure, as well as all constitutional theories that privilege some modalities over others. This view excludes most other constitutional theories. Does this mean that the social practice of using the modalities is inconsistent with most constitutional theories? It does not. Because the modalities are nothing more

than rhetorical topics, they are consistent with many different theories of constitutional interpretation, including the many theories that Bobbitt rejects.

Bobbitt is correct in one respect. A good constitutional theory should try to explain most of our existing practices, even if it is quite critical of some of them. An interpretive theory that claimed that the only valid arguments are arguments from original intention or natural law, for example, will have a great deal of difficulty explaining our current practices of constitutional argument. But most theories of constitutional interpretation—and most theorists—make space for all of the standard topics in constitutional argument; they simply give them different degrees of weight and emphasis.

Topics are shared tools for solving problems and inventing persuasive arguments; and the modalities in particular are commonplaces about interpretation. By their nature, such tools are likely to be compatible with many different theories of constitutional interpretation, and can fit into many different kinds of theoretical structures. That is why lawyers and judges with very different theoretical commitments can and do employ the same topics. It follows that the modalities will be compatible with most theories of interpretation, including both originalist and non-originalist theories, theories that treat all of the modalities as having equal status, and theories that give priority to some kinds of arguments over others.

Bobbitt correctly views the modalities as offering a common language, but it is precisely for that reason that people can use them in many different ways, based on different theoretical commitments. Although lawyers and judges will use the same common topics when they attempt to persuade each other, this does not tell us very much about which interpretive theory is the best theory.

Each interpretive theory will employ and order common topics according to its theoretical structure—its distinctive set of theoretical commitments, and its distinctive answers to the question of how to interpret the Constitution and why interpreting in this way is appropriate. Thus, constitutional theories may use the same topics in very different ways, depending on their internal structure. We can see this by comparing different kinds of pluralist and originalist theories.

Pluralist theories argue that interpreters should consider multiple factors in interpreting the Constitution and that no single factor controls all the time. Bobbitt's theory is an example.

Yet pluralist theories may have very different theoretical structures. Consider David Strauss's common law constitutionalism. Descriptively, it contends that constitutional law changes through common-law development and through the evolution of conventions; normatively, it claims that lawyers should analyze and interpret the Constitution in this way.[264]

In Strauss's model, doctrinal argument is the standard aproach, but lawyers may use all of the modalities as they develop doctrine and conventions in common-law fashion. (Recall that "doctrinal argument" in the broader sense uses many different topics; it does not merely apply existing doctrine to new factual situations.) The constitutional text has no special status; interpreters adhere to the text as a matter of convenience and in order to promote stability and predictability.[265] Strauss argues that his common-law approach is justified because the common law is a useful and legitimate way to develop law generally, and constitutional law in particular. The common law approach promotes stability, it conforms to rule of law values, and it economizes on wisdom.[266] (Bobbitt, of course, would reject any attempt either to justify or to legitimate constitutional argument by offering these kinds of reasons.)

Ronald Dworkin's moral reading is also a pluralist theory, but it has a different structure. It argues that to interpret the Constitution interpreters should construct the best account of existing legal materials that is also consistent with the best available moral theory.[267] Dworkin believes that this is the correct approach because in interpreting the Constitution—or the law generally—interpreters should promote the political value of integrity and strive to make the Constitution the best it can be.[268] People might associate Dworkin's moral reading solely with arguments from consequences, or with arguments from natural

264. STRAUSS, THE LIVING CONSTITUTION, *supra* note 34, at 35 (stating that precedents of the Supreme Court and traditions and understandings that have developed outside of the courts "form an indispensable part" of our living Constitution).

265. *Id.* at 104–05.

266. *Id.* at 38–45.

267. RONALD DWORKIN, LAW'S EMPIRE 139, 230–32, 379 (1987).

268. *Id.* at 53, 77, 225, 233, 262–63, 338.

law and natural rights. But this is incorrect: moral readers will use all of the modalities in rationally reconstructing doctrine and constitutional conventions.[269]

Pluralist theories can also differ in the weight and priority they give to different kinds of considerations. Some pluralist theories, like Bobbitt's or Stephen Griffin's, argue that all different kinds of arguments are on an equal footing.[270] But other theories do not. Consider, as an example, William Eskridge and Philip Frickey's "funnel of abstraction," originally developed for statutory interpretation.[271] This approach gives a general but defeasible priority to some considerations over others. Richard Fallon's constructivist coherence theory also has a priority rule: when there is an irreducible conflict between different kinds of arguments, interpreters should give priority to arguments in a certain order.[272]

Now consider originalist theories. Originalist theories share a common structure. They postulate that something is fixed at the time of adoption—whether original meaning, intention, or understanding—and that constitutional interpretations must be

269. Jack M. Balkin, *History, Rights, and the Moral Reading*, 96 B.U.L. REV. 1425, 1439–41 (2016) (arguing that Dworkin's moral reading is realized through standard forms of legal argument); James Fleming, *Fidelity, Change, and the Good Constitution*, 62 AM. J. COMP. L. 515, 518 (2014) ("[T]he multiple modalities of argument in constitutional interpretation . . . . are sites in which we argue about, and sources through which we justify, change: in particular, how best to realize and thus to be faithful to our constitutional aspirations. Or, as Dworkin put it, how to interpret the Constitution so as to make it the best it can be.").

270. Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1765–67 (1994) (arguing that the plurality of methods suggests that legal scholars should not try to create grand theories to resolve individual cases).

271. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 353 (1990); *see* WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 361-63 (2016) (applying the model to constitutional argument); *see also* Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 103 (2013) (proposing a hierarchy of constitutional arguments that asks judges to consult, in order, Text, Framing Understandings, Ratification Understandings, Post-Ratification Process, Judicial Precedent, Evolving Practice, Consequential Arguments, and Ethical Arguments). These versions have their own distinctive set of topics.

272. Fallon, *Constructivist Coherence*, *supra* note 99, at 1193–94 ("[T]he implicit norms of our constitutional practice accord the foremost authority to arguments from text, followed, in descending order, by arguments concerning the framers' intent, constitutional theory, precedent, and moral and policy values."); *see also id.* at 1243–46 (proposing a hierarchy of text, historical intent, theory, precedent, and value.)

consistent with what is fixed.[273] Beyond this, however, originalists differ greatly among themselves.

People might be tempted to think of originalism as a monist theory—one that hopes to reduce all of interpretation to a single consideration.[274] But this is incorrect. Most originalists are actually dualists, because their theories usually have a two-level structure; namely, figuring out what is fixed and then applying it to new facts. This is most obvious in the case of the New Originalism, but it is true even for originalists who reject the distinction between interpretation and construction.

New Originalists use the same common topics that pluralists do, but in two different ways and for two different purposes: The first is to clarify what is fixed at adoption (interpretation); the second is to implement original meaning in practice (construction).

In the first task, New Originalists will use topics to clarify any ambiguities in original meaning/intention/understanding. For this purpose, some kinds of arguments will probably be more salient and useful than others. The most prominent are textual arguments, which include a broad range of subtopics: arguments about evidence of contemporaneous use, dictionary definitions and textual canons of construction. In addition, one might clarify or resolve ambiguities in original meaning through considerations of purpose, structure, adoption-era practice, adoption-era judicial precedent, and adoption-era ideas about natural law and natural rights. New Originalists may well give priority to some kind of arguments over others, even if the priority is defeasible.

In constitutional construction, New Originalists will also use all of the common topics in the construction zone. Here the goal is to develop, implement, and apply doctrine consistent with original meaning. In the construction zone, New Originalists can place all of the modalities on an equal footing, or they can have a soft priority for some kinds of arguments akin to Eskridge and Frickey's funnel of abstraction. Barnett and Bernick's theory of

273. Solum, *Originalism and Constitutional Construction*, *supra* note 1, at 456.

274. Brett G. Scharfs, *Adjudication And The Problems Of Incommensurability*, 42 WM. & MARY L. REV. 1367, 1412 (2001) (arguing that formalism and originalism are examples of legal monism because "each posit[s] a single value that should be consulted in determining the outcome of a case."); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 388 (2013) (noting, but rejecting the argument that originalism involves "argumentative monism" that contrasts with pluralist methods.).

good faith construction emphasizes fidelity to original purpose and function.[275] That is, their theory simultaneously makes a claim about interpretive attitude and a claim about proper interpretive technique. Therefore their theory might give arguments from purpose and structure priority over other kinds of arguments.[276]

What about originalists, like Judge Bork and Justice Scalia, who reject the interpretation/construction distinction? They are also dualists. To ascertain original meaning, these originalists will also use various topics such as text, purpose, structure, and natural rights, although they may place a different emphasize on some topics depending on their particular version of originalism. Moreover, as I argued previously, all originalists, even those who reject the interpretation/construction distinction, allow for some degree of doctrinal development, and some degree of deference to custom, tradition, and past practice. That is especially so if they are lower court judges or arguing before lower court judges—then they will mostly reason from and apply previous precedents. Even originalists who reject the interpretation/construction distinction must still fill in gaps, consult tradition and past practice, and reason from case to case. They must still apply original meaning—and doctrines consistent with original meaning—to new facts and new technologies. They will use all of the modalities for these tasks, not simply one.

A final example of how originalism incorporates multiple modalities is Bruce Ackerman's theory of dualist democracy. Ackerman's is an originalism with multiple starting points, one following each constitutional moment. As its name implies, the theory's method of interpretation is also dualist. First, interpreters must articulate the basic commitments of each successive regime—Ackerman's equivalent to original public meaning. Then interpreters must engage in what Ackerman calls "intergenerational synthesis."[277] They must ask how each

275. *See supra* text accompanying notes 43–49.

276. A topical approach helps us understand the similarities and differences between originalists and pluralists. In the construction zone, for example, the New Originalism resembles how pluralists think of constitutional interpretation generally; except that pluralists might be willing to discount clear evidence of original meaning because of other, stronger, considerations, while New Originalists would not. This difference marks them as originalists who have a two-step theory, and not pluralists, who have only one.

277. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 88–90 (defining the problem of multigenerational or intergenerational synthesis); *id.* at 113–19, 141–62 (1991) (describing the technique of intergenerational synthesis).

successive regime's commitments build on, alter, or affect the others. As with Dworkin, one might think that Ackerman's model relies only on a handful of modalities: namely, purpose, political tradition, ethos, and honored authority. In fact, figuring out the commitments of each regime and combining them together artfully requires all of the tools in the lawyer's toolkit, and therefore all of the standard forms of argument.

When lawyers and judges with very different theories of interpretation argue about contested cases, they may often sound very much alike. The reason is that they use common topics that are compatible with many different theories.

Original meaning originalists, for example, hold that original meaning trumps other considerations. But in appropriate circumstances originalists can and do use topics that are unrelated to original meaning—for example, arguments from doctrine, political convention, custom, tradition, and institutional prudence. Originalists may turn to these arguments when original meaning does not offer a determinative answer. Originalists may also use these arguments if they are otherwise consistent with original meaning but are likely to be the most persuasive to their audience.

To be sure, when originalists write amicus briefs, they may exclusively argue in originalist terms, because they want to draw attention to evidence of original meaning. But when originalists represent parties in litigation before judges who may or may not share their theoretical views, they are likely to make every kind of argument that might convince a court. Doing this does not mean that they have abandoned originalism for pluralism or that they are secretly non-originalists. It means only that they shape their arguments to their audience. That is what sound lawyering requires.

Conversely, non-originalists deny that original meaning, intention, or understanding trumps all other considerations. Yet non-originalists very often make arguments about original meaning, intention and understanding, especially when they discuss questions about which there is very little judicial precedent—for example, war powers or presidential impeachment. They will also make these arguments if they think that they will be most persuasive before a particular judge or decisionmaker.

Non-originalists are usually pluralists of some kind; they believe that interpreters should consider multiple approaches to interpretation and use whatever arguments are most persuasive given the available materials. It follows, then, that when the most persuasive arguments concern original meaning, intention, and understanding, non-originalists will make these kinds of arguments. Doing this does not mean that they have converted to originalism. What it does mean, however, is that nonoriginalists cannot, in general, claim that arguments from original meaning, intention, or understanding are impossible or futile—for example, because doing the necessary historical work is too difficult. That is because non-originalists will turn to the very same kinds of arguments if they believe that they are the most persuasive.

One can multiply examples, but the point should be clear. People with very theoretical views can and often do make the very same arguments before decisionmakers. They can do this because constitutional argument builds on common topics for persuasion that, in turn, rest on widely accepted commonplaces about interpretation.

F. THE TOPICS AND LEGITIMACY

I have just argued that the modalities are consistent with many different theories, and do not play favorites among them. Bobbitt disagrees. He claims that the existence of the modalities renders other constitutional theories incorrect because they rest on a flawed conception of legitimacy. But this objection proves little, because Bobbitt's conception of legitimacy is unique to him, and most constitutional theories are not concerned with it.

Bobbitt's theory has different goals than most other constitutional theories. His central focus is securing legitimacy. But by "legitimacy," Bobbitt means general acceptance and use of common modalities for constitutional argument, and nothing more.[278] He rejects all constitutional theories that attempt to establish the legitimacy of judicial review or of the constitutional system by force of theoretical argument. But most theories do not try to establish "legitimacy" in Bobbitt's sense of the word. They have other fish to fry.

278. Bobbitt, *Reflections*, *supra* note 18, at 1938 (explaining that "there is nothing more to legitimacy" than following the rules of how to make a constitutional argument using the modalities).

There are many different kinds of constitutional theories, with many different kinds of projects. These projects include, but are not limited to:

- explaining how to interpret the Constitution correctly;
- explaining how judges should do their jobs;
- explaining the historical development of the constitutional system and constitutional doctrine;
- explaining how the Constitution, or certain features of it, would be more just, democratic, efficient, or reasonable or just if it were interpreted differently;
- explaining why the Constitution, or certain features of it, is sufficiently just, democratic, efficient, or reasonable under its current interpretation;
- explaining how constitutions *in general* serve important political values, including democracy, human rights, justice, and the rule of law;
- explaining the pros and cons of constitutional design, and arguing for or against particular design features.
- explaining how the current constitutional system, or parts of it, could be improved by redesigning or amending it; and
- defending the adequacy and/or the justice of the current constitutional system against proposals for redesign or amendment.

I agree with Bobbitt that none of these projects will establish legitimacy in his sense of the word. But that is largely because his definition of legitimacy is idiosyncratic.

Legitimacy is a complex concept with many different versions. For purposes of present discussion, one can distinguish four different kinds of legitimacy. *Sociological* legitimacy is the general acceptance of the regime's right to rule, including the right of state officials to employ coercion. *Procedural* legitimacy concerns whether the people clothed with state power in the system make decisions according to law—that is according to official legal rules and procedures. *Moral legitimacy* concerns whether the constitutional or political system is sufficiently just or morally admirable. Finally, *democratic legitimacy* concerns whether the constitutional or political system makes government action responsive and accountable to public opinion, public will, and public values, or otherwise allows the members of the

political community to govern themselves.[279] A regime can have more or less of each kind of legitimacy, because legitimacy is a comparative and contextual term, like "tall." Nevertheless, in some contexts, one might say that a regime is so deficient in some respect that it lacks legitimacy and is therefore illegitimate, just as one might say that people below a certain height are not tall.[280]

What does Bobbitt mean by "legitimacy?" He means the acceptance and continuation of a practice of argument by a community of participants—the fact that people accept and reason in a certain way within a particular constitutional order.[281] Such a concept of legitimacy is not directed to either moral legitimacy or democratic legitimacy. It could be a limited form of procedural legitimacy, because Bobbitt believes that using modalities in argument helps ensure that decisions are made according to law.[282] But there is a great deal more to procedural legitimacy than using the modalities. A legal system can be thoroughly corrupt and disregard all sorts of rule of law values even if officials employ standard legal arguments.

Bobbitt's concept of legitimacy could also be a limited form of sociological legitimacy. Bobbitt focuses on a particular social fact: that the sort of people who write briefs, make legal arguments, and decide cases accept certain ways of making constitutional arguments as appropriate for resolving constitutional controversies and directing the exercise of state power. But this, too, falls well short of a full version of sociological legitimacy in several important respects.

Most people in American society never read judicial decisions or briefs, and therefore have no idea what kinds of constitutional arguments lawyers make. So the fact that lawyers and politicians use the modalities is unlikely to be the basis of sociological legitimacy in the United States. It does not explain why ordinary Americans think that government officials have a right to rule and use coercion.

279. BALKIN, LIVING ORIGINALISM, *supra* note 2, at 64–65; *see also* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1790 (2005) (distinguishing between moral, sociological, and legal legitimacy).

280. BALKIN, LIVING ORIGINALISM, *supra* note 2, at 64–65.

281. Bobbitt, *Reflections*, *supra* note 18, at 1938.

282. *Id.* at 1881 ("[L]aw is legitimated by adherence to practice; this occurs when a decision is rendered according to law.").

It is true that everyone in the United States has the right to make legal arguments about the Constitution using the modalities, but most Americans do not do so. Most citizens, if they discuss the Constitution at all, are likely to engage in what Bobbitt calls "constitutional discourse," which, Bobbitt asserts, plays no role in legitimating constitutional law or judicial review.[283]

Moreover, if Bobbitt did claim that the general public's acceptance of the modalities bestows legitimacy, he would have to account for a troubling fact: Public opinion surveys suggest that a large part of the public does not agree with the equal status of the modalities. Many Americans think that judges should decide cases according to one modality—what the founders intended.[284]

To the extent that Bobbitt's account of legitimacy is sociological, it offers a very limited version of sociological legitimacy. The practice of making arguments helps bestow sociological legitimacy for constitutional law and judicial review among a limited class of educated professionals—lawyers and judges, political actors and a small number of citizens who regularly make constitutional arguments or otherwise pay attention to constitutional arguments.

This limited form of sociological legitimacy is valuable and important. Rhetorical topics allow people to reason together from common ideas and premises. This is the point of rhetorical invention—to appeal to other people in a community by means of premises held in common.[285] As Bobbitt himself notes—albeit disapprovingly—people with a range of different constitutional theories build on or incorporate these topics, and so these topics offer them a common language for theoretical disputes. Moreover, as argued in Part III, the use of common topics allows lawyers and judges to explain to each other why their interpretations are connected to and further the Constitution.[286]

283. *See id.* at 1952–53 ("The whole population is rarely called upon to make legal decisions with respect to the Constitution, although they are involved in constitutional discourse almost continuously.").

284. *See* NATHANIEL PERSILY, JACK CITRIN, AND PATRICK J. EGAN, PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (2008) (collecting public opinion surveys about constitutional interpretation); Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 363 (2011) (noting opinion polls taken over seven years indicating that somewhere between 37 and 49 percent of the public believe that the Supreme Court should focus primarily on original intention.).

285. *See supra* Part III.A.

286. *See supra* Part III.F-J.

For these reasons Bobbitt rightly emphasizes the importance of modalities—which are really commonplaces and shared rhetorical topics—as a source of sociological and procedural legitimacy.

Yet this conception of legitimacy remains quite limited. First, it does not secure sociological legitimacy among the members of the general public, most of whom never read constitutional decisions and pay little to no attention to what lawyers and judges say in their briefs, oral arguments, and decisions. Second, it does not secure procedural legitimacy in the work of legal officials, because one can use the topics to justify any number of practices that violate procedural legitimacy and rule of law values.

When most constitutional theorists talk about legitimacy, they are interested in something quite different from Bobbitt's very limited account. They want to know whether our current system is sufficiently *morally* legitimate, *procedurally* legitimate, or *democratically* legitimate; and what kinds of reforms, changes in practice, or changes in constitutional design and implementation would promote, improve, or increase these kinds of legitimacy. One might grant that the modalities help ensure a limited conception of legitimacy—in Bobbitt's sense—and yet think that there is much more work for constitutional theory to do.

One cannot help concluding that Bobbitt has engaged in a certain rhetorical sleight of hand. He notes that constitutional theorists have been asking about legitimacy; he then redefines legitimacy in a way that makes most of their inquiries superfluous, and then concludes that their inquiries are superfluous. But constitutional theorists might well respond that they really are interested in legitimacy, just not in Bobbitt's version.[287]

Bobbitt claims that "the forms of argument that can legitimate judicial review cannot justify it."[288] Conversely, he argues, the forms of argument that might justify the practice of judicial review—for example, in moral or political theory—cannot

287. *See* Bobbitt, *Reflections*, *supra* note 18, at 1938–39. In this passage, Bobbitt rejects Mark Tushnet's view that constitutional theorists are asking a different question than Bobbitt. He argues that Tushnet has changed the meaning of "legitimacy" so as to avoid a certain set of objections. But given that Bobbitt's concept of legitimacy is unique to him, it is probably Bobbitt himself who has engaged in this maneuver.

288. *Id.* at 1938.

legitimate it.[289] He has no objection to people outside the system of legal argument offering arguments for why the system (or the institution of judicial review) is just or unjust, democratic or undemocratic, efficacious or inefficacious. Likewise, he has no problem with people offering proposals for reform, or engaging in comparative studies. All of this falls into the realm of what he calls constitutional discourse. But the kinds of arguments that lawyers make before courts should never be confused with moral or political theory; and in any case, these arguments, even if transposed into a treatise or article on political theory, cannot legitimate the system.

Once again, because Bobbitt is relying on a very special definition of legitimacy, this is hardly an objection to most constitutional theory. Even if these projects involve constitutional discourse (because they propose reform of our institutions and practices), they do not aim at establishing Bobbitt's very narrow brand of legitimacy. Instead, they want to know whether the system is morally or democratically legitimate, the very questions in which Bobbitt disclaims interest.

G. CONSTITUTIONAL THEORY AND PRACTICE INTERPENETRATE

Bobbitt's general rejection of constitutional theory—and his attempt to establish a clear distinction between constitutional argument and constitutional discourse—create two additional problems for his approach. First, the practice of constitutional argument often includes constitutional theory—i.e., claims by the participants about what would make the system more morally or democratically legitimate. Second, although Bobbitt argues that justification cannot affect legitimacy, arguments about constitutional theory can be part of a reform project in political and legal culture that seeks to alter legal practice through social influence and persuasion. If such a reform project succeeded, it would alter the conditions of legitimacy in Bobbitt's sense of the word.

The boundary between constitutional argument and constitutional discourse, or between constitutional practice and

289. *See id*.; *see also id.* at 1898 ("It would be a mistake to think that a political theory (like majoritarianism), which can justify a system, can also legitimate it.").

constitutional theory, is porous.[290] Much of constitutional argument in legal briefs and judicial opinions involves disputes about constitutional theory. There we will find arguments about the proper role of judges, various justifications for judicial review, debates about the kinds of legal arguments that are appropriate and inappropriate in a given situation, and disputes about when some kinds of legal arguments should take priority over other kinds of legal arguments.

Constitutional argument, in short, seems saturated with constitutional theory. This should not surprise us. The participants in the practice of constitutional argument think that arguments about theory are potentially persuasive or winning arguments before their intended audience, and that is why they make them. One of the best ways to outflank an opponent is to question the theoretical justifications behind his or her arguments; hence the ascent to theory is a fairly standard rhetorical move. It would be bizarre if it did not regularly occur in legal argument, that most rhetorical of disciplines.

Perhaps equally important, disputes about constitutional theory can have significant consequences for the practice of constitutional argument over time. That is one reason why the people who train lawyers care about theory so much. If constitutional theories are taken up by a social or political movement, or if they are widely adopted and taught in American legal education, they may eventually convince many other lawyers and judges to change the way that they think about and engage in constitutional argument. Then the practice of constitutional argument will eventually change.

Originalism, for example, has become the de facto interpretive theory of the modern conservative movement, just as living constitutionalism earlier was the de facto premise of much of American liberal legal thought. If political conservatives eventually control the judiciary and win out in institutions of legal education, they will reshape the practices of constitutional interpretation. We have already seen such a transformation, to a

290. This is a point on which Bobbitt and I have long disagreed. *See* Bobbitt, *Reflections*, *supra* note 18, at 1911–12, 1916. Bobbitt argues that I see no distinction between the two categories; I argue rather that the two interpenetrate and their boundaries are always provisional and porous.

certain degree, in constitutional litigation and in the practice of statutory interpretation.[291]

Bobbitt is of two minds about such changes. On the one hand, he accepts that the practice of constitutional argument changes.[292] He purports merely to describe the practice correctly, rather than impose his own normative views on it.[293] He denies that he plays the role of a normative grammarian, who demands that people speak the language correctly. That would suggest that if the practice of constitutional argument does change—for example, if originalism becomes dominant, or if lawyers and judges make appeals to natural law and natural rights—Bobbitt will simply accept the result. Perhaps, he will even rewrite his theory so that it is a characteristic feature of constitutional practice that certain kinds of arguments do have priority over others. If it turns out that lawyers and judges regularly engage in coherence-based reasoning, perhaps Bobbitt would jettison the strong version of his incommensurability thesis as well.

On the other hand, Bobbitt does not seem to treat some features of the practice as mutable in this way. He views himself as a defender of the practices of constitutional argument (and thus of constitutional legitimacy) from those who would abuse them.[294] This is the reason for his strong opposition to originalism, which, he argues, undermines the legitimacy of American constitutional law. But what Bobbitt calls "abuse" might turn out to be nothing more than the cultural evolution of the system. It might represent American lawyers and judges arguing about the best way to engage in their practices, and slowly evolving to a new norm.

Originalism offers a good example. Originalism is a reform project that seeks to get lawyers and judges to alter their practices of constitutional argument and judicial review. It is part of a larger set of social and political movements that characterized the last

291. *See* Anthony J. Bellia Jr., *Justice Scalia and The Federal Court: Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2077 (2017) (noting Justice Scalia's influence in pushing lawyers toward originalism in constitutional interpretation and textualism in statutory interpretation).

292. Bobbitt, *Reflections*, *supra* note 18, at 1911, 1919; BOBBITT, CONSTITUTIONAL FATE, *supra* note 18, at 8.

293. Bobbitt, *Reflections*, *supra* note 18, at 1917, 1919.

294. BOBBITT, CONSTITUTIONAL INTERPRETATION, *supra* note 18, at 185 ("We should be especially vigilant therefore to answer attacks on the legitimacy of our constitutional forms—forms that are likely to be among the most enduring and admirable of the American contributions to human history.").

part of the twentieth century and the beginning of the twenty-first. If Bobbitt accepts changes in practice through social evolution, it is not clear how this reform project should undermine the legitimacy of American constitutional law—at least, as Bobbitt defines the term. Americans would have one practice before originalism's triumph, and another, somewhat different practice after its success, but in both cases they would still engage in a set of shared practices of argument. The system would still be legitimate in Bobbitt's sense. Perhaps Bobbitt's point is that, like any good traditionalist, he should resist originalism until it has won the day; at that point, he will simply change sides and defend the newly constituted order.

Nevertheless, I am not sure that Bobbitt would willingly jettison either the incommensurability thesis or the equal priority of the modalities just because most lawyers and judges no longer accepted them. I say this because they are necessary to his concept of decision according to conscience; and the role of conscience is central to his system. The lack of a decision procedure among the modalities, and the inevitable conflicts among them, create a space for the exercise of individual moral judgment. For Bobbitt, conscience is what allows a constitutional system that may be very wicked at times nevertheless to aspire toward justice.

Without the saving grace of conscience, Bobbitt's vision of the constitutional system might be very bleak indeed. That is why I suspect that although Bobbitt claims that his theory will continue to apply however the practice of constitutional argument might change, he must assume that certain features are more or less permanent conditions of constitutional legitimacy, in order to preserve the role of individual conscience. If so, he is a prescriptive grammarian of a certain sort, and there is a fixed star in his system. But that fixed star is not the modalities themselves; its name is conscience.

V. CONCLUSION

In this Article, I have argued that constitutional argument is a form of rhetorical invention that is structured in shared topics for persuasion, analysis, and problem-solving. Common topics do three things for the practice of constitutional law. First, they provide a common language for persuasion. Second, they offer a common way of showing that our legal arguments are connected to and further the Constitution. Third, they allow people with very

different values, policy preferences and theoretical commitments to engage in a common discourse about what is faithful to and what furthers a Constitution to which they all claim fidelity. The use of common topics allows each of the contending sides, in their own way, to express their fidelity to the Constitution through the thrust and parry of constitutional argument.

Merely making arguments, of course, is not enough. The participants must not only go through the motions of using common topics, they must back them up with a particular attitude of interpretive fidelity. One can think of the topics as an orthopraxis that directs us toward fidelity, even if it does not guarantee it. To the extent that the Constitution is part of America's civil religion, American constitutional argument emphasizes orthopraxy rather than orthodoxy.

The use of rhetorical topics in constitutional argument does not commit us to any particular constitutional theory. Different theories will have different theoretical structures. But all of them will share a common starting point. That is because the topics are held in common within American constitutional culture. So it is not surprising that most if not all prominent constitutional theories find a way to make themselves consistent with the fact that American lawyers use these topics in constitutional argument. The topics make American constitutional culture pluralist, but not in the way that Bobbitt imagined. Their existence does not confine us to one possible constitutional theory—Bobbitt's. Rather, precisely because they are shared aspects of our constitutional culture, they are consistent with any number of constitutional theories, including originalism. Indeed, lawyers who construct constitutional theories will inevitably find a space for the topics, because that is how lawyers with very different values, views, and interests, reason together about the Constitution.